



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45(b)(8): Appeals

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Note: This document focuses on a summary analysis of Section 106.45(b)(8) of the 2020 Final Title IX Regulations,¹ specifically requirements for Appeals. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§106.45(b)(8) - Appeals

The Final Rule makes a significant change from the Notice of Proposed Rulemaking (NPRM) with respect to requiring appeals: the NPRM did not require institutions provide for appeals at any stage of a Title IX sexual harassment grievance process, but under the Final Rule, institutions must make appeals available for both (1) determinations of responsibility and (2) dismissals of a formal complaint or any allegations therein, to both parties, on three specified grounds. Institutions may also offer other grounds for appeal, as long as they do so on equal terms for both parties. *See*, 34 C.F.R. §106.45(b)(8).

This section describes the mandatory bases for appeals, the required procedures for all appeals, and some additional areas for consideration.

Overview

Final Rule § 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, on the following bases:

- (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.

¹ The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

Importantly, all three of these mandatory appeal grounds contain a materiality requirement. The procedural irregularity and conflicts of interest or bias grounds for appeal both require that the issue being appealed actually affected the outcome. Newly discovered evidence, on the other hand, must be evidence that could have affected the outcome.

In other words, if the newly discovered evidence was immaterial to the outcome, it would not require an appeal to be granted, nor would immaterial procedural errors or bias.

Along with appealing the determination regarding responsibility, any party may appeal both mandatory and discretionary dismissals on these same grounds of material procedural irregularity, bias, or new evidence.

At first blush, complainants would seem to have the clearest interest in appealing a dismissal. E.g., 85 Fed. Reg. 30026, 30053 (May 19, 2020) (“if a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant’s allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds.”)

But the preamble also provides an interesting example of a potential respondent’s appeal where they believe the institution erred in making a jurisdictional determination. For example, the respondent might appeal a determination that the alleged conduct did not constitute sexual harassment as defined in § 106.30. Underlying such an appeal would be the respondent’s ability to have the procedural rights and protections mandated under § 106.45 for Title IX proceedings, rather than potentially less comprehensive protections defined in an institution’s process for a non-Title IX code of conduct violation. *See* 85 Fed. Reg. at 30288 fn 1129.

Institutions may offer grounds for appeal beyond the three mandatory bases, as long as they are offered equally to both parties. 34 C.F.R. § 106.45(b)(8)(ii). For example, the institution may determine whether the parties may appeal based on the severity or proportionality of the sanction. 85 Fed. Reg. at 30396. If an institution permits either party to appeal the sanction imposed, it must permit both parties to do so.

What is a procedural irregularity?

The phrase “procedural irregularity” is not defined in the Final Rule or preamble, but generally can be considered a failure to follow an institution’s own procedures. The preamble suggests that procedural irregularity could include failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, during the investigative process. 85 Fed. Reg. at 30249. Likewise, parties may appeal any erroneous relevance determination if it affected the outcome. *Id.* at 30343. Under the plain language of the Final Rule, however, a procedural irregularity will only be grounds for granting an appeal if it was material to the outcome of the determination regarding responsibility.

What is newly discovered evidence?

The Final Rule and preamble suggest a two-step process for evaluating if newly discovered evidence warrants the granting of an appeal.

The first question is whether the evidence proffered by an appealing party is indeed new. The Department cautions that if an institution allows parties to provide additional evidence after reviewing the evidence gathered during the investigation or the investigative report prior to a determination of responsibility, any such evidence (particularly evidence that is summarized in the investigative report) will not qualify as new evidence that was not reasonably available at the time the determination regarding responsibility was made. *See* 85 Fed. Reg. at 30307.

Second, if the evidence was not provided at any time prior to the determination of responsibility, the key question on appeal will be to evaluate whether the new evidence could have affected the outcome.

What is a conflict of interest and what is bias?

It will be 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. The Department has not provided much in the way of proscriptions in this area, so training will be key. For further analysis of the Final Rules' requirements regarding conflict of interest and bias, please see the Joint Guidance memo entitled *Section 106.45: Conflict of Interest or Bias*.

However, it is clear that a pre-existing assumption based on a sex stereotype would be sufficient to grant a party's appeal *if it* is shown to have affected the outcome.

What must all appeals include?

All appeal procedures must be implemented equally for all parties. The specific procedural requirements for appeals in the Final Rules remain largely unchanged from the NPRM and apply to all grounds for appeal provided by the institution:

- When one party appeals, the other party must be notified in writing.
- The appeal decision-maker(s) must be different from anyone who made the determination regarding responsibility or dismissal and must not be either the investigator or the Title IX Coordinator.
- 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.

What about supportive measures?

Supportive measures, such as mutual no-contact orders or academic course adjustments for either or both parties may continue in place throughout an appeal process.

What is the time frame for the appeal process?

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).

What is the remedy if an appeal is granted?

The preamble and regulation are silent about the proper remedy for an appeal, even if one of the mandatory grounds is found to have been present by the appellate decision-maker. Institutions should consider what remedies may be implemented and by whom, and specify these items as part of their policies and procedures.

Must the transcript or recording of a live hearing be made available to both parties before the time to appeal lapses?

Yes. It must be made available, but it does not have to be provided in the manner other evidence in the case file and the investigation report must be shared prior to the hearing.

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