

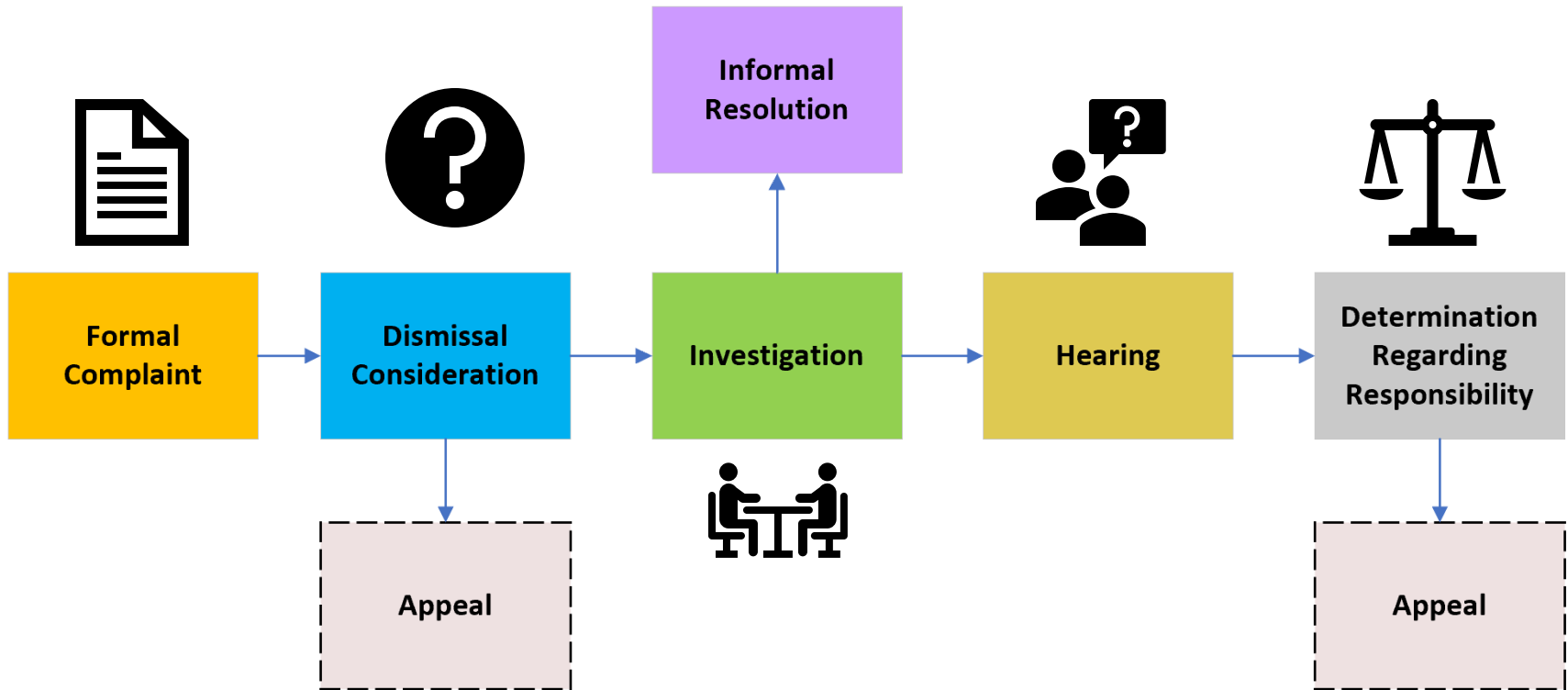
Session 5: Hearings

Training for Title IX Coordinators, Investigators, Hearing Coordinators, Hearing Advisors, Appeal Managers and Student Conduct Administrators

The U.S. Department of Education's New Title IX Rules
Office of the Chancellor
The California State University

From Investigation to Hearing

Overview of the Addendum B Process



From Investigation to Hearing - Recap



Final Investigation Report sent to Parties and their Support Advisors (if any)



Parties have 10 Working Days to provide response



Attach responses received to Final Investigation Report and provide to Parties and Hearing Officer

Hearing Advisors

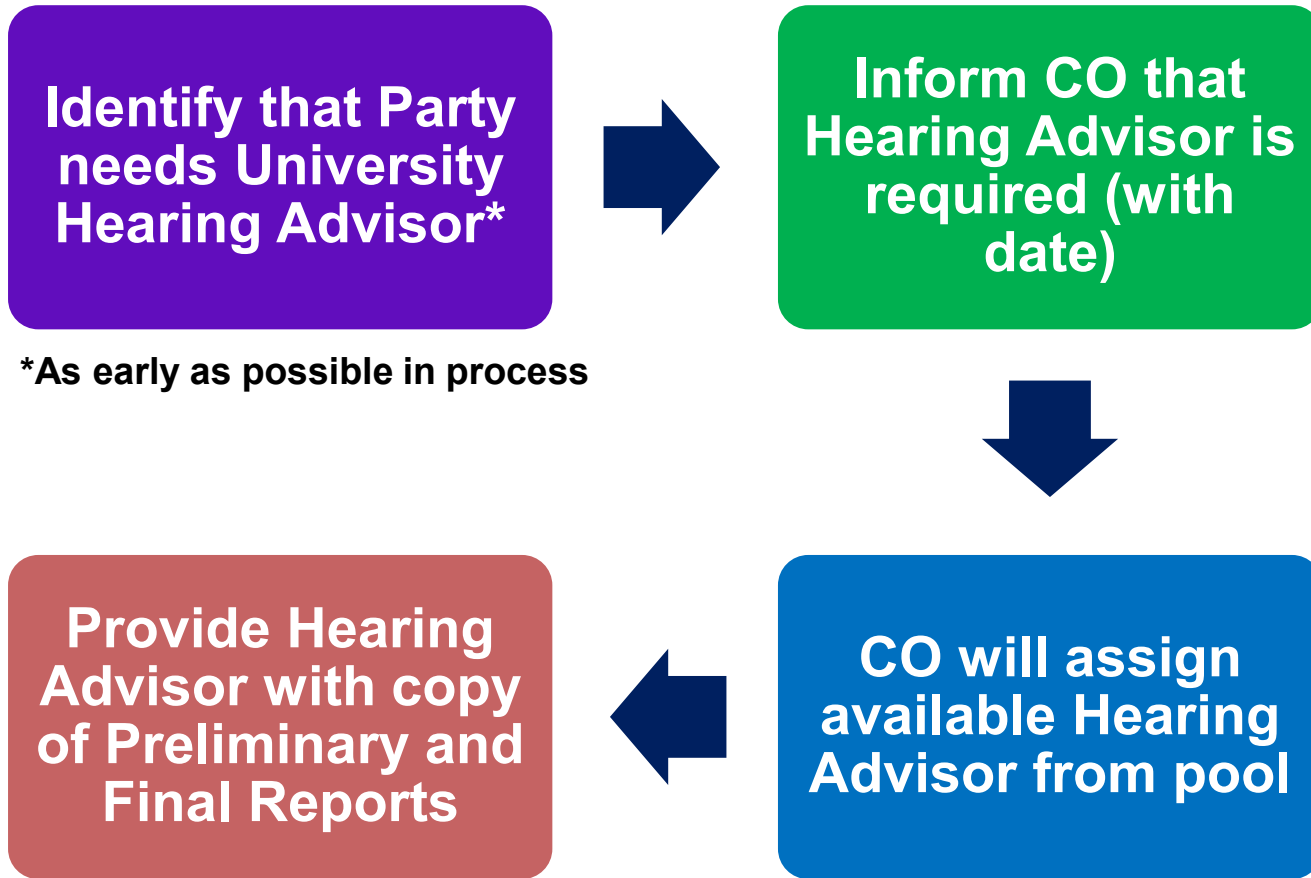
The Role of the Hearing Advisor

- University cannot limit a Party's choice of Hearing Advisor
- Could also be Support Advisor during investigation process
- Asks questions of the other party and witnesses
- Serves as the voice of a Party during hearing questioning, even if the Party is not present

University-Assigned Hearing Advisors

- University-Assigned Hearing Officer serves when a Party does not select a Hearing Advisor
- Pool of Hearing Advisors will receive training
- Joins the process once the investigation is complete and the parties are preparing for a hearing
- Does not “represent” a Party
- Does not have to assume that the party’s version of events is accurate

Assigning a Hearing Advisor



University-Assigned Hearing Advisor – Initial Steps

Receive assignment



**Review Preliminary and
Final Investigation Reports**



**Contact assigned party –
arrange to meet**

Hearing Scenario – Poll Question

A Complainant indicates that they need the University to assign them a Hearing Advisor. You, as Hearing Coordinator arrange this, but then the Complainant does not respond to the Hearing Advisor's numerous attempts to contact them. You also attempt to contact the Complainant but with no success. The day of the hearing arrives, and the Complainant says that they are not ready.

What do you do?



Pre-Hearing Processes

Written Notice of the Hearing

- ✓ 20 Working Days' Notice
- ✓ Date
- ✓ Time
- ✓ Location
- ✓ Participants
- ✓ Purpose of the hearing
- ✓ Identity of the Hearing Officer



Template available!

Hearing Coordinator Duties

- Scheduling the hearing
- Acting as an **initial liaison** between the campus and the University-assigned Hearing Advisor (if applicable)
- Notifying witnesses of the hearing
- Ensuring that the Hearing Officer is provided with a copy of the report and exhibits
- Coordinating videoconferencing
- Securing a location for the hearing (if necessary)
- Determine whether conflicts of interest exist with Hearing Officer
- Act as **liaison** between the Parties and the Hearing Officer on procedural matters

Objections to the Hearing Officer

- Within 5 Working Days after notice of the identity of the Hearing Officer provided to the Parties
- Objection may only be based on an actual conflict of interest
- A conflict of interest exists if the Hearing Officer has a personal relationship with one of the Parties or witnesses or has demonstrated **actual bias** towards a Party or witness
- The fact that a Hearing Officer has previously served as a Hearing Officer in a University proceeding will not constitute a conflict of interest
- Hearing Coordinator will determine if a conflict of interest exists

Bias

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an **objective** (whether a **reasonable person** would believe bias exists), **common sense approach** to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists [...].”
(FR 30252)

Examples of generalizations (provided by OCR in preamble):

- Assuming that all self-professed feminists, or self-described survivors, are biased against men
- Assuming that a male is incapable of being sensitive to women
- Assuming that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents in a Title IX role

(FR 30252)

Serving Impartially

Serving impartially includes avoiding the following:

- **Prejudgment of the facts at issue** – an opinion about a situation or a person that is formed before knowing or considering all of the facts (Cambridge English Dictionary)
- **Conflicts of interest** – a conflict between the private interests and the official responsibilities of a person in a position of trust (Merriam Webster Dictionary)
- **Bias** – the action of supporting or opposing a particular person or thing in an unfair way, because of allowing personal opinions to influence your judgment (Cambridge English Dictionary)

Serving Impartially

“The Department wishes to emphasize that parties should be treated with **equal dignity** and **respect** by Title IX personnel [...]”
(FR 30254)

- Consider your communications (verbal and written) – language and tone
- Even though you are not the decision-maker, be conscious of reaching conclusions as you investigate
- Continue to ask yourself whether there are additional facts or witnesses to explore to ensure that your investigation is as complete and impartial as possible
- Offer Supportive Measures and consider requests equally
- Apply limitations on Support Advisor (and Hearing Advisor) role(s) equally

Hearing Scenario – Poll Question

Two students on your campus participate in a story for the campus newspaper, in which they describe their experiences as Complainants in Title IX cases. Their cases were unrelated but they both had the same Hearing Officer who, in both cases, found the Respondent not responsible for the alleged conduct.

A Complainant in a current case raises an objection to this same Hearing Officer, stating they are clearly biased in favor of Respondents.



Witnesses



- Parties **may** submit proposed witness lists:
 - ✓ Names of witnesses
 - ✓ Current contact information for witnesses
 - ✓ Explanation of the relevance of each proposed witness's testimony and the disputed issue to which the witness's testimony relates
- Generally, witnesses should have been interviewed during the investigation
- Hearing Coordinator will share final witness list with Parties
- Hearing Coordinator will notify each witness of the date, time and location of the hearing

Advance Submission of Questions



- ❑ The Parties **may** submit a list of proposed questions for the other Party and witnesses to the Hearing Coordinator
- ❑ The questions will be provided to the Hearing Officer
- ❑ Not required but parties are strongly encouraged to provide questions in advance of the hearing – streamline process and opportunity for Hearing Officer to resolve relevancy concerns prior to the hearing
- ❑ The proposed questions will **not** be shared with the other Party
- ❑ The Hearing Officer will make all determinations regarding pre-hearing matters, including which witnesses have **relevant** testimony and will participate and which questions, if submitted, are **relevant** and will promptly notify the Hearing Coordinator who, in turn, will promptly notify the Parties

The Hearing

Who attends the hearing?

- Hearing Officer
- Complainant
- Respondent
- Hearing Advisor and Support Advisor for Complainant
- Hearing Advisor and Support Advisor for Respondent
- Title IX Coordinator
- Title IX Investigator (if not also the Title IX Coordinator)
- Hearing Coordinator
- Student Conduct Administrator or other appropriate University administrator
- An administrator from the CSU Chancellor's Office
- Witnesses (who will only be present during the part of the hearing that is relevant to their statement)
- Technology support/Interpreter/Security, if needed

Hearing Scenarios

1. When scheduling the hearing, a student witness refuses to participate or will not return your phone calls. What do you do?
2. One Party does not show up to the hearing. Their Hearing Advisor appears. What do you do?
3. A key witness does not show up to the hearing. Can the Hearing Officer use their statement from the Investigation Report?



The Hearing

What if a Party does not participate in the hearing?

Parties are not required to participate in a hearing, but there is risk in them not attending:

- If they are a **Complainant**
 - University's ability to take action regarding their Formal Complaint may be limited
 - Statements they made during the investigation (even if described in the Final Investigation Report) cannot be considered by the Hearing Officer
 - Complainant's Hearing Advisor will still be able to question the other Party

The Hearing

What if a Party does not participate in the hearing?

Parties are not required to participate in a hearing, but there is risk in them not attending:

- If they are a **Respondent**
 - Statements they made during the investigation (even if described in the Final Investigation Report) cannot be considered by the Hearing Officer
 - Respondent's Hearing Advisor will still be able to question the other Party

The Hearing

**Conducted via
videoconference in
most cases**

**Parties must be able
to simultaneously
see and hear all the
proceedings and
testimony**

**Ensure all evidence
provided during the
investigation is
available**

**Hearing Officer provides
overview of the
proceedings and Parties
can ask questions of the
Hearing Officer about the
process**

**Each Party has the
opportunity to make an
opening statement of no
more than 10 minutes –
must be made by party
themselves, not the
Hearing Advisor**

**No closing
statements**

Questioning

Generally, the Hearing Officer will begin questioning of the parties and each witness

The Investigator or the Title IX Coordinator (if not the Investigator) will be the first witness and will describe the Formal Complaint, investigation process, and summarize the evidence

Hearing Advisors will be permitted to ask **relevant** questions once the Hearing Officer has concluded their questioning of the other Party and each witness

Questioning

Hearing Advisor
asks question of
Party or witness

Hearing Officer
will indicate
whether question
is relevant*

If question is
deemed relevant,
Party or witness
will answer

***With explanation if
deemed not relevant**

Questioning

Hearing Officer has the discretion to request information from the Parties or Hearing Advisors regarding questions prior to making a determination about the relevancy of the question

Objections to questions are not permitted

Question should be asked in a **respectful, non-abusive manner**. The Hearing Officer determines whether a question satisfies this requirement

Hearing Officer may require that Hearing Advisor rephrase a relevant question or repeat the question

“Relevant”

- The Title IX Regulations do not provide a definition of “Relevant”
- Addendum B, Article II.F – **Relevant means having significant and demonstrable bearing on the matter at hand**
- Even if a question relates to a Relevant subject or issue, the Hearing Officer may determine that the Party or witness being asked the question is not required to answer if the question is repetitive or duplicative of prior questions

“Relevant”

The following evidence is considered **irrelevant**:

- A question is considered **NOT** relevant if it relates to the **Complainant's sexual predisposition** or **prior sexual behavior**. Exceptions to latter only:
 - such questions about the Complainant's prior sexual behavior is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; or
 - if the question concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is asked to prove consent.
- Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent
- Any information protected by a legally recognized privilege without a waiver

Hearing Scenario

A Party appears at the hearing but refuses to answer **some** of the questions posed by the other Party's Hearing Advisor (the questions were deemed relevant by the Hearing Officer).

Can the Hearing Officer use the Party's prior statements?



Hearing Scenario

A Party appears at the hearing but refuses to answer **some** of the questions posed by the other Party's Hearing Advisor (the questions were deemed relevant by the Hearing Officer). The Hearing Officer then asks some of the same questions as follow-up and the Party answers them.

Can the Hearing Officer use the Party's prior statements?



Hearing Scenario

A Party appears at the hearing, but the other Party's Hearing Advisor only asks them two basic questions, which they answer.

Can the Hearing Officer use the Party's prior statements that do not relate to the two questions asked by the Hearing Advisor during the hearing?



The Disruptive Party or Advisor

- The Hearing Officer may excuse from the hearing anyone (including either Party or their Hearing Advisor) whose behavior causes a material disruption
- Should a Hearing Advisor be removed from a proceeding, the University will provide a Hearing Advisor
- The Hearing Officer, in their discretion, may postpone the hearing
- In making a determination whether to postpone the hearing, the Hearing Officer will consider the equity of postponement as to both Parties
- Apply approach to disruptive Parties and Hearing Advisors equally for both Parties
- Consider ahead of time – University Hearing Advisor on standby?

After the Hearing

Determination Regarding Responsibility

- The Hearing Coordinator will transmit the Hearing Officer's Report to the Parties, the T9C and SCA/appropriate administrator **within 15 Working Days**
- Title IX Coordinator will review the Hearing Officer's report to ensure compliance with EO
- Where **no** violation – President (or designee) is informed, and Parties notified of outcome
- Where violation – Parties may submit impact statement (within **5 working days**) and T9C and SCA/appropriate administrator may submit written statement
- A Decision Letter will be sent to the Parties by the president or designee

Violation Found

Usually within 15 Working Days of the close of the hearing:

- Hearing Officer sends report to Title IX Coordinator, appropriate University Administrator and Parties (Title IX Coordinator will review the Hearing Officer's report to ensure compliance with EO)

Within 5 Working Days of receipt of report:

- Parties may submit written impact statement (2000-word limit)
- Appropriate University Administrator and Title IX Coordinator submit written statement → aggravating/mitigating factors and recommendation as to disciplinary outcome

Within 5 Working Days of Hearing Officer's receipt of statements:

- Hearing Officer submits Final Hearing Officer's Report to President or Designee with recommendation and rationale for disciplinary outcome

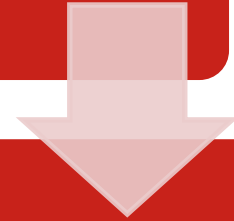
Within 10 Working Days of receipt of Final Hearing Officer's Report:

- President or Designee issues Decision Letter

No Violation Found

Usually within 15 Working Days of hearing:

- Hearing Officer sends report to Title IX Coordinator, appropriate University Administrator and Parties



Title IX Coordinator will review the Hearing Officer's report to ensure compliance with EO



President (or designee) is informed, and Parties notified of outcome via Decision Letter

Considerations when Crafting Remedies

- Distinct from disciplinary sanctions
- Remedies must be without fee or charge to the Complainant at the conclusion of the Formal Complaint process where the Respondent has been found responsible
- Questions to ask:
 - How are they designed to restore or preserve the complainant's equal access to the University's education program or activity?
- May include:
 - Modifications of work or class schedules, one-way restrictions on contact between the parties, changes in work or housing locations,
- If Remedies will be provided, this should be referenced in the President/Designee's Decision Letter → need not describe specific Remedies only that they are being provided
- The Title IX Coordinator is responsible for coordinating the effective implementation of Remedies

Questions?





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