

Hearing Panel/Decision Maker Training

Christine Taylor, J.D., LL.M.

Ara Zafar, J.D.

AGENDA

Update on the legal landscape and the new Title IX regulations

VAWA/Clery Act

Hearing Panel competencies

Wichita State University Policy

3.06/Sexual Harassment, Discrimination and Retaliation for Employees, Students and Visitors

Role and responsibilities of Hearing Panel/Decision Maker

- How to serve impartially
- Conducting a legally-compliant hearing process
- Relevance questions and evidence
- Best practices for decision-making
- Drafting a legally-compliant written determination
- Adjudication of a hypothetical case

Title IX

“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 educational program or activity receiving federal financial assistance.”

20 U.S.C. 1681 & 34 C.F.R. Part 106 (1972)

What's New

Title IX Regulations released May 6, 2020 and published May 19, 2020.

First time Title IX has the force and effect of law

- Enforceable by the Office for Civil Rights (“OCR”)

Set forth prescriptive due process protections

Addition of a hearings process

New policy updates – 3.06 Sexual Harassment, Discrimination, and Retaliation for Employees, Students and Visitors

New Regs pre-empt state and local laws

New Title IX Regulations

University is required to adopt a grievance process that complies with .06.45 of the new regulations for formal complaints as defined in .06.30.

- Requires a live hearing model with cross examination/questioning by an Advisor.
- Cross examination/questioning of all parties and witnesses

Provide persons entitled to notification information about the grievance process, including how to report or file a complaint of discrimination on the basis of sex, and how the university will respond.

Title IX Team

Title IX Coordinator or Designee

Investigator

Decision-Maker

- Hearing officers: One Chair and two panel members) Appeal Officer

Advisors (one for each party)

Title IX Team

Title IX Coordinator: Has the primary responsibility for coordinating the University's efforts related to the intake, investigation, resolution, and implementation of supportive measures to stop, remediate, and prevent discrimination, harassment and retaliation prohibited under WSU Policy 3.06.

Investigator: The person or persons charged by the University with gathering facts about an alleged violation of WSU Policy 3.06, assessing relevance, synthesizing the evidence, and compiling information into an investigation report and file of directly related evidence.

Title IX Team

Hearing Panel/Decision Makers: Those who have decision-making and sanctioning authority within WSU's Formal Grievance Process.

Advisor: A person chosen by party or appointed by the University to accompany the party to meetings related to the resolution process, advise the party on that process, and to conduct cross-examination for the party at the hearing.

Definitions and Key Concepts

Complainant: an individual who is alleged to be the victim of conduct that could constitute harassment or discrimination based on a protected class; or retaliation for engaging in a protected activity.

Respondent: an individual who has been reported to have engaged in conduct that could constitute harassment or discrimination as defined within this policy; or retaliation for engaging in a protected activity.

Definitions and Key Concepts

Formal Complaint: a document filed/signed by a Complainant or signed by the Title IX Coordinator alleging harassment or discrimination based on a protected class or retaliation for engaging in a protected activity against a Respondent and requesting that the University investigate the allegation.

- Document filed means a document or electronic submission (email or online report) that contains the Complainant's physical or digital signature or indicates that the person filing the formal complaint is the Complainant.
- The TIXC can sign a complaint but is not a party or Complainant in the process.

Definitions – Sexual Harassment

Sexual Harassment: The umbrella category including the offenses of sexual harassment, sexual assault, dating violence, domestic violence and stalking.

Conduct on the basis of sex (meaning sexual or sexualized conduct) that satisfies one or more of the following:

- **Quid Pro Quo:** An **employee** of the university, who conditions the provision of an aid, benefit, or service of the university, on an individual's participation in unwelcome sexual conduct and/or
- **Sexual Harassment:** Unwelcome conduct, determined by a reasonable person to be so severe, and pervasive and objectively offensive, that it effectively denies a person equal access to the university's education program or activity.

Sexual Assault

Sexual Assault: Means one of the following sexual offenses, whether forcible or nonforcible, when directed at another person without that person's consent, including instances where the person is incapacitated:

- **Rape** – The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the Complainant.
- **Fondling** – The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Definitions – Sexual Assault Continued

- **Incest** – Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Kansas law.
- **Statutory Rape** – Nonforcible sexual intercourse with a person who is under the statutory age of consent (16 years of age in Kansas).

Definitions – Sexual Harassment Continued

Dating Violence: Is defined as violence committed by a person who is or has been in a social relationship or romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on the complainant's statement with consideration of the length of the relationship, type of the relationship, and the frequency of interaction between the persons involved in the relationship.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

Definitions – Sexual Harassment Continued

Domestic Violence: Defined as a felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the complainant;
- By a person with whom the complainant shares a child in common;
- By a person who is cohabitating with or has cohabitated with, the complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the Complainant under Kansas domestic or family violence laws; or
- By any other person against an adult or youth complainant who is protected from that person's acts under Kansas domestic or family violence laws.

Domestic Violence

The important change: To categorize the incident as DV under this policy, the relationship between the respondent and the complainant must be more than just two people living together as roommates. The people must be current or former spouses or have an intimate relationship.

Definitions – Sexual Harassment Continued

- Stalking:** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
- Fear for the person’s safety or the safety of others; or
 - Suffer substantial emotional distress.

Stalking

For the purposes of this definition—

- **Course of conduct** – two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- **Reasonable person** – a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** – significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

NOTE

With respect to the above definitions: If the preponderance of the evidence shows that it is more likely than not the conduct occurred it is not necessary for the Decision-Maker to proceed with an analysis of *severe, pervasive, objectively offensive*. ***Because by definition it is severe, pervasive, objectively offensive*** and there is a finding of sexual harassment.

Other Sex-Based Offenses

- **Discrimination on the basis of sexual orientation, gender identity or gender expression:** Providing differential treatment on the basis of sexual orientation, gender identity or gender expression, or harassment on the basis of sexual orientation, gender identity or gender expression.
- **Discrimination against pregnant and parenting students:** Providing differential treatment on the basis of a student's status as pregnant or parenting, or harassment on the basis of a student's status as pregnant or parenting.

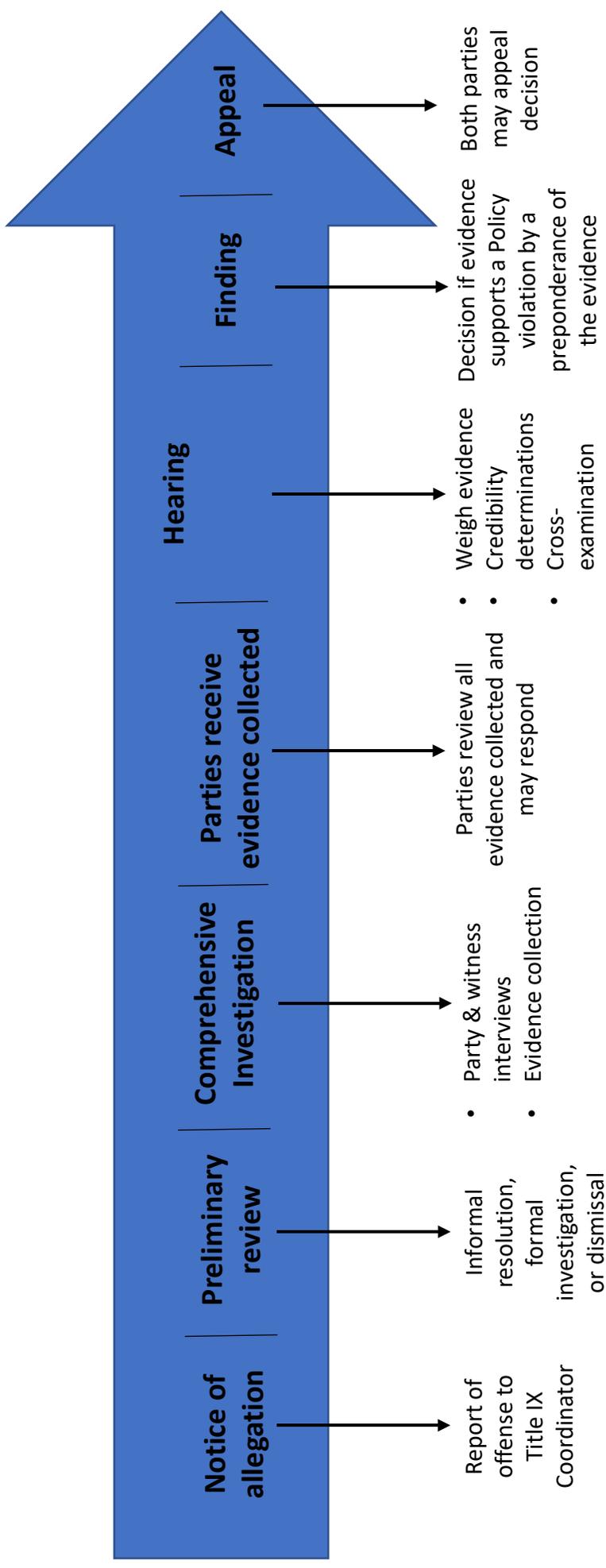
https://www.wichita.edu/about/policy/ch_08/ch8_21.php

What Happens When OIEC Receives a Report

University Response:

- Contact the individual impacted
 - OIEC responds to every report
- Offer appropriate supportive measures (interim measures)
- Inform of their options and explain process for filing a Formal Complaint (“FC”)
 - TIXC files a FC
- Other considerations
- Investigate every FC

WSU Title IX Complaint Process



https://www.wichita.edu/about/policy/ch_03/ch3_06.php

University Response

Must respond promptly in a manner that is not **deliberately indifferent** to actual knowledge of sexual harassment in an education program or activity of the university against a person in the United States.

Education program or activity: locations, events, or circumstances over which the university exercises substantial control over both the Respondent and the context in which the sexual harassment occurs. This includes any building owned or controlled by a student organization that is officially recognized by the university.

Prompt Contact

The Title IX Coordinator promptly makes **supportive measures** available to the parties upon receiving notice or a complaint.

At the time that supportive measures are offered, the University will inform the Complainant, in writing, that they may file a formal complaint with the University either at that time or in the future, if they have not done so already.

The Title IX Coordinator works with the Complainant to ensure that their wishes are taken into account with respect to the supportive measures that are planned and implemented.

Supportive Measures

Supportive measures: non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the parties to restore or preserve access to the University's education program or activity, including measures designed to protect the safety of all parties or the University's educational environment, and/or deter harassment, discrimination, and/or retaliation.

- Consider the Complainant's wishes
- Inform Complainant the supportive measures are available with or without the filing of a formal complaint
- Must treat Complainants and Respondents equitably by offering supportive measures to both as defined in §106.30

Supportive Measures

Referral to counseling, medical, and/or other healthcare services

Referral to the Employee Assistance Program

Visa and immigration assistance

Student financial aid counseling

Referral to community-based service providers

Altering campus housing assignment(s)

Altering work arrangements for employees or student-employees

Safety planning

Providing campus safety escorts

- Providing campus safety escorts
- No contact orders between the parties
- Academic support, extensions of deadlines, or other course/program-related adjustments
- Trespass
- Timely warnings
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- Any other actions deemed appropriate by the Title IX Coordinator

Other Considerations

Emergency Removal- The University can act to remove a Respondent entirely or partially from its education program or activities on an emergency basis when an individualized safety and risk analysis has determined that an immediate threat to the physical health or safety of any student or other individual **arising from the allegations of sexual harassment** justifies removal.

- Provide Respondent with notice and opportunity to challenge the decision immediately following removal. Must respect all rights under ADA/504 as applicable.

- A Respondent may be accompanied by an Advisor of their choice when meeting with the Title IX Coordinator for the show cause meeting. The Respondent will be given access to a written summary of the basis for the emergency removal prior to the meeting to allow for adequate preparation.

Emergency Removal

The University will implement the least restrictive emergency actions possible in light of the circumstances and safety concerns. At the discretion of the Title IX Coordinator, alternative coursework options may be pursued to ensure as minimal an academic impact as possible on the parties.

Employee Administrative Leave

TIXC may place a non-student employee respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Sec. 504/ADA.

University Response

Promptness: Allegations are acted on promptly once the University has received notice or a Formal Complaint. The University typically resolves complaints between 60-90 days.

- There are exceptions and extenuating circumstances. Parties will receive written notice if there will be a delay, the reason for the delay and the estimated additional time needed.

University Response

Equity of Rights

- Complainants and Respondents are treated equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.
- Remedies must be designed to restore or preserve equal access to the university's education program or activity.
- Post-determination remedies may include the same individualized services described "supportive measures" in WSU's policy and in §106.30. The remedies can be disciplinary or punitive and need not avoid burdening the respondent.

Due Process

Due Process in Procedure:

- Consistent, thorough and procedurally robust handling of the allegations
- The university substantially complied with its published policies and procedures
- Policies and procedures afford sufficient Due Process rights and protections

Due Process in the Decision/Determination

- The decision is reached on the basis of the evidence presented
- The decision on a finding of responsibility and sanction are impartial and fair.

Grievance Process – Procedural Due Process

The procedures reviewed apply only to **qualifying allegations of sexual harassment** (sexual assault, dating violence, domestic violence and stalking) involving students, staff, administrators or faculty members.

The procedures reviewed also apply to **qualifying allegations of sex-based offenses** (sex discrimination on the basis of sexual orientation, gender identity, gender expression, sexual exploitation, and discrimination against pregnant and parenting students).

Grievance Process – Procedural Due Process

Notice/Complaint: Upon receipt, the University initiates an initial assessment to determine appropriate next steps.

- Offering supportive measures
- Informal resolution;
- Formal Grievance Process including an investigation and live hearing

Only an investigation and grievance process will determine whether the Policy has been violated.

Initial Assessment – Procedural Due Process

Does the Complainant wish to make a Formal complaint?

- Yes: TIXC will assist if desired
- No: does the TIXC initiate the complaint based upon the VRA?

If a Formal Complaint Received

- Notice
- Formal investigation
- Evidence
- Investigative Report
- Hearing

Notice to Parties – Procedural Due Process

Written Notice must be provided to Respondent (if known)

- Notice about the Formal Grievance Process (including informal resolution processes)
- Allegations of sexual harassment, including as many specific details known at the time. Including date and location of the incident (if known)
- Identities of the parties involved in the incident (if known)
- The conduct constituting sexual harassment as defined by §106.30.
- Statement that the Respondent is presumed no responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process

Notice to Parties – Procedural Due Process

Inform the parties that they may have an Advisor of their choice. The Advisor may be but is not required to be an attorney. The Advisor may inspect and review evidence with a party

- Advisors must agree in writing not to share information or evidence outside of the grievance process

Inform the parties of the Code of Conduct provision that prohibits knowingly submitting false information or knowingly making false statements during the Grievance Process.

Provide notice of any additional allegations added after the initial notice to the parties whose identities are known.

Mandatory Dismissal – Procedural Due Process

The University **must** dismiss a Formal Complaint or any allegations if, at any time during the investigation or hearing it is determined that:

- The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Policy even if proved; and/or
- The conduct did not occur in an educational program or activity controlled by the University (including buildings or property controlled by recognized student organizations), and/or the University does not have control of the Respondent; and/or
- The conduct did not occur against a person in the United States; and/or
- At the time of filing a formal complaint, a complainant is not participating in or attempting to participate in the education program or activity of the University.

Discretionary Dismissal – Procedural Due Process

The university **may** dismiss a Formal Complaint or any allegations therein if, at any time during the investigation or hearing:

- A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein; or
- The Respondent is no longer enrolled in or employed by the University; or
- Specific circumstances prevent the University from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Right to an Advisor – Procedural Due Process

The parties may each have an Advisor of their choice present with them for all meetings and interviews within the resolution process, if they so choose. The parties may select whomever they wish to serve as their Advisor.

- This could include an attorney, advocate or support person.

The Advisor cannot have institutionally conflicting roles, for example, the Title IX Coordinator who has an active role in the matter, or a supervisor who must monitor and implement sanctions.

A party cannot insist on an Advisor who doesn't have the inclination, time or availability.

Who Can Serve as an Advisor?

The Advisor may be a friend, mentor, family member, attorney, or any other individual a party chooses to advise, support, and/or consult with them throughout the resolution process. The parties may choose Advisors from inside or outside the university community.

Parties also have the right to choose not to have an Advisor in the initial stages of the resolution process, prior to a hearing.

The Title IX Coordinator will also offer to assign a trained Advisor for any party if the party so chooses if the party does not have an advisor **at the time of hearing**

- If the parties choose an Advisor from the pool available from the University, the Advisor will be trained by the University and be familiar with the University's resolution process.

Advisors in Hearings/University- Appointed Advisor

Under U.S. Department of Education regulations applicable to Title IX, cross-examination is required during the hearing, and must be conducted by the parties' advisors. The parties are not permitted to directly cross-examine each other or any witnesses.

If a party does not have an Advisor for a hearing, the University will appoint a trainee advisor for the limited purpose of conducting any cross-examination.

A party may reject this appointment and choose their own Advisor, but they may not proceed without an Advisor. If the party's Advisor will not conduct cross-examination, the University will appoint an Advisor who will do so regardless of the participation or non-participation of the advised party in the hearing itself.

Extensive questioning of the parties and witnesses will also be conducted by the decision-maker(s) during the hearing.

Advisor's Pre-Hearing Role

The parties may be accompanied by their Advisor in all meetings and interviews at which the party is entitled to be present, including intake and interviews.

Advisors should help the parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith.

The University cannot guarantee equal Advisory rights, meaning that if one party selects an Advisor who is an attorney, but the other party does not or cannot afford an attorney, the University is not obligated to provide an attorney.

Privacy

Resolution proceedings are private. All persons present at any time during the resolution process are expected to maintain the privacy of the proceedings in accordance with University policy.

- **Members of the Grievance Pool will not discuss these matters outside the proceedings.**

While there is an expectation of privacy around what Investigators share with parties during interviews, the parties have discretion to share their own knowledge and evidence with others if they so choose.

- The university encourages the parties to share the information with their Advisors.

Burden of Proof and Evidence

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility by a preponderance of the evidence rests with the University.

- While the burden of gathering evidence rests with the University, the parties are given the opportunity to provide any evidence they believe is relevant .
E.g. text messages, social media postings, voicemail etc..

Both parties are provided an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

Investigation Report

Prior to the completion of the investigation, the investigator will prepare an **investigation report** summarizing the investigation.

- Includes summary statements of the parties and any witnesses, and evidence provided by the parties and witnesses (including fact and expert witnesses).
- The report, including all evidence **directly related** to the complaint, is sent to each party and their Advisors. In addition, the investigator will include all relevant evidence upon which the investigator does not intend to rely on, and all inculpatory and exculpatory evidence obtained during the investigation
- Sent electronically

Investigation Report

The parties and their Advisors will have 10 days to submit a meaningful written response, which the investigator will consider prior to completion of the investigation report.

- Not required; parties have the **opportunity** to do so

The final investigation report will be sent to both parties and their Advisors at least 10 before the hearing, for their review and written response.

Sent electronically

Referral for Hearing

The Title IX Coordinator will select appropriate Decision-makers from the Pool depending on whether the Respondent is an employee or a student. Allegations involving student-employees will be directed to the appropriate Decision-makers depending on the context of the alleged misconduct.

A referral for hearing is made once the final investigation report is transmitted to the parties and the Decision-maker(s)– The hearing cannot be less than ten (10) business days from the conclusion of the investigation/when the final investigation report is transmitted *unless* all parties and the Decision-maker(s) agree to an expedited timeline.

Decision-Makers

The University will designate a three-member panel from the Pool, at the discretion of the Title IX Coordinator. One of the three members will be appointed as Chair by the Title IX Coordinator.

The Decision-maker(s) will not have had any previous involvement with the investigation. The Title IX Coordinator may elect to have an alternate from the Pool sit in throughout the resolution process in the event that a substitute is needed for any reason.

Those who have served as Investigators will be witnesses in the hearing and therefore may not serve as Decision-makers. Those who are serving as Advisors for any party may not serve as Decision-makers in that matter.

Decision Makers & Confidentiality

It is critical that proceedings and cases remain confidential

- Do not discuss with anyone who is not involved
- Only discuss in a private setting
- Failure to maintain confidentiality should be grounds for dismissal from the Hearing Pool

FERPA & Educational Records

- Students have a right to review their records
- Exercise caution with what you put in writing or in your notes

Employee Records

Decision Maker Tips

Be professional, not lawyer-like or judge-like*

Strive to determine whether the Respondent(s) violated university policy

Serve as “*Process Keepers*” and integrity is the highest priority

*We know this is difficult, we are lawyers too!

Pre-hearing Process

Decision-makers chosen to make up the three-person hearing panel

- One chair, two additional panelists
- TIXC notifies the parties and advisors

Pre-hearing conference (Recorded)

- Reviewing evidence and investigation report
- Determination of admissibility, boundaries with respect to evidence that will be permissible during the hearing
- Discussion with advisors on questions on cross-examination
 - Avoiding surprise questions
- Stipulation of certain evidence (including party statements) and witness statements

The Hearing – Immediately Preceding the Hearing

- Time to review the investigation report and evidentiary materials
- Chair answers procedural questions
- Review key questions pertaining to the allegations