

Equity Hearing Council Annual Training, Part 2A: Hearing and Appeal Procedures in Interim USU Sexual Misconduct Policy 339 and 339A



**Office of Equity
Logan Campus
Distance Education, Room 400
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Today's Topics

First

- A refresher of policy terms from part 1

Second

- An overview of the hearing process

Third

- An overview of the appeals process



Checking In

In what ways do you feel confident being part of a hearing or appeal?

In what ways do you *not* feel confident being part of a hearing or appeal?





Part One: Refresher of Policy Terms

Key question: What policy terms are relevant for the hearing process?

General Policy 339 and 339A Terms

Sexual Misconduct

- Sexual harassment (quid pro quo and hostile environment), sexual exploitation, sexual assault, relationship violence (dating violence and domestic violence), and sex-based stalking

Claimant

- A person who is alleged to have experienced conduct that could constitute Sexual Misconduct

Respondent

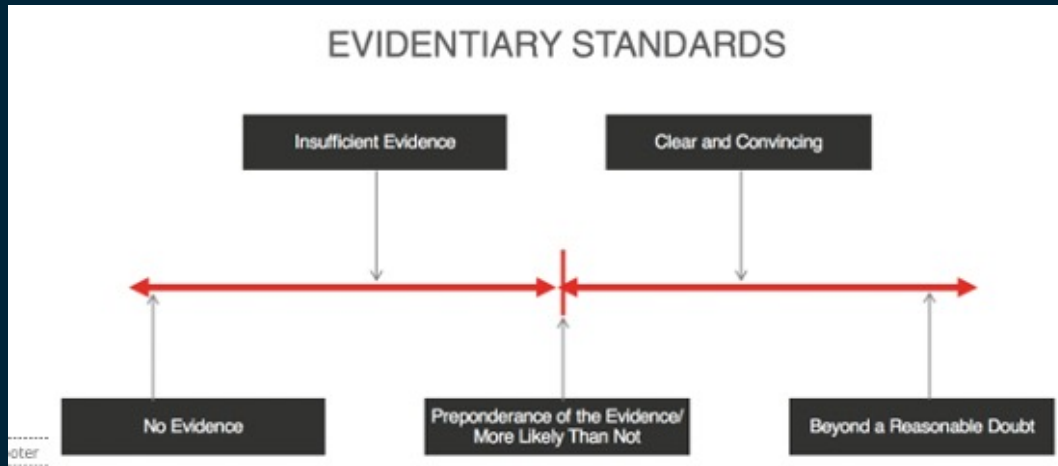
- An individual who is alleged to have committed Sexual Misconduct

Grievance Process

- The process undertaken by the Office of Equity from the filing of a Formal Complaint through to the resolution of any Appeals
- The Grievance Process may include a Claimant- or University-driven Formal Investigation and Hearing, or an Alternative Resolution

Preponderance of the Evidence

Based on the evidence, it is more likely than not that the Respondent committed a policy violation



Elements of the Investigation Record

- Incident Report
- Formal Complaint
- Notice of Allegations
- Claimant Interview
- Claimant Evidence
- Respondent Interview
- Respondent Evidence
- Other Evidence
- Response(s) to the Record
- Response(s) to the Preliminary Investigation Report
- Final Investigation Report



Part Two: Hearing Process Overview

Key question: What happens before, during, and after a hearing?

Purpose of the Live Hearing

- USU Policy 339: The live hearing is the *first and primary* phase of the sexual misconduct grievance process for determining whether there is a preponderance of the evidence of a policy violation
- During the hearing, parties may provide an opening/closing statement and question one another and witnesses (through their Process Advisors)

Formal Complaints under Policy 339

- The University will not issue a sanction arising from an allegation of Sexual Misconduct without holding a hearing unless the formal complaint is otherwise resolved through an Alternative Resolution process

Formal Complaints under Policy 339A

- Either party may opt-in to a hearing
- If a party does not opt-in to a hearing under USU Policy 339A, then the party waives their right to a hearing
 - The Hearing Officer/Panel will be appointed and will conduct a review of the Record
 - The Hearing Officer/Panel will issue a Provisional Determination letter within 21 days of appointment and follow other relevant steps in procedures 339A

Before the Hearing

- The University, through an investigator, has the burden to gather sufficient evidence for the hearing officer/panel to determine whether, by a preponderance of the evidence, the respondent violated policy
- The University will conduct a fair and impartial Grievance Process, free of actual conflicts of interest, demonstrated bias, and discrimination, in which both parties are treated as equitably as possible



Steve
Rammell
(he/him)



Kristen
Beck
(she/her)



Dan
Biddulph
(he/him)

Jen
Damelio
(she/her)

Scheduling the Hearing

- Hearing scheduling process is facilitated by Office of Equity Case Coordinators
- The hearing is scheduled no sooner than 10 days but within 60 days of the issuance of the final investigation report
 - Will not occur outside of business hours



Lilia Sanchez
(she/her)

Case Coordinator Responsibilities

- Appoint the Hearing Officer, Hearing Panel (if appropriate), and Process Advisors (if appropriate)
 - Based on rotation through participation tracking spreadsheet
- Organize and facilitate the hearings
 - Issue notices of pre-hearing conference (if scheduled) and hearing, reminder of hearing, and other communications post-hearing
- Answer procedural questions and give procedural guidance to Hearing Officers/Panels
 - Do not participate in the deliberation or make outcome decisions

Appointing the Hearing Officer and Panel and Process Advisors

- When the preliminary investigation report is issued, Case Coordinator appoints:
 - Hearing Officer
 - Hearing Panel
 - Only if requested by one of the parties
 - 2 people, combination of faculty and staff
 - University-appointed Process Advisors
 - Only if party has not appointed their own
- Prior to appointment, Case Coordinator checks for conflict of interest and bias and availability for projected hearing dates

USU's Hearing Officers:

Laura Anthony
Erin Butcher
Morris Haggerty
Burke Nazer
Natalie Nelson
Kevin Olsen

Hearing Officer Responsibilities, Part 1

- Follow USU interim policy and procedures 339/339A
- Serve free of conflicts of interest and bias
- Conduct an unbiased review of the evidence in the Record and focus on what is relevant, credible, etc.
- Maintain decorum during the hearing
- Attend the live hearing and ask relevant questions of the parties and witnesses
- Determine whether questions asked by the process advisors, on behalf of the party, are relevant, and therefore allowed to be asked (if not relevant, states the reason)

Hearing Officer Responsibilities, Part 2

- Determine it is more likely than not that one party's representation of the facts is more "accurate" than the other
- Determine whether there is preponderance of evidence that Respondent violated the policy
- Write the provisional determination letter and work with the Case Coordinator to issue it
- Write the written determination and work with the Case Coordinator to issue it

Preparing for the Hearing

- Once appointed, individuals are given access to guidance documents for their specific role and the case's Record
 - [USU guidance documents](#) for Hearing Officers/Panel Members
- Hearing Officer may schedule pre-hearing conference
 - Purpose: prepare the parties for the hearing experience and answer any questions the parties may have about the hearing
 - Invitees: Hearing Officer, parties, party process advisors, party support persons, and Case Coordinator
 - Timing: typically scheduled about 1 week prior to hearing

Hearing Basic Logistics

- Hearings may be conducted in-person or via videoconferencing
 - All participants must be able to simultaneously see and hear each other for the entire time during which they are permitted or required to be present, except for recesses
- Hearing is recorded
- Hearing is closed to the general public
- Hearings are generally scheduled for 4 hours

Hearing Attendees

- Only the following individuals will be allowed into the hearing:
 - Hearing Officer or Hearing Panel Members (if relevant)
 - Case Coordinator
 - Claimant
 - Claimant's Process Advisor and Support Person (if relevant)
 - Respondent
 - Respondent's Process Advisor and Support Person (if relevant)
 - Office of Equity investigator
 - Will be present only at the time of their testimony
 - Witnesses, including fact and expert witnesses
 - Will be present only at the time of their testimony and will not be permitted to hear other witnesses' testimony
 - Other university officials as may be required

Roles During the Hearing

Hearing Officer

- Calls hearing to order, maintains decorum, and directs hearing panel responsibilities (if relevant)
 - Asks relevant questions
 - Makes relevance determinations for each question asked by process advisors and when they find a question is not relevant, states the reason for their decision on the record

Hearing Panel (if relevant)

- Serves as a decision-maker
- Asks relevant questions

Process Advisor

- May conduct questioning of the other party and witnesses on behalf of the party they are advising

Hearing Format, Part 1

- Hearing Officer opens the hearing and establishes rules and expectations for the hearing
- Claimant Opening Statement (10 minutes)
 - May only reference evidence in the record
- Respondent Opening Statement (10 minutes)
 - May only reference evidence in the record
- Hearing Officer/Panel questions Claimant
- Claimant's Process Advisor questions Claimant
- Respondent's Process Advisor questions Claimant
 - Hearing Officer must determine all questions as relevant or not relevant

Hearing Format, Part 2

- Hearing Officer/Panel questions Respondent
- Respondent's Process Advisor questions Respondent
- Claimant's Process Advisor questions Respondent
 - Hearing Officer must determine all questions as relevant or not relevant
- Hearing Officer/Panel questions Witness 1
- Claimant's Process Advisor questions Witness 1
- Respondent's Process Advisor questions Witness 1
- Additional witnesses questioned as listed above
- Claimant Closing Statement (10 minutes)
- Respondent Closing Statement (10 minutes)

Hearing Format, Part 3

- A recess may be called at any time during the hearing
- The Hearing Officer will end the hearing
- At the end of the hearing, the Hearing Officer/Panel will deliberate on the evidence presented and move toward a determination and next steps
 - Deliberation can take place at end of hearing period or after the hearing period at other scheduled time(s) prior to provisional determination letter deadline

Hearing Officer/Panel Decorum, Part 1

- At the outset, remind the parties that they can take a break whenever they need one
 - Call a recess if either party appears to be in distress
- Treat all parties with dignity and respect
- Conduct the hearing with fairness
 - Example: Don't draw conclusions based on a party's appearance
- Explain private conversations to help prevent fear of the unknown
 - Example: "We have to discuss an issue related to the last question. We just need a few moments."

Hearing Officer/Panel Decorum, Part 2

- When you are going to ask a difficult line of questioning, signal to the party what you are going to be asking
 - Example: “In order to understand whether there was capacity to consent, I need to ask some questions about alcohol or drug consumption.”
- Consider how you phrase things and, when possible, talk about what happened with sensitivity

Hearing Officer/Panel Decorum, Part 3

- To avoid misunderstanding, reference profanity, offensive terms, and/or slurs (racial, sexual, etc.) by using the word or phrase directly
 - Exception 1: Do not say the “N-word” or “C-word” directly
 - Exception 2: If the word or phrase is not relevant to the allegation or part of a quote, it doesn’t need to be said
- Be thoughtful about how you ask questions and seek information about what a Claimant was wearing
 - Example: “In order to understand the timeline of what happened, I need to ask some questions about what and/or how the clothes you were wearing may have come off.”

Practice Activity:

Asking Difficult Questions Sensitive

- How could you ask questions about the following topics in a sensitive way?
 - How a Claimant indicated their lack of consent
 - What a Respondent was thinking when they kept contacting the Claimant after the Respondent was told to stop
 - Why a witness didn't intervene when they noticed how intoxicated the Respondent was
 - Why the Claimant delayed coming forward to report the Respondent's behavior

After a Hearing: Responsibility of the Hearing Officer/Panel and Case Coordinator, Part 1

- Within 14 days of the hearing, the Case Coordinator will send the Provisional Determination Letter
 - [USU Provisional Determination Letter template](#)
- Sent to the parties, their Process Advisors, the Sanctioning Authority (if there is a finding), and the Title IX Coordinator
- Outlines facts supporting the Determination and the policy violations the Hearing Officer/Panel has found Respondent to have committed, if any
 - The Provisional Determination Letter will also include factual findings relevant to mitigating and aggravating factors.

Aggravating and Mitigating Factors

- Factors considered by the Sanctioning Authority when determining the appropriate sanction for a violation
 - Aggravating factors: reasons why the Respondent's punishment for a violation should be increased
 - Mitigating factors: reasons why the Respondent's punishment should be decreased

Examples of Aggravating Factors

- Severe or egregious acts related to the finding of misconduct. For example:
 - Behavior persisted despite repeated attempts by Claimant to indicate it was unwelcome or get it to stop
 - Behaviors were premeditated or extensive
 - Use of physical force, a weapon, intimidation, or threats
- Use of alcohol and drugs to facilitate harm
- Respondent was in a position of power or authority
- Respondent refuses to accept responsibility
- Cumulative misconduct violations and/or prior sexual misconduct findings

Examples of Mitigating Factors

- Respondent accepted responsibility, acknowledged wrongdoing and the impact on the claimant
- Respondent demonstrated an improved understanding of policy, and/or articulated a plan to modify future behavior
- Mistaken or unintentional behavior [identified only for sanctioning purposes]*
- Respondent has made restitution or taken other proactive steps to engage in restorative actions

After a Hearing: Responsibility of the Parties

- If there is a finding of a policy violation, the parties may provide a sanction statement to the Sanctioning Authority
 - Within 7 days of the issuance of the Provisional Determination Letter
 - Statements should address relevant evidence in the Provisional Determination Letter and describe mitigating and aggravating factors that the party feels the Sanctioning Authority should consider for each violation found

Sanctioning Authority

- A University Employee or office that has the authority to determine appropriate Sanctions
 - **Office of Student Conduct & Community Standards**
 - Determine sanctions for student respondents
 - **Supervisors, with Human Resources**
 - Determine sanctions for staff respondents
 - **Provost's Office, with Dean and Human Resources**
 - Determine sanctions for faculty respondents

After a Hearing: Responsibility of the Sanctioning Authority

- Within 7 days of the end of the Sanction statement period, the Sanctioning Authority will issue a Sanction Letter to the Hearing Officer
- Outlines the Sanction that should be ordered for each of the policy violations the Hearing Officer/Panel has found the Respondent to have committed
 - The Sanction must be proportionate to the policy violation(s), considering the parties' Sanctions statement, if any, and Mitigating and Aggravating Factors

Range of Possible Sanctions: Employee Respondents

- Warning up to and including termination of employment
- Finding is documented in Respondent's personnel file
- Student employees will be subject to employee sanctions only if violation(s) occurred in the course of their employment

Range of Possible Sanctions: Student Respondents

- Warning, probation, suspension, or expulsion
- Finding is documented in Respondent's education file
 - Could also be a permanent notation on Respondent's transcript

After a Hearing: Responsibility of the Title IX Coordinator

- Claimant may provide a written impact statement to the Title IX Coordinator within 7 days after the issuance of the Provisional Determination Letter
- Within 15 days of receiving the written Determination from the Hearing Officer/Panel, the Title IX Coordinator will issue a Remedies Letter to the Claimant
- Outlines the Remedies that will be provided to the Claimant for each of the policy violations the Hearing Officer/Panel has found the Respondent to have committed

After a Hearing: Responsibility of the Hearing Officer/Panel and Case Coordinator, Part 2

- Within 30 days of the hearing, the Case Coordinator will issue a written Determination
 - [USU Determination template](#)
- Sent to the parties, Process Advisors, the investigator, the Sanctioning Authority, and the Title IX Coordinator, simultaneously
- If the Hearing Officer/Panel finds the Respondent to have violated the policy, the Hearing Officer/Panel will attach the Sanction Letter to its Determination
- If no Appeal is filed, then the Determination is final on the deadline to Appeal

Part Two Summary

- Under USU Policy 339, the live hearing is the *first and primary* phase of the sexual misconduct grievance process for determining whether there is a preponderance of the evidence of a policy violation
- Hearing Officer directs the hearing panel responsibilities
- Hearing Panel serves as a decision-maker, if relevant
- Process Advisor may conduct questioning on the party's behalf
- After a hearing, a Provisional Determination Letter is issued
- Sanctioning Authority will issue a Sanctions Letter only if the Hearing Officer/Panel has found the Respondent responsible for a policy violation





Part Three: Appeals Process Overview

Key question: What happens if an appeal is filed?

Appeal Basics, Part 1

- Within 10 days of the date the Determination is issued by the Hearing Officer/Panel, either party may file a written Appeal of the Determination
 - Can also appeal the sanction if participating in the sanctions-only process of an Alternative Resolution
- The non-appealing party can file a written response to the Appeal within 10 days

Appeal Basics, Part 2

- An Appeal is performed “on the record” (there is no hearing) by a 3-person Appeal Panel
 - Scope is limited to the grounds specifically identified in the party’s Appeal
- The Appeal Panel can dismiss the Appeal if it does not meet the grounds for appeal and/or it was not timely filed

Grounds for Appeal of the Determination

1. Procedural irregularity that affected the outcome of the matter
2. New evidence, including witnesses, that was not reasonably available despite due diligence by the close of the response to the Record period and/or at the time of the Determination about responsibility or dismissal was made, that could affect the outcome of the matter
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had an Actual Conflict of Interest or Demonstrated Bias for or against Claimants or Respondents generally or the specific Claimant or Respondent that affected the outcome of the matter

Potential Outcomes of an Appeal of the Determination

- Affirm the Hearing Officer/Panel's Determination
- Modify the Hearing Officer/Panel's Determination
- Remand the Determination to the Hearing Officer/Panel
- Overturn the Determination if the Determination was based on a procedural error(s) and that the error(s) resulted in prejudice to the appealing party

Responsibility of the Appeal Panel

- Within 30 days of the date the Appeal is filed by the appealing party, the Appeal Panel will issue a written Appeal Decision
- Sent simultaneously to the Title IX Coordinator, Hearing Officer/Panel, both parties, and their Process Advisors
- Includes the rationale for the Appeal Decision
 - Appeal decision is final and may not be further appealed

After the Appeal Process or If No Appeal is Filed

- If the Respondent has been found to have violated the Sexual Misconduct policy:
 - The Sanctioning Authority helps implement Sanctions
 - The Title IX Coordinator works with the Claimant to implement Remedies

Part Three Summary

- Either party may file a written Appeal of the Determination
- An Appeal is performed “on the record” (there is no hearing) by 3-person Appeal Panel
- The Appeal Panel can affirm, modify, remand, or overturn the Hearing Officer/Panel’s Determination
- Appeal decisions are final and may not be further appealed



Presentation Summary

- Under USU Policy 339, the live hearing is the *first and primary* determination phase of the sexual misconduct grievance process as to whether there is a preponderance of the evidence of a policy violation
 - Hearings are optional under USU policy 339A
- Hearing Officer/Panel serves as a decision-maker
- Either party may file a written Appeal of the Determination
- Sanctions (Respondents) and Remedies (Claimants) are implemented at the end of the Appeal process/period if the Respondent has been found responsible for a policy violation

