

ACTIVITY



Working Groups: Application of Stages 1-4



#5

The Hearing Process

Stage 5: The Hearing Process

The Final Regulations require a live-hearing that provides:

- The decision-maker(s) the opportunity to ask questions of the parties and witnesses, and
- An opportunity for each party's advisor to cross-examine the other party and witnesses...

Before a finding of responsibility or non-responsibility is made and any disciplinary sanctions issued by the institution.

§106.45(b)(6), (7)

Stage 5: The Hearing Process Coordination

1. Assignment of hearing facilitator. A hearing facilitator, who may be the Title IX Coordinator, may appoint the hearing officer/panel, schedule the hearing, obtain the necessary technology, facilitate the hearing by scheduling witnesses, meet with the parties to discuss format of hearing, etc.
2. Assignment of Hearing Panel (or Hearing Officer). The Title IX Coordinator will appoint a Hearing Panel to hear the case and determine the outcome.
 - a. *Challenging Hearing Panelists for Perceived Bias or Conflict of Interest.*

Stage 5: Notice of Hearing

3. At least 10 days before the hearing, the parties will receive a Notice of Hearing that will inform them of:
 - a. The date, time, and location of the hearing
 - b. Requirement to have an advisor to conduct cross-examination
 - c. The participants (including the witnesses who will be made available to testify) in the hearing
 - d. The names of the members of the Hearing Panel,
 - e. Provide the Hearing Rules and Procedures (if applicable)
 - f. Inform/remind about the availability of informal resolution (if applicable)

Stage 5: Sanctions, Remedies and Purpose of Hearing

- a. Describe the potential, or range of disciplinary sanctions and remedies that could result from a determination of responsibility. §106.45(b)(1)

- g. The purpose of the hearing (to determine responsibility based on the chosen standard of proof, and if the respondent is found responsible, to issue an appropriate disciplinary sanction(s) for the respondent and remedies for the complainant.)

Stage 5: Advisors

4. Advisors required. Each party must have an advisor, who may or may not be an attorney, at the hearing to conduct cross-examination on behalf of the party. §106.45(b)(2)(B).
 - a. School may not limit the choice or presence of an advisor for either party. §106.45(b)(2)(B).
 - b. If a party does not choose an advisor, the institution must provide an advisor for the party, free of charge, throughout the hearing process, who may or may not be an attorney.
 - c. May impose restrictions on advisor role, except for performing cross-examination.

Stage 5: Hearing Panel's Role

5. Hearing Panel to Review Investigative Report and Relevant Evidence. The Hearing Panel will review the investigative report and the relevant evidence relied upon in the investigative report before the hearing.
 - The hearing panel will review evidence determined not relevant by the investigator only if the parties wish to challenge that determination at the hearing or pre-hearing conference.

Stage 5: Witness Notice to Testify

6. Witness Notice to Testify. Because the hearing panel will call all relevant witnesses to testify, the hearing facilitator will notify each witness in writing of the request to participate in the hearing and provide a date/time for their testimony.
 - Title IX Coordinator or Hearing Panelists do not have subpoena power, therefore cannot require witnesses (or parties) to attend and testify, but can make alternative arrangements for them to appear, if necessary.

QUESTIONS?

Stage 5: Hearing Logistics

7. Hearing Logistics.

- a. *Live Hearing.* The hearing must be live. Live hearings can occur with parties in same room, separate rooms or separate physical or geographic locations. §106.45(b)(6)(i)
- b. *Technology.* Technology used must enable the parties and decisionmaker(s) to simultaneously see and hear one another and any testifying witnesses. Decision-makers to be trained on technology. §106.45(b)(6)(i)
- c. *Audio Recording.* Must record the hearing and provide the recording or transcript to the parties to review. §106.45(b)(6)(i)

Stage 5: The Live Hearing

7. The Hearing.

- a. The Hearing Chair will provide to the parties and their advisors a brief overview of the hearing process and the expectations for participants' conduct.
 - The parties and their advisors must agree (on the record) to abide by those expectations or risk removal from the hearing (institution will appoint new advisor).

Stage 5: Role of Hearing Officer or Chair

b. The Hearing Officer/Chair will discuss their procedural and substantive roles:

- Ask questions of the parties and witnesses, directly
- Allow advisors to cross-examine the other party and witnesses
- Exclude non-relevant questions and testimony
- Observe recognized legal privileges
- Take reasonable steps to maintain order and decorum
- Otherwise administer the hearing

Stage 5: The Hearing Layout

- c. Discretionary whether to offer opportunity for opening/closing statements.
- d. The questioning procedure (generally):
 - i. The hearing panel will first question the complainant.
 - ii. Respondent's advisor may then question the complainant.
 - iii. The hearing panel will question each witness.
 - iv. After the hearing panel questions a witness, the complainant's advisor, then the respondent's advisor, may question that witness.
 - v. The hearing panel will next question the respondent.
 - vi. The complainant's advisor may then question the respondent.

Stage 5: Role of Advisors in the Hearing

- e. Advisors must ask questions in the following manner:
 - i. Advisors will pose each question verbally to the Hearing Chair, who will determine whether the question is relevant.
 - ii. If the Hearing Chair deems the question relevant, the Hearing Chair will instruct the party or witness to answer the question.
 - iii. If the Hearing Chair deems the question not relevant, the Hearing Chair will explain the rationale for the determination and instruct the party or witness not to answer.

§106.45(b)(6)(i)

Stage 5: Other Considerations

- iv. *Example of a way to limit role of advisor:* The Hearing Chair may ask Advisors to frame why, from the advisor's perspective, a question is or is not relevant, but the Hearing Chair will not entertain argument from the advisors on relevance once the Hearing Chair has ruled on a question.
- v. The Hearing Chair's decision on whether a question is relevant is final.

QUESTIONS?

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As a member of the hearing panel, review this scenario and in small groups, determine how you would proceed.

**Please refer to the Chat Box for this document.*

Stage 5: Delays for Good Cause

8. If the complainant, the respondent, or witnesses fail to appear and/or participate, the hearing will continue as scheduled unless the hearing panel determines there is “good cause” to suspend the hearing for a reasonable time.

- Must allow for the temporary delay of the grievance process or the limited extension of time frames for good cause.

§106.45(b)(1)(v)

- “Good cause” can include the unavailability of parties, witnesses, or advisors due to extenuating circumstances.
- Written notice of a delay or extension and the reason therefor shall be sent to the parties in writing.

Stage 5: After the Hearing

9. Following the close of the hearing, the hearing panel will deliberate to determine responsibility.
 - a. The Hearing Chair will draft a written determination supporting the determination on responsibility (based on a majority or unanimous vote).
 - b. Upon a finding of responsibility, the hearing panel will issue disciplinary sanctions (respondent) and remedies (complainant).
 - c. The Hearing Chair or Title IX Coordinator will contemporaneously inform the parties of the determination of responsibility and any disciplinary sanctions/remedies in the Notice of Outcome.

Stage 5: Notice of Outcome

10. The written Notice of Outcome will include:

- Identification of the allegations
- A description of the procedural steps taken from the receipt of the formal complaint through the determination of responsibility
- Findings of fact supporting the determination
- Conclusions regarding the application of the policy to the facts
- A statement of, and rationale for, the result as to each allegation
- *How the hearing panel resolved questions of credibility**
- The procedures and permissible bases for appeal

§ 106.45(b)(7)

Stage 5: Finality of Outcome

11. The hearing panel's determination regarding responsibility becomes final either:
 - a. On the date the parties receive the Appeal Decision, if an appeal was filed, or
 - b. On the date on which an appeal would no longer be considered timely.

§106.45(b)(7)(iii)

QUESTIONS?



#6

The Appeal Process

Stage 6: The Appeal Process

An appeal process following a live hearing and Notice of Outcome is mandatory pursuant to the Final Regulations. §106.45(b)(8).

Coordination of the appeal process is as follows:

1. Resolutions May Be Appealed. Any party may appeal:

- A determination regarding responsibility
- A dismissal of part or all of a formal complaint

Stage 6: Grounds for Appeal

2. Grounds for Appeal. A party may appeal on one or more of the following grounds:
 - a. Procedural irregularity that affected the outcome;
 - b. New evidence that was not reasonably available at the time the dismissal or determination regarding responsibility was made and that could affect the outcome; and/or
 - 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;
 - d. Any other grounds articulated under your policy.

§106.45(b)(8)

Stage 6: Filing an Appeal

3. An appeal must be in writing to the Title IX Coordinator and articulate the specific ground(s) for the appeal.
 - Provide the parties with a reasonable and equal opportunity to submit a written statement in support of or challenging the dismissal or the determination regarding responsibility.

Stage 6: Appeal Timeliness

4. An appeal will be considered timely in the following circumstances:

- a. Appeal of Notice of Dismissal.* A notice of appeal submitted to the Title IX Coordinator is timely if it is filed with the Title IX Coordinator within [two] [business] days of the delivery of Notice of Dismissal.
- b. Appeal of Responsibility.* A notice of appeal submitted to the Title IX Coordinator is timely if it is filed with the Title IX Coordinator within [five] [business] days of the delivery of the Notice of Outcome.

Stage 6: Rights of Parties during Appeal

5. Advisors During Appeal. The parties may continue to use their advisor or select a different advisor for the Appeal Process.

6. Notice of Appeal. Upon receipt of an appeal, the Title IX Coordinator will simultaneously issue a Notice of Appeal to both parties. The Notice of Appeal will:
 - a. Inform the party that an appeal has been filed by the complainant and/or the respondent;
 - b. Indicate whether the appeal is timely;
 - c. If the appeal is timely, contain a copy of the appeal appended to the Notice of Appeal and disclose the name of the Appeal Officer assigned by the Title IX Coordinator.

Stage 6: Appeal Officer Appointment

7. The Appeal Officer must be independent of the previous processes, including independent from any appeal of a dismissal that may have been heard earlier in the process.

a. Challenging Appeal Officer for Perceived Bias or Conflict of Interest.

b. When the selection of the Appeal Officer is final, the Title IX Coordinator will provide the materials for the appeal to the Appeal Officer.

Stage 6: Appeal Officer's Role

- c. Non-Appealing Party's Response to Appeal.* The non-appealing party will have [two] [business] days to submit to the Appeal Officer a written response to the appeal, which response will be provided to the appealing party.
- d. Other Responses to Appeal.* The Appeal Officer may invite the investigator or Hearing Chair to submit a response to the appeal, which written responses will be provided to the parties.

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Consider the following scenario. How does your policy advise the Appeal Officer to proceed?

**Please refer to the Chat Box for the scenario.*

Stage 6: The Appeal Process - Requirements

8. Supportive Measures During Appeal Process. Supportive measures may be continued or modified during the Appeal Process, as appropriate.
9. Postponing of Sanctions During Appeal Process. If an appeal was timely filed, any sanctions that had been imposed on respondent are postponed during the Appeal Process.
10. Written Decision. The Appeal Officer will generally render to the Title IX Coordinator a written decision on the appeal (“Appeal Decision”) as to each ground raised and provide the rationale for the decision.

Stage 6: The Appeal Written Decision

- a. Timing of Appeal Decision.* Absent exigent circumstances, the Appeal Decision will be released within [seven] [business] days from when the Appeal Officer received the written responses from the parties or from the investigator or Hearing Panel.
- b. Delivery of Appeal Decision to Parties.* The Appeal Officer's written decision will be sent to the parties simultaneously.
- c. No Further Appeal.* The Appeals Officer's decision is final and there are no further appeal options.

Stage 6: Possible Actions During the Appeal

Generally, the Appeal Officer takes one of three possible actions on appeal:

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

QUESTIONS?



#7

Implementing Sanctions & Remedies

Stage 7: Implementing Sanctions and Remedies

1. Sanctions and Remedies Post-Appeal. If a disciplinary sanction imposed in the original determination of responsibility remains, or a modified sanction is imposed by the Appeal Officer, the Title IX Coordinator will:
 - Coordinate the implementation of the sanction, and
 - Coordinate and implement the remedies owed to the complainant and implement any other long-term supportive measures, as necessary.

Stage 7: Privacy of Sanctions and Remedies

2. The university must maintain privacy of sanctions, remedies, and long-term supportive measures, provided that maintaining privacy does not impair the institution's ability to institute the sanctions, remedies, and supportive measures.

CHAT



If a sanction calls for suspension or expulsion, what is your institution's procedure to put the separation into effect?

QUESTIONS?

BONUS STAGE: Recordkeeping

An institution must maintain records for at least seven (7) years. Records to be maintained include the following. §106.45(b)(10)

- Determination regarding responsibility
- Audio or audiovisual recording or transcript of the grievance process.
- Disciplinary sanctions imposed on the respondent
- Remedies granted to the complainant
- Appeal and decision on appeal
- Any informal resolution and result thereof
- Supportive measures (or why not delivered)
- Documentation that response not deliberately indifferent and that school has taken measures to restore or preserve equal access to programs and activities.

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Working Groups: Application of Stages 5-7

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QUESTIONS?

Thank you!

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

Please look in Chat for evaluation link and it will be emailed to you.