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Facilitating Hearings With Confidence

August 19, 2021
Speakers: Judge Michael Jamison & Judge Patricia Riehl
Pre-Hearing Meetings
What is a pre-hearing meeting?

• Meeting prior to the hearing that provides the opportunity to:
  • Clarify the purpose of the live hearing and standard of evidence
    • Preponderance of the Evidence vs. Clear and Convincing Evidence
  • Discuss the practical mechanics of the hearing
  • Establish the allegations & related evidence
  • Review the rights & responsibilities of the Parties & role of Advisors
  • Confirm witness attendance
  • Discuss relevancy
  • Answer questions
Who attends the pre-hearing meeting?

• Parties & Advisors
  • Advisors are invited, but not required, to attend
  • Parties may not have Advisors at this point

• Decision Maker(s) (“Hearing Officer”)

• Hearing Facilitator (if applicable)
When does the pre-hearing meeting occur?

• After Parties & Advisors have received & responded to the Investigative Report

• After the Investigation Report has been finalized

• Before the live hearing
Why can pre-hearing meetings be important for the parties?

• 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
Why can pre-hearing meetings be important for the parties?

• Parties are beginning to fully understand the hearing process & what it entails
  • Process & potential consequences of the Title IX process become “real”
  • 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
Why can pre-hearing meetings be important for Decision-Maker(s)?

- 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

Decision-Makers should review the investigative report prior to the pre-hearing meeting to become familiar with the case details, witnesses, and evidence.
Sample pre-hearing meeting agenda

1. Introductions
   • Parties, Advisors & Hearing Officer

2. Hearing Preparation
   • Confirm Parties’ access to Investigative Report & Evidence
   • Discuss witnesses that will be expected to attend the hearing

3. Review Live Hearing Procedures
   • May differ depending on the school’s Title IX policy
Sample Live Hearing Procedures

- Decision-Maker(s) opens the hearing
- Decision-Maker(s) questions Complainant
- Decision-Maker(s) questions Respondent
- Respondent Advisor cross-examines Complainant
- Complainant Advisor cross-examines Respondent
- Witnesses will be called and questioned by the Decision-Maker(s) and cross-examined by the Advisors
- Decision-Maker(s) concludes the hearing

⚠️ Hearing procedures may vary, as long as the school’s Title IX policy is followed.
Sample pre-hearing 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 & Rules of Decorum
     • Punctuality, inclusive language, prohibited behavior, etc.
   • Relevance under Title IX
What is not relevant under Title IX?

• Evidence about a Complainant’s sexual predisposition

• Evidence about a Complainant’s prior sexual behavior, except when:
  • Questions & evidence are offered to prove someone other than Respondent committed the alleged conduct; or
  • Questions & evidence concern specific incidents of the Complainant’s prior sexual behavior with respect to the Respondent & are offered to prove consent.

• Medical and similar privileged records unless the party has provided written consent
Sample pre-hearing meeting agenda

5. State date & time for the live hearing

6. Ask for questions from Parties & Advisors
Hearings & Hearing Officers
What is expected of Hearing Officers?

• Hearing Officers are independent examiners of the facts
• Hearing Officers are not judges
  • Not a court of law; but the outcome of any hearing has legal consequences
• Cannot be the Title IX Coordinator or Investigator
What to do when chosen as a Hearing Officer?

• Take a deep breath & say a prayer!
• Read & understand the school’s Sexual Harassment Policy
  • The Policy is the Hearing Officer’s guide throughout the process
• Read the Investigative Report & supplemental documents
• Organize the Report to easily access information during the hearing
• Take note of important statements & evidence from Report
  • This can inform the Hearing Officer’s direct examination questions
Crafting Direct Examination Questions

- Consider the Investigative Report
  - Are there any inconsistencies that need to be addressed or clarified?
  - What questions did the Investigator NOT ask the Parties or Witnesses that must be addressed?

- Use clear, specific language
  - Questions may need to address intimate or personal details
  - Use appropriate terminology
  - Do not be shy!

- Keep trauma in mind
  - Trauma impacts individuals differently
Hearing Day

* Be patient with scheduling

1. Opening Statement to the Parties
2. Direct examination of the Complainant
3. Complainant’s Advisor conducts cross-examination
   • Pause for relevance determinations
4. Direct examination of the Respondent
5. Respondent’s Advisor conducts cross-examination
   • Pause for relevance determinations

⚠ Actual order of direct and cross-examination may differ depending on the school’s Sexual Harassment Policy.
Conclusion of the Hearing

6. Request recommended sanctions & remedies from the Parties & school

7. Prepare the final written determination within 10 days

Do not share the determination with anyone in advance
Lessons learned

• A pre-hearing meeting should occur several days before the hearing

• Incidental findings can be discussed at the pre-hearing meeting

• Pre-hearing meetings allow the Hearing Officer to rule on evidence that a Party may legitimately want to exclude from the hearing
Dos and Don’ts

- **Do** make sure the Hearing Officer is trained
- **Do** understand the school’s Sexual Harassment Policy
- **Do** ask for the transcript of the hearing
  - Don’t surprise the Title IX Office with a transcript request on the day of the hearing
- **Do** phrase direct examination questions with trauma in mind
- **Do** be aware of Advisor power imbalances
  - Interject for clarification, if needed
  - Thorough direct examination may help “level” imbalances
Dos and Don’ts

• **Don’t** make the entire Investigative Report part of your record
• **Don’t** be guided or influenced by conclusions from the Investigator
• **Do** establish Rules of Decorum for the hearing
• **Don’t** forget that these are emotional and personal matters
• **Don’t** be afraid to step in if the hearing goes “sideways”
• **Do** be patient
• **Do** remember that kindness matters
Thank you!

Questions?

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