



**1. May a party submit a written statement instead of meeting with Student Conduct?**

Parties may meet with Student Conduct as part of Stage Two (Proposed Sanction), Stage Three (Opportunity to Contest the Preliminary Determination), or both. In each case, either party may schedule a meeting, communicate in writing, or both. Nonetheless, when possible, parties are encouraged to meet with Student Conduct, whether in person or remotely (by phone or video, for example).

**2. Should Student Conduct always give parties the full 20 days allotted to contest the investigator's preliminary determination?**

If both parties contest, Student Conduct should move forward with the process – it is not necessary to wait for the 20 days to expire. In all other scenarios, Student Conduct should wait the full 20 days before moving forward.

**3. May a party decline to attend the Stage Four pre-hearing meeting and instead provide information in writing?**

Any party contesting (or presumed to contest) the investigator's preliminary determination regarding a policy violation must participate in the pre-hearing meeting, generally in person or remotely. If the contesting party cannot participate in person or remotely (if they are incarcerated and not allowed to conference in, for example), the campus should make accommodations to permit them to participate however they are able (in writing, for example).

A party who is not contesting is strongly encouraged to participate in the pre-hearing meeting, but their participation is not required. The non-contesting party can participate via writing if they wish.

**4. What if a party shows up at the hearing with new information that wasn't discussed at the pre-hearing?**

At the hearing, the parties have the opportunity to present evidence they submitted in advance, subject to any exclusions determined by the hearing officer. Generally, they may not introduce evidence at the hearing that they did not identify during the pre-hearing process – this includes witness testimony. However, the hearing officer may exercise their discretion to accept or exclude additional evidence at the hearing. If the hearing officer accepts the evidence, they will allow the other party to review it, with the appropriate time for review determined by the hearing officer.

**5. Should a party's assertion that the investigator was biased be addressed at the hearing – meaning that the asserting party could present evidence about the alleged bias, and the hearing officer would determine whether it affected the investigation?**

No. The purpose of the hearing is to resolve any factual issues that are in dispute and relevant to the determination of whether the respondent violated University policy. The parties can challenge any of the investigator's factual findings. The hearing officer will then hear evidence on the disputed issues, and make their own independent determination of the facts. Because the hearing officer relies neither on the investigator's preliminary determination as to whether the respondent violated policy, nor on any of the investigator's factual findings that are disputed by the parties, the hearing should cure any alleged bias in the investigation.



If a party asserts an investigator is biased, the Title IX Officer should evaluate that assertion and respond as appropriate to ensure the University is providing a process that is fair and impartial. However, this evaluation and response is not part of the University's investigation and adjudication of the underlying allegations. At the appeal stage, parties can challenge the outcome of the hearing based on the *hearing officer's* bias, on the ground of procedural error.

**6. Appendix E allows complainants and respondents to be physically separated during the hearing, if either party wishes, to protect their well-being. When this occurs, which party gets to be in the room with the hearing officer during the hearing?**

In all cases, the hearing officer must resolve disagreement based on consideration of all relevant circumstances. Here are some general guidelines:

- In many cases, one party expresses a preference to participate in the hearing remotely; if so, the hearing officer should generally defer to that party's wishes, provided technology makes the party visible to a sighted hearing officer, or audible to a non-sighted hearing officer, while they are testifying.
- When instead both parties prefer to be in the room with the hearing officer, the hearing officer may offer to visually separate the parties (for example, with a partition) so that both may be present.
- If visible separation is not acceptable to one or both parties (if they are uncomfortable being in the same room, for example), then generally the hearing officer should allow the party providing testimony to be present while the non-testifying party participates remotely.
- Witnesses who would like to testify in person rather than remotely should generally be allowed to do so. If such a witness does not want to be in the room with a party, the hearing officer should allow the witness to be present, and the party to participate remotely.

**7. If there is to be a hearing and the complainant indicates that they do not intend to participate, should the campus proceed, given the potential legal limitations on its ability to determine that a policy violation occurred?**

Even in cases where the campus may ultimately be precluded from determining that a policy violation occurred (see #12 below), Appendix E requires us to proceed with the hearing. This is because other key circumstances could develop, such as the complainant changing their mind to participate; the development of evidence during the hearing (such as another witness's testimony) that makes complainant's credibility less critical; or respondent's testimony developing in a way that no longer contradicts complainant's statements.

**8. If there is a hearing and the complainant indicates that they do not intend to participate, what evidence may the hearing officer allow in the hearing?**

The hearing officer should allow all evidence that is relevant to an issue that is disputed and relevant to the question of whether a policy violation occurred. How this evidence is weighed and whether a policy violation may be found, after the hearing is concluded, depends on considerations discussed in ##12 and 13, below.



**9. If there is a hearing and a party indicates that they do not intend to participate, can they still submit evidence and questions?**

Yes. Even if a party does not intend to participate in the hearing, they can submit the same information as a participating party, including proposed evidence, witnesses, and questions for the hearing officer to ask the other party and witnesses.

**10. What role does the investigation report play in the adjudication process (if there is a hearing)?**

The investigation report remains an important part of our process. It provides background and context to the hearing officer on each party's assertions and the procedural history of the case. The hearing officer should read the entire report. However, there are limitations on what parts of the report the hearing officer can rely on as evidence, as discussed below.

During the pre-hearing process:

- The hearing officer should use the investigation report (along with the parties' input) first to help determine the scope of the hearing, and then to identify evidence and witnesses relevant to the issues within scope.
- If the parties themselves do not identify such evidence and witnesses for consideration in the hearing, the hearing officer may and should. This includes, for example, any documentary evidence relied on in the report, such as text messages, that may be relevant to determining whether a policy violation occurred.

At the hearing:

- The hearing officer may rely on as established fact the investigator's: findings of fact, conclusions regarding whether an element of a policy violation was substantiated, and conclusions regarding whether a policy violation as a whole occurred, as documented in the investigation report, that neither party has disputed.
- The hearing officer may not rely on as established fact the investigator's: findings of fact, conclusions regarding whether an element of a policy violation was substantiated, and conclusions regarding whether a policy violation as a whole occurred that either party has disputed.
- Without relying on them as established fact, they may also use evidence (including party and witness statements) from the investigation report to probe the testimony of parties and witnesses as they answer questions at the hearing, including for the purpose of assessing the party's or witness's credibility. For example:
  - If a party or witness testifies differently during the hearing than they did in the investigation, the hearing officer may ask them about the inconsistency and give them an opportunity to explain it.



- If the investigation report includes witness testimony that contradicts a party's hearing testimony, and the witness does not testify at the hearing, the hearing officer may ask the party to address the witness's inconsistent assertions. (If the witness does testify at the hearing, the hearing officer may more directly assess the credibility of both the witness and the party.)

After the hearing, in making the policy violation determination, consistent with the principles applying to the use of the investigation report during the hearing:

- The hearing officer may rely on undisputed findings and conclusions (about elements of or the entire alleged policy violation) from the report.
- On any disputed issue, the hearing officer generally may not consider for the truth of its content the testimony of parties or witnesses from the investigation report, even if such testimony was used as the basis for questioning at the hearing as described above.
- If the hearing officer uses parts of the investigation report to probe the testimony of parties or witnesses at the hearing, they may consider their responses to such portions of the report for the purpose of assessing the party's or witness's credibility.
- In cases where a party does not testify, the hearing officer generally may not rely on their disputed statements as memorialized in the investigation report for the truth of their content.

Exceptions may apply and hearing officers should consult with counsel and the Systemwide Title IX Office if questions arise.

#### **11. What issues are appropriate for the Title IX investigator to testify about at the hearing?**

The investigator's testimony may be helpful if there are, for example, disputes about the authenticity of evidence summarized in the investigation report and at issue at the hearing, or, if the hearing officer is using party or witness statements from the investigation report to probe a party's or witness's testimony at the hearing, whether the investigator accurately memorialized those statements in the investigation report.

Generally, the investigator should not be questioned about their assessment of party or witness credibility, as the hearing officer should be making their own credibility assessments anew. They also should not be questioned about the investigative process, other than the narrow aspects described in the paragraph above, nor their preliminary determination of whether policy violations occurred.

#### **12. If the respondent testifies at the hearing, but the complainant does not, is it still possible for the hearing officer to determine that a policy violation occurred?**

Because the consequences of complainant's nonparticipation may be very nuanced, we encourage you to consult with your campus counsel in such cases. We also request, where the hearing officer intends to find a violation where the complainant has not testified, that you consult with the Systemwide Title IX Office to ensure consistent application of the principles of evidentiary reliability under the SVSH Policy and case law. In all such cases, we also ask that they inform Systemwide Title IX of decisions and



outcomes, so that we can learn from your experiences to help other campuses.

The general principle is that, in cases (1) where potential sanctions may be severe (one year or longer suspension, or dismissal) and (2) where the credibility of the complainant or other witness is critical to determining whether a policy violation occurred, due process requires that the respondent have an opportunity to question them (indirectly). Assuming that a severe sanction may be in play, however, here are several considerations:

- In the context of Appendix E, complainant's nonparticipation is potentially significant only where their credibility is critical to determining an issue that the hearing officer has determined is both disputed and relevant to determining whether a policy violation occurred.
- If the complainant's credibility is not important to determining whether a policy violation occurred, their nonparticipation may not be an obstacle to making that determination. For example:
  - If the key issue is complainant's incapacitation, and there are other witnesses who testify at the hearing about their direct observations of complainant's demeanor, level of intoxication, and functioning at the relevant time (as compared to, for example the complainant's statements about their level of intoxication), that evidence may be weighed along with respondent's account even if complainant does not testify. A court in one of our cases held that the complainant's credibility was not at issue where there was ample witness testimony relevant to complainant's incapacitation.
  - If the facts as alleged by respondent are sufficient to establish a policy violation, complainant's credibility is not critical. A court in one of our cases upheld the campus's policy violation determination on the grounds that no reasonable person who saw what respondent admitted to seeing could think that complainant had capacity to consent, even though she did not testify at the hearing.
  - If respondent admits the key allegations of the complaint, complainant's credibility is not important. A court in one of our cases upheld the campus's policy violation determination on the grounds that respondent's own statement that the sexual interaction at issue "might have just happened" and was "spur of the moment" demonstrated lack of consent under our policy; "where there is no need to weigh competing evidence, there is no need to determine competing credibility."
  - If respondent was found guilty of criminal charges based on the same conduct alleged in the complaint, it is also likely possible to determine that a policy violation occurred, even without complainant's participation.
- On the other end of the spectrum, in cases that truly turn on complainant's credibility - for example where the critical issue is what the parties said to each other during the encounter (as relevant to consent), only they were present, and they gave conflicting accounts during the investigation -- the hearing officer likely will not be able to find a policy violation. As discussed above, in such a case, the hearing officer generally may not rely on, for the truth of their content:
  - Complainant's statements about the conversation as memorialized in the investigation report;
  - the Title IX investigator's hearing testimony about what complainant said during the



investigation (as discussed in #11 above, questioning along these lines should not be allowed except as noted); and

- other witnesses' hearing testimony about what complainant may have told them about the encounter.
- If the meaning of critical documentary evidence turns on complainant's testimony, and they do not participate, the hearing officer likely will not be able to find a policy violation. By contrast, if the meaning of documentary evidence is clear and the dispute is about its authenticity, the Title IX investigator may be able to provide sufficient clarification through testimony that the Complainant's nonparticipation does not preclude use of the evidence.

**13. What happens if a witness who participated in the investigation does not testify at the hearing, and their credibility is central to the determination of whether a policy violation occurred?**

The nonparticipation of witnesses whose credibility is critical to determining whether a policy violation occurred should be treated similarly to the nonparticipation of complainant -- see above principles and guidelines.

**14. If a party files an appeal, does the other party have the right to respond?**

Yes. If a party files an appeal, the other party should receive a copy of the appeal and be allowed to respond in writing. When the appeal ground is disproportionate sanction, both parties have the additional opportunity to meet separately with the appeal officer to provide input on the sanction. The appeal officer will consider only the evidence presented at the hearing, the investigation file, the appeal statements of the parties, and – in disproportionate sanction appeals—input provided during any meetings with the parties.