

GRAND RIVER | SOLUTIONS

Hearings in a Post Regulatory World

Day One

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Meet Your Facilitators



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She/Her/Hers

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About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

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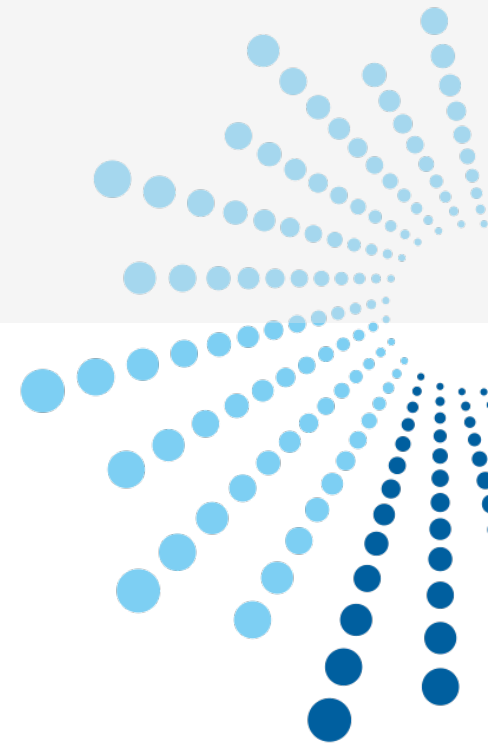
After the Hearing



Title IX Requirements For Hearings

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01





Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

AND... Only Covered, IF:

Place of Conduct

- On campus **OR**
- Campus Program, Activity, Building, **AND**
- In the United States

Required Identity

- Complainant participating/attempting to participate in Program or Activity, **AND**
- Control over Respondent

Procedural Requirements for Investigations

Notice to both parties

Equal opportunity to present evidence

An advisor of choice

Written notification of meetings, etc., and sufficient time to prepare

Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report

Report summarizing relevant evidence and 10 day review of report prior to hearing

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction



The Requirement of Impartiality

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Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

Section 106.45(b)(1)(iii)

“

Title IX Coordinator, investigator, **decision maker**, or facilitator of informal resolution must receive training on...how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

”

Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.



All hearings must be recorded.



Participants must be able to communicate during the hearing

The parties with the decision maker(s)

The parties with their advisors

What is the purpose of the hearing?

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Purpose of the Hearing

1

Review and
Assess
Evidence

2

Make Findings
of Fact

3

Determine
Responsibility/
Findings of
Responsibility

4

Determine
Sanction and
Remedy

Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible?

Is it convincing?



Is it reliable?

Can you trust it or rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

Trauma-informed practices provide tools/techniques for engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Hearing



Format of Questions



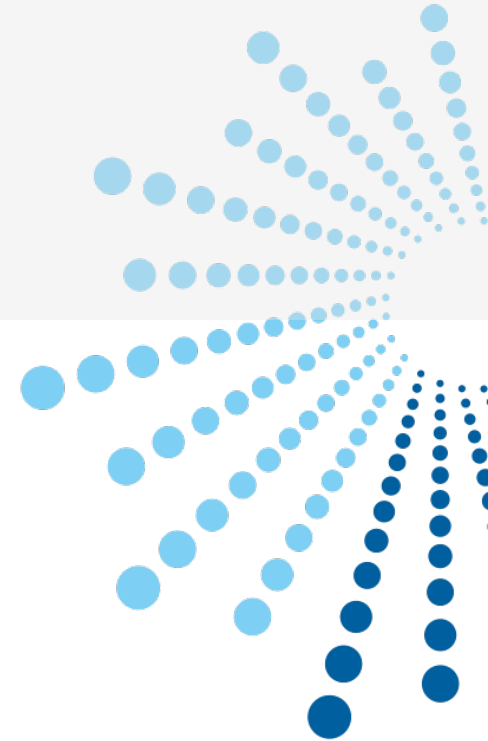
Approach to Clarification



Process Participants

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Who are the participants at the hearing?

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The Participants

The Parties

Complainant

An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent

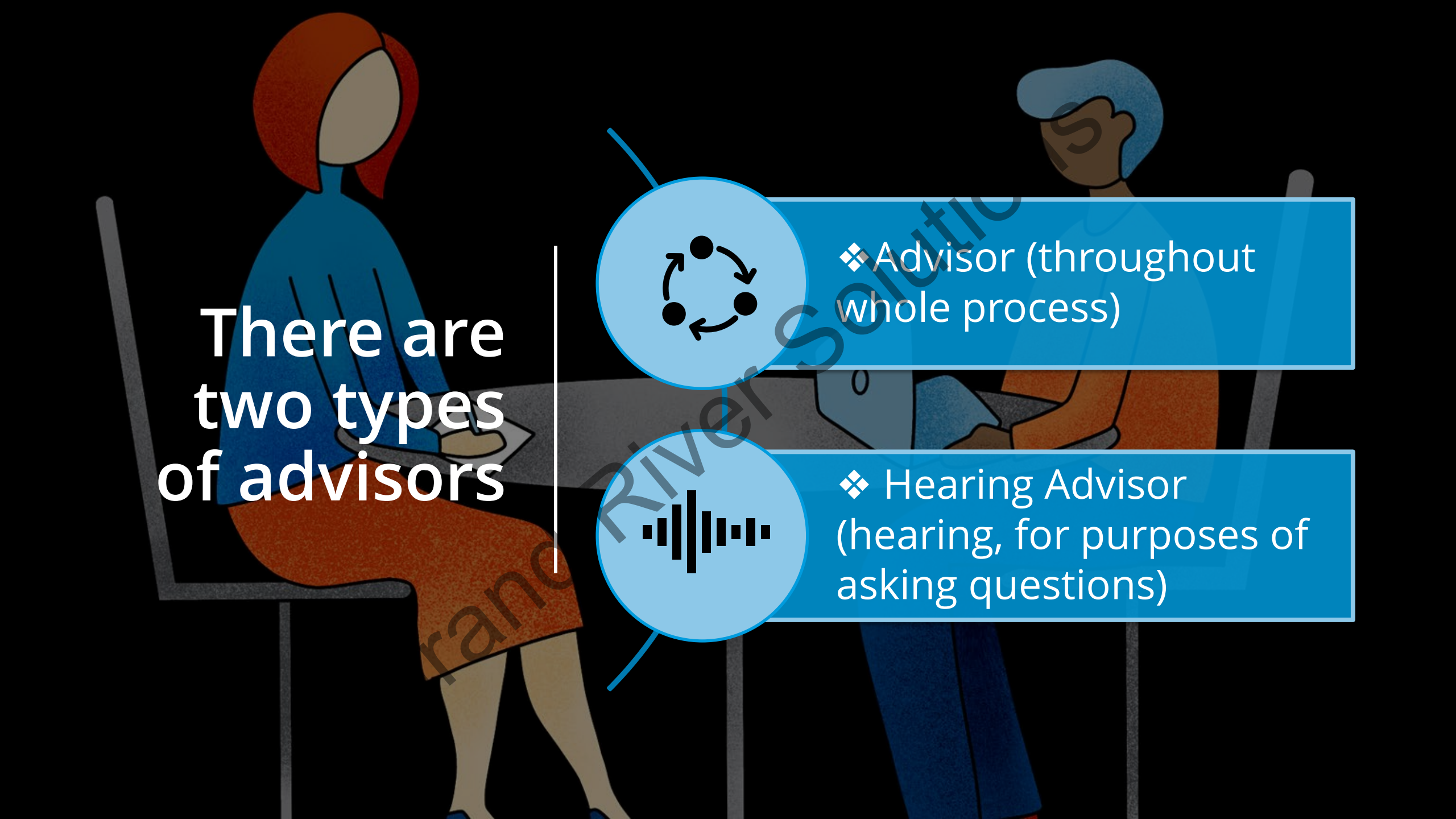
An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

The Participants

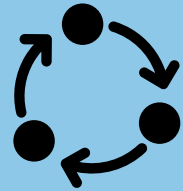
The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- Can be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.





There are
two types
of advisors



❖ Advisor (throughout
whole process)



❖ Hearing Advisor
(hearing, for purposes of
asking questions)

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institutionally appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings

The Participants

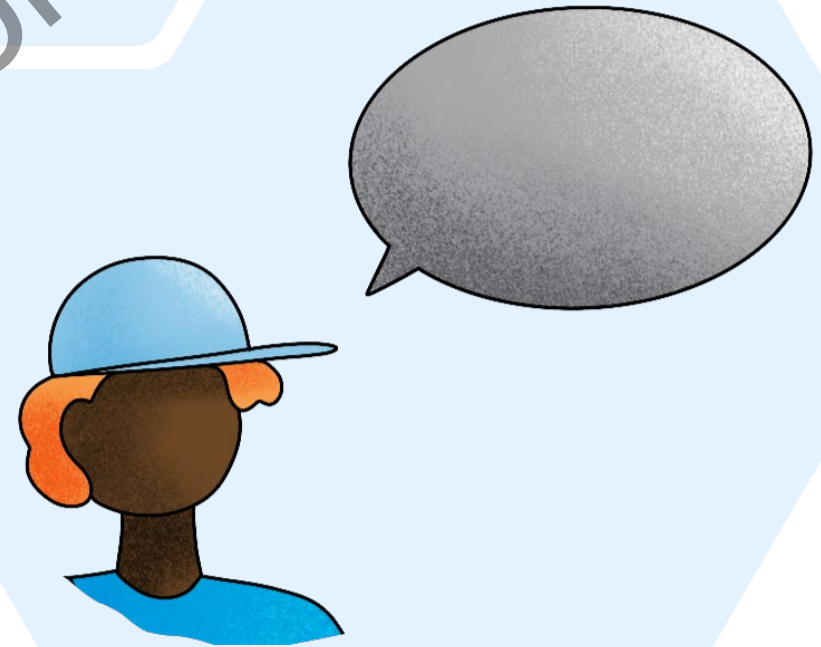
Advisors



The Participants

Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



The Participants

The Hearing

Facilitator/Coordinator

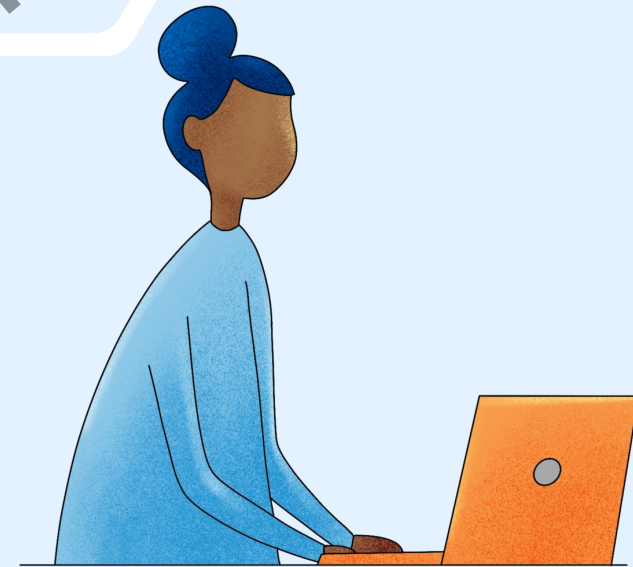
- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
- Optional, not required



The Participants

The Decision Maker

- One person
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome



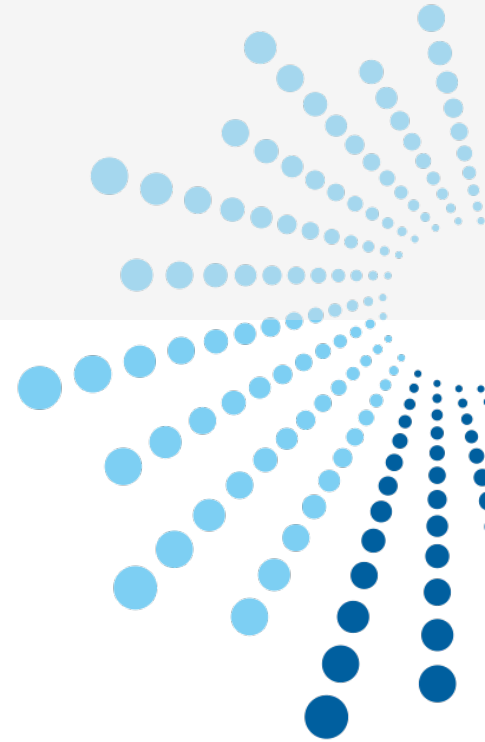


Pre-Hearing Tasks: Hearing Chair

What should be done in advance of the hearing

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What do you typically discuss at a pre-hearing meeting?

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Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

- Format
- Roles of the parties
- Participation
- Decorum
- Impact of not following rules

Cross Examination/Questioning Format & Expectations

Decision Maker



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



May convene a pre-hearing meeting



Anticipate challenges or issues



Prepare the script

Common Areas of Exploration



Credibility?



Clarification on timeline?



Thought process?



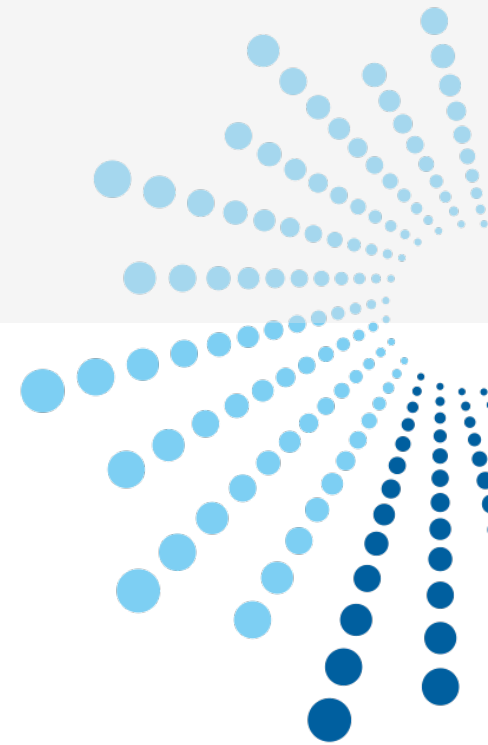
Inconsistencies?



The Hearing

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What is the order of proceedings at a hearing?

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Order of the Proceedings

01

Introductions
and instructions
by the Chair;
Opening
Statements

02

Presentation by
Investigator

03

Presentation of
information and
questioning of
the parties and
witnesses

04

Closing
Statements

05

Deliberation &
Determination

Opening Statements

Optional: Not required by the regulations; institution may choose to allow.

- Prior to questioning beginning during the hearing, each party may be given the opportunity to make an opening statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker.
- Both parties should give opening statement before either is questioned.
- Typically, the complainant goes first.

Opening Introductions and Instructions by the Chair



The institution may have a script for this portion of the proceedings, and it should be used.

Introduction of the participants.

Overview of the procedures.

Overall goal: manage expectations.

Be prepared to answer questions.



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Presentation of Information

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A photograph of a person wearing a yellow jacket and safety glasses, shouting into a white megaphone. The image is semi-transparent and serves as a background for the text.

Presentation of Information & Questioning of the Parties

01

The Hearing Panel will question Complainant first

02

Cross examination of Complainant will occur next

03

Follow up by the Hearing Panel

04

The Hearing Panel will question Respondent second

05

Cross examination of Respondent will occur next

06

Follow up by the Hearing Panel

Questioning of the Witnesses

01

The Chair will determine the order of questioning of witnesses

02

The Hearing Panel will question first

03

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

04

Follow up by the Hearing Panel

Closing Statements

Prior to the conclusion of the hearing, each party may have the opportunity to make a closing statement.

- Prior to the conclusion of the hearing, each party will have the opportunity to make a closing statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker .
- Not time to introduce new information or evidence.

General Questioning Guidelines

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Format of Questioning



The Hearing Panel or the advisor will remain seated during questioning



Questions will be posed orally



Questions must be relevant

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What constitutes a relevant question?

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What constitutes a relevant question?

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

When is evidence relevant?

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When is evidence relevant?

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



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What are examples of irrelevant or impermissible questions?

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Information protected by an un-waived legal privilege

Medical treatment and care

Unduly repetitious or duplicative questions

Information that otherwise irrelevant

Complainant's prior sexual history, with limited exceptions.

Irrelevant and Impermissible Questions

When Questioning....



Be efficient.



Explore areas where additional information or clarity is needed.



Listen to the answers.



Be prepared to go down a road that you hadn't considered or anticipated exploring.



Take your time. Be thoughtful. Take breaks if you need it.

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Foundational Questions to Always Consider Asking

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

Common Areas of Where Clarity or Additional Information is Needed

Credibility

Reliability

Timelines

Inconsistencies

Details about the
alleged
misconduct

Facts related to
the elements of
the alleged policy
violation

Relevancy of
Certain Items of
Evidence

Factual Basis for
Opinions

Questioning to Assess Reliability

Inherent plausibility

Logic

Corroboration

Other indicia of reliability

Questioning to Assess Credibility

No formula exists, but consider asking questions about the following:

opportunity to view

ability to recall

motive to fabricate

plausibility

consistency

character, background, experience, and training

coaching

Credibility Versus Reliability

Reliability

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.



Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Is it authentic?



Never assume that an item of evidence is authentic.



QUESTION THE PERSON WHO OFFERED THE EVIDENCE



REQUEST ORIGINALS



OBTAIN ORIGINALS FROM THE SOURCE



HAVE OTHERS REVIEW AND COMMENT ON AUTHENTICITY



ARE THERE OTHER RECORDS THAT WOULD CORROBORATE?

What are examples of some "hard" questions for you?

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What are the “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

How to Ask the Hard Questions

Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...