Title IX Coordinator Training Online Course

Class Three: The Grievance Process – Hearings & Appeals

Marjory Fisher
Associate Vice President & Title IX Coordinator, Columbia University

Melinda Grier
Melinda Grier Consulting & Novus Law Firm, Inc.

Janet P. Judge
Partner, Holland & Knight LLP

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

Class Overview

• Due Process / Fundamental Fairness
• Credibility Determinations
• Advisors
• The Written Determination
• Appeals
Due Process (Fundamental Fairness)

A Fair Process:

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- so as to allow the decision-maker(s) to reach a determination consistent with the standard of evidence.

The Process That Is Due
Title IX Sexual Harassment Grievance Process: Elements of “Due Process”

- Notice to the Respondent of the allegations
  - Opportunity to respond
  - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice

State the Standard of Evidence

Same standard of evidence for all.

Either:
- Preponderance of the evidence, i.e., more likely than not; or
- Clear and convincing evidence, i.e., substantially more likely to be true than not.

And Not:
- Beyond a reasonable doubt (no other reasonable explanation possible – criminal cases).
Evidence:

- Directly related
- Relevant

Evidence that is not relevant:

- Complainant’s prior sexual history or predisposition except:
  - Where offered to prove that someone other than the Respondent committed the alleged misconduct.
  - Where related to the sexual behavior between the Complainant and the Respondent and is offered to prove consent.
- Information protected by a legally recognized privilege.
- Treatment records absent permission.
- Statements of a party or witness that does not “submit to cross examination.”

What About:

- Respondent’s Prior Sexual History or Predisposition
- Law Enforcement Evidence
- Hospital Records
- Passage of Time/Unavailability
- Hearsay, Bad Acts, Polygraph
- Statements not subject to Cross
- Complainant/Respondent not at the Hearing

Credibility Determinations
Considerations

- What evidence is most believable?
- Corroborating evidence
  - Other testimony
  - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents

Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
  - Credibility on one fact doesn’t make all of that person’s testimony credible, and
  - Lack of credibility on one point doesn’t make all of that person’s testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn’t necessarily being dishonest.
Caution

- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.

The Decision-Maker (Hearing Officer)
Getting Ready

• Self-identify any conflict of interest or bias.
• Prepare, prepare, prepare.
• Read the report carefully and repeatedly, but don’t prejude.
• Understand the conduct at issue and the elements of the alleged violations.
• Identify areas of agreement and disagreement.
• Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?

Points to Consider: May have rules that:
• Require advisors be respectful and prohibit abusive/intimidating questioning.
  • Deem repetition of the same question irrelevant.
  • Allow for removal of advisors.
• Specify any objection process.
• Govern the timing and length of breaks to confer, and prohibit disruption.
• Require that parties make any openings and closings.
• Who will enforce the rules of decorum?
  • How will you train decision-makers?
Advisors

- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
  - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn’t accompanied by one.
  - Institutions may require parties to provide advance notice of their advisor’s attendance.
    - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
  - Need not be of “equal competency.”
- May establish guidelines for advisors.
  - Role of advisors in hearings and meetings.
  - Use of non-disclosure Agreements.
More on the Advisor’s Role

- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... carefully.

Working with the Parties’ Attorneys
Advisor or Legal Representative

• Clarify procedures and role in advance.
• Distinguish between advisor and legal representative.
• Emphasize the “ground rules” - provide any rules of decorum.
• Establish lines of communication and points of contact.

Written Determination
Written Determination

• Identification of allegations potentially constituting sexual harassment
• Description of the procedural steps
• Findings of fact supporting the determination
• Conclusions regarding the application of the code of conduct/policy to the facts
• Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
• Appeal procedures and grounds

Appeals
Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, 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.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.

**Appeal Process**

- Notify other party upon receipt of appeal.
- Appeal decision-maker can’t be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.
Questions?

Note

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