



**Title IX Coordinator
Training Online Course:
Fundamentals of the August 2020
Regulatory Requirements**

**Module 2: Formal Complaints,
Investigations & Grievance Procedures**

Amy C. Foerster, Partner, Troutman Pepper Hamilton Sanders
LLP
Melinda Grier, Melinda Grier Consulting
Janet P. Judge, Partner, Holland & Knight LLP

© 2020 NACUA. All rights reserved. NACUA is a registered trademark of NACUA. NACUA is a registered trademark of NACUA. NACUA is a registered trademark of NACUA.

1



**THE FORMAL
COMPLAINT PROCESS**

2

The Formal Complaint

- Filed by the Complainant or signed by the Title IX Coordinator.
 - Title IX Coordinator ≠ Complainant
- Filed in person, by mail, by email or another approved method.
- Includes allegations of Title IX sexual harassment and requests that the IHE investigate those allegations.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity at the time of filing.

§106.30(a)



National Association of College and University Attorneys

3

The Formal Complaint – Consolidation

- **May** consolidate formal complaints if sexual harassment allegations:
 - Are against more than one respondent, or
 - Are by more than one complainant against one or more respondents, or
 - Are by one party against the other party (*i.e.*, “counterclaim”).
- **As long as** the allegations of sexual harassment arise out of the same facts or circumstances and are so intertwined that the allegations directly relate to all of the parties.

§106.45(b)(4)



National Association of College and University Attorneys

4

Written Notice of Allegations

Written notice of the allegations to the parties must include:

- Notice of the grievance process.
- Notice of the allegations that may constitute Title IX sexual harassment, including sufficient details and time for the respondent to prepare a response before an initial interview.
- A statement that the respondent is presumed not responsible unless and until a determination of responsibility is reached at the conclusion of the process.

§106.45(b)(2)

Written Notice of Allegations (cont.)

Written notice of the allegations to the parties must also include:

- Notice of the parties' right to an advisor of choice at any meeting, interview or other proceeding related to the formal complaint.
- Notice of the parties' (and their advisor's) right to inspect and review evidence gathered during the investigation.
- The institution's prohibition against false statements.

NOTE: IHE must provide notice of additional allegations as they arise and are subject to investigation, if applicable.

§106.45(b)(2)

Mandatory Dismissal of a Formal Complaint



If the conduct alleged:

- Would not constitute Title IX sexual harassment even if proved,
- Did not occur in the IHE's education program or activity, or
- Did not occur in the United States.

§106.45(b)(3)(i)



National Association of College and University Attorneys

7

Discretionary Dismissal of a Formal Complaint

If:

- Complainant notifies the Title IX Coordinator in writing of their wish to withdraw the complaint or any allegations in it,
- Respondent is no longer enrolled or employed by the IHE, *or*
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.

§106.45(b)(3)(ii)



National Association of College and University Attorneys

8

Upon Dismissal ...

- Provide written notice of and the reasons for dismissal to both parties.
- Party may appeal dismissal.
- Dismissal does not preclude investigation and adjudication under another provision or policy.

Advisors

- IHE must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.
- Advisor may be, *but is not required to be*, an attorney.
- IHE may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.
- IHE may establish advisor guidelines (*e.g.*, Rules of Decorum).
- NOTE: IHE must provide an advisor at no cost for purposes of cross-examination at the hearing, if the party does not have one.

§106.45(b)(5)(v)

Informal Resolution

- Only an option *after* the formal complaint is filed.
- IHE **may** informally resolve allegations of Title IX sexual harassment at any time prior to reaching a determination regarding responsibility, provided that:
 - Allegations do not involve an employee engaging in sexual harassment of a student;
 - Informal resolution is facilitated by trained individuals with no conflict of interest; and
 - IHE obtains parties' voluntary, written consent to the informal resolution process.

§106.45(b)(9)

Informal Resolution (cont.)

- IHE must provide parties involved in the process with written notice of:
 - The allegations and the requirements of the informal resolution process.
 - Circumstances precluding parties from resuming formal complaint process/same allegations.
 - The right to withdraw and resume the formal complaint grievance process any time prior to agreeing to a resolution.
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.

§106.45(b)(9)



INVESTIGATIONS & GRIEVANCE PROCEDURES

13

Investigation

- IHE cannot access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without the voluntary, written consent of that party.
- Each party must have an equal opportunity to present witnesses (fact and expert), and to identify inculpatory and exculpatory evidence.
- IHE cannot restrict a party's ability to discuss allegations or gather evidence.

§106.45(b)(5)

14

Investigation (cont.)

- Parties must have sufficient written notice of all hearings, interviews and other meetings to sufficiently allow them to prepare.
- IHE must provide the parties (and their advisors) all evidence directly related to the allegations at least 10 days before the investigator completes the investigative report, so that the parties may review and respond.
 - Directly Related ≠ Relevant
 - IHE must make that evidence available at the hearing

§106.45(b)(5)

Investigative Report

- Must fairly summarize relevant evidence.
- IHE must send the investigative report to the parties (and their advisors) at least 10 days before the hearing for their review and written response.

§106.45(b)(5)(vii)

Live Hearing

- Decision-maker cannot be the Title IX Coordinator or the investigator.
§106.45(b)(7)
- Either party may request that the parties be in separate rooms, but IHE must provide technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness providing information.
- Must record or create a transcript.
§106.45(b)(6)

Cross-Examination / Advisors

Cross-examination must be conducted by each party's advisor – directly, orally and in real time.

- Allow all relevant questions and follow-up questions, including those challenging credibility.
- Cross-examination **cannot** be conducted by a party – if the party does not have an advisor, the IHE must provide one at no cost.

IHE can establish rules of decorum governing hearing, including cross-examination.

§106.45(b)(6)(i)

Relevancy Determinations

- Before a party or witness answers a question, the decision-maker must determine whether it is relevant and explain any decision to exclude the question as not relevant.
- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.

§106.45(b)(6)(i)



National Association of College and University Attorneys

19

Relevancy Determinations (cont.)

Preamble:

- It is enough for the decision-maker to say the question is not probative of any material fact.
- The decision-maker may not require questions in writing in advance of hearing.
- IHE may have rules precluding the parties (or advisors) from challenging relevancy decisions during the hearing.
- May only exclude questions based on relevance.
 - Not because they are unduly prejudicial, concern prior bad acts or seek character evidence.
 - Questions may be deemed not relevant when they are duplicative of other evidence already in the record.
 - But, the decision-maker must exclude (a) medical, etc. records if the party has not consented in writing; and (b) statements when the party/witness is not subject to cross.



National Association of College and University Attorneys

20

Excluding Statements from Consideration

If a party or witness is not subject to cross-examination, the decision-maker may not rely on their statement in determining responsibility.

- But, the decision-maker may not draw any inferences as to responsibility as a result of individuals not subjecting themselves to cross-examination.

§106.45(b)(6)(i)



National Association of College and University Attorneys

21

Hearing Decorum

May have rules that, *e.g.*:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
- Limit or prohibit objections to relevancy determinations.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make openings and closings, if any, and set time limits.



National Association of College and University Attorneys

22

Standard of Evidence

May use preponderance of the evidence or clear and convincing standard, but must use the same standard for formal complaints of sexual harassment against students as for formal complaints against employees, including faculty.

§106.45(b)(1)(vii)

Hearing Outcome / Written Determination

Written determination must include:

- Identification of allegations potentially constituting sexual harassment.
- Description of the procedural steps from the filing of the formal complaint through the determination.
- Findings of fact supporting the determination.
- Conclusions regarding the application of the policy to the facts.
- Statement of and rationale for the result as to each allegation.
- Sanctions and whether remedies will be provided.
- Appeal instructions.

§106.45(b)(7)

Hearing Outcome / Written Determination (cont.)

The determination becomes final on the date the IHE provides the parties with the written determination of the appeal, if any, or the date on which an appeal would no longer be timely, if there is no appeal.

§106.45(b)(7)

Appeals

Must allow for appeals based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- May include other grounds, equally available to both parties.

§106.45(b)(8)

Recordkeeping

Records regarding the following must be maintained for 7 years:

- Investigation, including the determination regarding responsibility, the hearing recording or transcript, sanctions and remedies
- Appeal and outcome
- Informal resolution and result
- Supportive measures
- Training

§106.45(b)(10)

Note

The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice.

The transmission of information in this presentation does not establish an attorney-client relationship with the recipient. The recipient should not act on the information contained in this presentation without first consulting retained legal counsel.

If you desire legal advice for a particular situation, you should consult an attorney.