

TITLE IX COORDINATOR TRAINING: HEARINGS PRE TO POST

August 17-18, 2022





Hearings

- Institutions shall provide for a live hearing before a hearing examiner using the contested case proceedings set forth in SDCL chapter 1-26. 1:17.C.5.1.
- Institutions will coordinate with the BOR office to retain law trained hearing examiners.
- Live hearings may be conducted with all parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. 1:17.C.5.
 - Either party may request that the hearing occur with the parties located in separate rooms. 1:17.C.5.3.3.
 - Decision-makers (hearing examiners) shall be trained on technology utilized during the hearings.
- The institution shall create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. 1:17.C.5.1.



Hearings--Notice

- An institution shall provide notice to both parties at least 15 days prior to the hearing (See *Notice of Hearing Template*). The notice shall include:
 - The time, place, and nature of the hearing;
 - The legal authority and jurisdiction under which the hearing is to be held;
 - Reference to the particular policy, rules, or laws involved;
 - A short, plain statement of the allegations asserted;
 - A statement of any action authorized, which may affect the parties, as a result of any decision made at the hearing;
 - A statement that the hearing is an adversarial proceeding and that a party has the right at a hearing to be present, to be represented by an attorney, and that these and other due process rights will be forfeited if they are not exercised at the hearing;
 - A statement that if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party may require the use of the Office of Hearing Examiners by giving notice of the request to the institution no later than ten (10) days after service of the notice required by this section; and
 - A statement that the final decision may be appealed to circuit court and the South Dakota Supreme Court as provided by law.

1:17.C.5.2.1-5.2.8.



Hearings—Role of the Advisor

- Parties have the right to an advisor of their choice, who may be, but is not required to be, an attorney. 1:17.C.4.4.
- An institution must provide an advisor at the live hearing if a party does not have one.
 - The institution must provide the advisor at no fee or charge to the party, but the institution may choose the advisor, who may be, but is not required to be, an attorney. 1:17.C.5.3.
- An advisor may be permitted, at the hearing examiner's discretion, to ask the other party and any witnesses all relevant questions and follow up those questions, including those challenging credibility. 1:17.C.5.3.1.
- An advisor is required to conduct cross examination. A party may never personally cross examine a witness. 1:17.C.5.3.2.
- Any restrictions imposed on advisor participation by the hearing examiner must apply equally to both parties. 1:17.C.4.4.



Pre-Hearing Logistics

- Retention of hearing examiner (campus should work with BOR office to retain)
 - Communication with the HE: Parties are not permitted to have “ex parte” communications with the HE.
- Hearing advisors
 - Don’t assume a party is looking for one or will find one until it has been confirmed. Be proactive in building a pool of individuals on your campus.
- Room layout and tech needs
- Recording method and device
- Scheduling: The TIX Coordinator will be responsible for communicating with parties, advisors, and witnesses regarding scheduling and hearing availability.
 - Other details to manage in a timely manner: Method of party/witness appearance (in-person, Zoom, other)
- Copies of complaint documents available for hearing.
- Managing expectations regarding timelines, outcomes, or hearing roles.



Typical Hearing Outline

- Opening Statements
 - Some parties may wish to deliver their own statement or have their advisor read or deliver one for them.
- Presentation of Evidence
 - 1) University presents evidence and witness testimony to fulfill its policy obligation regarding the burden of proof and burden to gather evidence sufficient to reach a determination regarding responsibility.
 - Both complainant and respondent, through their advisor, have the opportunity to ask questions of any witness called by the university. Since this is typically considered cross-examination, questioning occurs through the advisor.
 - The hearing examiner may also ask questions.
 - The hearing examiner will monitor the examination and cross-examination of witnesses to ensure that questions are relevant.
 - 2) Complainant presents evidence and witness testimony (if they have evidence or witnesses beyond those called by the university).
 - The respondent, presenting attorney for the university, and the hearing examiner will also have the opportunity to cross examine or ask questions of the witnesses.
 - 3) Respondent presents evidence and witness testimony (if they have evidence or witnesses beyond those called by the university).
 - The complainant, presenting attorney for the university, and the hearing examiner will also have the opportunity to cross examine or ask questions of the witnesses.
- Closing Statements
 - Hearing examiners have permitted closing statements in various forms: Orally and immediately following the presentation of evidence, or in writing due within a certain number of business days following the hearing.
- ** Remember: Some of the hearing procedure may depend on the discretion of the hearing examiner used for that hearing. The above is only a general outline of how hearings have been conducted to date and may differ or be adapted depending on the circumstances.



FAQs about Hearings:

- When answering questions about what will occur at the hearing, remember: much of what occurs and how it may happen is within the discretion of the hearing examiner.
 - A hearing examiner may impose rules of conduct for a hearing as long as they are equally applied to the parties and do not contradict a policy requirement.
- Due to confidentiality requirements, other than an advisor, a party may not have others attend the hearing. This includes support persons.
 - If a party has a disability, the party may be entitled to have additional persons such as persons assisting with the disability, or a language interpreter, as such individuals' presence is required by law (IDEA, ADA) and/or necessary to conduct the hearing.
 - REMEMBER: Disclosure of information without express authorization from a student to anyone who is not their designated advisor (a parent or other party) regarding a complaint may not only violate BOR Policy 1:17, but also FERPA.
- The HE will provide their proposed determination to the president of the institution/the president's designee for review. There is not a required deadline for this per policy, although the general requirement to conduct complaints in a "reasonably prompt timeframe" still remains.



After a hearing:

- Recording: Review for any issues and make sure its downloaded stored properly in a secure location.
- Exhibits: The TIX Coordinator is the official keeper of the record, so any hard copy exhibits that are admitted during the hearing are typically turned over to the coordinator for retention.
- Follow up with the presenting attorney.
- Help coordinate any outstanding communications.



After a hearing:

- An institution must provide the proposed written determination to the parties simultaneously. The proposed determination becomes final either:
 - At the conclusion of the petition for administrative review to the Executive Director; or
 - If a petition for administrative review is not filed by either party, the date on which the petition for administrative review would no longer be considered timely.
 - 1:17.C.5.5.
- If no petition for administrative review is filed within the timeframe provided, upon the expiration of the timeframe, the proposed determination of the institution shall constitute the final decision on the matter, which is subject to appeal to the state circuit court in accordance with South Dakota law. 1:17.C.5.5.



Petitions for Administrative Review

- Petitions may be filed by either party.
- Review may be sought from:
 - An institution's proposed determination regarding responsibility; or
 - An institution's dismissal of a formal complaint or any allegations therein.1:17.C.6.1.
- A petition for review must be filed:
 - In writing to the Executive Director of the Board of Regents; and
 - No later than ten working days after notice of the institution's decision is deemed received.1:17.C.6.1.



Petitions for Administrative Review

- Grounds for review by either party:
 - A procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator, or decision maker had a conflict of interest or bias for or against complainants or respondents general or the individual complainant or respondent that affected the outcome of the matter.

1:17.C.6.1.1-6.1.3.
- Petitions not made on one of these grounds, or that do not include supporting arguments or documentation, will be rejected. 1:17.C.6.2.



Petitions for Administrative Review

- Within five working days of receiving a petition, the Executive Director, or their designee, shall provide written notice of the petition to the other party. That party will have five working days from the date of the notice to submit a written statement to the Executive Director in support of, or challenging, the outcome. 1:17.C.6.3.
- Petitions for administrative review will be limited to a review of:
 - The written determination of the institution, which shall include the proposed determination of the hearing examiner;
 - The verbatim record of the hearing;
 - Supporting documents submitted as part of the hearing; and
 - Written statements and/or supporting documentation submitted by the respondent and/or complainant in accordance with the appeal process. 1:17.C.6.4.1-6.4.4.



Petitions for Administrative Review

- The Executive Director will issue a decision on the petition after receipt of the non-petitioning party's written statement or after the expiration of the time provided to submit such a statement.
 - The decision will be issued simultaneously to both parties.
- The Executive Director's review of the petition is limited to determining whether:
 - Any material decisions lack substantial support in the record; and
 - Any procedural errors materially impacting the integrity of the decision.
- The Executive Director may affirm or modify the decision of the institution, or return the decision to the institution for reconsideration, additional investigation, or a new hearing.

1:17.C.6.5.



Continuing Requirements

- Supportive measures to maintain the status quo may continue during pendency of an appeal. p. 30393.
 - In certain circumstances, an institution may also opt to continue supportive measures in the event of a determination that a respondent is not responsible for the conduct alleged in a formal complaint.
- Preservation of Records
 - The following must be obtained for a seven-year period:
 - Each sexual harassment investigation including:
 - Any determination of responsibility;
 - Any audio or audiovisual recording or transcript of any live hearing conducted in the matter;
 - Any disciplinary sanctions imposed on the respondent; and
 - Any remedies provided to a complainant designed to restore or preserve equal access to an education program or activity.
 - Any appeal and the result therefrom;
 - Any informal resolution and the result therefrom; and
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution.

1:17.C.10.1.1-10.1.4.



Sanctions

- May only be implemented after a determination of responsibility is issued and cannot be effective until after an appeal, if one is requested, has been resolved.
 - Supportive measures may still be implemented.
- A determination of responsibility is not required to result in a specific sanction. Institutions have flexibility to determine which sanction is most appropriate for the institution's campus community. p. 30407.
- An institution may consider mitigating circumstances when imposing sanctions. p. 30144.
- More than one type of sanction may be imposed on a respondent for any single finding of responsibility. 1:17.C.2.2.11.



Remedies

- Remedies should restore or preserve equal access to the institution's education program or activity. 1:17.C.5.4.5.
 - They must be provided to a complainant when a respondent has been found responsible for sexual harassment against the complainant.
 - A remedy to the complainant may take the same form as a sanction on the respondent.
 - A remedy may take the same form as a supportive measure, although remedies may be disciplinary or punitive in nature and may burden the respondent.
 - The Title IX Coordinator is responsible for implementing remedies.
 - Remedies should not be disclosed to the respondent unless the respondent is directly affected or disclosure to the respondent is necessary to carry out the remedy. p. 30425.