

GRAND RIVER | SOLUTIONS

Title IX in a Post Regulatory World

Day Two

Chantelle Cleary

Today's Agenda

01

Hearings in a Post Regulatory World

04

Conducting the Hearing

02

Roles and Responsibilities

05

Evidentiary Issues

03

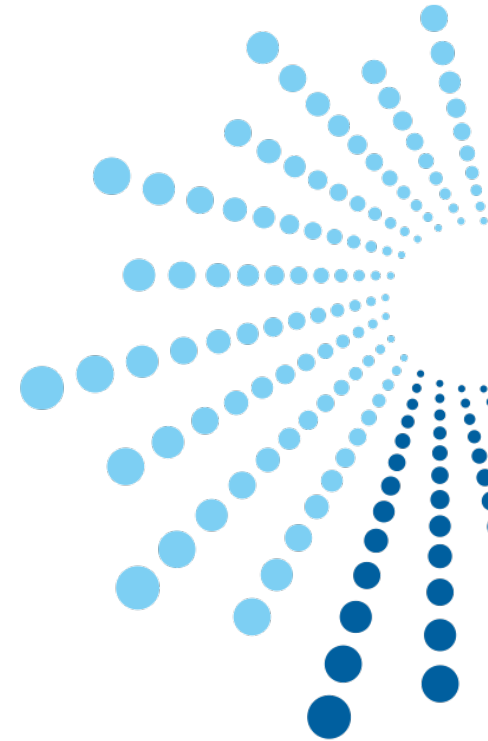
The Hearing

06

Post-Hearing

3A

Pre-Hearing Tasks





Hearings in a Post Regulatory World

Procedural Requirements, Practical Requirements,
and so much more

01

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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

Purpose of the Hearing

Why are we doing all of this?

Review and
Assess
Facts



Make
Findings of
Fact



Determine
Responsibility
/ Findings of
Responsibility



Determine
Sanction
and
Remedy

The Essential Elements of All Hearings

Clear Procedures

Due/Fair Process

Fair, Equitable, and Neutral

Consistency

Trauma Informed

Well Trained Personnel

Clear Procedures

The Process

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

The Players

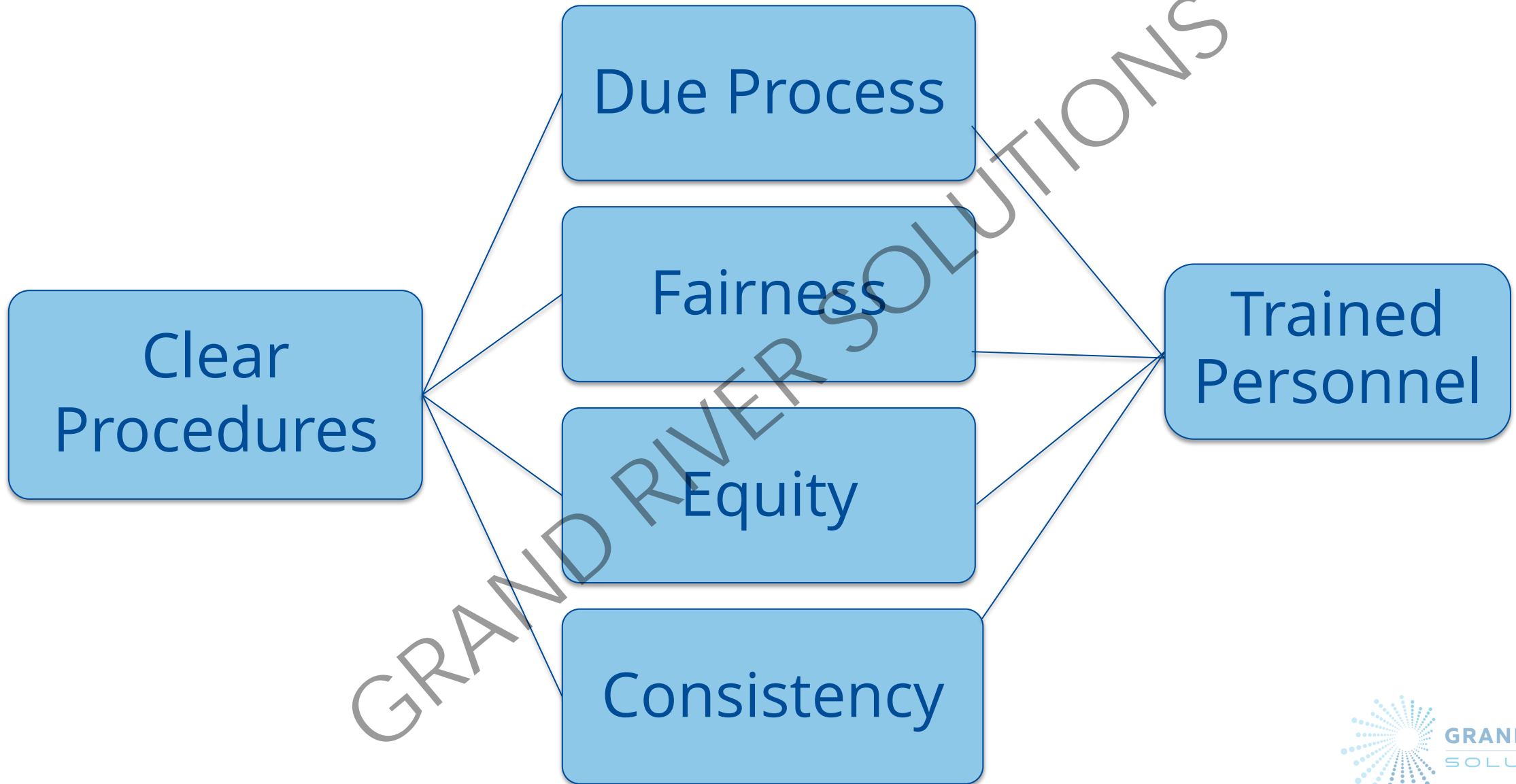
- The roles of all participants

The Evidence

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

The Outcome

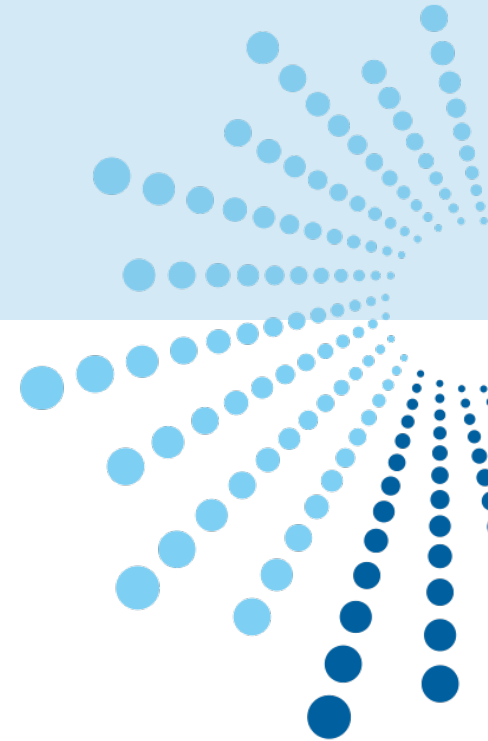
- Deliberations; Notice; manner and method communicated.





Roles and Responsibilities

People, Functions, and Impartiality



02

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

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

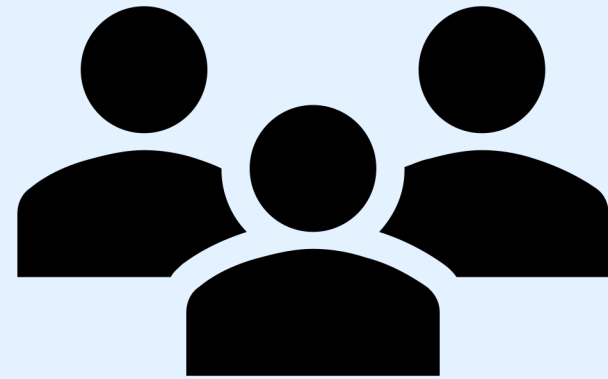
Administrative Staff

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?

General Counsel

Spectators

Student newspaper

Interested faculty

Title IX Coordinator

The Players

Hearing Advisors

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



The Players

Support Person

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



The Players

The Coordinator/Chair

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



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



The Players

A Panel?

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



Impartiality

WHAT DOES THIS *REALLY* MEAN?





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



03

The Hearing

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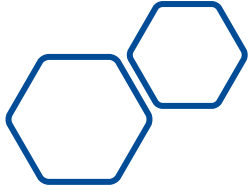




Pre-Hearing Tasks

What should be done in advance of the hearing

3A



Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments

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



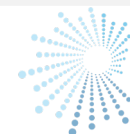
Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues

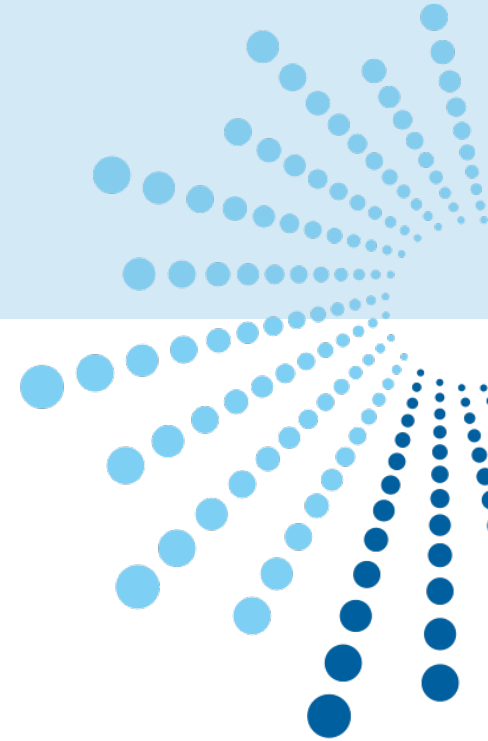




Conducting the Hearing

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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.



Opening Statements

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

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

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

- 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



Evidentiary Issues

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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!

Evaluating this evidence

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

EVIDENCE

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

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.

Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give
unreliable testimony**



After the Hearing

06

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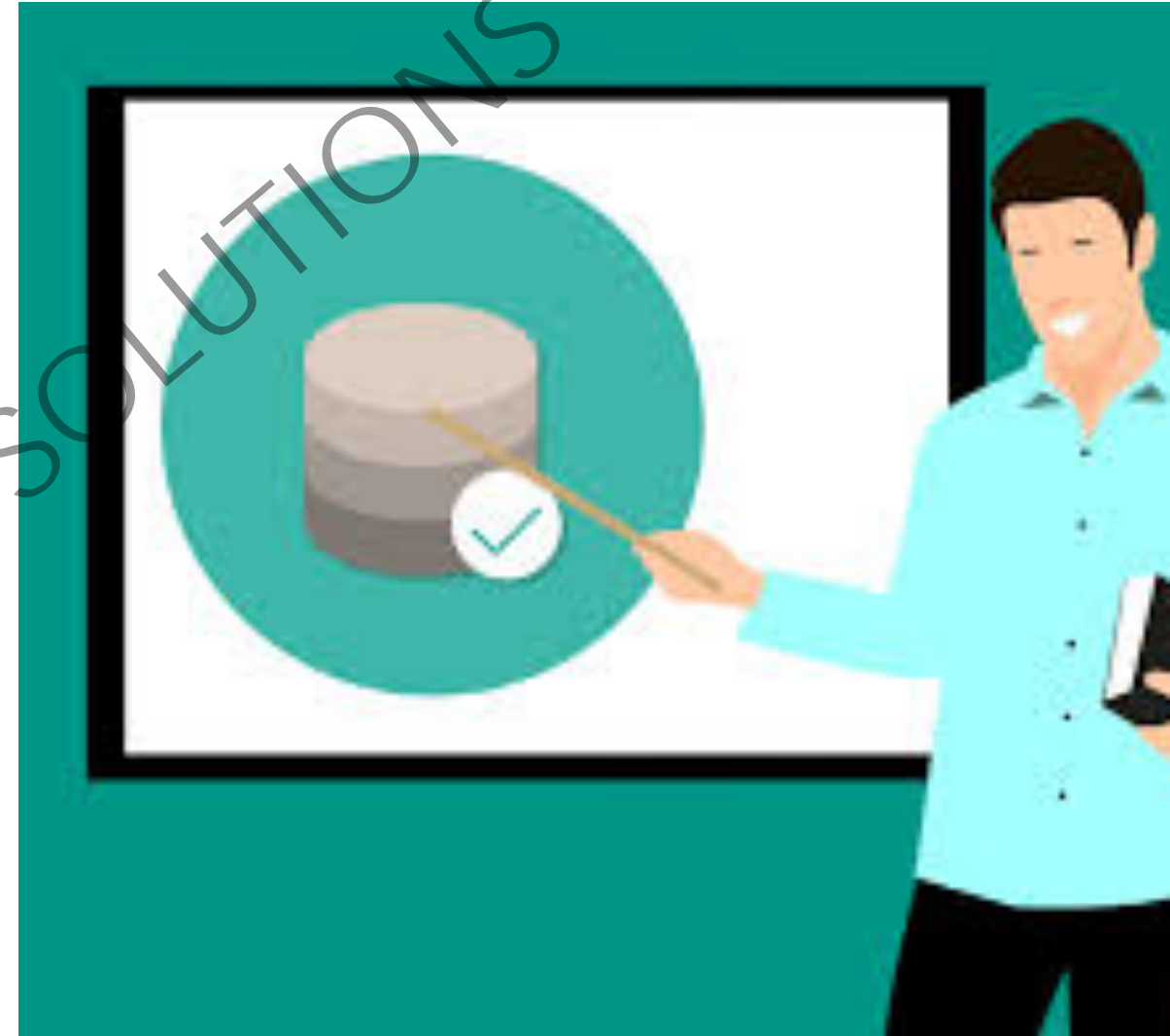
Deliberations

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

Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
- Apply Standard of Proof



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



Appeals

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Appeals: Mandatory Grounds

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.



Appealing
sanctions?

Other grounds for
appeal?

- Your discretion

Questions?



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