

LAYING THE GROUNDWORK

The Importance of Pre-Hearing Strategizing

Hon. Patricia Riehl and Kenneth Chackes, JD

Hon. Patricia Riehl



Kenneth Chackes, JD



Learning Objectives



Develop strategies for reviewing investigation reports and evidence



Define the role of each individual involved in the pre-hearing meeting



Identify how to conduct an effective pre-hearing meeting

REVIEWING THE INVESTIGATIVE REPORT AND FILE



What is an Investigative Report?

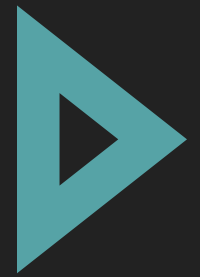


Fairly summarizes relevant evidence and facts of the case, as well as the procedural steps taken by the institution



Required Contents:

- Title IX Regulations (§ 106.45 Grievance process for formal complaints of sexual harassment)
- “Create an investigative report that fairly summarizes relevant evidence (§ 106.45(b)(5)(vii))
- Each school’s Policy might require additional contents



Might include some or all of the following:

- Introduction: name of Investigator and dates of investigation
- Individuals involved: Complainant, Respondent, Advisors, Witnesses
- Date of reported incident
- Summary of reported incident
- Applicable policy and alleged policy violation
- Case history/Procedures followed
- Summary of the Parties' interviews
- Summary of Witnesses' interviews
- Description of other evidence (documents)
- Disputed v. undisputed facts
- Evaluation of relevant evidence
- Determination of credibility
- Parties' responses to evidence

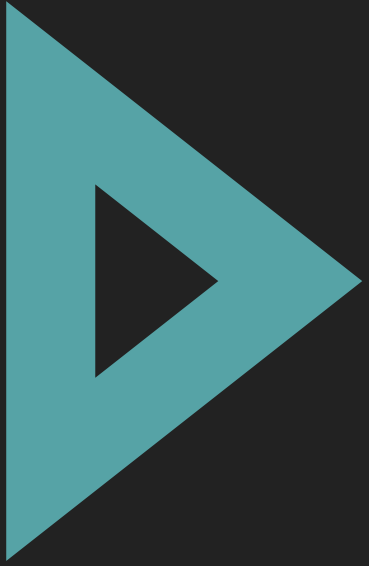
What is an Investigative File?

- ▶ Contains all evidence obtained during the investigation
- ▶ Could include the following and more:
 - Interview summaries, interview transcripts, communication between the parties such as text messages, emails, direct messages via social media, photos, videos
- ▶ May also include evidence collected from individuals aside from the Parties such as security footage, call logs, police reports, etc.

REVIEWING THE INFORMATION

Read the investigative report and entire investigative file CAREFULLY.

The report and evidence can be the primary basis for the decision of the hearing officer - the contents may not be repeated at the hearing itself





Ideally, all information gathered by the investigator should be discussed in the report and included in the file



At some schools, however, the Investigator might exclude from the report and file information that the investigator deemed irrelevant



Best practice - the Hearing Officer should determine what is and what is not relevant, not the Investigator



Review ALL evidence, even if it seems irrelevant or insignificant



Organize the information in a way that will allow for easy access during the pre-hearing meeting and the hearing

REVIEWING THE INFORMATION



Consider key facts needed to determine responsibility.

Review statements and evidence and compare against the elements of the offense.

Do they support or refute?

Inculpatory

Any evidence favoring the Complainant

Exculpatory

Any evidence favoring the Respondent

ELEMENTS OF THE OFFENSE

CONDUCT
ON THE
BASIS OF
SEX

+

UNWELCOME

+

SEVERE,
PERVASIVE,
OFFENSIVE

+

DENIES A
PERSON
EQUAL
ACCESS TO AN
EDUCATIONAL
OPPORTUNITY

REVIEW THE ELEMENTS

Determine what facts (elements) are in dispute

Carefully study the evidence that is relevant to each disputed fact (element). In other words, what would prove or disprove the fact (element)?

If the investigation report contains conclusions regarding disputed issues or credibility, determine if the evidence clearly supports those conclusions.

The Investigator was not the Decision-Maker!

WHAT IF...

we have these...

CONDUCT
ON THE
BASIS OF
SEX

+ UNWELCOME +

~~SEVERE,
PERVASIVE,
OFFENSIVE~~

+ DENIES A
PERSON
EQUAL
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OPPORTUNITY

but not this?

GOALS FOR THE REVIEW PROCESS



**DETERMINE
WHAT NEEDS TO
BE ASKED AT
THE HEARING**



**DETERMINE
WHAT
INFORMATION IS
MISSING
(if any)**



**IN ADDITION TO
PARTIES, WHAT
WITNESSES NEED
TO APPEAR AT
THE HEARING**

PRE-HEARING MEETING



WHAT IS THE PRE-HEARING MEETING?

- Meeting before the hearing to walk through guidelines, expectations, and more
- Led by the Title IX Coordinator or Decision-maker(s)
- Not mandated by Title IX regulations, but permitted
- Prepares all parties (including the hearing officer) for what is ahead
- Seen as a best practice in Title IX

INVESTIGATION TIMELINE



Should be held following issuance of investigation report and after parties and their advisors have had the opportunity to review and respond to evidence

PRE-HEARING CHECKLIST



Clarify purpose of hearing



Reiterate standard of evidence



Discuss hearing procedure



Review rights and responsibilities



PRE-HEARING CHECKLIST



Confirm witness attendance



Explain relevancy of evidence



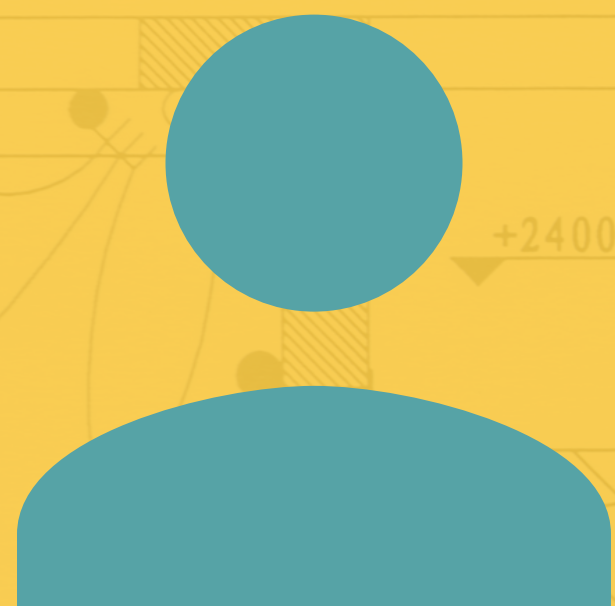
Review logistics and needs



Answer parties' questions



WHO IS SEATED AT THE TABLE?

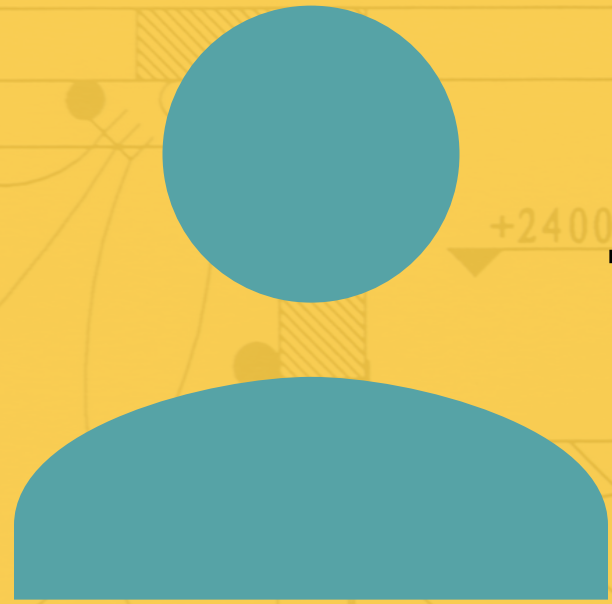


Hearing Officer

- Conducts the pre-hearing conference
- Sets datelines for witness disclosures
- Sets the hearing date
- Advises all present of the rules and procedures to be followed at the hearing

The Hearing Officer sets the “rules of the road”.

WHO IS SEATED AT THE TABLE?

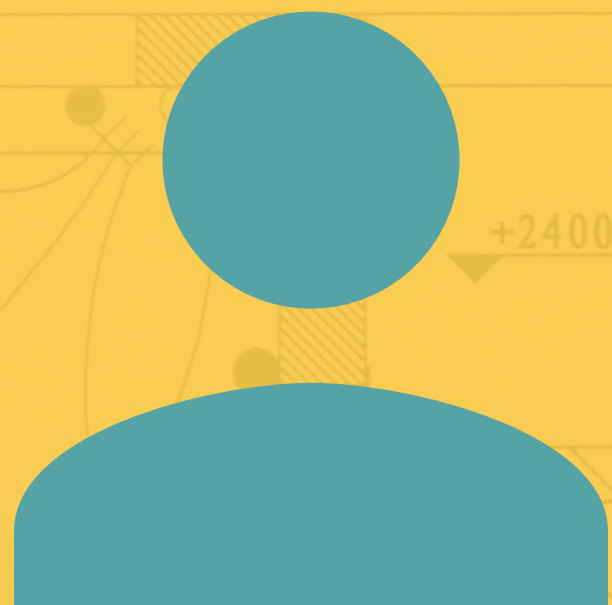


Title IX Coordinator

- Have the burden of proof in any hearing
- Request witness' to appear for the hearing
- Facilitate the hearing itself
- They are the record keeper of the hearing

The TIX Coordinator is the overseer of the process.

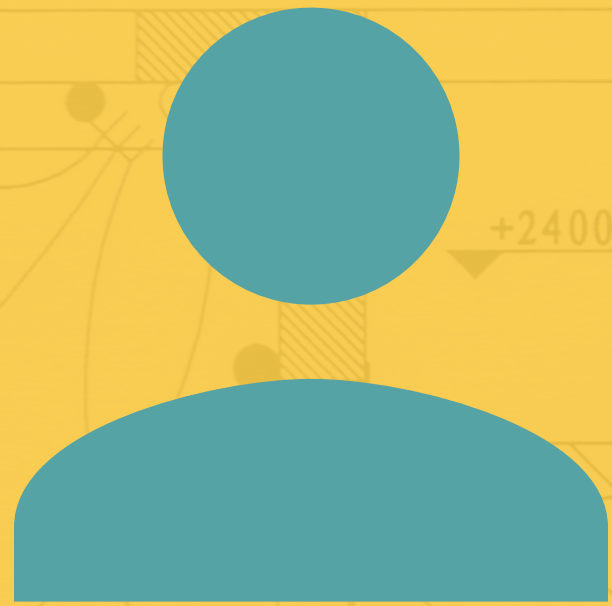
WHO IS SEATED AT THE TABLE?



Complainant

- The reporting party
- May have questions about the process and how it works
- Pre-hearing conference allows them to "put a face" to the Hearing Officer

WHO IS SEATED AT THE TABLE?

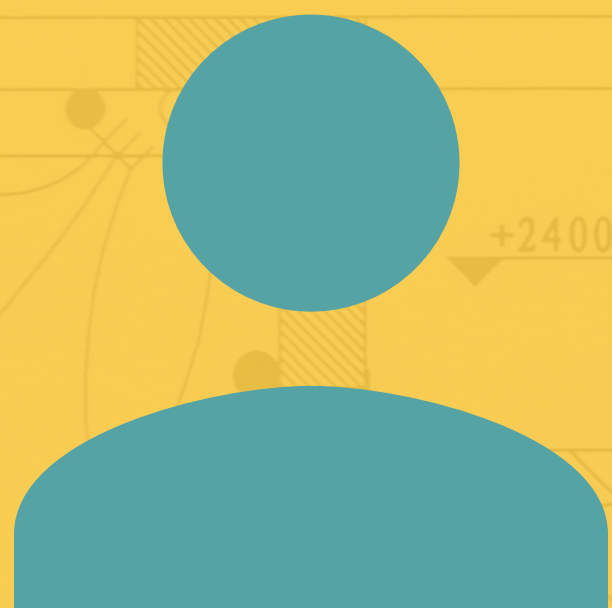


Complainant's Advisor

- Represents the interests of the Complainant
- Only individuals allowed to cross-exam witnesses, as the Complainant is prohibited from doing their own cross-examination
- Pre-hearing conference is the time to iron out any evidentiary issues
- Establish the witnesses expected to be called for the hearing
- Acquaints them with the rules and procedures of the hearing

Remember an advisor can be an attorney or not, it is the Complainant's choice.

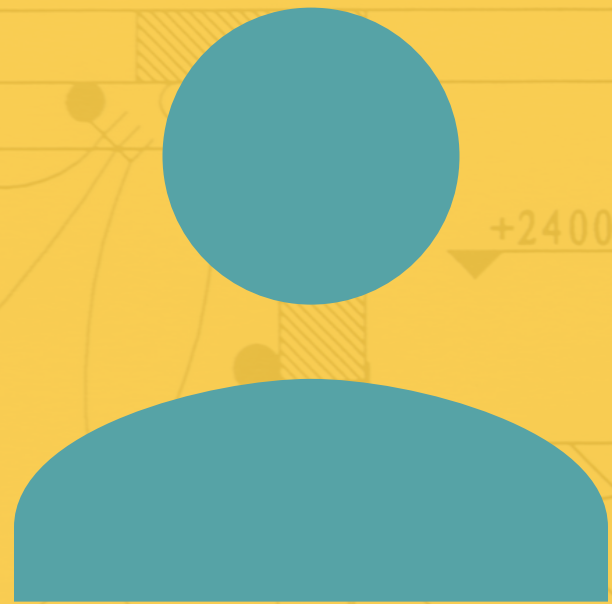
WHO IS SEATED AT THE TABLE?



Respondent

- The responding party
- May have questions about the process and how it works
- Pre-hearing conference allows them to "put a face" to the Hearing Officer

WHO IS SEATED AT THE TABLE?



Respondent's Advisor

- Represents the interests of the Respondent
- Only individuals allowed to cross-exam witnesses, as the Respondent is prohibited from doing their own cross-examination
- Pre-hearing conference is the time to iron out any evidentiary issues
- Establish the witnesses expected to be called for the hearing
- Acquaints them with the rules and procedures of the hearing

Remember an advisor can be an attorney or not, it is the Respondent's choice.



Be aware that parties may select
non-attorney advisors.

Acknowledge power imbalances
that might be created.

IMPORTANCE OF THE PRE-HEARING MEETING

Most individuals have not participated in this type of hearing

- The many “unknowns” surrounding the live hearing may be anxiety-inducing for the parties
- Pre-hearing meetings may help ease some anxiety because the Hearing Officer addresses many of those “unknowns”
- Unfortunately, this does not mean that the parties will not be anxious during the hearing

BENEFIT TO THE PARTIES AND ADVISORS

Allows parties to put a face with a name

Parties begin to fully understand hearing process and what it entails

Process and potential consequences of the TIX process become "real"

BENEFIT TO THE PARTIES AND ADVISORS

After the pre-hearing meeting, some parties may decide to move forward with informal resolution (if permitted)

Can help make the live hearing more efficient, focused, and effective

BENEFIT TO THE HEARING OFFICER

- Clarify the authority of the Decision-Maker(s) in front of the Advisors and Parties
- Ensure Parties and Advisors have the same understanding of and expectations for the live hearing
- Anticipate any issues and troubleshoot before the hearing begins
- Slow the process down to allow more thoughtful decision-making

COORDINATING THE PRE-HEARING MEETING

- Schedule parties separately
- Ensure the meeting occurs well before the anticipated hearing date to accommodate any requests for changes or special needs
- If either party does not have an advisor, now is the time to provide one
- Ask parties to bring their list of cross-examination questions for review
- Select your videoconferencing platform for the hearing

SAMPLE MEETING AGENDA

1

Introductions

- Parties
- Advisors
- Title IX Team

2

Hearing preparation

- Confirm Parties' access to investigative report and evidence
- Confirm witness participation

3

Review procedure

- Consult your school policy
- If your policy does not establish procedure, create a flow for the hearing

SAMPLE MEETING AGENDA

4

Outline live hearing rules

- Authority of the decision-maker at the hearing
 - Permission to speak, requests for breaks, etc.
- Consequences of not submitting to cross-examination
- Expectations of rules and decorum
 - Punctuality, inclusive language, prohibited behavior, etc.
- Relevance under Title IX

SAMPLE MEETING AGENDA

5

Establish timeframe

- Share date and time for live hearing
- Explain potential length of hearing
- Discuss technology logistics

6

Answer Questions

- Discuss any barriers, concerns, needs, or worries
- Ensure no questions are left unanswered, this is the time to clarify for all parties



Remind the parties one final time about informal resolution options. This may be the last chance to explore them.

NAVIGATING CHALLENGES



QUESTIONS?