

Due Process — Equal Dignity

This policy implements and is consistent with the requirements set out in *Administrative Regulation — Due Process*. In addition, these procedures should be read in conjunction with *Administrative Regulation — Equal Dignity*.

I. Formal Hearings

A. Hearing Roles and Responsibilities

1. Hearing Clerk

Appropriate Office of Equal Opportunity staff will serve as hearing clerks for equal dignity due process hearings and appeals. The assigned hearing clerk has responsibility for scheduling the hearing, securing the location, ensuring the availability of the hearing panel, communicating with the hearing officer and ensuring the availability of the hearing officers, as well as other logistics.

2. Hearing Officer

The executive director of the Office of Equal Opportunity will appoint a hearing officer for each hearing. The hearing officer shall be a member in good standing of the Kentucky Bar Association. The hearing officer will preside over the hearing, instruct the hearing panel on legal issues and make rulings as to the admissibility of evidence. However, the hearing panel will be the ultimate decision-maker as to responsibility for a violation.

3. Hearing Panel

As set out in *Administrative Regulation — Due Process*, the Executive Vice President for Finance and Administration (EVPFA) will appoint a hearing/appeals board of 30 employees. The faculty senate will nominate 20 faculty employees and the EVPFA will appoint 10 to the hearing/appeals board. The staff senate will nominate 20 staff employees and the EVPFA will appoint 10 to the hearing/appeals board. To ensure all aspects of the University are represented, the EVPFA will appoint 10 additional employees. From this board, there will be a randomly selected three (3)-person hearing panel and if an appeal, a randomly selected three (3)-person appeal panel.

B. Complainant Participation in Hearing

When a formal hearing is required, the respondent will have the right to participate in the hearing to provide a defense on their behalf. In some instances, federal law gives the complainant the same rights. This is true in cases of allegations of sexual harassment under Title IX. In cases with sexual harassment charges, all rights and processes outlined below apply equally to the complainant.

C. Pre-Hearing Procedures

1. Notice of Charges

When a formal hearing is required, the University will provide a statement of charges to the respondent. The statement of charges will detail the circumstances of the alleged violation, including the final investigative report and any probable cause determination. The notice also will provide a hearing date that is at least 15 business days after the notice.

2. Access to Evidence

No later than 10 business days prior to a scheduled hearing, the parties will have access to all exculpatory and inculpatory evidence gathered during the investigation.

3. Submission of Information

No later than 10 business days prior to a scheduled hearing, the University, the respondent and the complainant, if participating, must submit the following to the hearing officer:

- challenges to any hearing panel member;
- any information they wish to present at the hearing;
- the name(s) of their attorney(s) or advisor(s);
- a preliminary list of questions or topics they wish to ask of the other party(s); and
- a list of possible witnesses and the subject(s) on which they are expected to testify.

Except where allowed by the hearing officer, the parties may not submit information for the hearing after this deadline. Upon the receipt of information from all participating parties, the hearing officer will review the information submitted to eliminate any redundant, irrelevant or prejudicial information.

4. Request for Postponement

At any time prior to a scheduled hearing, the University, the respondent or the complainant, if participating, may request to postpone the hearing. The hearing

officer may accept or deny the request after considering the nature of the request and the incident at issue. The hearing officer's decision is final and may not be appealed.

5. Pre-Hearing Disclosures to Parties

No later than three (3) business days prior to a scheduled hearing, the University, the respondent and the complainant, if participating, will receive a copy of the following:

- A list of witnesses;
- Preliminary questions submitted by parties; and
- Any other related information.

These disclosures will be provided by the hearing clerk.

6. Sexual Harassment under Title IX Disclosures

In cases with charges stemming from sexual harassment under Title IX, in addition to the items above, the pre-hearing disclosures will include:

- The final investigative report; and
- The probable cause determination.

7. Pre-Hearing Materials for the Hearing Panel

No later than three (3) business days prior to a scheduled hearing, the hearing panel will receive a copy of the following:

- Information about the parties;
- The final investigative report, including any appendices;
- A list of potential witnesses;
- The charged policy violations;
- The date and location of the charged violation; and
- Any other related information.

These disclosures will be provided by the hearing clerk.

D. Conduct of Hearings

1. Burden of Proof

The respondent is presumed not responsible for a violation. The University has the burden of proving, by preponderance of the evidence, that the respondent committed the violation. Where federal or state law requires a higher standard of proof, the higher standard will be used.

The University will present its case through the general counsel or attorneys under the direction and control of the general counsel.

While the complainant's testimony will be an integral part of the University's proof, the complainant has no responsibility other than to appear as a witness. Where required by federal or state law, the complainant will have the opportunity to cross-examine the respondent and/or witnesses during the hearing.

2. Rape Shield Protection

In cases related to sexual harassment under Title IX, questions or evidence regarding a complainant's prior sexual behavior is considered irrelevant unless it is offered to prove that someone other than the respondent committed the alleged misconduct or to prove consent.

3. Right to Counsel

The respondent and the complainant, if participating, have the right to legal counsel of their choice at their own expense. In some instances, federal law may require the University to provide legal counsel to the respondent and to the complainant, if participating. In hearings related to charges of sexual harassment under Title IX, the University will provide an attorney to conduct questioning during the hearing for both the respondent and complainant if they do not have their own.

4. Right to an Advisor

The respondent and the complainant, if participating, have the right to a non-attorney advisor(s) of their choice. Advisors may communicate privately with the individual they are supporting but may not question witnesses or offer oral argument during the hearing.

5. No Obligation to Present a Defense

Because the respondent is presumed not responsible and the burden of proof is on the University, the respondent is not required to present a defense.

6. Witnesses

The University, the respondent and the complainant, if participating, may call witnesses and may cross-examine witnesses offered by the other parties. Witnesses other than the respondent and the complainant, if participating, will be excluded from the hearing except for the period of their own testimony.

The University, the respondent and the complainant, if participating, are responsible for arranging the attendance of witnesses. The hearing clerk will advise all potential witnesses of their right to be free from retaliation.

7. Evidence

The University, the respondent and the complainant, if participating, may present evidence. The Kentucky Rules of Evidence will govern the admission of evidence, but the hearing officer has the discretion to allow hearsay evidence.

8. Right Against Self-Incrimination

Any witness, including the respondent or the complainant, if participating, may refuse to appear and/or exercise the right against self-incrimination. The hearing panel may not draw an inference due to a witness' non-participation or refusal to answer questions.

9. Instructions to the Hearing Panel

At the conclusion of the hearing, the hearing officer will instruct the hearing panel as to:

- The presumption of non-responsibility;
- Standard of evidence required; and
- Any other matter the hearing officer deems necessary for the hearing panel's determination.

10. Record of Hearing

The hearing clerk will arrange for a video recording and/or transcript of the hearing.

E. Formal Hearing Decisions

1. Determination of Responsibility

The hearing panel will determine whether the respondent is responsible for a violation. Any finding of responsibility must be unanimous. No member of the hearing panel may abstain.

2. Recommendation of Sanctions

If the hearing panel reaches a responsible finding, the hearing panel will convene a supplemental proceeding to determine the sanction(s). The University, the respondent and the complainant, if participating, may submit evidence or argument concerning the appropriateness of a particular sanction. The respondent's past violations of University policy may be considered at this time.

3. Decision of the Hearing Panel

The hearing panel will issue a written decision to the parties explaining its finding and accompanying rationale and recommended sanctions. The hearing panel may impose any sanction up to and including expulsion (students), revocation of status as a registered student organization, separation of employment (employees) or a recommendation of termination of faculty appointment (faculty). The decision of the hearing panel will be provided simultaneously to both respondent and complainant.

II. Appeals

A. Applicability of Appellate Procedures

These appellate procedures apply whenever a formal hearing has reached a decision for an alleged violation of equal dignity.

B. Eligibility for Filing an Appeal

Any respondent who has been found responsible by a hearing panel may appeal either the finding of responsibility, the sanction imposed or both. The University may not appeal.

1. Sexual Harassment under Title IX

In cases of sexual harassment under Title IX, the respondent or complainant may appeal on the following basis:

- Dismissal of a formal complaint or allegation of a formal complaint;
- Finding of no probable cause;
- The hearing panel's decision regarding the finding of responsibility; or

- The imposition of a particular sanction.

C. Grounds for Appeal

A respondent or complainant may appeal on *any grounds* including, but not limited to, procedural irregularity, erroneous factual conclusions, incorrect legal conclusions, violations of constitutional rights or the discovery of new evidence not available at the original hearing. For purposes of an appeal involving Title IX, appeal grounds include, but are not limited to, bias that may have impacted the outcome, previously unavailable evidence and procedural error which may have impacted the outcome.

D. Appointment of Appeal Clerk

The Executive Vice President for Finance and Administration will appoint an appeal clerk who will have responsibility for empaneling the appeals panel, receiving and distributing the briefs, scheduling oral arguments, if requested, and distributing findings.

E. The Notice of Appeal

A respondent may appeal by filing a notice of appeal with the Executive Vice President for Finance and Administration within seven (7) business days of the decision determining the sanction. The notice should simply state the respondent wishes to appeal either the finding of responsibility, the sanction imposed or both.

In those instances where federal law gives the complainant the right to participate, the complainant may appeal by filing a notice of appeal with the Executive Vice President for Finance and Administration within seven (7) business days of the decision determining no responsibility. The notice should simply state the complainant wishes to appeal the finding of no responsibility or probable cause determination.

1. Appeal Record

Upon receipt of a notice of appeal, the appeal clerk will prepare the appeal record. The appeal record consists of the following:

- Pre-hearing materials for the hearing panel.
- The hearing officer's pre-hearing written rulings.
- The hearing panel's written decision and any sanction recommendation.
- The determination and imposition of sanction from the cabinet member, if any.

- A transcript of the hearing.
- Any other materials admitted into evidence during the hearing.

Upon completion of the appeal record, the appeal clerk will certify the record is complete and will send a copy to all parties.

F. Briefs

1. Appellate Briefs

When a party, either respondent or complainant, is challenging a finding, sanction or both, the appellate brief is due 10 business days after the appeal clerk certifies the record is complete. The appellate brief must not exceed 25 pages, double-spaced, with 12-point type. The appellate brief will be provided to the University and the other party for response.

2. University's Brief

The University's brief is due 10 business days after the brief of the party initiating the appeal. The University's brief must not exceed twenty-five (25) pages, double-spaced, with 12-point type.

3. Opposing Party Response Brief

The non-appealing party may submit a response brief to the appeal, and it is due 10 business days after the brief of the party initiating the appeal. The response brief must not exceed 25 pages, double-spaced, with twelve 12-point type.

4. Reply Brief of the Party Initiating the Appeal

The party initiating the appeal may file a reply brief within 10 business days after the University or non-appealing party briefs. The reply brief must not exceed 10 pages, double-spaced, with twelve (12)-point type.

5. Modification to Deadline and Page Limits

Upon request of any party, the appeals panel may extend the time for filing a brief and/or the page limits.

G. Appeal Decisions

1. Decision by the Appeals Panel

After reviewing all briefs and the appeal record, the appeals panel will make a written decision. The decision must be supported by a majority of the appeals panel. No member of the appeals panel may abstain.

2. Standard of Review

In reviewing the decision of the hearing panel, findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo (reviewing without any deference to the hearing panel).

3. Decision Concerning Responsibility

With respect to the issue of responsibility, the appeals panel may affirm, reverse or reverse and remand for further proceedings. In those instances where federal law allows the complainant to appeal a finding of no probable cause or dismissal of a complaint, the appeals panel may affirm or reverse and remand for further proceedings.

4. Decision Concerning Sanction

As to the sanction, the appeals panel may affirm or impose a lesser sanction. Except where the law allows the appeals panel to increase the sanction, the appeals panel may not increase the sanction.