

*Week Four:
The Hearing
Process and
Disciplinary
Sanctions*

July 9, 2020



Our Hopes...

What this workshop is:

1. Unpack legal requirements

CHAT

Please let us know how you wish to participate in this virtual learning environment.



The Hearing Process and Disciplinary Sanctions

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Thursday, July 9, 2020

1:00 - 2:30 PM - Eastern



■ Addressing the Hearing Process in the Policy

‡ Straight forward

‡ Easy to understand

‡ Transparent

Pre-hearing process

The Title IX Coordinator (or designee) will:

- ‡ Appoint decisionmaker(s) - hearing officer/hearing panel.
 - ± Explain who these decisionmaker(s) will be (i.e., faculty, staff, students, outside experts, etc.)

- ‡ Decisionmaker(s) must be free of bias and conflict of interest.
 - ‡106.45(b)(1)(iii)

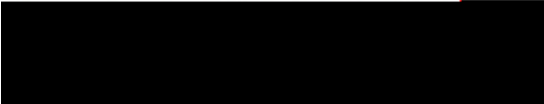
- ‡ Ensure decisionmaker(s) receives training on (‡106.45(b)(1)(iii)):
 - ± Any technology to be utilized at the live hearing.
 - ± On issues of relevance of questions and evidence.



The Title IX Coordinator (or designee) will:

- ‡ Provide decisionmaker(s) and parties/advisors the Investigative Report and all “relevant” evidence relied upon within the Investigative Report and the parties’ responses thereto.
 - ± At least 10 days prior to the hearing. †106.45(b)(5)(vii)

‡ ~~per~~





The Title IX Coordinator (or designee) may:



■ Conflicts of Interest and Biases

‡ Decisionmaker(s) must not have a conflict of interest or bias:

± For or against complainants or respondents generally, or

± An individual complainant or respondent.

†106.45(b)(1)(iii)

■ Conflicts of Interest and Biases

‡ Examples of potential conflicts of interest:

± Decisionmaker is faculty advisor for one of the parties.

± Decisionmaker is friends with one of the party's parents/relatives.

± Decisionmaker ruled on one of the party's academic appeals relating to an academic integrity issue.

± Decisionmaker investigated/disciplined a party for non-Title IX conduct.

■ Conflicts of Interest and Biases

- ‡ Harmful/unlawful biases can be unconscious.
 - ± Unconscious bias is a person's preferences for objects and people at a subconscious level that unintentionally influence their behavior and decision making.

- ‡ How to recognize biases that impermissibly impact a determination:
 - ± Pre-judgment of the facts; pre-determined outcome
 - ± Partisan approach by decisionmaker in their questioning of the parties
 - ± Improper application of hearing procedures
 - ± Application of sex stereotypes

■ Conflicts of Interest and Biases

- ‡The key is for a Title IX Coordinator to recognize any potentially harmful biases of decisionmaker(s) before a hearing.
- ‡Hearings must be based on evidence, not on personal beliefs about a complaint or the parties/witnesses involved.

■ Conflicts of Interest and Biases

- ‡ The Final Regulations already provide some measures to prevent against conflicts of interest and potential biases that could inappropriately impact the outcome:
 - ± Separate the investigative and adjudication functions
 - ± Decisionmakers must be trained to serve impartially without prejudging the facts at issue
 - ± Require training materials that avoid sex stereotypes, including application of the rape shield protections.



■ Hearing Process

‡ Hearings must be “live.” †106.45(b)(6)(i)

‡ At the request of either party or in the school’s discretion, live hearing can occur with parties in separate rooms/locations.

†106.45(b)(6)(i)

± Hearings can be conducted virtually with participants in other geographic locations or on-campus.

‡ Must provide technology enabling the parties and decisionmaker(s) to simultaneously see and hear one another and any testifying witnesses. †106.45(b)(6)(i)

‡ Must record the hearing and provide the recording or transcript to the parties to review. †106.45(b)(6)(i)



‡ Parties must have an advisor fo



■ Hearing process

- ‡ Party opening/closing statements optional.
- ‡ The decisionmaker(s) are permitted to ask questions directly to the parties and witnesses.
- ‡ The parties' advisors are permitted to cross-examine the other party and witnesses (decisionmaker(s) must first determine whether each question posed by an advisor is relevant before the witness answers). †106.45(b)(6)(i)
 - ± "Relevance" is the decisionmaker(s) only evidentiary threshold for admissibility or exclusion of questions and evidence. (Preamble, p. 1190 (Federal Register version)).





‡ The decisionmaker(s) will issue a written determination



ACTIVITY

Fact pattern

A hearing is taking place for the adjudication of the Complainant's formal complaint alleging that the Respondent raped the Complainant in the Complainant's dorm room a year ago.

While the Respondent's advisor is virtually cross-examining the Complainant, half-way into the advisor's questions, the Complainant bursts into tears and is unable to stop sobbing. The Complainant then declines to participate further and leaves the room. The Complainant's advisor remains.


Respondent, seeing the reaction of the Complainant, also declines to participate further and leaves the room.

ACTIVITY

How should your policy address this situation (i.e., what options are available to the parties)?



QUESTIONS



‡ Post-secondary schools are required by the Final Regulations to provide cross-examination o



The objective for cross-examination under the Final Regulations:

- To allow parties to probe/challenge the credibility, plausibility and reliability of statements asserted by parties/witnesses.
- To give the decisionmaker(s) the opportunity to observe parties and witnesses answer questions, including those challenging credibility, to serve the truth-seeking purpose of an adjudication.
- To permit parties to pose questions intended to promote the asking party's perspective with respect to the allegations at

■ Cross-examination

§106.45(b)(6)

‡ Parties and witnesses must “submit to cross-examination” for their “statements” to be considered by the decisionmaker(s).

†106.45(b)(6)(i)

± “Statements” are intended assertions of fact. (Preamble p.1213 (Federal Register version))

± “Statement” includes any statement made by a party or witness throughout the investigation, and statements made to the other party and witnesses during/around the alleged incident.

‡ “Submit to cross-examination” means answering those cross-examination questions that are relevant. (Preamble p.1213 (Federal Register version))

■ Cross-examination

§106.45(b)(6)


‡ Schools can adopt rules within the hearing process to ensure cross-examination is performed in a respectful and non-abusive manner.

± Examples of questioning that may be harassing or abusive:

‡Advisor yells or screams at the other party/witness

‡Advisors stands and physically leans into the party/witness' personal space.

‡Advisor asks questions in a manner designed to promote rape myths or sex-based stereotypes.



Decisionmaker(s) must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.

‡ Decisionmaker(s) must not draw any inferences based on
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ACTIVITY

Consequence when a party or witness does not submit to cross-examination

Text messages



QUESTIONS



■ Hearing Role of Advisor

§106.45(b)(6)(i)

‡ The parties are entitled to have an advisor of their choice at the hearing, who may or may not be an attorney, to conduct cross-examination. †106.45(b)(2)(B).

± Only one advisor/support person permitted at the hearing for each party, unless otherwise required by law.

(Preamble, p. 1177-1178 (Federal Register version))

‡ Restrictions may be established regarding extent of advisor's participation in the hearing, as long as restrictions provided equally to both parties.



■ Hearing Role of Advisor

§106.45(b)(6)(i)

Example of a restricted advisor role that may be imposed:

- ‡ Advisor acts as party's proxy during hearing; is not "representing" the party (Final Regulations preamble, p.1180, 1187 (Federal Register version))

- ‡ "...the requirement for a party's advisor to conduct cross-examination need not be more extensive than simply relaying the party's desired questions..." (Preamble, p.1028 (Federal Register version))

■ Role of Advisor at the Hearing

§106.45(b)(6)(i)

Example of a broader advisor role that may be permitted:

‡ Advisor serves to “represent” their party.

- “A recipient may, but is not required to, allow advisors to ‘represent’ parties during the entire live hearing (or, for that matter, throughout the entire grievance process).”
(Preamble, p. 1186-1187 (Federal Register version))
- “Representation” could allow advisors to raise objections to questions asked and evidentiary rulings by decisionmaker(s), argue their party’s position, instruct party not to answer a question, conduct direct examination of their party and witnesses in addition to cross-examination, etc.



QUESTIONS



■ Decisionmaker(s) Determination

- ‡ Decisionmaker(s) can deliberate right after the hearing, or at another date soon after the hearing.
- ‡ Decisionmaker(s) must objectively evaluate of all relevant evidence (inculpatory and exculpatory) and arrive at a finding of “responsible” or “not responsible” as to each allegation utilizing the preponderance of the evidence/clear and convincing standard of proof.



■ Decision and rationale

§106.45(b)(7)

The written decision must include:

- ‡ The allegations of sexual harassment

- ‡ A description of the procedural steps taken from receipt of the formal complaint through determination (notifications to parties, interviews with parties and witnesses, etc.)

- ‡ Findings of fact supporting the determination (what happened?)

■ Decision and rationale

§106.45(b)(7)

- ‡ Conclusions regarding the application of the policy to the facts (utilizing chosen standard of proof)
- ‡ The result of each allegation (responsible or not responsible), and rationale for it.
- ‡ If finding of responsibility, decision must include the disciplinary sanction imposed, and remedies to preserve/restore equal access for the Complainant.
- ‡ Provide process and permissible grounds for appeal (both parties have right to appeal)



■ Disciplinary Sanctions

‡ While not required by the Final Regulations, if decisionmaker(s) is to consider certain factors when arriving on an appropriate sanction, list the factors for consideration in the policy. For example:

“In determining the appropriate sanction(s), the University must examine and consider a number of factors, including, but not limited to: 1) level of risk or harm to the community; 2) the nature and seriousness of the offense; 3) use of drugs or alcohol in the perpetration of the violation; 4) motivation underlying the Respondent’s behavior; 5) the Respondent’s record of past misconduct, including prior violations of the same or similar type.”

■ Disciplinary Sanctions

‡ The range of disciplinary sanctions for students, faculty, and staff should, at a minimum, mirror the available sanctions within the school's:

- Student conduct code
- Employee handbook
- Faculty handbook/statutes

‡ School has discretion to tailor disciplinary sanctions to address specific situations.

- May use the disciplinary process as an educational tool rather than a punitive tool due to wide discretion to utilize informal resolution processes. (Preamble, p. 272 (Federal Register version))



Examples of possible Student sanctions:

‡ Warning

‡ Probation

‡

■ Disciplinary Sanctions

Examples of possible employee/staff sanctions:

- ‡ Corrective counseling including but not limited to warning through termination
- ‡ Behavioral Improvement Plan
- ‡ Referral to the Employee Assistance Program
- ‡ Required training or education
- ‡ Suspension without pay
- ‡ Suspension with pay
- ‡ Termination



Examples of possible faculty sanctions:

- ‡ Corrective counseling
- ‡ Written warning
- ‡ Written reprimand
- ‡ Loss of prospective benefits for a stated period (for instance, suspension of "regular" or "merit" increase in salary or suspension of promotion eligibility)
- ‡ Reassignment of duties
- ‡ Suspension without pay
- ‡ Suspension with pay
- ‡ Tenure non-renewal
- ‡

RESOURCE

■ Remedies

- ‡ If a respondent is found responsible, the complainant is entitled to remedies designed to preserve or restore equal access to the school's education program and activity. †106.45(b)(1)(i).
- ‡ Schools must provide all students, faculty and staff a clear understanding of possible or a range of remedies available under the grievance process. †106.45(b)(1)(i).
- ‡ Remedies can be the same as or similar to the "support measures" listed in the policy, but do not need to be non-disciplinary or non-punitive and do not need to avoid burdening a respondent.

■ Remedies

Examples of possible remedies:

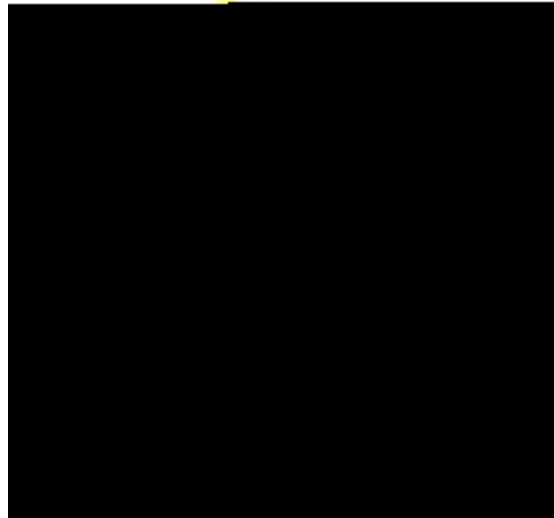
- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual/individual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of campus
- “Other similar measures”



QUESTIONS



Hearing Rules and Procedures



■ Hearing Rules and Procedures

‡ The Final Regulations allow universities to proscribe rules and procedures for the hearing.

‡ Hearing rules and procedures should accurately illustrate the format and operation of the hearing for the involved participants.

‡ Recommend a link to the Hearing Rules and Procedures in the policy.

‡

■ Hearing Rules and Procedures

- ‡ The hearing will begin at the pre-scheduled time provided in the Notice of Hearing/email/etc.
- ‡ Prior to the start of the hearing, the parties and their advisors will report to their individually assigned private conference rooms in the student union. The Hearing Panel will be in a separate conference room nearby.
- ‡ The parties and advisors will have access to technology to enable them to see and hear one another and the Hearing Panel in real-time.
- ‡ The hearing will be recorded, and the parties will be provided with the recording or a transcript thereof to review within 5 days after the conclusion of the hearing.

■ Hearing Rules and Procedures

- ‡ At the prescheduled time, the Hearing Panel Chair will convene the hearing by virtually connecting the Hearing Panel with the parties and their advisors.
- ‡ The Hearing Panel Chair will provide to the parties and their advisors a brief overview of the hearing process and expectations for participants' conduct.
- ‡ The parties and their advisors must agree to abide by those expectations or risk removal from the hearing. If an advisor is removed for failure to abide by the hearing rules, the hearing will continue after a new advisor is appointed by the university, who may or may not be an attorney.



■ Hearing Rules and Procedures

- ‡ The purpose of allowing the parties, through their advisors, to question the other party and witnesses is to permit the parties:
 - To probe the credibility, plausibility and reliability of statements asserted by parties/witnesses, and
 - Provides an opportunity to bring out additional facts and details about the alleged incident(s).

- ‡ Advisors must engage in questioning that is relevant, respectful, non-intimidating and non-abusive.



†



■ Hearing Rules and Procedures

‡ The Hearing Panel shall:

± Facilitate the hearing,

± Ask questions of the parties and witnesses,

± Verbally exclude non-relevant questions and testimony.

‡ Examples may include immaterial, extraneous, or unduly repetitious questioning or testimony, prior bad acts unrelated to the alleged incident(s), information regarding a party's character.

■ Hearing Rules and Procedures

- ± Take reasonable steps to maintain order and decorum, and
 - ‡ Includes ability to oversee advisor questioning in a manner that avoids aggressive, abusive questioning of any party or witness.

- ± Observe recognized legal privileges, such as:
 - ‡ Questions and evidence about the Complainant's sexual history or behavior are not permitted, unless asked offered to prove that someone other than Respondent committed the conduct, or to prove consent.
 - ‡ Privileged information protected under HIPAA, FERPA, or any other federal law, unless a written waiver from the owner of the privilege is provided.

Hearing Rules and Procedures

- ‡ The advisor's role within the hearing is limited.* Complainants and Respondents are expected to respond to questions from the Hearing Panel and the other party's advisor on their own behalf.
- ‡ The parties and their advisors may consult in private during the hearing, but not while a question is pending.
- ‡ The role of the advisor is to relay their party's desired questions to be asked of the other party and witnesses.
- ‡ Advisors are not permitted to raise objections to questions posed by the other party's advisor, argue in support of their party's position, or otherwise "represent" the party at the hearing.

*example of a very limited advisor role.

■ Hearing Rules and Procedures

- ‡ The Hearing Panel will question the Complainant, Respondent, and witnesses directly.
- ‡ The Complainant and Respondent are prohibited from questioning each other and witnesses directly; rather, they must do so through their advisors.





‡ The Chair's decision on whether a question is relevant is

Hearing Rules and Procedures

- ‡ The questioning of the parties and witnesses will generally take place as follows:
- The Hearing Panel will ask the Complainant questions first, while the Respondent may view the hearing virtually. The Respondent's advisor may then ask questions of the Complainant.
 - The Hearing Panel will next address the Respondent in the same format as the Complainant. The Complainant's advisor may then ask questions of the Respondent.
 - The Hearing Panel will next question each witness. After the Hearing Panel questions a witness, the Complainant and then the Respondent's advisors may ask questions of the witness.

■ Hearing Rules and Procedures

- ‡ If a party or witness fails to submit to questioning from a party's advisor, the Hearing Panel may not rely on that individual's prior statements to the investigator or statements made by the individual within the relevant evidence before the Hearing Panel.
- ‡ If a party or witness fails to submit to questioning from a party's advisor, the Hearing Panel may not draw an inference about the decision regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.



■ Hearing Rules and Procedures

- ‡ Should the parties or Hearing Panelists wish to hear from a witness at the hearing who was not previously disclosed during the investigation process, the Hearing Chair may temporarily adjourn the hearing and request that the investigator interview the witness and provide the interview summary/transcript to the parties before reconvening the hearing, or continue the hearing and invite the witness to appear and submit to questions from the Hearing Panel and the parties advisors, if the testimony from that witness is relevant.
- ‡ The Hearing Panel shall have discretion whether to allow evidence to be presented at the hearing that was available during the investigatory process.

■ Hearing Rules and Procedures

- ‡ Each party, speaking on their own behalf, shall have 5 minutes to provide a closing statement. The Complainant will speak first followed by the Respondent.
- ‡ The Hearing Panel Chair will adjourn the hearing.
- ‡ The Hearing Panel has 10 business days to objectively evaluate and weigh the relevant evidence, both inculpatory and exculpatory, to determine the outcome. A majority vote is required for an outcome.
- ‡ The Title IX Coordinator will distribute the Hearing Panel's determination to the parties simultaneously through Maxient.



QUESTIONS



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](#)

EVALUATION

Thank you!

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

