



# ADMINISTRATIVE HEARING PROCEDURES

FEBRUARY 1, 2020

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## ARTICLE 1. INTRODUCTION

**1.1 General.** This document provides a standard operating procedure for formal administrative hearings. This procedure may be incorporated in another procedure by reference, either as is or with appropriate modifications consistent with the other procedure. This procedure may also be used on an ad hoc basis to handle individual situations where a University official authorized to make policy decisions for the University determines that a formal hearing is an appropriate means to resolve the issue in question or where policy otherwise mandates. In such a case, a University official will inform the parties in writing that this procedure will be followed and will specify any modifications to this procedure. Certain policies may require that a hearing will be held only after the involved parties have attempted to resolve the dispute informally.

### 1.2 Definitions.

1.2.1 Complainant: the person or persons filing a formal complaint pursuant to [UAP 2720, 2740, 3110](#), CEEO [Discrimination Grievance Procedure \(DGP\)](#), and any other person or persons requesting a formal hearing to review a determination of policy violation.

1.2.2 Respondent: the person responding to formal complaint filed by the Complainant, by CEEO, or the Title IX Coordinator.

1.2.3 Parties: the complainant and respondent collectively.

1.2.4 Non-participating Party: a party who does not participate in the grievance process or who is no longer affiliated with the University.

1.2.5 Departmental Investigation: a formal complaint filed by a UNM entity rather than by an individual complainant. CEEO files departmental investigations pursuant to [UAP 2720, 2740, 3110](#), CEEO [Discrimination Grievance Procedure \(DGP\)](#).

1.2.6 Individual Investigation: a formal complaint filed by a member of UNM staff in their official capacity, rather than by an individual complainant.

1.2.7 Hearing Officer: the decisionmaker appointed pursuant to policy, procedure, or by order of the Board of Regents or the President to hear the evidence presented by the parties at the hearing and to decide whether to uphold the decision being challenged or whether a policy violation has occurred.

1.2.8 Hearing Coordinator: the office or individual assigned to facilitate the hearing by providing administrative assistance to the Hearing Officer. The Hearing Coordinator has no substantive decision-making authority regarding the issues to be decided at the hearing or the outcome thereof.

1.2.9 Advisors: the designated individual assisting a party during the administrative hearing process.

1.3.0 Sanctioner: The individual or entity responsible for deciding the appropriate sanction when there is a determination that University policy has been violated. Sanctioning authority is determined by the policy that has jurisdiction over the Respondent.

**1.3 Calculation of Time and Time Limits.** Unless otherwise specified herein, the term “days” refers to regularly recognized University business days, and does not include weekends, holidays, or other University closures. The Hearing Officer shall extend any time limit set forth in these rules for good cause. Good cause shall include: the fact that a time limit includes finals week, periods such as vacations, holidays, or intersessions, the absence of parties, or the Hearing Office staff from the institution. Any time extension shall be communicated in writing to all parties along with a new written schedule.

**1.4 Consolidation.** There is a presumption that matters with the same parties and/or witnesses shall be adjudicated as separate matters. The Hearing Officer has the discretion to consolidate matters for the purpose of administrative efficiency.

**1.5 Burden of Proof.** The burden of proof is met when a preponderance of the evidence supports a finding of a policy violation. A preponderance of the evidence means that, based on the relevant, reliable evidence submitted, it is more likely than not that a policy violation occurred.

**1.6 Decisionmaker Training.** The hearing officer shall be required to complete specific training prior to the hearing. Such training will be prescribed by the CEO, the Title IX Coordinator, University policy, procedure, or by order of the Board of Regents or the President. If so prescribed or ordered, the Hearing Coordinator will work with the appropriate University Department to obtain and provide the required training to the Hearing Officer prior to the hearing.

**1.7 Sanctioner Training.** Sanctioners shall be required to complete specific training prior to the sanctioning phase. Such training will be prescribed by CEO, the Title IX Coordinator, University policy, procedure, or by order of the Board of Regents or the President.

**1.8 Provision of Remedies.** Remedies may be provided to a Complainant when a Respondent is found responsible for violating a University policy(ies). Any remedy must be designed to maintain the Complainant’s equal access to the working/learning environment and may include the same individualized services described in the CEO Discrimination Grievance Procedure as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent. Remedies are confidential and are not included in the Respondent’s sanction letter.

**1.9 Accommodations for Disabilities.** This Policy does not alter any institutional obligations under federal disability laws including the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973. Parties may request reasonable accommodations for

disclosed disabilities to the Hearing Coordinator at any point before or during the hearing process. The Hearing Coordinator shall work with University personnel including the Accessibility Resource Center (ARC), pursuant to University Administrative Policy 2310, or the ADA Coordinator or their designee to provide accommodation, as appropriate. Neither the ADA Coordinator nor ARC shall be required to provide the Hearing Coordinator, Decisionmaker, or other hearing participant the exact medical reason for the exception or accommodation.

**1.10 Advisor designation/appointments.** Each party must have an Advisor. A party may choose a person to serve as their Advisor or may request a University appointed Advisor at no cost by contacting the Hearing Coordinator. Parties do not have the right to self-representation for purposes of cross-examination.

A party must identify their Advisor two business days before the pre-hearing conference by contacting the Hearing Coordinator. A party must also disclose whether their Advisor is an attorney. If a party appears at the hearing without an Advisor, the hearing must be stopped as necessary to permit the University time to assign an Advisor to that party. A party cannot decline the assigned Advisor without first designating a new one.

A party may change advisors upon notice to the Hearing Coordinator; however, changing advisors within five (5) days of the hearing is strongly discouraged. If a party correctly asserts that an Advisor refuses to engage in cross-examination on the party's behalf, the University will provide an Advisor who will conduct cross-examination. If a party refuses to work with an Advisor who is willing to conduct cross-examination on the party's behalf, that party has no right to self-representation.

**1.11 Advisors.** Anyone may serve as an advisor. An advisor may be, but does not have to be, an attorney. A party may request that a University advisor be appointed to them free of charge. Advisors are not appointed to non-participating parties.

1.11.1 Advisor's role: The Advisor's role is to assist a party during the hearing process and to provide support during the hearing. An Advisor may also assist a party throughout the entire grievance process, as agreed upon by the Advisor and the party. Attorneys who serve as Advisors must follow the rules for Advisors. Non-appearance of a party at a hearing does not constitute a non-participating party.

The Advisor must cross-examine the other party, the other party's witnesses, and may ask all relevant questions and follow-up questions as permitted by the Hearing Officer, including questions that challenge credibility. If a party calls the other party as a witness, that witness is subject to cross-examination procedure and is questioned by the Advisor.

Such cross-examination at the hearing must be conducted directly, orally, and in real time by the party's Advisor and never by the party personally. A party's Advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Advisors shall not be allowed to answer questions posed to the parties or witnesses by the Hearing Officer or the other party's Advisor.

**1.12 Party Role.** The party's role is to designate an Advisor, prepare for the hearing, adhere to the proceeding timeline, ask questions of their witness/es, and otherwise fully participate in the process other than cross-examination.

**1.13 Opening/Closing Statements.** Only parties shall be allowed to make personal opening or closing statements at the discretion of the Hearing Officer. If the Hearing Officer allows one party this option, each party will have the same option.

**1.14 Decorum.** Administrative hearings are not civil or criminal proceedings and are not designed to mimic formal trial proceedings. As such, the University has adopted rules of decorum that prohibit any party, witness, Advisor, or Hearing Officer from questioning witnesses or parties in an abusive, intimidating, or disrespectful manner. These rules may be enforced through the removal of any participant who refuses to comply with said rules. The rules and standards apply equally to all participants regardless of sex, gender, or other protected class, and regardless of whether they are in the role of Advisor, Complainant, Respondent, witness, or other participant.

The following Rules of Decorum are to be observed in the hearing:

1. Questions must be conveyed in a neutral tone;
2. Parties and Advisors will refer to other parties, witnesses, Advisors, and institutional staff using the name and gender used by the person and shall not intentionally misname, deadname, or misgender any person in communication or questioning;
3. No party may act abusively or disrespectfully during the hearing toward any other party or to witnesses, Advisors, or the Hearing Officer, or any other individual participating in the hearing;
4. Advisors may not yell, scream, badger, or physically "lean in" to a party or witness's personal space. Advisors may not approach the other party or witnesses without first obtaining permission from the Hearing Officer;
5. Advisors may not use profanity or make irrelevant personal attacks upon a party or witness. Questions are meant to be interrogative statements used to test knowledge or understand a fact; they may not include accusations within the text of the question;
6. Parties and Advisors may take no action at the hearing that a reasonable person would see as intended to intimidate or coerce a party, witness, Hearing Officer, or any other participant.

**1.15 Warning and Removal Process.** The Hearing Officer shall have sole discretion to determine if the Rules of Decorum have been violated. The Hearing Officer will notify the offending person of any violation of the Rules.

Upon a second or further violation of the Rules, the Hearing Officer shall have discretion to remove the offending person or allow them to continue participating in the hearing or other part

of the process. Where the Hearing Officer removes a party's Advisor, the party may select a different Advisor of their choice, or accept an Advisor provided by the University for the limited purpose of cross-examination at the hearing. Reasonable delays, including the temporary adjournment of the hearing, may be anticipated should an Advisor be removed. A party cannot serve as their own Advisor in this circumstance.

The Hearing Officer shall document any decision to remove an Advisor in the written determination regarding responsibility.

## **ARTICLE 2. PREHEARING MATTERS**

**2.1 Notice of Hearing.** Upon completion of its investigative report, the investigating entity will submit the investigative file or other relevant documentation in its entirety to the Hearing Coordinator. Upon receipt of the file, the Hearing Coordinator will schedule the date of the hearing. The Hearing Coordinator will send the parties notice of the hearing no less than ten (10) business days before the hearing date. The notice of hearing will include the following:

- A description of the alleged violation(s), a list of all policies allegedly violated, a description of the applicable procedures, and a statement of the potential sanctions/responsive actions that could result
- Burden of Proof Standard
- The time, date, and location of the pre-hearing conference (described in Section 2.2) and whether the pre-hearing conference will be held in-person or via virtual means
- The time, date, and location of the hearing, and whether the hearing will be held in-person or via virtual means
- Any technology that will be used to facilitate/record the hearing
- Information about the option for the live hearing to occur with the parties located in separate rooms using technology that enables the Hearing Officer and parties to see and hear a party or witness answering questions. Such a request must be raised with the Hearing Coordinator at least five (5) business days prior to the hearing
- A list of all those who will attend the hearing
- Information on how the hearing will be recorded and on access to the recording for the parties after the hearing
- A statement that if any party or witness does not appear at the scheduled hearing, the hearing may be held in their absence, and the party's testimony and any statements given prior to the hearing will not be considered by the Hearing Officer except in non-Title IX cases with a non-appearing party (see section 3.1). No inference will be drawn from the absence of a party.
- Notification that the parties may have the assistance of an Advisor at the hearing and will be required to have one present to conduct cross-examination
- Notification that if a party does not secure an Advisor of their choice, the University will appoint one free of charge
- A copy of all the materials provided to the Hearing Officer about the matter
- An invitation to contact the Hearing Coordinator to arrange any disability accommodations, language assistance, and/or interpretation services that may be needed at the hearing, at least five (5) business days prior to the hearing

- Identification of which electronic devices are prohibited from being brought into the hearing

**2.2 Pre-Hearing Conference.** After receipt of the information specified in Section 2.3, the Hearing Officer will meet with the parties and/or their Advisors to consider clarifying or simplifying the issues to be heard by the Hearing Officer, answering any procedural questions, limiting the number of witnesses, or considering any other matters which may aid the conduct of the hearing. The Hearing Officer will also consider the submission of new, previously undiscovered evidence submitted by the parties, as described in Section 2.3.2. Unless otherwise agreed upon by both parties, pre-hearing conferences will be held separately for each party.

### **2.3. Preparation of Evidence.**

2.3.1 All relevant evidence from the parties should have been submitted during the investigation preceding the hearing. The investigative file that is submitted to the Hearing Coordinator at the conclusion of an investigation contains the same evidence and documents that were provided to the parties during the investigation.

2.3.2 The parties may present any new, previously undiscovered evidence for use at the hearing two (2) business days prior to the pre-hearing conference, as described in Section 2.2. The Hearing Officer has sole discretion to determine whether the new evidence will be considered at the hearing. Approval of the Hearing Officer shall depend on the relevance of the document, whether the party could have obtained it earlier, the time remaining until the hearing, and the degree of prejudice to the other party.

2.3.3 All members of the University community shall cooperate with the parties' reasonable requests to provide evidence and to appear at the hearing as witnesses.

**2.4 Notice Requirements for Parties.** At least two (2) business days before the pre-hearing conference, each party shall provide the Hearing Coordinator with electronic copies of the following information, copies of which the Hearing Coordinator shall distribute to the other party(ies) and to the Hearing Officer:

2.4.1 A list of intended witnesses, or a statement that no witnesses will be called. If the parties present a list of intended witnesses, they shall provide a brief statement summarizing each witness' anticipated testimony. The Hearing Officer will rely on the investigative list of witnesses and their statements therein in lieu of a witness list in Departmental and Individual Investigations with a non-participating party. The Hearing Officer may place reasonable limitations on the number of witnesses, either before or after the list is submitted, but in no event more than two (2) business days prior to the hearing. The Hearing Officer may exclude witness testimony that is cumulative or irrelevant to the issue presented. No witnesses other than those on the list may testify without the consent of the Hearing Officer.

2.4.2 The name of any Advisor appearing with the party at the hearing and whether the Advisor is an attorney.

2.4.3 Electronic copies of any new, previously undiscovered evidence that the parties wish to be considered at the hearing. The Hearing Officer has sole discretion to determine whether the new evidence will be considered at the hearing.

## **ARTICLE 3. HEARINGS**

**3.1 Departmental and Individual Investigations.** Where there are Departmental or Individual Investigations involving non-Title IX allegations with a non-participating party, the hearing officer may consider a non-participating party's statements if relevant; however, in all other regards, when Title IX and non-Title IX allegations are addressed together in one complaint at the same hearing, the procedures below will be used for all allegations.

The Office of Compliance, Ethics and Equal Opportunity (CEEEO) and the Title IX Coordinator shall not participate as complainants during the hearing process.

**3.2 Evidence.** The parties may testify, may present testimony of other witnesses, and/or introduce and explain documents and other evidence at the hearing. The Hearing Officer may exclude cumulative, unfair, or irrelevant evidence, but is not required to follow judicial rules of evidence.

**3.3 Irrelevant Evidence.** The Hearing Officer may exclude any evidence that is irrelevant, which includes but is not limited to:

- A complainant's prior sexual history, unless offered to prove consent with respect to respondent, or to prove that someone other than respondent committed the alleged conduct;
- Information protected by a legally recognized privilege cannot be used (i.e., attorney-client privilege);
- Statements not subject to cross-examination
- Duplicative evidence; and
- Parties' HIPAA-protected treatment records unless a party gives written consent.

**3.4 Determination of a Question as Relevant.** Before a party or witness answers a cross-examination or other question, the Hearing Officer must first determine if the question is relevant and explain any decision to exclude a question as irrelevant.

**3.5 Order of Evidence.** The Hearing Officer may, pursuant to Section 2.3, determine the order of evidence. The Hearing Officer may ask questions any time during the hearing.

**3.6 Witnesses.** The parties may present the testimony of witnesses in support of their case. The parties are responsible for ensuring that their witnesses appear to testify at a hearing. The parties



and the Hearing Officer shall have the right, within reasonable limits set by the Hearing Officer, to question the parties and all witnesses who testify orally. The Hearing Officer will require all witnesses to affirm the truth of the testimony they present. Witnesses are allowed in the hearing room for their testimony only.

**3.7 Modified examinations.** Reasonable limits may include any modifications the Hearing Officer deems appropriate under the circumstances, including but not limited to allowing a party or witness to testify remotely. Requests for modifications to the method a party's or witness' testimony is elicited or presented must be included in the witness list submitted by the party seeking the modification pursuant to Section 2.4.1.

**3.8 Record of Hearing.** The Hearing Coordinator shall make a digital audio recording of the proceedings. The parties may request a copy of the recording. Such requests shall be made to the Hearing Coordinator. The Hearing Coordinator shall provide the party with a digital copy of the recording.

The record of the hearing shall consist of the digital recording and an electronic copy of all documents introduced as evidence. The record shall be kept by the University for ten (10) years after all appeals have been concluded or after the time for appeal has expired, whichever comes first.

**3.9 Written Argument.** After hearing the evidence, the parties have the option of submitting written arguments to the Hearing Officer. Parties must submit their arguments to the Hearing Coordinator no later than two (2) business days following the hearing.

**3.10 Closing the Hearing.** No new evidence may be submitted after the hearing, except for the parties' written arguments, if they choose. The hearing is deemed fully and finally closed for purposes of appeal pursuant to Section 4.0 herein upon the issuance of the Hearing Officer's determination, unless the Hearing Officer expressly leaves the proceedings open pending some later action to be taken by the Hearing Officer, a party, or another person or entity specifically identified in the Hearing Officer's express instruction that the hearing remain open pending the later action occurring.

**3.11 Sanctioner.** Sanctioners will work with the Hearing Officer to include an appropriate sanctioning determination in the final report. The sanctioner may attend the hearing or review the hearing record, to issue the proposed discipline contemporaneous to the finding.

**3.12 Remedies.** After a finding of responsibility by the Respondent, OEO or the Title IX Coordinator may provide remedies to the Complainant in adjudications involving UAP 2740. Remedies are confidential and will be provided only to Complainant, and their Advisor if given permission by the Complainant.

**3.13 Closed Hearings.** All administrative hearings shall be closed to the public and the media.

## **ARTICLE 4. APPEALS**

**4.0 Appeal.** No appeal of the Hearing Officer’s decision may be taken until the hearing is fully and finally closed as provided in Section 3.10 herein. Any subsequent appeal must be submitted pursuant to the timelines provided in the policy, procedure, or order authorizing the appeal.