

GRAND RIVER | SOLUTIONS

# Hearings in the New Era: Are You Ready?

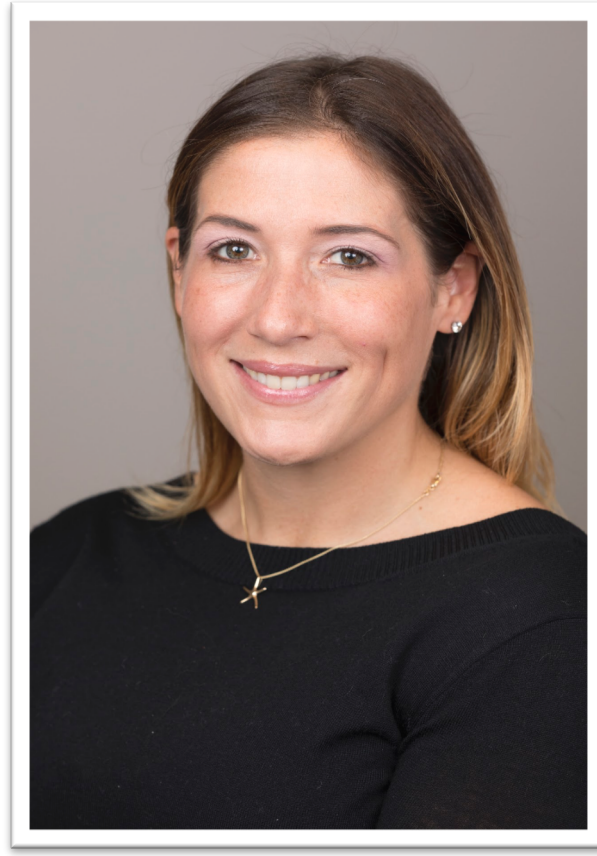
## Day One

Jody Shipper and Chantelle Cleary



**Jody Shipper, J.D.**

Co-founder and Managing Director  
Grand River Solutions



**Chantelle Cleary, J.D.**

Senior Consultant  
Grand River Solutions



# About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

# Today's Agenda

01

Regulatory Overview

05

Hearings Logistics

02

The Infrastructure for Compliance

06

Evidentiary Issues

03

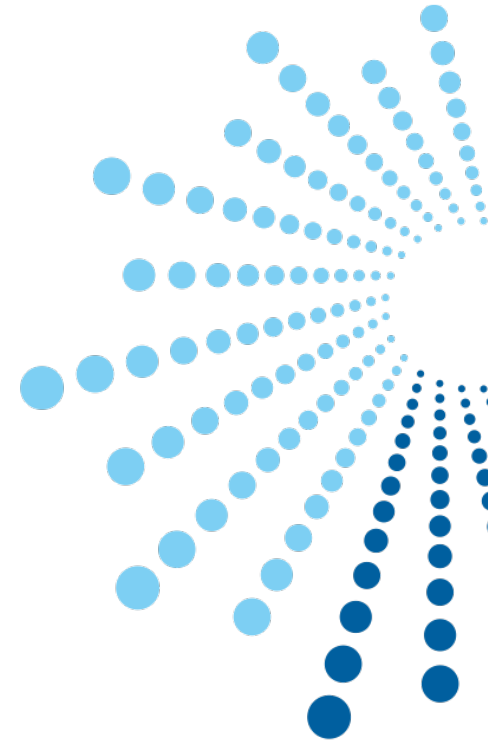
Roles and Responsibilities

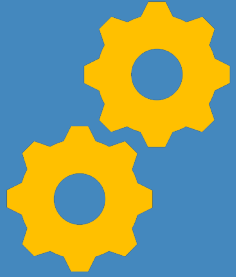
07

Post-Hearing

04

Pre-Hearing Tasks





# The Infrastructure for Compliance

An overview of what is required and what is needed to comply

PART 1

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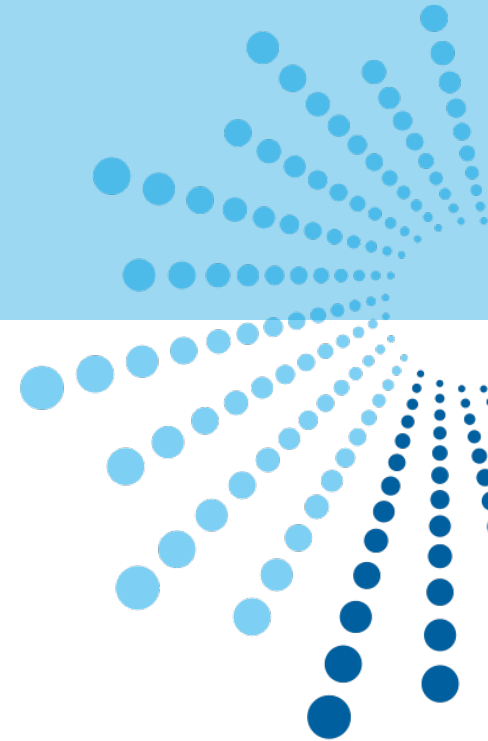


# Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements

01

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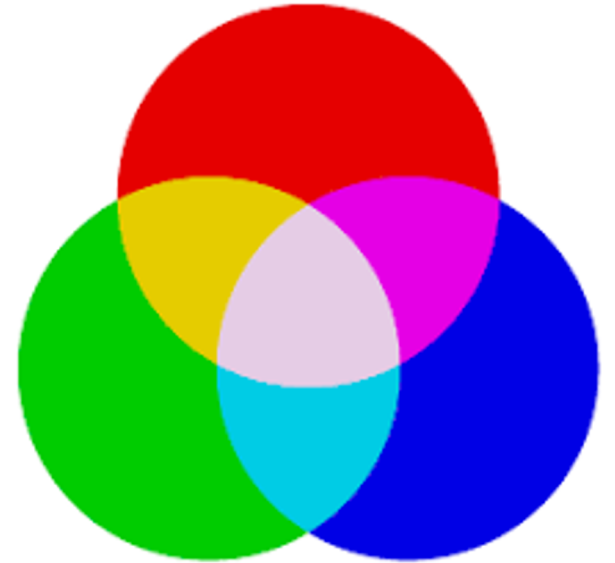
# What is Covered by Title IX

- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

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# What (Mis)Conduct is Covered by the New Regulations' Processes?

- Sexual Harassment
  - Hostile Environment
- Quid Pro Quo (employee to student)
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking





# It Was Bad, But Not Title IX Bad

If not 106.30, then no 106.45

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**1. Nature of Complaint:**

- A complaint of sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
- A complaint of Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
- A complaint of quid pro quo sexual harassment by an employee respondent against a student.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

**2. Location:**

- The incident(s) occurred at school, within the United States;
- The incident(s) occurred as part of a recognized program in in a building under the school's control, and within the United States;
- The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

**3. The institution has control over the respondent, meaning the Respondent is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed). In addition, the institution may have control over a respondent who is a contractor, an alum, or a vendor under certain circumstances.**

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

**4. Complainant is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed), or otherwise still accessing or attempting to access a university program or activity, within the United States.**

If yes to one of the above, continue. If no, please see (go to basic sex harassment policy).

# Definition of Sexual Harassment

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

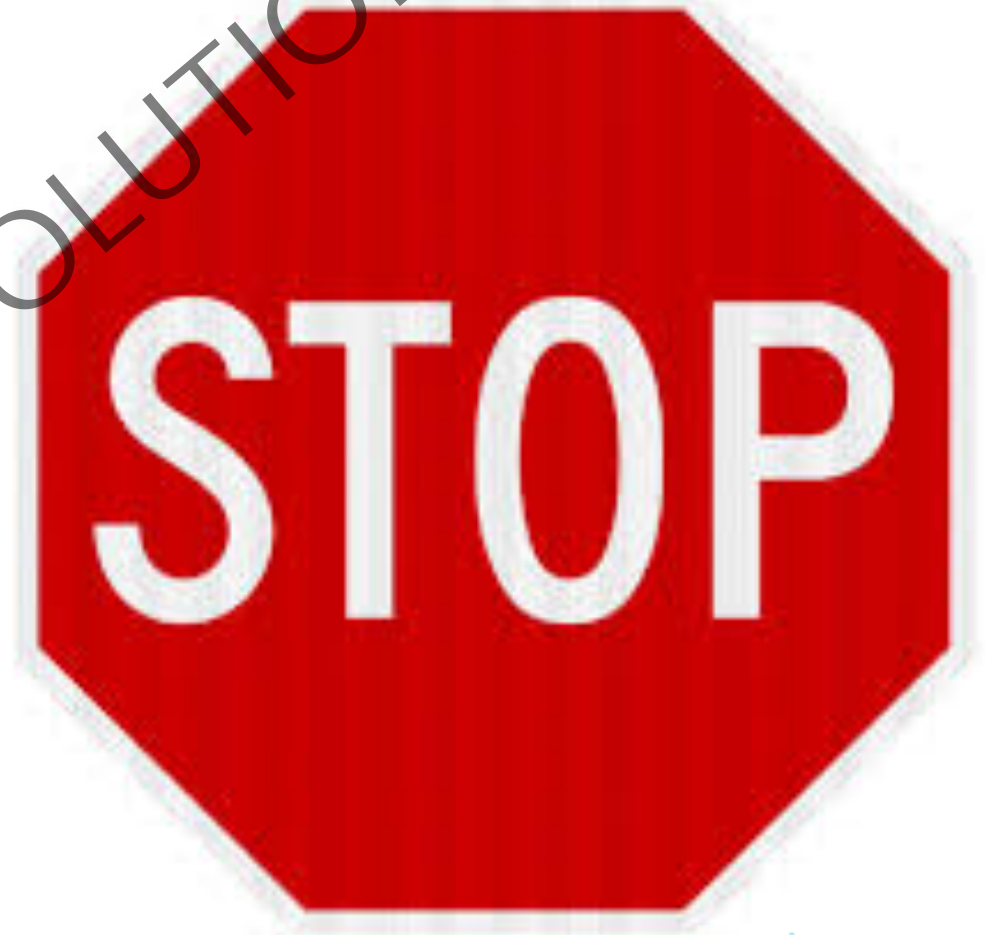
- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively 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).

# Sexual Assault, Dating Violence, Domestic Violence, Stalking

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Remember; Jurisdictional elements apply

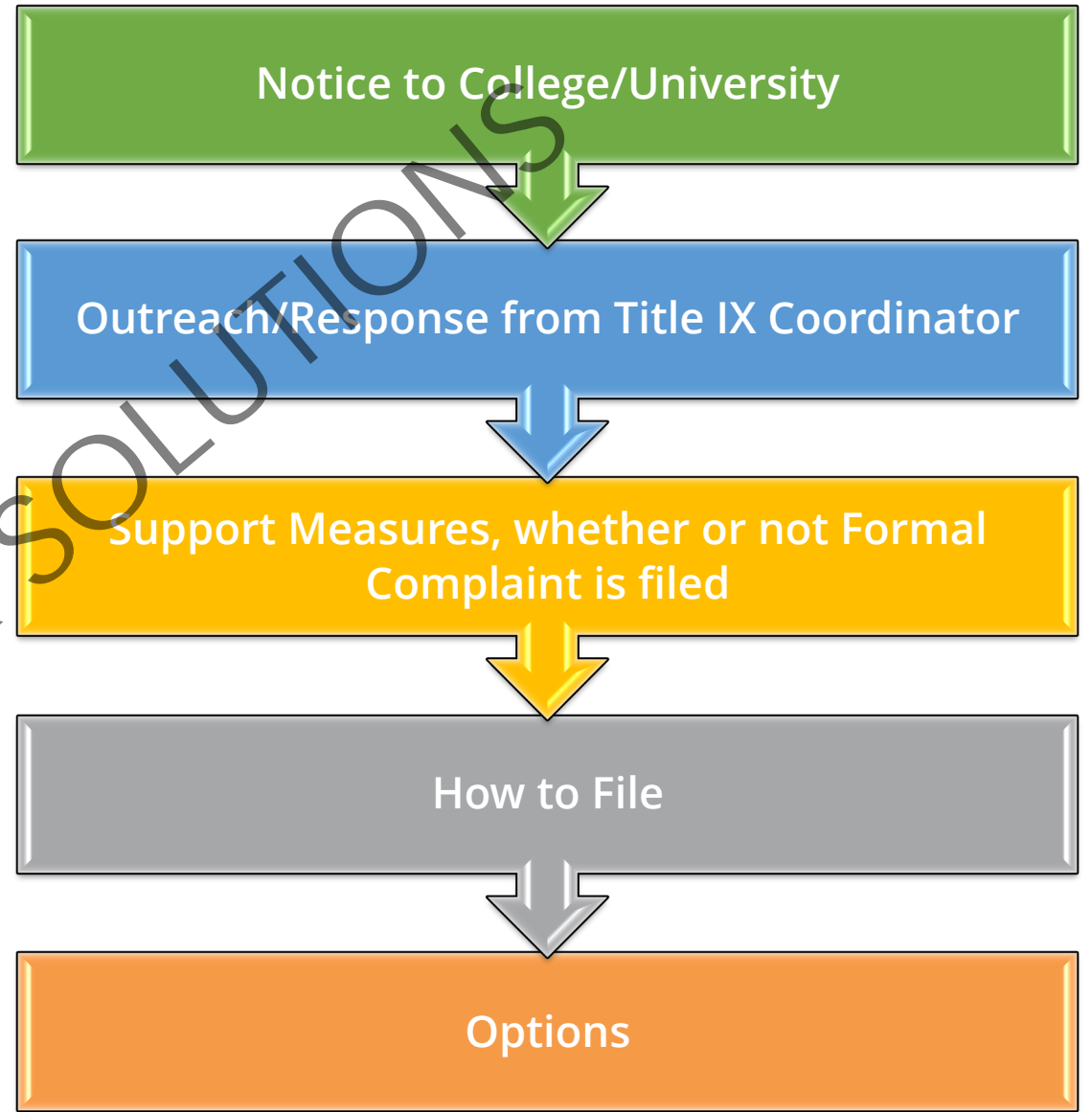
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# Before The Investigation

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# 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

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# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

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

Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction

What do we  
need to do  
all of this?



Space



Technology



Clear & Comprehensive Procedures



Staff



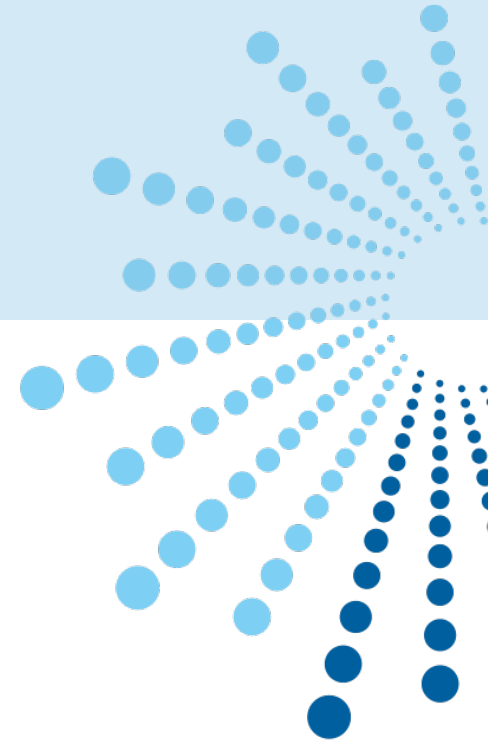
Expertise and Confidence





# The Infrastructure for Compliance

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02

# Purpose of the Hearing

Why does it matter?

Review and  
Assess  
Facts



Make  
Findings of  
Fact



Determine  
Responsibility  
/ Findings of  
Responsibility



Determine  
Sanction  
and  
Remedy

# The Essential Elements of All Hearings

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Clear Procedures

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Due/Fair Process

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Fair, Equitable, and Neutral

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Consistency

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Trauma Informed

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Well Trained Personnel

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# Clear Procedures

## The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

## The Players

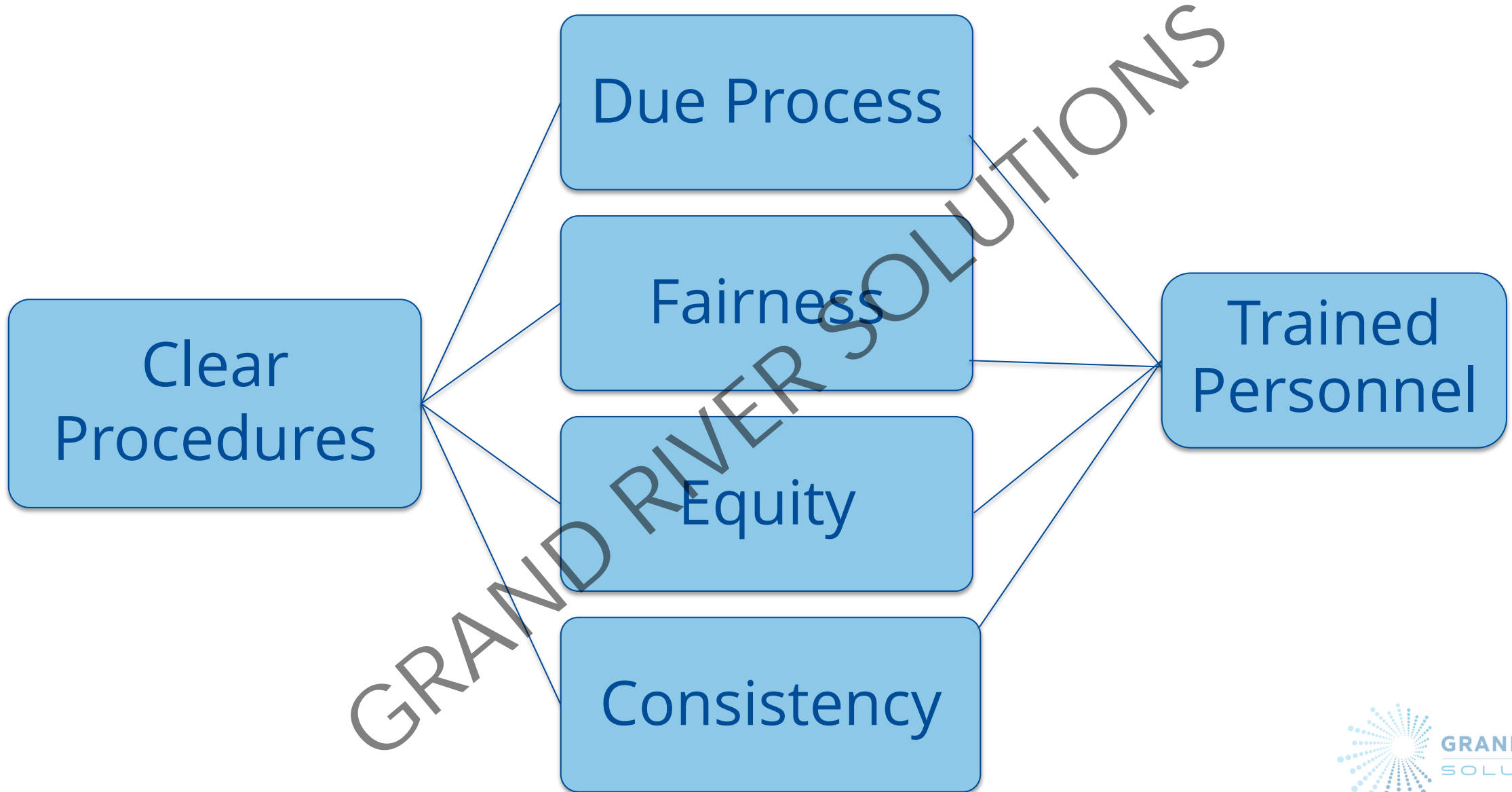
- The roles of all participants

## The Evidence

- Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

## The Outcome

- Deliberations; Notice; manner and method communicated.



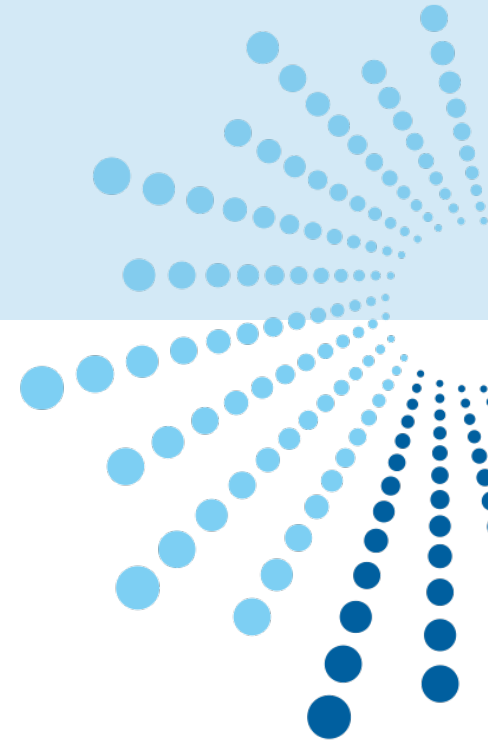


# Roles and Responsibilities

People, Functions, and Impartiality

03

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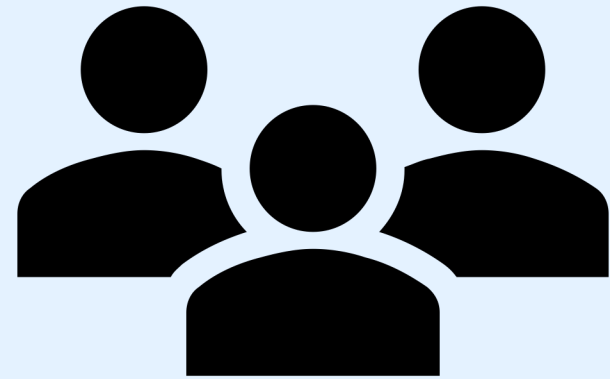


# Hearing Participants

Complainant	the person bringing the complaint
Respondent	the person against whom the complaint has been filed
Advisor	will conduct cross examination; role varies depending on school
Adjudicator(s) or Panelist(s)	role varies depending on when in the process the hearing occurs and responsibility of the officer
Investigator	summarizes the investigation, answers questions
Witnesses	present in the room only when answering questions
Hearing Coordinator/Officer	coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants
Decision-Maker	makes decision as to whether policy was violated
Administrative Staff	assists with the logistical coordination of the people, the space, technology, etc.

# Other Considerations Panel

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?





Who is  
NOT  
in the  
Hearing?

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General Counsel

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Parents

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Student newspaper

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Interested faculty

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Title IX Coordinator

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# The Players

## Hearing Advisors

- Will conduct examination/cross
- Roles
- Training/Qualifications
- Communicating their role
- Enforcing their role

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# The Players

## Support Person

- Optional
- Silent
- Roles
- Communicating their role
- Enforcing their role

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# The Players

## The Coordinator/Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Voting or non-voting
- Writes the decision
- Trained

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# The Players

## The Decision Maker

- May be Hearing Chair or on panel
- Determines whether policy was violated
- Cannot be investigator, Title IX Coordinator, or Appeals Officer

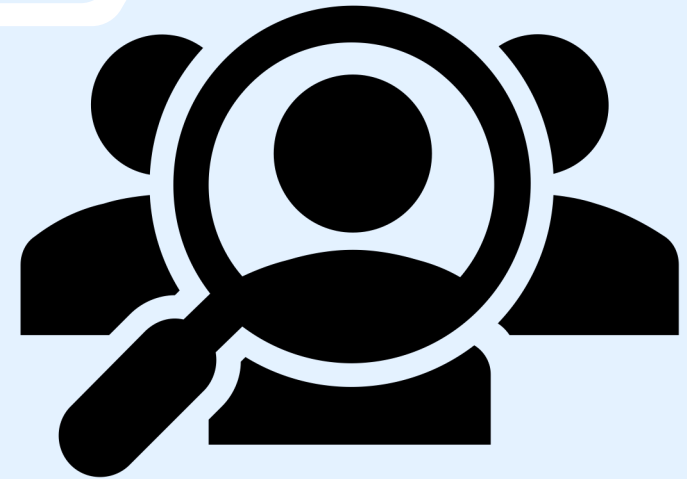
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# The Players

## The Panel

- Fact finders
- Number of panelists?
- Composition?
- Makes the finding
- Unanimous?
- Pool?
- Recruitment and retention



# Impartiality

WHAT DOES THIS *REALLY* MEAN?

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# Prejudging

- “Believe all victims”?
- Is bringing forward a case a “judgment”?
- Avoiding any presumption of responsibility

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# Bias? Conflict of Interest

- Being anti-rape
- The investigator once took a women's studies course
- The appeals officer wrote on Facebook last week that if a boy is accused, he definitely did at least *something* wrong
- The Title IX Coordinator went to the same college as the Complainant's mother
- The Title IX Coordinator's daughter works for the Complainant's mother



# Logistics of a Hearing

# Considerations for the Physical Space

- Room location and set-up
  - Entrances, exits, and proximity
- Privacy screens & partitions
- Technology
- Hallway control
- Space for extra visitors

# Hearing Room Configuration

Investigator & Hearing  
Coordinator

Hearing Officer

Witness

Respondent &  
Advisor

Complainant &  
Advisor

# Remote Participation

- **In whole or in part?**
- **Communication considerations**
  - Chat function or emails
- **Private consultation between parties and advisors**
  - Use of breakout rooms
  - Communication considerations
- **Practice runs**
- **Connectivity Considerations**

# Other Considerations

Time Limits

Breaks

Formality,  
Order and  
Gate-Keeping

Handling  
disruptions and  
interruptions

Poor behavior?

Recording



# The Hearing

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PART 2



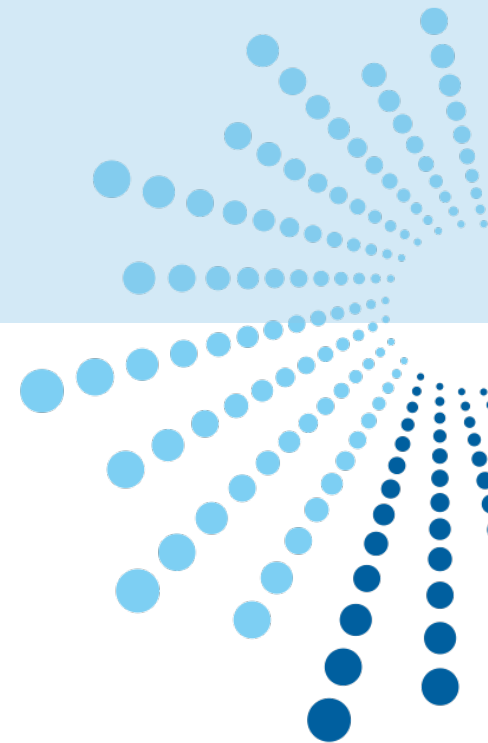


# Pre-Hearing Tasks

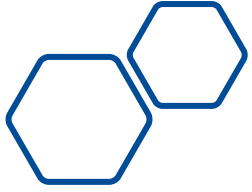
What should be done in advance of the hearing

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# Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments



# Pre-Hearing Preparation of Participants

# The Parties and their Advisors, and the Witnesses

## Pre-hearing instructions

- Via conference or meeting
- In writing

## Set expectations

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

# The Decision Maker(s)



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



Anticipate challenges or issues





# Hearing Logistics

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05

# Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

*This should be scripted and used consistently.*



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# Opening Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Requiring submission prior to hearing
  - Word limit
  - Time limit

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# Testimony

Procedures should be clear about:

- Order of/parties and witnesses
  - Could simply leave this up to the decision maker
- Order of examination
  - Questioning by the decision maker
  - Cross examination by the advisor
  - Will the advisor be permitted to question their own party?
  - Will there be a second round of questioning?
- Consistency is essential. Consider putting this all in your procedures.



# Cross Examination

Who does it?

- Must be conducted by the advisor
- If party does not appear or does not participate, advisor can appear and cross
- If party does not have an advisor, institution must provide one

# Cross Examination

## Permissible Questions

- Questions must be relevant
- Not relevant
  - Duplicative questions
  - Questions that attempt to elicit information about
    - Complainants prior sexual history
    - Privileged information
    - Mental health

# Cross Examination

## Role of the Decision Maker

- Rulings by Decision Maker required
  - Explanation only required where question not permitted

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# Cross Examination

## Impact of Not Appearing

- Exclusion of all statements of that party
- Exception- DOE Blog
- What if a party or witness appears, but does not answer all questions

# Closing Statements

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- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Time limit
  - Submission in writing after the hearing

# Common Challenges

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party or witness appears but declines to answer some (or all) questions
- Disruptions
- Maintaining Decorum

# Tips for Increasing Efficiency

01

Be prepared

02

Have an  
experienced chair

03

Have back up plans  
for technology  
issues

04

Require pre-  
hearing written  
submissions

- of opening statements
- of questions in advance

# Being Trauma-Informed

## Training your panel/adjudicators

- Asking questions
- Asking “why”
- Filtering questions of the parties

## Preparing parties

- Reviewing the investigation report
- Sharing their story again
- Answering questions again

## The attraction of prudent interests





# Evidentiary Issues

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# Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary

# Types of Evidence

## **Direct Evidence**

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

## **Circumstantial Evidence**

Evidence based on inference and not on personal knowledge or observation.

## **Corroborating Evidence**

Evidence that differs from but strengthens or confirms what other evidence shows

# Non-Testimonial Evidence

Text Messages	Social Media posts	Social Media Communications	Emails
Surveillance	Videos	Photographs	Police Body Camera Footage
Swipe Records	Medical Records	Phone Records	Audio Recordings

# Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

**EVIDENCE**

# 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 really on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

Logical connection between the evidence and facts at issue

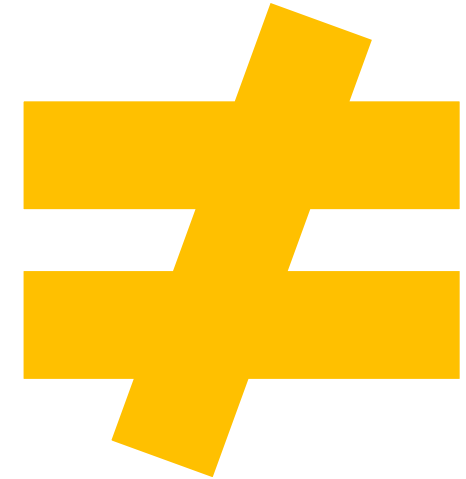
Assists in coming to the conclusion – it is “of consequence”

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



# Relevance is Not...

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial, direct
- Based on complicated rules of court



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# Assessing Authenticity

Investigating the products of the investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.

# Assessing Credibility and Reliability

**No formula exists, but consider the following:**

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
- Your own bias and limited experience

# Assessing Reliability

Inherent plausibility

Logic

Corroboration

Past record

Other indicia of reliability

# Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give  
unreliable testimony**

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# Credibility Versus Reliability

## Reliable evidence:

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

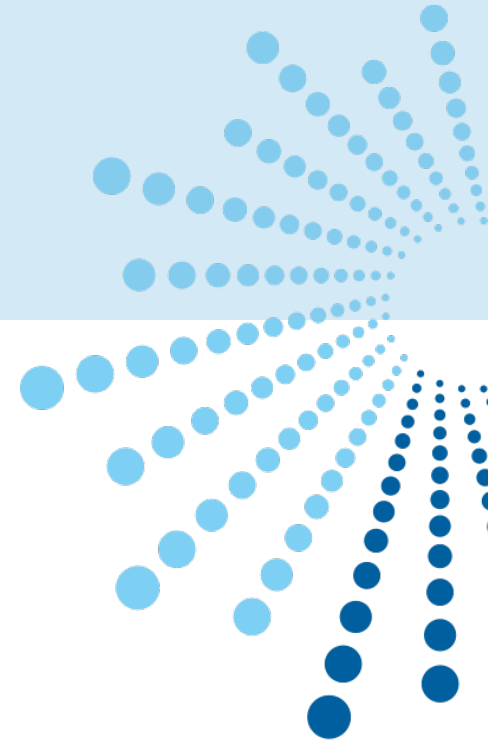
## Credibility:

- 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.



# After the Hearing

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06

# Deliberations

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# Weighing the Evidence & Making A Determination

- 1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then
- 2) Analyze whether the conduct that happened constitutes a violation of the school's policies



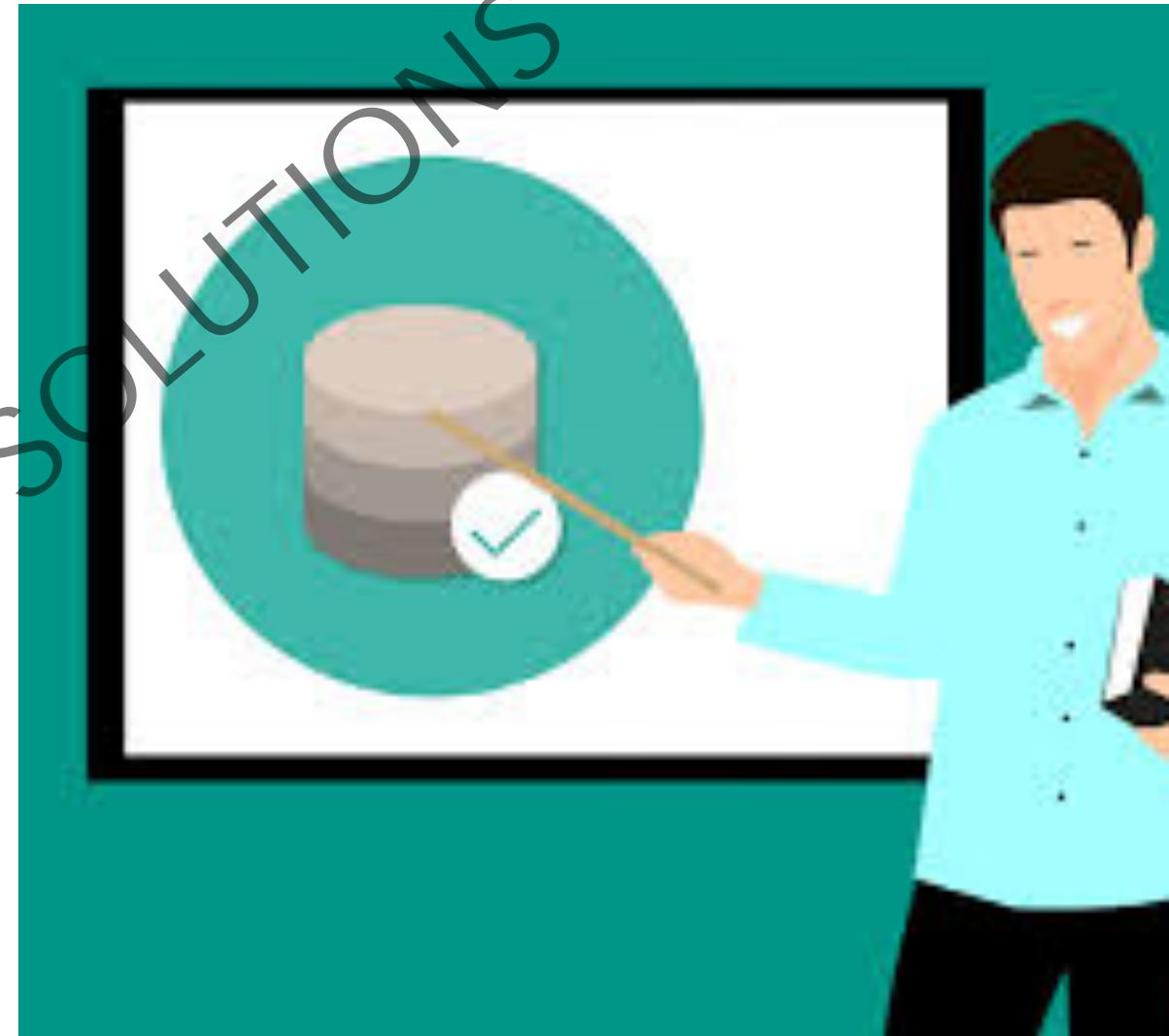
# What Impacts How We Assess Others

- I saw a woman kick a vending machine. Wow, she is angry. Who would do that?
- Me? / kicked the vending machine because I'm stressed and my kid is hungry and I'm running late, and who wouldn't kick the vending machine?
- Confusing type of person and situation

# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate

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# Preponderance of the Evidence

- More likely than not
- Does not mean 100% true or accurate
- A finding = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated



# Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and Remedies
- Procedure for appeal



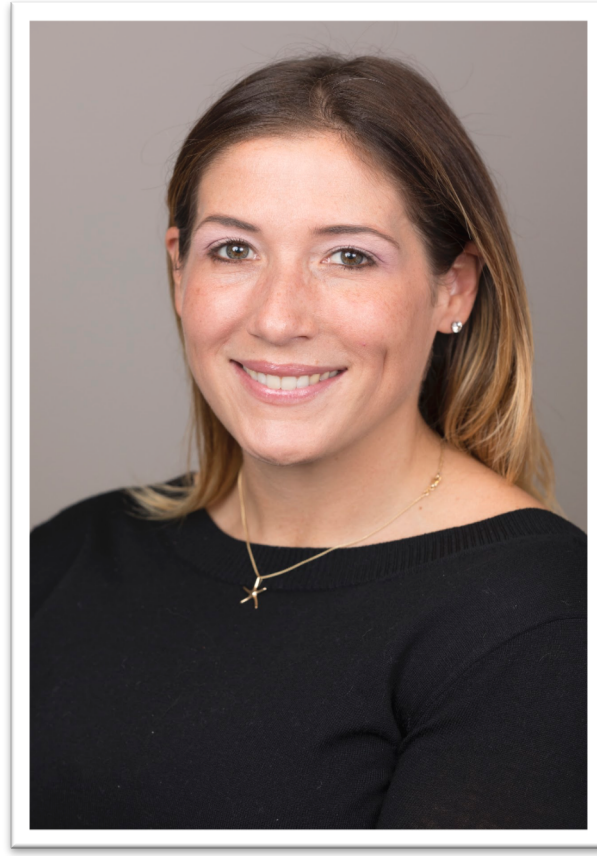
Questions?





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