



Title IX Sexual Harassment Training: Informal Resolution And The Hearing Process

Informal Resolution And The Hearing Process As
Part Of The Title IX Sex Harassment Complaint
Procedure



MARICOPA
COMMUNITY COLLEGES

Quarles & Brady LLP

Road Map

- Informal Resolution
- The Live Hearing
- The Role of the Decision-Maker
- Determination of Responsibility
- Quiz!
- Questions?

Informal Resolution

- As an alternative to the formal grievance procedure, the college may offer parties the option of participating in an informal resolution process.
- The Title IX regulations do not require informal resolution options as part of a college's Title IX policy or procedures
- Consider whether informal resolution is appropriate for certain types of claims (e.g., sexual assault)
- Parties still have the right to an Advisor during the informal resolution process.

Informal Resolution

- Informal resolution may not be offered to the parties ***unless a formal complaint of sex harassment is filed***
- Informal resolution ***also cannot be offered*** in instances when the complaint involves a college employee sexually harassing a student.

Informal Resolution

- To the extent a college provides informal resolution options, they will typically involve mediation by a third-party mediator or restorative justice opportunities.
- **Very Important:** Both parties must provide *informed, written, voluntary consent* to attempt informal resolution of a formal complaint.
 - Without such consent, informal resolution *is not an option*

Informal Resolution

- For consent to be informed and the process equitable, both parties must be notified (in writing) of:
 - The allegations made in the formal complaint;
 - The requirements of the informal resolution process; and
 - What elements of the process will remain confidential (or not confidential) if the parties choose to participate

Informal Resolution

- Either party can withdraw consent ***at any time***
 - If consent is withdrawn, the formal grievance process steps must be followed
- Informal resolution options ***cannot be made mandatory*** by the College
 - Thus, if a party does not wish to participate in informal resolution, the party cannot be required to do so

Informal Resolution

- If you offer mediation as an informal resolution process, the college must ensure:
 - The mediator does not hold another role in the Title IX process (i.e., is not the investigator, proposed decision-maker, etc.);
 - That the mediator is trained on the College's Title IX procedures;
 - That the mediator has received training on Title IX requirements – including conflicts of interest, bias, prejudgment of facts, etc.

Informal Resolution

- **Hypothetical:** Mark contacts the College's Title IX Coordinator over the phone and reports that his classmate, Alex, is sexually harassing him and notes that he intends to file a formal complaint against her. The Title IX Coordinator suggests that, prior to filing the formal complaint, Mark and Alex should try mediation with a third-party mediator provided (and paid for) by the College. Is this permissible?

Informal Resolution

- **Answer:** No – informal resolution options can only be offered to a party *after* a formal complaint has been filed by the complainant. Because Mark has not yet filed a formal complaint, the Title IX Coordinator cannot offer him the option to participate in an informal resolution option such as mediation.

Informal Resolution

- **Hypothetical:** Lindsey files a formal Title IX complaint alleging that her social sciences professor, Judi, subjected her to sexually harassing comments throughout the prior semester. Prior to the completion of the investigation, the Title IX coordinator offers both parties the opportunity to participate in mediation and they provide written consent to move forward with mediation. Is this permissible?

Informal Resolution

- **Answer:** No – Informal resolution *cannot* be offered in cases where a student has filed a Title IX complaint against an employee of the college due to the power differential.
- Even though the parties both consented to participate in mediation, the Title IX Coordinator should not have offered informal resolution as an option based on the nature of the case.

The Live Hearing

- The Title IX regulations now require that colleges ***must hold live hearings*** for formal complaints of sexual harassment that are not dismissed or otherwise resolved through informal resolution.
- The single-investigator model is no longer permissible. As far as Advisors are concerned, the same Advisor may advise a student throughout the entire process.
- A separate ***Decision-maker*** oversees the hearing and issues the written determination following the hearing.

The Live Hearing

- Prior to the hearing, Title IX Coordinator will send a ***Notice of the Hearing*** to the parties.
- The notice should contain:
 - Description of the alleged violations;
 - List of policies allegedly violated;
 - Description of hearing procedures;
 - Statement of potential sanctions/remedies;
 - Time, date, and location of the hearing;
 - Any technology that will be used in the hearing;

The Live Hearing

- The notice of hearing should also contain:
 - Information about the option for the live hearing to occur with the parties located in separate rooms;
 - A list of all those who will attend the hearing;
 - Information on how the hearing will be recorded;
 - Notification that the parties may have the assistance of an advisor; and
 - An opportunity to arrange any necessary accommodations for the hearing.

The Live Hearing

- The parties must also receive the *final* investigation report at least 10 days prior to the hearing, which "fairly summarizes all relevant evidence."
- Advisors may receive their own copy of the material for inspection. Please make sure you ask the Title IX Coordinator to provide you a separate copy

The Live Hearing

- The live hearing does not have to be done in-person (though in-person hearings are preferred)
- MCCCCD will **allow for the hearing to be conducted in separate rooms**, and provide technology that will allow the parties to simultaneously see and hear each other and the witnesses.
- Any party or witness may be allowed to participate in the hearing remotely.
- Advisors will be in the same room as their Advisees.
- The college ***must record*** all hearings.

The Live Hearing

- The Decision-maker is responsible for determining what testimony will be admitted at hearing and relied upon in the final determination.
 - It is the Decision-maker's job to determine whether a question is **relevant** to prove (or disprove) any of the specific allegations at-issue in the proceeding
 - The Decision-maker must issue a determination on relevance *before* a party answers a question and must explain why something is not relevant
 - "**Relevance**" for purposes of the hearing has additional nuance as compared to the investigation process

The Live Hearing

- The Decision-maker must allow the advisors to ask parties and witnesses:
 - **All relevant questions and follow-up questions**
 - **Questions challenging credibility**
- That must occur even if a party does not show up for the hearing and only the party's advisor is present at the hearing

The Live Hearing

- Questions about the Complainant's sexual predisposition or prior sexual behavior ***are presumptively not relevant***, unless such questions:
 - Are offered to prove that someone other than the Respondent committed the alleged sexual harassment; or
 - Concern specific incidents of the Complainant's prior sexual behavior with the respondent and are offered to prove consent
- The Decision-maker should exclude such questions if they do not fall into these exceptions
- Advisors should be vigilant to catch relevance issues, although no right to object exists.

The Live Hearing

- The live hearing must provide the opportunity for cross examination, **which may only be conducted by the *parties' Advisors***
 - A party **cannot** cross examine another party directly during the hearing (or ever)
 - If a party does not have an Advisor for the hearing, the College ***must provide*** the party an Advisor (at the College's expense)

The Live Hearing

- The Decision-maker may ask questions of the parties and may rely on all statements from a party of witness, regardless of whether they refuse to respond to questions from the Decision-maker or others.

The Live Hearing

- **Hypothetical:** Hannah is a drama student who witnessed a sexual assault at the college's theater during a rehearsal. She reluctantly agreed to be interviewed as a part of the Title IX investigation. Hannah has been struggling since this investigation interview, and has sought professional help. For her own mental health, she refuses to appear as a witness at the live hearing.
- Can Hannah's investigation interview be relied upon by the Decision-maker in making a determination regarding responsibility?

The Live Hearing

- **Answer:** Yes, Hannah's interview can be relied upon in the determination regarding responsibility.
- The Decision-maker can rely on statements that Hannah made during her investigation interview, regardless of whether she presents herself for cross-examination during the live hearing.
- The Decision-maker cannot draw an inference about Hannah's interview statement based solely on Hannah's absence from the live hearing.

The Role of the Decision-Maker

- The Decision-maker must **objectively evaluate relevant evidence presented at hearing.**
- What does this mean?
 - Impartially consider all of the evidence
 - No prejudgment of facts
 - No deference to recommendations from investigator
 - Allow the parties to have an equal opportunity to inspect and review evidence obtained in the investigation and that is relevant to the charges

The Role of the Decision-Maker

- The Decision-maker (unlike the investigator) will engage in ***credibility determinations*** of the party's and witnesses
 - i.e., Determine who is telling the truth and who is not?

Role of the Decision-Maker

- In reviewing the evidence presented at the hearing, the Decision-maker is responsible for properly applying:
 - The presumption of innocence;
 - The Title IX policy's burden of proof;
 - Relevancy considerations;
 - Privilege protections; and
 - Medical record protections

Determination Regarding Responsibility

- Following the hearing, the Decision-maker must consider the relevant evidence prepared at hearing and issue a written ***determination regarding responsibility***, which must include:
 - The allegations potentially constituting Title IX sexual harassment;
 - A description of the procedural steps taken;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the school's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions and remedies; and
 - Procedures and permissible bases for the complainant and respondent to appeal

Determination Regarding Responsibility

- The determination must be sent simultaneously to the parties (and their advisors), along with information to both parties regarding the process of filing an appeal.

Determination Regarding Responsibility

- Title IX Coordinator is responsible for effective implementation of any remedies from the determination
- This determination becomes final:
 - If an appeal is not filed, the date on which an appeal would no longer be considered timely
 - If an appeal is filed, on the date that the school provides the parties with the written determination of the result of the appeal

Quiz – Test Your Knowledge!

- Rico is the respondent in a Title IX grievance process. Rico does not designate an Advisor for the investigation, so the college provides him an Advisor during the live hearing. Rico thinks his Advisor is hindering his case because the advisor does not know the circumstances of the case as well as he does. Frustrated, Rico ignores the Advisor's advice and takes the lead and tries to cross-examine the Complainant.
- Given Rico's displeasure with his Advisor, can he cross-examine the Complainant and carry on defending himself?

Quiz – Test Your Knowledge

- **Answer:** No – Rico cannot conduct cross examination during the live hearing, despite his frustrations with his appointed Advisor.
- **Reasoning:** During the live hearing, only the parties' Advisors may conduct cross examination (even if a party is displeased with his or her advisor).
- **Extra Question:** Can Rico appeal the Decision-maker's determination because he feels the Advisor did not ask good cross-examination questions?
- **Answer:** No. This is not one of the permissible grounds for appeal.

Quiz – Test Your Knowledge!

- Emily is the Complainant in a Title IX hearing against Sam, who she has accused of sexually harassing her. Sam does not appear for the Title IX hearing, but her Advisor, Lucas does. Lucas begins to cross examine Sam at the hearing and Emily's Advisor says that Emily should not be subject to cross-examination since Sam is not present to be cross-examined.
- How should the Decision-maker rule?

Quiz – Test Your Knowledge!

- **Answer:** The Decision-maker must allow the cross-examination. The fact that Sam is not present at the hearing does not bar her advisor from cross-examining Emily.

Quiz –Test Your Knowledge!

- Who is responsible for issuing the Determination of Responsibility and determining potential sanctions in a Title IX investigation:
 - The Title IX Coordinator
 - The Investigator
 - The Decision-Maker

Quiz – Test Your Knowledge!

- The **Decision-maker** is responsible for issuing the Determination of Responsibility and determining potential sanctions.
- The Title IX Coordinator implements sanctions but does not determine them – and the investigator is not involved in the Determination of Responsibility or the sanctions.

QUESTIONS?

© 2020 Quarles & Brady LLP - This document provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this document. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.