



Title IX Investigator Training – Part III



Welcome.



Judith W. Spain
J.D., CCEP

Compliance Collaborative Program Consultant,
Georgia Independent College Association





Please don't judge people. You don't know what it took someone to get out of bed, look and feel as presentable as possible, and face the day. You never truly know the daily struggle of others.

Karen Salmansohn

Agenda

Live Hearing

Appeal



LIVE HEARING



Must Have Live Hearing

For postsecondary institutions only, the recipient's grievance process must provide for a live hearing.

- Sec. 106.45 (b)(6)(i)



Options

“Where the facts alleged in a formal complaint are not contested, or where the respondent has admitted, or wishes to admit responsibility, or where both parties want to resolve the case without a completed investigation or adjudication, 106.45(b)(9) allows a recipient to facilitate an informal resolution of the formal complaint that does not necessitate a full investigation or adjudication.”

- Page 1224



Options

“[c]ommentators' descriptions of an administrative disposition model, or a proposed voluntary resolution agreement, are permissible under the final regulations if applied as part of an informal resolution process in conformity with 106.45(b)(9), which requires both parties' written, voluntary consent to the informal process. The Department declines to authorize one or both parties, or the recipient, simply to 'waive' a live hearing...”

- Page 1224



Decision-Maker

“The decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s).”

- Sec. 106.45 (b)(7)



Decision-Maker

“Separate Decision Maker: [T]he decision-maker must not only be a separate person from any investigator but the decisionmaker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report. ”

- Pages 1056 and 1063



Parties Physically Present

Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

- Sec. 106.45(b)(6)(i)



Recording

Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

- Sec. 106.45(b)(6)(i)



Questions of Parties and Witnesses by Advisor

At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

- Sec. 106.45 (b)(6) (i)

“If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”

- Sec. 106.45 (b)(6) (i)



Cross-Examination

“Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.”

- Sec. 106.45 (b)(6) (i)



Must Submit to Cross-Examination

- If a party or witness does not submit to cross-examination at the live hearing, the decisionmaker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Sec. 106.45(b)(6)(i)



Relevant Questions

“Only relevant cross-examination and other questions may be asked of a party or witness.”

- Sec. 106.45 (b)(6) (i)



Determination of Relevancy

“Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

- §106.45 (b)(6) (i)



Rape Shield Protection

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

- §106.45 (b)(6) (i)



Written Determination Required

Written determination required.

- Sec. 106.45 (b)(7)(i)

Identification of the allegations potentially constituting sexual harassment.

- Sec. 106.45 (b)(7)(ii)



Written Determination Content

A description 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.

- Sec. 106.45 (b)(7)(ii)

Findings of fact supporting the determination.

- Sec. 106.45 (b)(7)(ii)



Written Determination Content

Conclusions regarding the application of the recipient's code of conduct to the facts.

- §106.45 (b)(7)(ii)

[D]ecisionmakers [must] lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility.

- Page 814



Written Determination Content

“A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and 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.”

- Sec. 106.45 (b)(7)(ii)



Written Determination Content

The recipient's procedures and permissible bases for the complainant and respondent to appeal.

- Sec. 106.45 (b)(7)(ii)

Simultaneous notification of parties required.

- Sec. 106.45 (b)(7)(iii)



Remedies

“Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made.”

- Sec.106.45(b)(1)(i)

“Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.”

- Sec. 106.45(b)(1)(i)



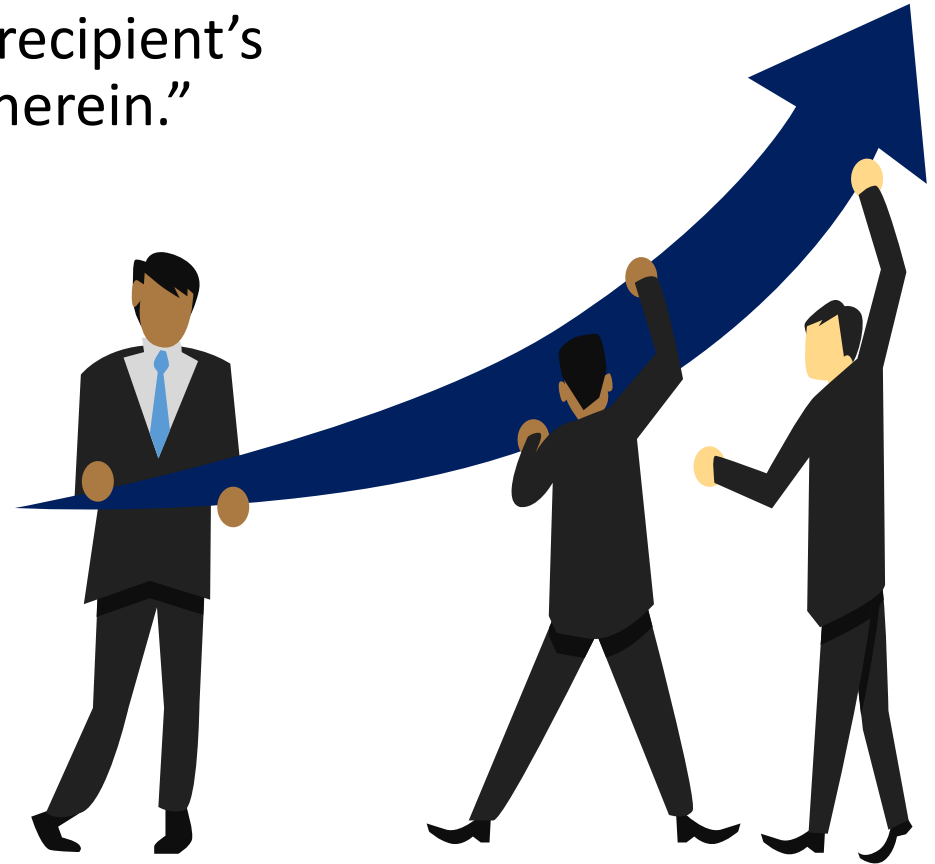
APPEALS



Both Parties Can Appeal

“A recipient 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.”

- Sec. 106.45 (b)(8)



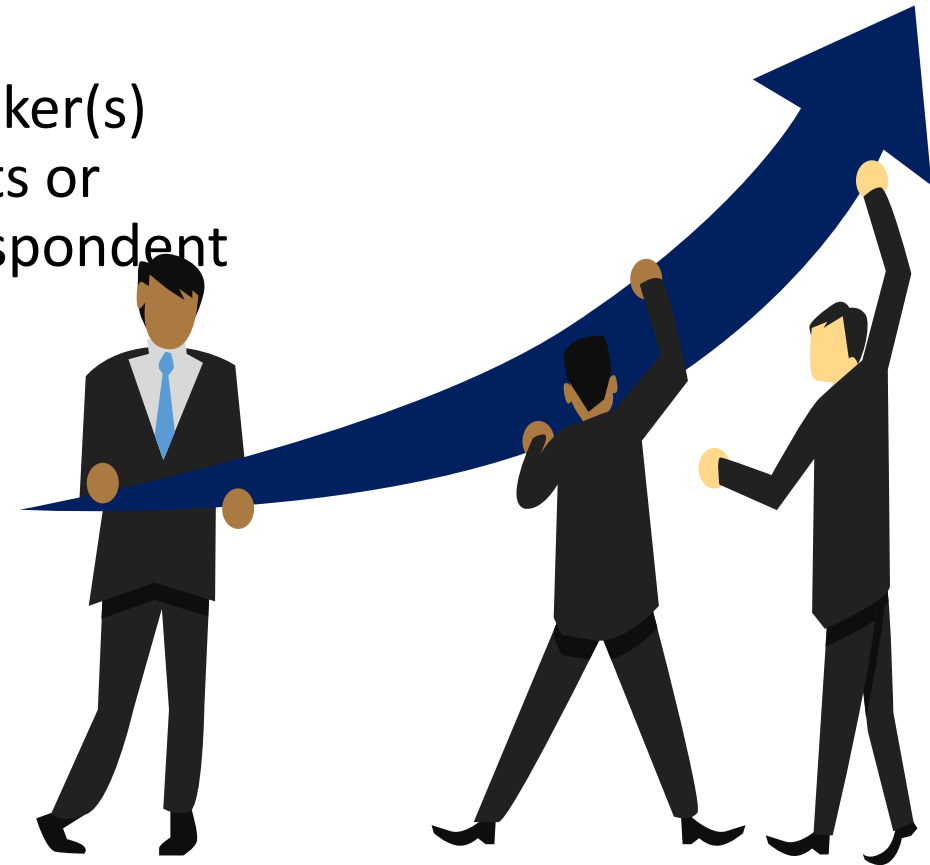
Grounds for Appeal

“(A) Procedural irregularity that affected the outcome of the matter

(B) 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

(C) 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.”

- Sec. 106.45 (b)(8)



Additional Bases for Appeal

“A recipient may offer an appeal equally to both parties on additional bases.”

- Sec. 106.45(b)(8)



Requirements for Appeals

“Requirements for Appeals: (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (B) 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; (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section; (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (E) Issue a written decision describing the result of the appeal and the rationale for the result; and (F) Provide the written decision simultaneously to both parties.”

- Sec. 106.45(b)(8)



RESOURCES

- OCR and Title IX
- https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
- Joint Guidance on Title IX -
- <https://system.suny.edu/sci/tix2020/>





Judith W. Spain J.D., CCEP

jspain@georgiacolleges.org

Cell (859)582-9451



Contact.

