

Policy Implications & Practical Application for Appeals & Record-Keeping



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Before the Appeal: Final Determinations



- Before any appeal, there must be a final determination by the decision-maker (or group of decision-makers) that is contained in a written report including the following:
 - Allegations:
 - Identification of the allegations of sexual harassment
 - Procedural steps taken:
 - A recitation of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Findings of fact:
 - Findings of fact supporting the determination

Before the Appeal: Final Determinations (Cont.)



- Rationale and sanctions:
 - The decision-maker must make a finding of responsibility or non-responsibility for each allegation, and describe the rationale for the finding based on an “objective” evaluation of the evidence presented at the hearing
 - The written determination must also indicate what disciplinary sanctions, if any, will be applied to the respondent if that party is found responsible for the allegations
 - Finally, institutions must indicate “whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant.” §106.45(b)(7)(ii)(E).
- Appeal:
 - Procedures and permissible basis for appeal

Finality of the Determination



The final determination becomes final either:

1. On the date on which an appeal would no longer be considered timely; or
2. If an appeal is filed, on the date that the school provides the parties with the written appeal determination

What Decisions Can be Appealed?



- § 106.45(b)(8) states that institutions must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein.

Grounds for Appeal



- Appeals may be granted on the following basis:
 - A procedural irregularity that affected the outcome;
 - New evidence that was not reasonably available at the time the determination or dismissal was made and could affect the outcome;
 - The Title IX Coordinator, investigator, or adjudicator had a conflict of interest or bias that affected the outcome of the matter; or
 - A school also may offer an appeal equally to both parties on additional bases.

What is a Procedural Irregularity?



- Not defined in the Final Rules.
- Possible examples:
 - Failure to follow an institution's own procedures
 - Failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, during the investigative process
 - Erroneous relevance determination if it affected the outcome
- Other areas unclear:
 - Missed deadlines? Only if sufficient to affect the outcome.
 - Must show material adversity, not theoretical
 - Dismissal of formal complaint for jurisdictional reasons

What is Newly Discovered Evidence?



Preamble sets out two processes for evaluating if newly discovered evidence warrants the granting of an appeal:

1. Is the evidence new?
 - Must be evidence not reasonably available at the time the determination of responsibility was made

2. If it is “new” evidence, whether the new evidence could have affected the outcome
 - Material to the determination

What is a Conflict of Interest & What is Bias?



- No definition in Final Rules or Preamble
- Must be decided on a case-by-case basis
 - The Final Rules simply indicate that Title IX Coordinators, investigators, decision-makers, and/or facilitators must not be biased against a particular class of parties in the grievance process, including biases against complainants or respondents
 - But, Department rejected notion that the mere employment by Title IX Coordinators, investigators, decision-makers, and/or facilitators by an institution is not inherently biasing
 - Pre-existing assumption based on a sex stereotype that affected the outcome would be sufficient
 - Up to institutions to determine on a case-by-case basis what type of conflict of interest and bias would disqualify someone sufficiently such that an appeal should be granted on that basis
 - Training is key to avoid these allegations

Who Decides the Appeal?



- Institutions designate
- § 106.45(b)(8)(iii) makes it clear that the appeal decision-maker cannot be the same person as the decision-maker below, or as the Title IX Coordinator or investigator in the case

Appeal Procedures



- When one party appeals, the other party must be notified in writing.
- The decision-maker(s) must be free from conflict of interest and bias, receive appropriate training (including anti-bias training), and otherwise comply with the requirements set forth in Final Rule § 106.45(b)(3)(iii)
- Both parties must be given a reasonable, equal opportunity to submit a written statement in support of, or challenging, the responsibility determination or dismissal
- The outcome of the appeal must be in writing, and must include the rationale
- The written decision must be provided simultaneously to both parties
- Any further specific contents of appeal procedures are up to individual institutions to determine

Appeal Timelines



- No mandated timeline in Final Rules
- Appeals must be *reasonably prompt* as part of the overall grievance process, which includes requiring institutions to specify set time frames for each phase, including the appeal phase, under § 106.45(b)(1)(v)

Supportive/Emergency Measures During Appeals



- Supportive measures, such as mutual no-contact orders, housing adjustments, or academic course adjustments for either or both parties may continue in place throughout an appeal process
- Emergency removals – based on individualized assessment of safety and risk (includes finding of “immediate threat,” “to the physical health or safety of any student or other individual,” “arising from the allegations of sexual harassment”)
- Employee Administrative Leave

What is the Remedy?



- If appeal is granted:
 - Final Rules are silent about remedy
 - Institutions must fashion remedies/processes:
 - Institutions should consider what remedies may be implemented and by whom, and specify these items as part of their policies and procedures

Policy Considerations



- Consider defining in the policy:
 - Number of days the parties have to make the appeal (if this time period lapses, then the determination becomes final)
 - Deadline for written statement of appeal (identifying reason and providing an explanation) to be submitted to recipient, which recipient must provide to the other party while implementing appeal procedures equally
 - Time frame for giving each party opportunities to submit written statements in support of or challenging the outcome
 - Allow for responses to other party?
 - Back and forth does not seem to be required
 - Deadline to issue a written decision and provide it to both parties simultaneously

Record-Keeping



- For each sexual harassment complaint, the institution must maintain records for 7 years that include:
 - Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment;
 - The basis for the school's conclusion that its response was not deliberately indifferent;
 - Documentation that the school took measures designed to restore or preserve equal access; and
 - If the school did not provide supportive measures, the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Record-Keeping (Cont.)



- Documentation of each sexual harassment investigation
- If there was an adjudication, the records also must contain:
 - Any determination regarding responsibility;
 - Any audio or audiovisual recording or transcript;
 - Any disciplinary sanctions imposed on the respondent;
 - Any remedies provided to the complainant;
 - Any appeal and the result; and
 - Any informal resolution and the result.

Record-Keeping (Cont.)



- Training Materials: Apart from any specific proceeding, institutions also must keep for 7 years, all materials used to train Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process
- Further, schools must make these training materials publicly available on their websites

Any Questions?



Thank You!



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