

*Week Five:  
The Appeal  
Process  
July 23, 2020*

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## Welcome & Introductions

### Our Hopes...

<p><u>What this workshop is:</u></p> <ol style="list-style-type: none"> <li>1. Unpack legal requirements</li> <li>2. Identify what needs to change in your policy</li> <li>3. Networking/discussion with colleagues/expert faculty</li> </ol>	<p><u>What this workshop is not:</u></p> <ol style="list-style-type: none"> <li>1. Not legal advice</li> <li>2. Not a “how to” operationalize roles - focus is on integrating mandates into policy</li> <li>3. Not a “one-size-fits-all” given institutional context</li> </ol>
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## Agenda:

1. Review appeal process in the final regulations for your policy
2. Question & Answer


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## CHAT

*How do you like to participate in virtual learning environments? Let us know!*

**CONNECTING YOUR MICROPHONE**

To connect your microphone, identify the Microphone Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your mic muted at all times, unless you are speaking.



**RAISING YOUR HAND TO SHARE YOUR VOICE**

If at any time during the event you'd like to say something using your mic, please raise your hand and the speaker/host will call on you. To raise your hand, identify the icon at the top of the screen that looks like someone raising their hand. You can click on this same icon to lower your hand.

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## The Appeal Process

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Thursday, July 23, 2020

1:00 - 2:30 PM - Eastern



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### ■ Appeal Process

#### §106.45(b)(8)

- The Final Regulations require an appeal process for two types of appeals:
  1. Appeal process for a determination regarding responsibility.
  2. Appeal process following a mandatory or discretionary dismissal of a formal complaint or an allegation contained in a formal complaint.
- Appeals must be equally available to both parties.




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**■ Appeal Process**  
**§106.45(b)(8)**

For both types of appeals, a school must:


- 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 or the Title IX Coordinator;
  - Decision-maker(s) for the appeal can be a single Appeal Officer or an Appeal Panel.

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 **POLL**


**Who will conduct your appeals process?**

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**■ Appeal Process**  
**§106.45(b)(8)**

- Ensure that decision-maker(s) for the appeal are free from a conflict of interest and bias, receive appropriate training, including anti-bias training, and otherwise comply with the requirements of §106.45(b)(1)(iii).
- Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the responsibility determination or dismissal;
- Issue a written decision and rationale to both parties simultaneously.


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IMPRESSIONS 9

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**■ Appeal Process**  
**§106.45(b)(8)**

The Final Regulations require *at least* three grounds for appeals:


- A. Procedural irregularity that affected the outcome;
- B. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome; and
- 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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IMPRESSIONS 10

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**■ Appeal Process**  
**§106.45(b)(8)**


- Schools are permitted to include additional contents relating to the appeal process at their discretion.
- Schools may offer additional bases for appeal equally to both parties, such as to allow for an appeal on the severity or proportionality of the sanction. §106.45(b)(8)(ii).
- Allowing an appeal to challenge the remedies imposed is not necessary per OCR. (Preamble, p. 940 (Federal Register version)).



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**■ Appeal Process**  
**§106.45(b)(8)**


- The parties should have access to the recorded hearing or hearing transcript before the time to appeal lapses.
- Schools should provide a reasonable timeframe for the appeal process.
  - The Final Regulations require that all schools include “reasonably prompt” timeframes for investigation and resolution, *including appeals*.
- The parties may have an advisor of their choice during the appeal process, who may or may not be an attorney.




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**■ Appeal Process**  
**§106.45(b)(8)**


- The written determination on responsibility and sanctions, if applicable, are postponed until the decision on the appeal is sent to the parties. §106.45(b)(7)(iii).
  - Keep supportive measures in place during appeal period to maintain status quo between the parties and ensure equal access to education.
  - Can revisit emergency removal if necessary.
- Appeal decision is final.

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IMPRESSIONS 13

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 **CHAT**

**What types of qualifications  
are you looking for when  
designating your appeal  
officer(s)?**

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IMPRESSIONS 14

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## QUESTIONS

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**■ Appeal Procedure - Sample**


1. Any party may appeal a determination regarding responsibility or a dismissal of part, or all of a formal complaint under the grounds set forth in Section \_\_\_ [insert grounds].
2. If no appeal is filed, or an appeal is not timely, the original finding will stand, effective on the date the appeal period expires.
3. The appeal procedures herein are implemented equally for all parties.
4. Supportive measures may be continued or reinstated by the Title IX Coordinator during the appeal process, as appropriate.



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**■ Appeal Procedure - Sample**

5. Upon delivery of the Notice of Outcome, both parties may submit an appeal to the Title IX Coordinator within 7 business days. Following receipt of a Notice of Dismissal, the parties may submit an appeal to the Title IX Coordinator within 2 business days.
6. An appeal must articulate the specific ground(s) for the appeal and provide a statement and/or evidence in support of or challenging the responsibility determination or dismissal decision.
7. The Title IX Coordinator will promptly confirm receipt of the appeal and notify the other party of the filing of the appeal by distributing a written Notice of Appeal to both parties.



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## ■ Appeal Procedure - Sample

8. The Title IX Coordinator will determine if the appeal is timely. If the appeal is timely, the Title IX Coordinator will:
  - a. Appoint an Appeal Officer to decide the appeal. The Appeal Officer is independent of the previous process, including from any dismissal appeal that may have been heard earlier in the process.
  - b. Provide the identity and contact information for the Appeal Officer to the parties.
  - c. If both parties submit appeals (i.e., cross-appeals or counter-appeals), the same Appeal Officer will decide both appeals individually, but contemporaneously. The same Appeal Officer will decide any appeals arising from the same facts and circumstances.



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## ■ Appeal Procedure - Sample


9. The parties shall have 24 hours to object to the appointment of the Appeal Officer, in writing, on bases of perceived bias or conflict of interest.
  - The bases of objection must be articulated in writing.
  - The Title IX Coordinator has the sole authority to determine whether to replace the Appeal Officer and that decision is final.
10. When the selection of the Appeal Officer is final, the Title IX Coordinator will provide the appeal to the Appeal Officer.



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**■ Appeal Procedure - Sample**


11. The parties are entitled to an advisor, who may or may not be an attorney during the appeal process.
12. The Appeal Officer will review the appeal and determine whether it articulates a valid ground or grounds for appeal pursuant to Section \_\_\_ of the Policy.
13. If an appeal does not articulate a valid ground or grounds for appeal, the Appeal Officer will dismiss the appeal, in writing, for failing to articulate a valid ground for appeal. The Title IX Coordinator will communicate the dismissal decision to the parties simultaneously.



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**■ Appeal Procedure - Sample**

14. If the Appeal Officer determines the appealing party has articulated valid grounds for appeal, the Appeal Officer will notify the parties simultaneously.
15. Following this notification, the non-appealing party has 2 business days to submit a written response to the appeal to the Appeal Officer, which will be provided to the appealing party.
16. The Appeal Officer may invite the investigator or Hearing Coordinator to submit a response to the appeal, which will be provided to the parties.
17. No further submissions related to the appeal are permitted.




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**■ Appeal Procedure - Sample**

18. An appeal of a determination on responsibility is not a review of the entire matter; rather, it is an objective review of the written documentation related to the investigatory and hearing processes and record of the Hearing, along with the appeal-related submissions authorized herein.

19. Accordingly, the Appeal Officer will not interview, question, or meet with the parties or their advisors.

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**■ Appeal Procedure - Sample**

20. The Appeal Officer is to defer to the original findings and determination, remanding only when there is clear reason to do so, and modifying the outcome and sanction(s) only when there is a compelling justification to do so.

21. The Appeal Officer may take one of three possible actions on appeal:

- a) Dismiss the appeal for failure to meet the grounds of appeal, upholding the initial outcome and sanction(s), if applicable.
- b) Remand to the original investigator or hearing panel with specific instructions on the remanded issue(s).
- c) Modify the outcome and/or sanction with a rationale supporting the modification.

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## ■ Appeal Procedure - Sample

22. The Appeal Officer will generally render a written decision on the appeal, as to each ground raised, and rationale for the decision, within five (5) business days from receipt of the appeal, absent exigent circumstances.
23. The Title IX Coordinator will simultaneously forward the Appeal Officer's written decision to the parties.
24. The Appeals Officer's decision is final and there are no further appeal options.



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## ■ Appeal Procedure - Sample

25. If a sanction imposed in the original determination remains, the Title IX Coordinator will coordinate the implementation of the sanction. The Title IX Coordinator will also coordinate and implement the remedies owed to the Complainant and implement any other long-term support measures, as necessary.

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## ACTIVITY

The Complainant filed a formal complaint alleging that the Respondent fondled the Complainant in a dorm room on campus. The parties completed the grievance process pursuant to § 106.45 and the Hearing Panel found the Respondent responsible for fondling and issued a sanction of probation.

The Complainant submitted a timely appeal stating the following:

*Dear Title IX Coordinator,*

*I am appealing the Respondent's sanction because it is too lenient. The Respondent should be expelled.*

**How do you proceed under your policy?**



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## ACTIVITY

Following a determination of responsibility where the sanction imposed on the Respondent was probation, the Respondent submitted an appeal on day 5 claiming decision-maker bias toward male respondents resulted in a harsher sanction than is appropriate under the circumstances.

After the Complainant is notified and provided a copy of the Respondent's appeal, the Complainant files their own appeal on day 7 that fails to articulate a bases for appeal, but claims a harsher sanction than probation was warranted.

*The University requires appeals to be filed by the parties within 5 business days upon receipt of the Notice of Outcome.*

**How do you proceed under your policy?**



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## ACTIVITY

A Complainant filed a formal complaint against a Respondent where the Complainant alleged that the Respondent engaged in hostile environment sexual harassment.

After the Title IX Coordinator met with the Complainant to discuss the specific allegations for purposes of the Notice of Allegations, the Title IX Coordinator determined that the alleged conduct did not constitute Title IX Sexual Harassment as defined in § 106.30. Accordingly, the Title IX Coordinator dismissed the formal complaint pursuant to the mandatory dismissal provision in the Final Regulations and provided the dismissal and rationale for the dismissal to both parties.

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## ACTIVITY

Upon dismissal of the formal complaint, the Complainant immediately refiled the complaint against the Respondent with Student Conduct alleging General Harassment, an offense under the Conduct Code.

The Respondent then appealed the Title IX Coordinator's dismissal on the bases of "procedural irregularity that affected the outcome of the case" and asked that the formal complaint be reinstated as Title IX Hostile Environment Sexual Harassment.

Why would a Respondent want the formal complaint reinstated as Title IX Sexual Harassment opposed to going through the Student Conduct Process on the claim of General Harassment?

**How do you proceed under the policy?**



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## CHAT

### Let's Chat!

Since we successfully completed five out of the six workshop series, let's use this time to hear from you!

- What questions remain?
- What feels uncertain?
- Do you feel like you're progressing towards successful revision of your policy? Why or why not?

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## QUESTIONS

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## RESOURCE

### Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)



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## EVALUATION

### Thank you!

Please remember to complete the event evaluation. Your comments will help us continually improve the quality of our programs.

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