

Guide to Chairing a Hearing

ATIXA GUIDELINES

Topics Covered

- Pre-Hearing Prep
- Considerations in Running Effective Hearings
- The Hearing
- Considering and Evaluating Evidence
- Weighing Evidence
- Deliberations/Making a Determination
- Sanctioning
- Writing Decisions/Rationales
- Appeals

Pre-Hearing Prep

- The Hearing Panel will meet with the TIXC and/or Facilitator
- Hearing Panel will have a “Chair” selected
- TIXC/Facilitator will review with the panel:
 - The role of the Chair
 - The role of the panel
 - Hearing decorum
 - Review policy and procedure of hearings
 - Inform panel of virtual hearing practices (i.e. who will be virtual, who will be physically in attendance)
- The Chair and TIXC/Facilitator will meet and discuss any possible irrelevant evidence, statements or proposed questions
- Any content that is considered irrelevant within the final investigative report will be noted in writing from the Chair to panel members, all parties and their respective advisors with rationale of why it will not be used in the hearing

Pre-hearing Prep cont.

TIXC/Facilitator will remind the panel of their core responsibilities:

- Privacy and confidentiality issues;
- Expected decorum;
- Neutrality and equitable questioning;
- Bias, conflicts of interest and recusal;
- Standard of Evidence used
- Guidelines for recording, notetaking, and recordkeeping
- Review Trauma-Informed questioning and how a live hearing can re-traumatize

During pre-hearing prep the panel members will take advantage of this time to:

- get organized;
- discuss any issues;
- formulate questions;
- become familiar with the logistics of the hearing script;
- rule on any pre-hearing questions submitted by parties;
- rule on any pre-hearing efforts by parties to have evidence from the investigation declared, relevant, or irrelevant;
- Learn how the parties and witnesses will be participating (virtual, physical)
- Group review of the investigation report;
- Clarify policy, policy-based questions;
- Decide on who will ask questions – Will questions be from the Chair only? Will the panel rotate with different questioners (of different races, sexes, etc.)? Might particular question(s) be strategically more effective from one panelist versus others? Who will ask what, of whom? Pre-assigning can make the flow of questions at the hearing much smoother and can also avoid asking duplicative questions.

A hearing cannot function effectively or efficiently if a panel wastes time asking questions about information that is unambiguous and/or unchallenged according to the investigation report or materials, unless the purpose of the question is to help ascertain credibility.

Questions for the Hearing

The Panel should focus on the following:

- Relevant facts about what happened during the incident(s)
- Any related events
- Any corroborating information or other information that could illuminate the credibility or validity of evidence and/or testimony
- Facts necessary to establish a timeline
- Background information about the situation, the parties, and the witnesses that provides relevant context

When developing questions, consider the following:

- ✓ What do I need to know?
- ✓ Is the answer already in the investigation report or documentation that has been provided? If so, does it need to re-confirmed?
Am I the best person to ask this question? If not, who is the best panel member to ask it?
- ✓ Why do I need to know it? (if it is not going to help you decide whether a policy was violated, then it is probably not a good question.)
- ✓ What is the best and most concise way to ask the question?
- ✓ Asking empty content ladled questions just for questioning sake is not useful and a waste of time.
- ✓ Are these questions equitable? (do I need to ask both parties)

A Panel member asking a question may need to be prepared to explain their rationale for asking a question if challenged.

A Reporting Party's sexual predisposition is ALWAYS irrelevant and also contain limitations on when questions may be asked about the Reporting Party's sexual history. The investigators may have already this information in the report.

The TIX Regs state that there are only 2 exceptions:

- The questions and evidence about the Reporting Party's prior sexual behavior are offered to prove that someone other than the Responding Party committed the alleged conduct;
or
- If the questions and evidence concern specific incidents of the Reporting Party's prior sexual behavior with respect to the Responding Party and are offered to prove consent.

Considerations in Running Effective Hearings

The Chair, with assistance from the TIXC/Facilitator, is responsible for the orderly conduct of the hearing.

There will be a hearing script to follow during the hearing to ensure that the hearing is well-run and all pertinent announcements are made to the participants/attendees.

Per regulations, hearing attendance is limited to:

- Hearing Panel Members
- TIXC/Facilitator
- Investigators - throughout the hearing
- The parties and advisors
- Witnesses - only present during their testimony
- Anyone else in attendance should be specifically approved by the TIXC *in advance*

In-Person Hearings and Tech-Enabled Hearings

- All rooms and technology reserve and set-up will be completed by the TIXC/Facilitator. Some hearings may be both in-person and tech-enabled. The hearing panel will be notified prior to the hearing regarding where and how the hearing will proceed.
- The TIXC/Facilitator will be responsible for running the technology and handling any “private” rooms within the technology in order for parties and their advisors to speak privately if they are not in the same room at the time of the hearing.
- Whichever hearing type is happening, all parties must be able to inspect, review, and refer to any evidence gathered as part of the investigation that is directly related to the allegations, including evidence which the Chair/Panel does not intend to rely in reaching a determination. This is usually provided to the parties and their advisors through the final report. However, there may be something that the panel does not find relevant or last minute evidence that was not available at the time of the investigation that may need to be shared.
- Decorum of the hearing is the same whether in person or tech-enabled.

Hearing Decorum

The panel must always remember how critically important it is to maintain a professional, neutral, and respectful demeanor.

Aspire for discussion within the hearing to be professional, but as conversational and relaxed as possible to avoid coming across as too “judicial”.

Panelist must actively listen and should remain emotionally neutral for the duration of the hearing. The goal is to fully understand the parties’ accounts of the alleged misconduct and ensure they have the information needed to make a reliable determination.

Panel members demeanor should be:

- Calm
- Respectful
- Neutral

Panel members should avoid:

- Making snide remarks
- Sarcasm
- Sharp retorts
- Being smug, victorious or accusatory

Panel members should be well read enough into the investigative report that shock or disbelief or any emotion comes through during the hearing.

Tone of voice and facial expression of the panel is everything during a hearing. *Especially* if there is a lawyer present and things are not going in the direction of their party.

Hearing decorum is set by the panel.

Phones and/or other distracting devices should be silenced.

Panel members should do minimal note taking, consistently writing can make it seem like you are not actively listening.

Plan for short breaks. Hearings can be heavily emotional and having a break can help everyone involved.

Anyone from the Title IX team participating in the particular incident: TIXC, investigators, MC TIX Advisors, hearing panel, facilitator will be observed and judged by both the parties and their advisors. From the beginning to the end for anything that could possibly help their cause for an appeal depending on the determination.

During any break or at any time that you can be observed by the parties and their advisors, be courteous and friendly, but do not gather in an area to speak with each other. Panel members need to be viewed as neutral.

Panel members should dress professionally and comfortably for the hearing. Consider the parties and institutional culture.

Dress code for panel members needs to be “just right”. For example, slacks/skirts and shirt. Simple, but effective.

Excessive formal attire (business suit type) may create a barrier for the individuals involved who may not have access to such attire. On the other hand, too casual (jeans/t-shirt/favorite Birkenstocks) may unintentionally suggest that the panel members are not taking the proceedings seriously.

College branded items are a good source of clothing for panel members. But use caution if there is a sport branded on the shirt and an individual from an athletics is involved, the panel does not want to seem biased by wearing that particular team shirt.

The Hearing

Comfort With Language –

The nature of sex/gender-based harassment and discrimination can be graphic. Not only will you be hearing the words “penis” and “vagina” and/or all other names they are known by; as panel members, you will be on the speak them in your questions and deliberations.

Sexual harassment/assault cases can be emotional and traumatic for people to experience, but also to hear. Panel members must prepare to hear difficult things and to have their own emotional boundaries and limits tested.

During these types of hearings, there may be times when the panel decides to take a short break.

After the hearing is finished, there will be confidential debriefing sessions available for those TIX Team members who may need to express feelings over the experience.

If there are enough members available, the TIXC will have an alternate panelist chosen if a panelist should need to be fully excused from the hearing.

Recording and Documenting the Hearing-

The TIX Regs require at least an audio recording of the hearing. Recordings enable the parties to frame appeals and enable the Appeal Panel to review the proceedings if necessary.

In the hearing script provided to the Chair, this is one of the first topics announced for the parties and their advisors. The only recording allowed during the hearing is by Midland College due to FERPA. All parties and their advisors will be informed prior to the hearing and they will be allowed copies of the transcripts from the hearing.

The Title IX Coordinator is required to keep all records of the TIX hearing/appeals according to policy which is 7 years.

“Record” includes all notes physically taken and/or written during the hearing. So be very careful what you are writing.

Role of the Chair During the Hearing-

The Chair is responsible for ensuring the institution follows published procedures, maintains process integrity and efficiency, and makes all necessary administrative decisions during the hearing.

If a question occurs, the TIXC and/or Facilitator (if TIXC was part of the investigation) will be on hand for the Chair if a procedural issue arises.

The Chair will be provided a script prior to the hearing. The Chair will need familiarize themselves with process and flow of the script in order to ensure a professional hearing flow. This will also help clear up any questions with the TIXC and/or Facilitator prior to the hearing.

This script will allow the Chair to make opening remarks that clearly outline the hearing process. The script does not need to be memorized and can be used during the hearing.

The Script - Opening Remarks (all included in the script)

- Review of the allegations and clearly indicate each alleged policy violation as outlined in the hearing notice;
- Outline the procedures that will be used during the hearing, as well as the order of the hearings;
- Confirm with all participants that there are no anticipated interruptions or delays;
- Identify the Panel, parties, Advisors, witnesses, Investigators, and any others who are scheduled to appear;

- Review the technology being used and the recording of the hearings and that no one else may record the hearing;
- Indicate how the parties and Advisors pay confer during the hearing and any opportunities for breaks;
- Ensure the parties and Advisors have reviewed and understood the guidelines for decorum during the hearings. The Chair should reiterate that excessive disruptive behavior may result in the removal of Advisors or postponement of the proceeding;
- The Chair will discuss expectations of truthfulness and any consequences of false statements or misleading information or fabricated evidence.

Order/Sequence of Hearing (follows the script)

Sequencing of a hearing can be done many different ways. ATIXA recommends determining a typical order for witnesses and presentation of witnesses and using it consistently across all TIX hearings.

ATIXA Recommendation:

- 1) Investigation report summary by investigators and questioning of the investigators by panel and parties;
- 2) Reporting Party opening statement;
- 3) Questioning of the Reporting Party by Advisors and Panel;
- 4) Responding Party opening statement;
- 5) Questioning of the Responding Party by Advisors and Panel;
- 6) Questioning of Witnesses by Advisors and Panel;
- 7) Reporting Party makes a closing statement (not an impact statement);
- 8) Responding Party makes a closing statement (not an impact statement);
- 9) Chair closes the hearing and dismisses everyone (except facilitator);
- 10) Chair opens panel deliberation for determination of violation.

- During the hearing, all procedural questions or concerns must always be directed at the Chair. If a party or Advisor (who may be unaccustomed to this) can be gently reminded to direct questions to the Chair.
- Live hearing are NOT judicial and therefore “objections” are not necessary. Instead, the Chair should lead the Advisor who asked in the direction of “Why is that a question relevant?” or “Where are you going with that questions?”; it could be that relevance isn’t immediately apparent or the line of questioning could head in a potentially relevant or irrelevant direction.
- If the Chair determines the question not relevant or has been asked and the Advisor (specifically a lawyer) will want to argue the integrity of their question. The answer will be along the lines of “The ruling stands, but you can raise your concerns on appeal”.

Concluding the Hearing

At the conclusion of the hearing, the Chair will advise the parties of the next steps that include timeframe of determination, how parties and Advisors will be notified, and information on appeals.

If the hearing is in person, the Chair should dismiss parties and their advisors at staggering intervals so the parties may avoid any uncomfortable or contentious interactions immediately outside of the hearing area. The Facilitator will help with this.

Reference

Dunn, Timothy, J.D.; Hambleton, Mandy, M.S.; Morris, Leslee, J.D.; Pacelli, Kim, J.D.; Sokolow, Brett A., J.D.; Vincent, Joseph, M.L.S.; ATIXA Guide to Chairing a Hearing; 2021 ATIXA