

Equity Hearing Council Training: Serving as a University-appointed Process Advisor



UtahStateUniversity

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Today's Topics

First

- A refresher of policy terms and procedures

Second

- Role of the University-appointed Process Advisor

Third

- Preparing yourself and a party for the hearing



Checking In

In what ways do you feel confident being a University-appointed Process Advisor?

In what ways do you *not* feel confident being a University-appointed Process Advisor?

Image from <https://peepstrategy.com/group-discussion-steps-to-make-it-better/>





Part One: Refresher of Policy Terms and Procedures

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

USU's Obligations Under Title IX

- An institution must respond when it has “actual knowledge” of “sexual harassment” that occurred within the school’s “education program or activity”
 - Actual knowledge: when the University’s Title IX Coordinator or a Reporting Employee has notice of Sexual Misconduct or allegations of Sexual Misconduct
 - Sexual harassment: quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, and stalking
 - Sexual exploitation (Policy 339A)

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

Grievance Process Components

Alternative Resolution

- A voluntary process in which parties agree to resolve a Formal Complaint without completing an investigation

Formal Investigation

- The evidence-gathering process that begins with the filing of the Formal Complaint by a claimant and ends when the Appeal process is complete

University-driven Formal Investigation

- A formal investigation of Sexual Misconduct allegations undertaken by the University when there is no participating Claimant

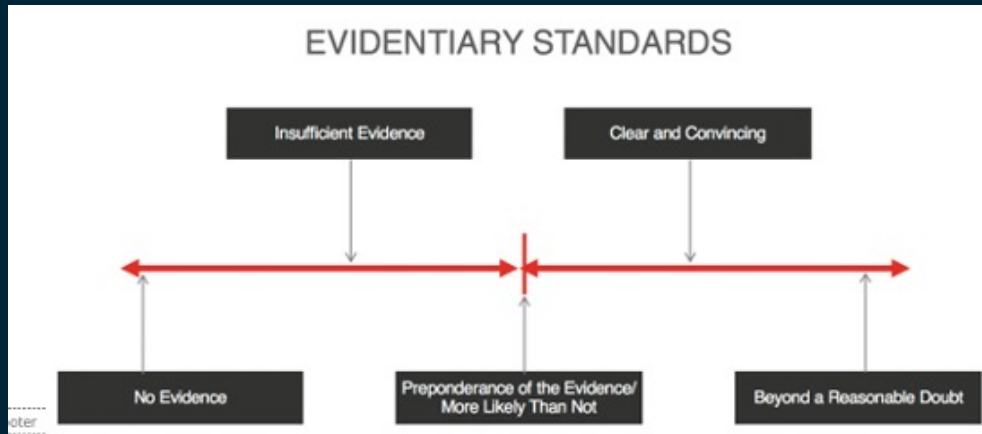
Presumption of Not Responsible

The University will presume that the Respondent is not responsible for violating Policy 339/339A until either:

- The parties reach an Alternative Resolution agreement in which the Respondent admits a violation; or
- The Hearing Officer/Panel reaches a Determination at the conclusion of a hearing that Respondent has violated the policy

Preponderance of the Evidence

A determination of responsibility is reached if, 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

Components After the Hearing

- Provisional Determination Letter is issued
- If there is a finding of a policy violation, the parties may provide a sanction statement to the Sanctioning Authority
- Claimant may provide written impact statement to the Title IX Coordinator
- Determination is issued
- Either party may file an Appeal of the Determination



Part Two: Process Advisor Role Overview

Key question: What are the responsibilities of a University-appointed Process Advisor?

Equity Hearing Council Roles

University-appointed Process Advisor

- A USU faculty or staff member chosen by the University to advise and assist the Claimant or Respondent in the hearing, including in conducting questioning of another party and witnesses on behalf of the party

Hearing Panel Member

- A Hearing Officer and, if requested in writing by one of the parties, two Employees
- The University assigns Hearing Panel members to review a Formal Complaint of Sexual Misconduct in a hearing and determine whether the Respondent violated the Title IX Sexual Misconduct Policy by a Preponderance of the Evidence

Appeal Panel Member

- A three-person panel with individuals who are not the investigator, Title IX Coordinator or Hearing Panel members, assigned by the Case Coordinator to review and decide an Appeal of a Determination

Party's Right to a Process Advisor

- Both parties have a right to a Process Advisor throughout the entire grievance process (including meetings, interviews, and the live hearing)
- Parties must sign a release of information for their Process Advisor (only if not university-appointed)

Appointment as a Process Advisor

- A party can request a University-appointed Process Advisor at any time during the grievance process
- When the preliminary investigation report is issued, Case Coordinator appoints 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
 - Each party can also raise concerns with the Case Coordinator about perceived conflicts of interest and bias that the appointed Process Advisor may have

Responding to Conflicts of Interest Check by Case Coordinator

- Always identify whether you have
 - Personal or professional ties to the Respondent, or
 - Personal or professional ties to the Claimant, or
 - Prior knowledge of the case
 - That could affect your ability to serve as a Process Advisor with objectivity
- If your answer is yes, you should be honest about that and admit that you cannot serve impartially

Scope of the Process Advisor Role: Before the Hearing

- Direct the party to appropriate sources of information in response to questions posed by the party
- Remind the party that they must speak for themselves during the grievance process
 - Exception: question asking during the hearing is done by the Process Advisor
- Answer questions the party has about policy and procedures
- Remind the party about support resources throughout the process

Scope of the Process Advisor Role: During the Hearing

- If requested by the party, read an opening and/or closing statement (that is written by the party)
- Engage in questioning of the other party and witnesses on behalf of the party
 - Based on questions received from the party they are assisting

Scope of the Process Advisor Role: After the Hearing

- Educate the party about what happens after the hearing has concluded
 - If there is a finding of a policy violation, they can submit a sanction statement to the Sanctioning Authority
 - If you are working with the Claimant, they can submit an impact statement to the Title IX Coordinator
 - After the Determination is issued, they can file an appeal
- Direct the party to appropriate sources of information in response to questions posed by the party
- Remind the party about support resources

A University-Appointed Process Advisor Should Not, Part 1/2

- Provide legal advice
- Develop a narrative, story, or statement for the party
- Advocate for or against responsibility of a policy violation
- Provide predictions or assessments of the matter
- Make decisions for the party (e.g., whether they should participate in the hearing)
 - Instead: tell the party you are there to provide information about the process but are not there to make decisions for them or on their behalf

A University-Appointed Process Advisor Should Not, Part 2/2

- Investigate the case
 - Instead: focus on educating the individual about the process
- Provide answers that may not be accurate
 - If you are unsure how to answer a question a party asks you:
 - Contact the Office of Equity Case Coordinator or the Title IX Coordinator
 - Ask the party to write their questions down and provide responses in writing

Communications with Process Advisors

- Communications between University-appointed Process Advisors and the party they are assisting are private
- Communications are not privileged and may be required to be disclosed in civil or criminal proceedings

Process Advisor Reporting Requirements

- University-appointed Process Advisors are not required to report disclosures of sexual misconduct received within the context of their role as a Process Advisor
- If a party the Process Advisor is assisting makes a disclosure, the Process Advisor should share information with the party about confidential resources and supportive measures

Self-Care and Boundary Setting as a Process Advisor

- Remember this is a challenging process for everyone involved and you should practice self-care as you engage in this process
- You can set boundaries with the party
 - Remind the party of the scope and limits of your role as a University-appointed Process Advisor
 - You should refer the party to relevant support resources when appropriate
- Contact the Office of Equity with any questions or concerns

Part Two Summary

- Both parties have the right to a Process Advisor throughout the entire grievance process
- Process Advisor's role is to help the party understand the grievance process and prepare for the hearing
- Process Advisor will conduct questioning on behalf of the party during the hearing
- Process Advisors should not provide legal advice, develop opening or closing statements for the party, or make decisions for the party





Part Three: Preparing for the Hearing

Key question: What should a Process Advisor do to prepare themselves and the party for the hearing?

Preparing for the Hearing, Part 1/4

- Once appointed, Process Advisors are given access to guidance documents and the case's Record
 - [USU guidance documents](#) for University-appointed Process Advisors
 - [SUNY process advisor guide](#)
- Review policy and procedures 339/339A's sections about the hearing and sanction processes

Preparing for the Hearing, Part 2/4

- Meet with the party
 - Establish a communication method to use during the hearing that isn't the Zoom chat
 - Discuss the party's plans for the opening statement, other party and witness(es) questioning, and closing statement
 - Inform your party they can request an accommodation for the hearing by emailing the Office of Equity's Executive Director
 - Examples: scheduled breaks, transcription turned on, interpreter

Preparing for the Hearing, Part 3/4

- Attend pre-hearing conference, if scheduled
 - 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 for maximum of 60 minutes

Hearing Basic Logistics

- Hearings may be conducted in-person or via videoconferencing
 - In-person location depends on room availability
 - 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
 - The party can use the 'pin' feature in Zoom to 'pin' the Hearing Officer/Panel if they do not want to see the other party
- Hearing is recorded
- Hearing is closed to the general public
- Hearings are generally scheduled for 4 hours

Preparing for the Hearing, Part 4/4

- Test your internet connection before the hearing if the hearing is remote
 - Remind the party to do the same
- During the hearing, all parties should be in a private, quiet setting
- In addition to a Process Advisor, the party can also have one Support Person
 - Other than the Support Person, no one else should be in the room with the party, especially witnesses

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

- Conducts questioning of the other party and witnesses on their party's behalf

Hearing Format, Part 1/4

- 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

Preparing for Opening Statements

- The party should decide whether they will give the opening statement or if you will give it on their behalf
 - If the Process Advisor gives the opening statement, the party must provide a written statement for the Process Advisor to read
- The opening statement should outline relevant information about the allegations including where that information is in the Record

Hearing Format, Part 2/4

- 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 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

Preparing for Questioning

- The party should decide what information is relevant and create questions that would help elicit that information from the opposing party and witness(es)
 - Review the definition of the type of sexual misconduct alleged
 - Consider facts in the Record that would support their position that a given element of sexual misconduct is either met or not met
 - Prioritize questioning to focus on the most relevant evidence
- Each party's Process Advisor is allowed to ask all relevant questions and follow-up questions, including those challenging credibility
- The party can submit their questions to the Hearing Officer before the hearing and at any time during the hearing

What is Relevant Evidence?

- Evidence is relevant if it tends to make the allegations at issue more or less likely to be true
- Relevant evidence can include both exculpatory and inculpatory evidence
 - Inculpatory: evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish responsibility
 - Exculpatory: evidence that shows, or tends to show, a person's lack of responsibility

Irrelevant Questions and Evidence, Part 1/2

- The following evidence is considered “irrelevant”:
 - Duplicative questions
 - Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent

Irrelevant Questions and Evidence, Part 2/2

- The following evidence is considered “irrelevant”:
 - Any information protected by a legally recognized privilege without a waiver
 - Examples: rape crisis center counselors or advocates, clergy
 - Claimant’s sexual predisposition or prior sexual behavior (“rape shield” exclusion)
 - Subject to two exceptions
 - Office of Equity investigator will indicate if the information fits within an exception in the investigation report

Irrelevant Evidence Exceptions: Prior Sexual Behavior, Part 1/2

- Exception 1: Evidence of prior sexual behavior is permitted if offered to prove someone other than the Respondent committed the policy violation
 - Example: Witness saw Claimant, who was heavily intoxicated, having sex with Claimant's prior partner at the same time Claimant alleged Respondent sexually assaulted them

Irrelevant Evidence Exceptions: Prior Sexual Behavior, Part 2/2

- Exception 2: Evidence of prior sexual behavior is permitted if it is about the Claimant and Respondent's history together AND is offered to prove consent 34 CFR § 106.45(b)(6)
 - Example: Proof of past consensual intercourse between Claimant and Respondent that suggests consent in this case (e.g., Respondent and Claimant had previously established the use of a specific "safe word". During this sexual encounter, Claimant did not use the established safe word. Respondent interpreted this as consent to the sexual activity given their history.)

Asking Questions about Prior Sexual Behavior

- Questions about prior sexual behavior *must* mirror the two exceptions in the Title IX regulations in order to be relevant and permitted within the hearing
- For a question to be allowed within exception 2, it must be about the parties' prior interactions
 - Irrelevant: “Has the claimant ever shared with you that they have engaged in [specific behavior] in their sexual encounters?”
 - Relevant: “Has the claimant ever shared with you how they gave consent to engage in [specific behavior] in their prior sexual encounters with the respondent?”

Relevance Determinations During the Hearing

- All questions must be addressed to the Hearing Officer for a relevance determination before they can be answered by a party or witness
- The Hearing Officer may exclude any question
 - The Hearing Officer must explain any decision to exclude a question as not relevant on the record
- The Hearing Officer may require that a question be rephrased or restated

General Rules of Questioning

- Parties or Process Advisor aren't allowed to object to the Hearing Officer's relevance determinations
- Only the person to whom a question is directed may answer
 - Process Advisors are not permitted to answer the questions on behalf of the party
- Parties and witnesses are not required to answer questions during the hearing
 - The Hearing Officer/Panel cannot draw an inference about a policy violation based solely on the party's or witness's refusal to answer questions
 - The Hearing Officer/Panel may consider participation in the hearing (or lack of participation) when analyzing weight and credibility of evidence

Hearing Format, Part 3/4

- Claimant Closing Statement (10 minutes)
- Respondent Closing Statement (10 minutes)

Preparing for Closing Statements

- The party should decide whether they will give the closing statement or if you will give it on their behalf
 - If the Process Advisor gives the closing statement, the party must provide a written statement for the Process Advisor to read
- The closing statement is an opportunity to summarize for the Hearing Officer/Panel the relevant evidence and any other information the party wishes to highlight

Hearing Format, Part 4/4

- 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) before the provisional determination letter deadline

Part Three Summary

- Process Advisors should be familiar with the case's Record and the steps of the hearing process
- Process Advisors can deliver a party's opening and/or closing statement, if provided by the party
- Process Advisors will conduct questioning on behalf of the party
- The Hearing Officer will determine if a question is relevant after it is asked by the Process Advisor and before it is answered by the party or witness



Presentation Summary

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