



SOUTH DAKOTA

BOARD of

REGENTS



Hearings

‡ Institutions shall provide for a live hearing before a hearing examiner using the contested case proceedings set forth in SDCL chapter 261 1:17.C.5.1.

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Hearings--Notice

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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 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.
- ‡ v À] • } OE %o QOE u] šš š Z AE] w Pv OE [• discretion, to ask the other party 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.

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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 with 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 with 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 Statement

‡ 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 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 persons with physical disabilities (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 college. The president will then provide the determination to the student and the advisor. The deadline for this per policy, although the general requirement to conduct a hearing is within 60 days of the filing of the complaint, the deadline for the president to provide the determination is within 10 business days of the hearing.



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:

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regarding responsibility; or

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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

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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 generally or an 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, 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-% š] š] %] Œ š Ç [• Á Œ] š š v • š š u v š or after the expiration of the time provided to submit such a statement.
- ‡ The decision will be issued simultaneously to both parties.
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 - ‡ 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, 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 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
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- ‡ 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
- ‡ 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
- disclosure to the respondent is necessary to carry out the remedy. p. 30425.