

GRAND RIVER | SOLUTIONS

Hearings in the New Era: Are You Ready?

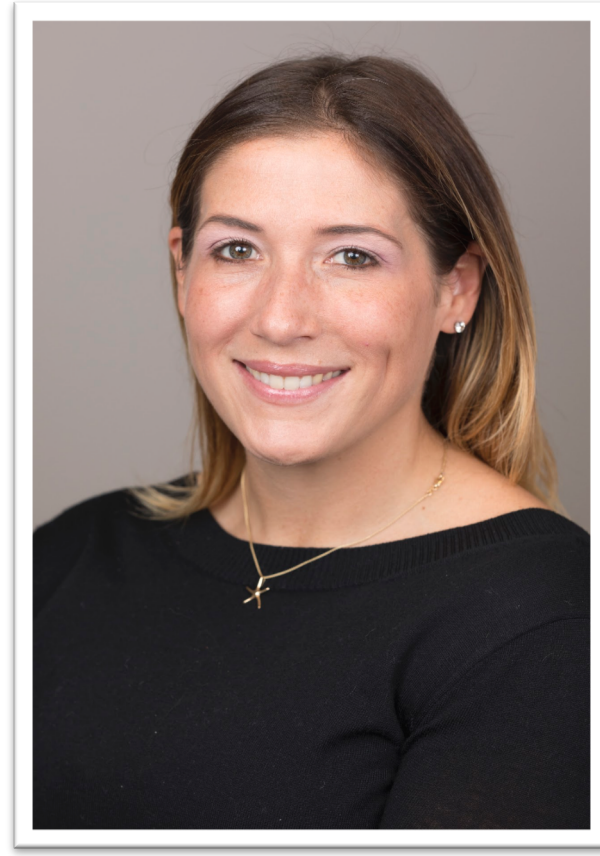
Day One

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

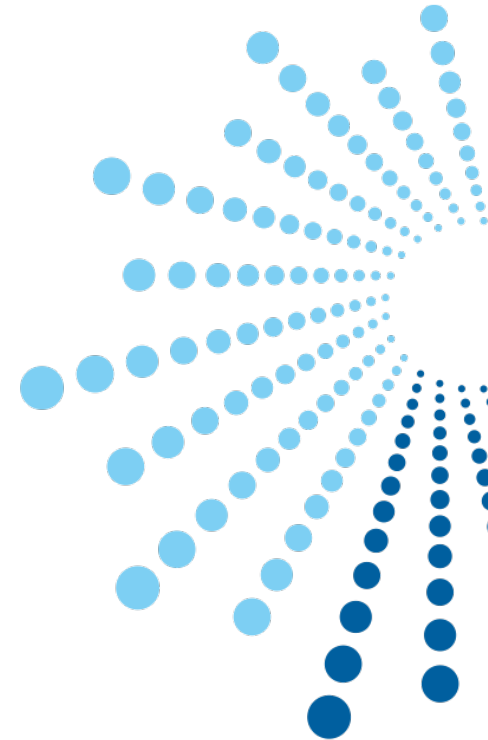
Roles and Responsibilities

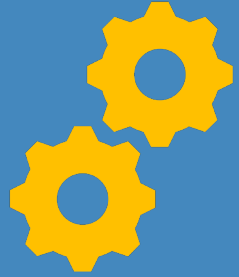
07

Post-Hearing

04

Pre-Hearing Tasks



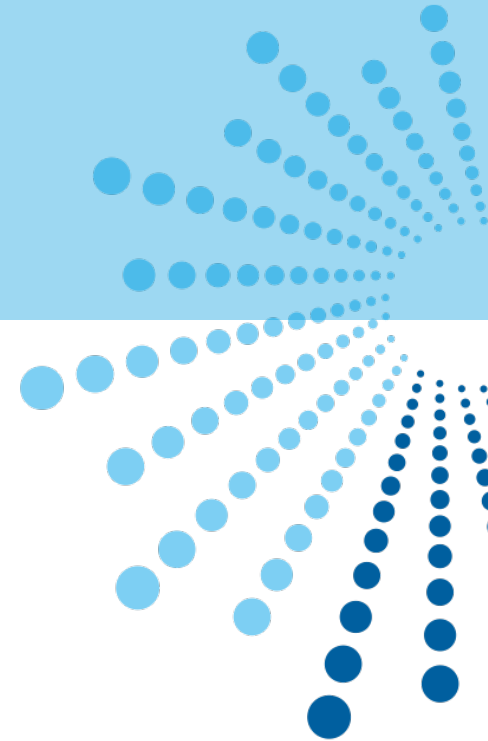


The Infrastructure for Compliance

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

PART 1

GRAND RIVER SOLUTIONS





Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements

01

GRAND RIVER SOLUTIONS



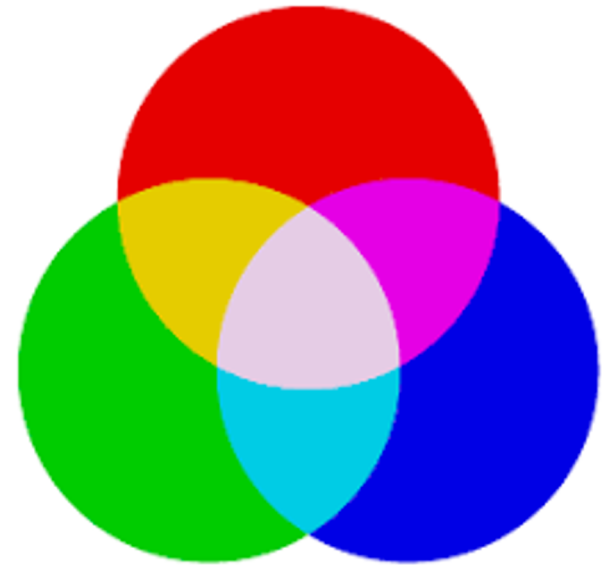
What is Covered by Title IX

- 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

GRAND RIVER SOLUTIONS

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

GRAND RIVER SOLUTIONS



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

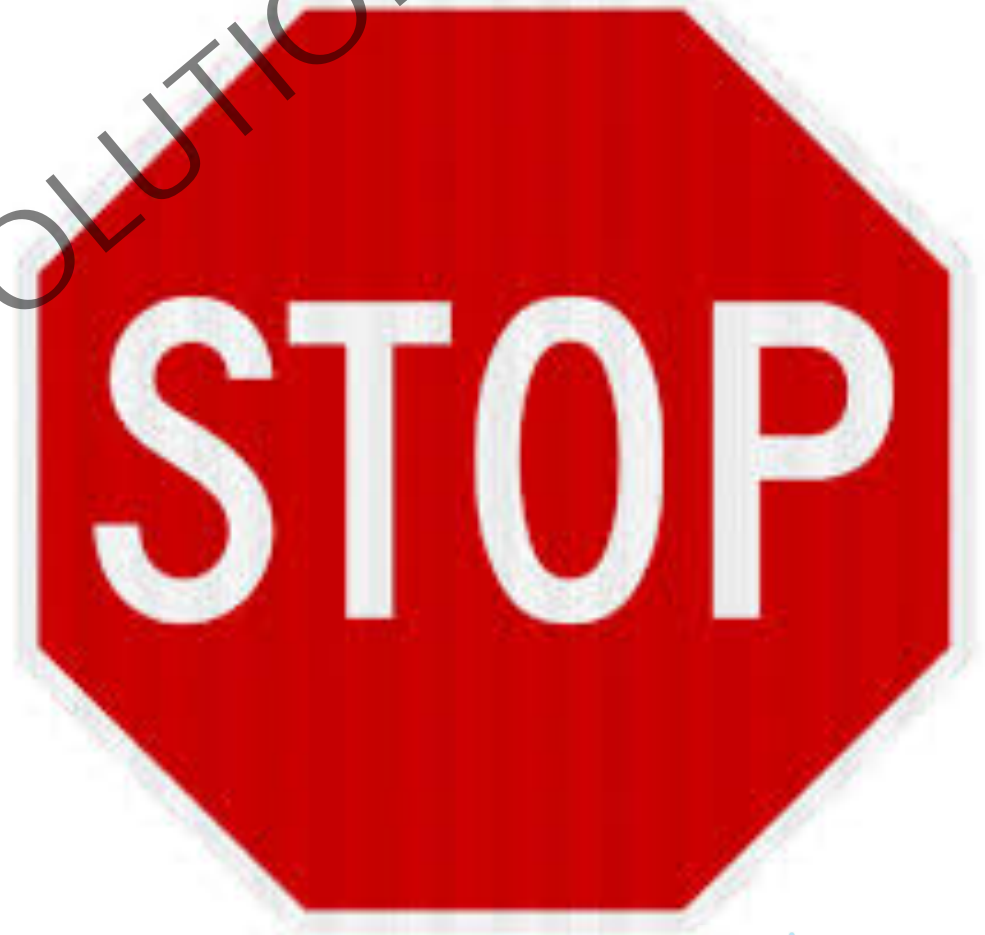
Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (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

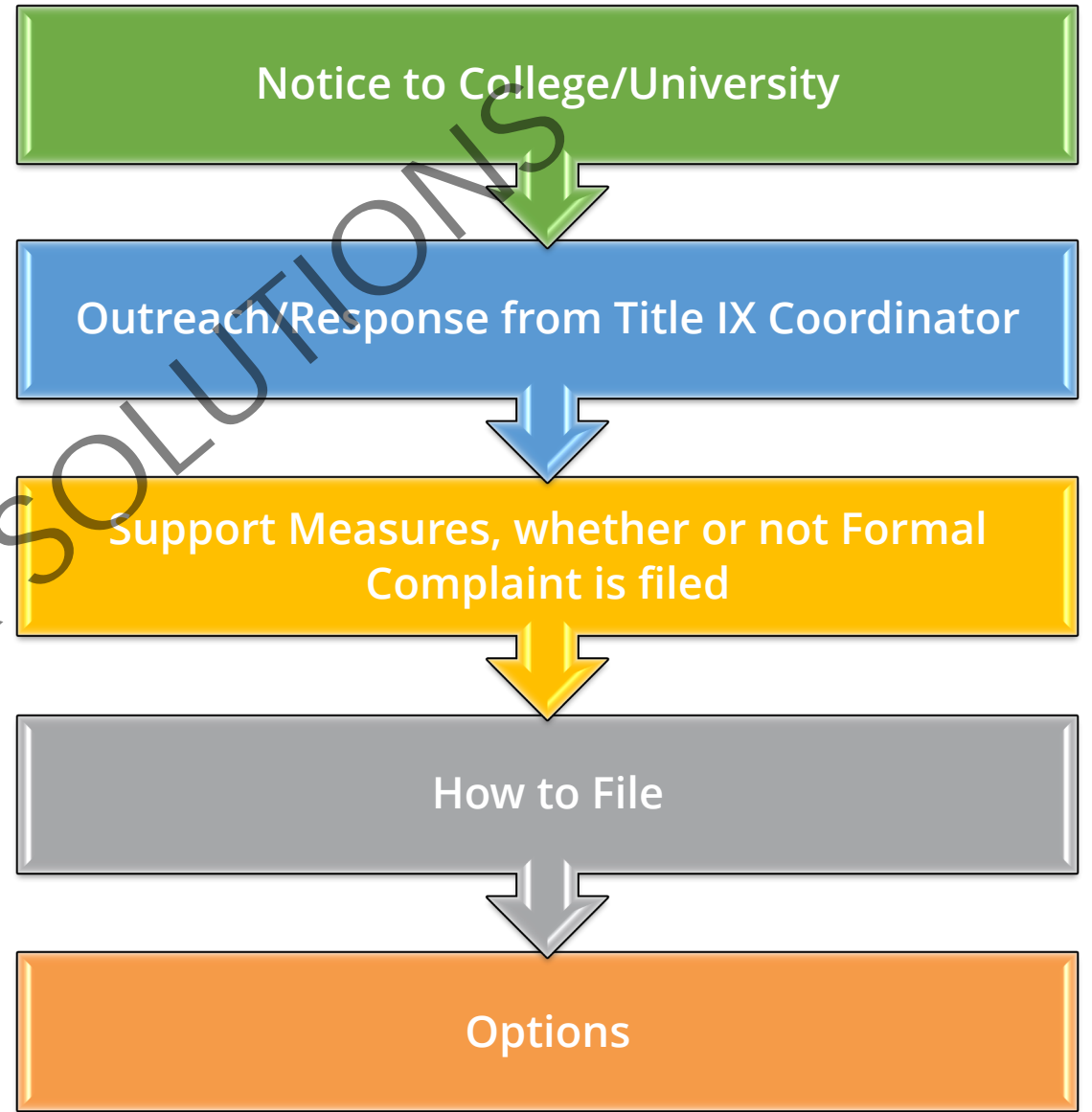
Remember; Jurisdictional elements apply

GRAND RIVER SOLUTIONS





Before The Investigation



GRAND RIVER SOLUTIONS

Procedural Requirements for Investigations



NOTICE TO BOTH
PARTIES



EQUAL
OPPORTUNITY TO
PRESENT EVIDENCE



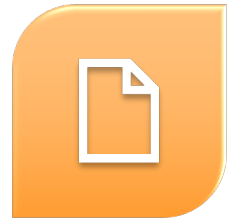
AN ADVISOR OF
CHOICE



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

GRAND RIVER SOLUTIONS

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

GRAND RIVER SOLUTIONS



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

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

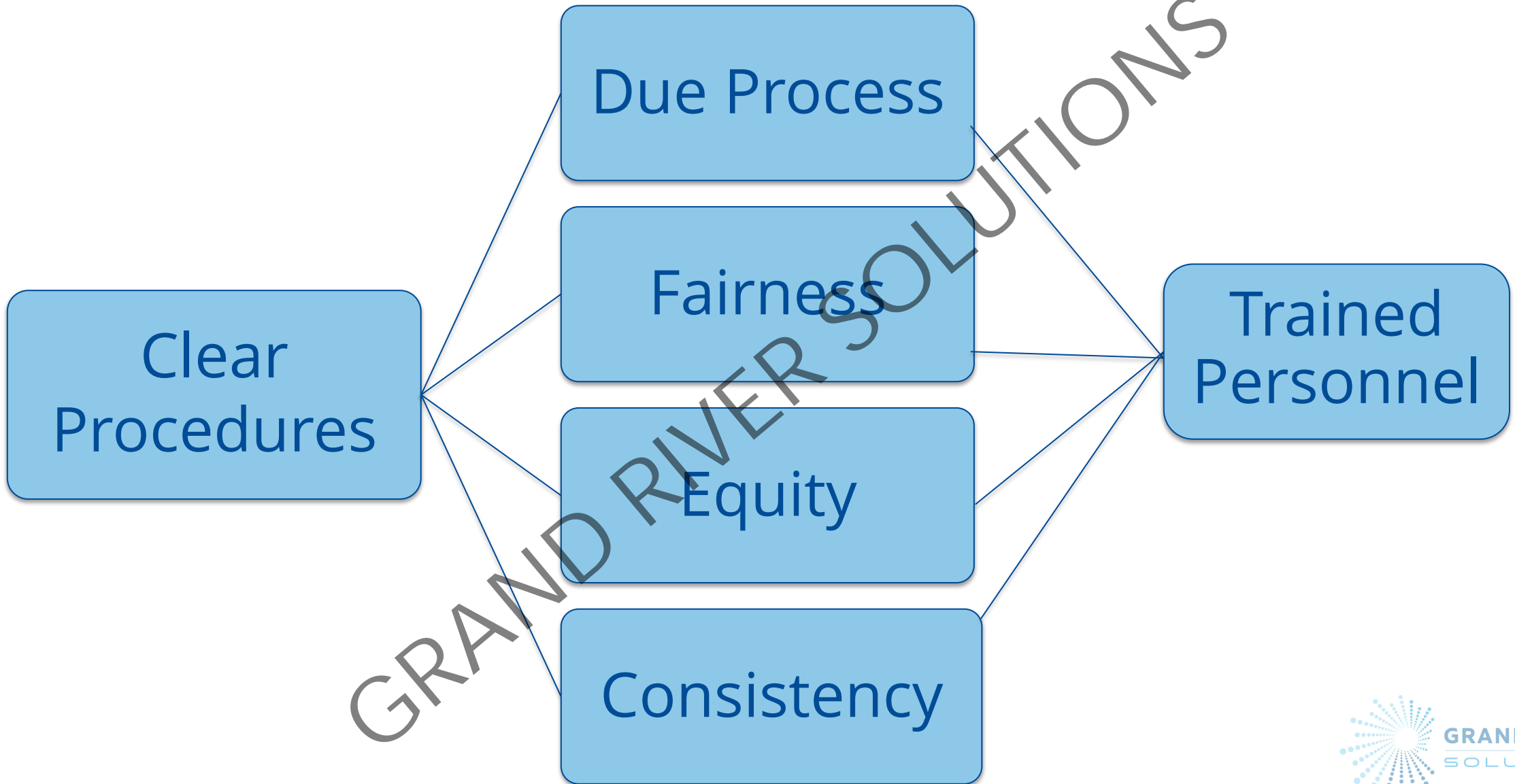
- The roles of all participants

The Evidence

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

The Outcome

- Deliberations; Notice; manner and method communicated.



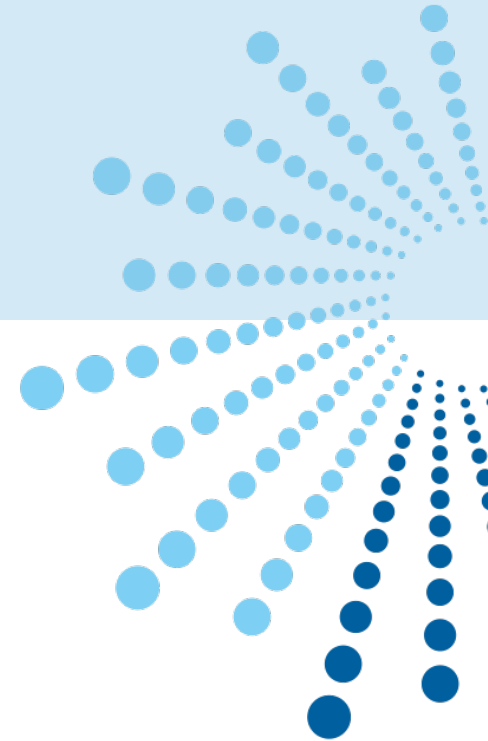


Roles and Responsibilities

People, Functions, and Impartiality

03

GRAND RIVER SOLUTIONS

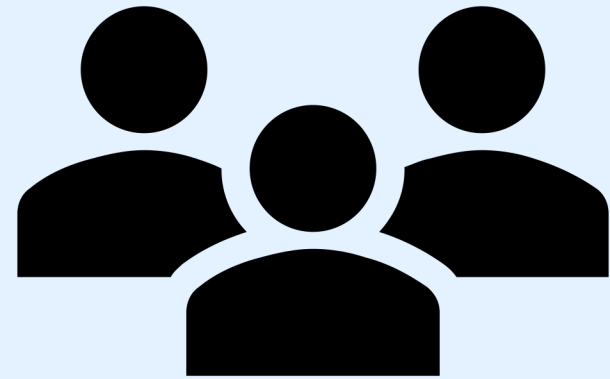


Hearing Participants

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?

General Counsel

Parents

Student newspaper

Interested faculty

Title IX Coordinator

GRAND RIVER SOLUTIONS

The Players

Hearing Advisors

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

GRAND RIVER SOLUTIONS



The Players

Support Person

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

GRAND RIVER SOLUTIONS



The Players

The Coordinator/Chair

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

GRAND RIVER SOLUTIONS



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

GRAND RIVER SOLUTIONS



The Players

The Panel

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



Impartiality

WHAT DOES THIS *REALLY* MEAN?

GRAND RIVER SOLUTIONS



Prejudging

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

GRAND RIVER SOLUTIONS



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

GRAND RIVER SOLUTIONS

PART 2



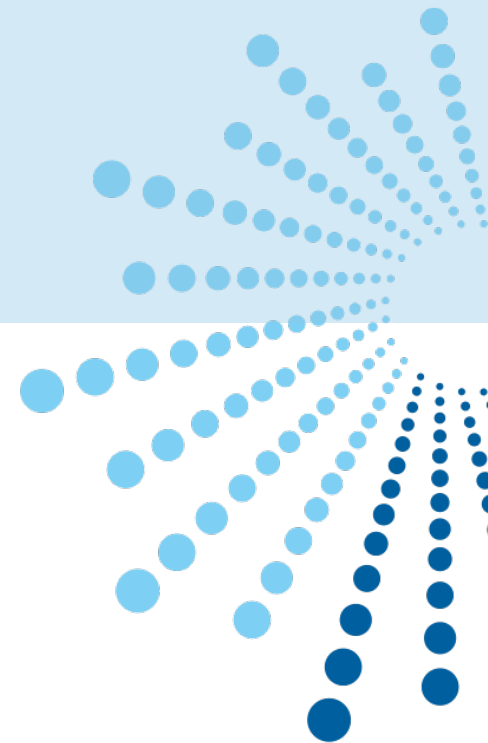


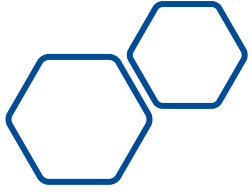
Pre-Hearing Tasks

What should be done in advance of the hearing

04

GRAND RIVER SOLUTIONS





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



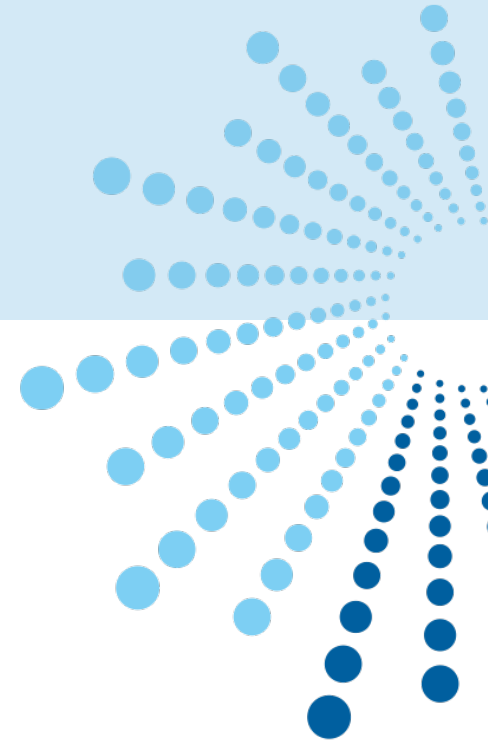
Anticipate challenges or issues





Hearing Logistics

GRAND RIVER SOLUTIONS



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.



GRAND RIVER SOLUTIONS

Opening Statements

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

GRAND RIVER SOLUTIONS

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

GRAND RIVER SOLUTIONS

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

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

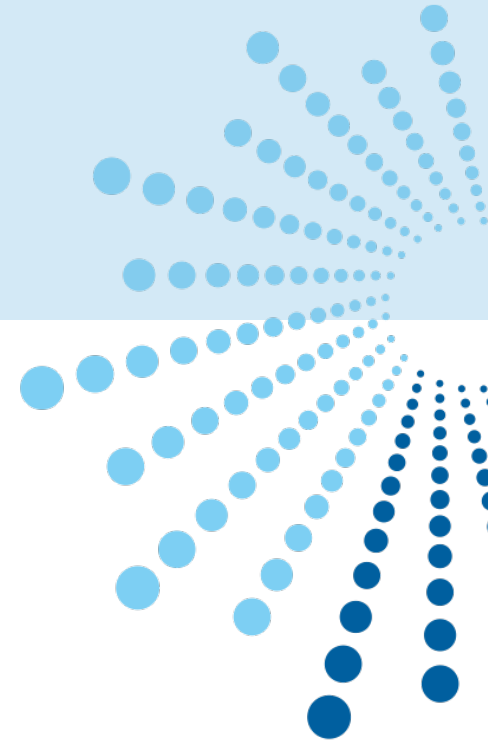
The attraction of prudent interests



Evidentiary Issues

06

GRAND RIVER SOLUTIONS



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

GRAND RIVER SOLUTIONS

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

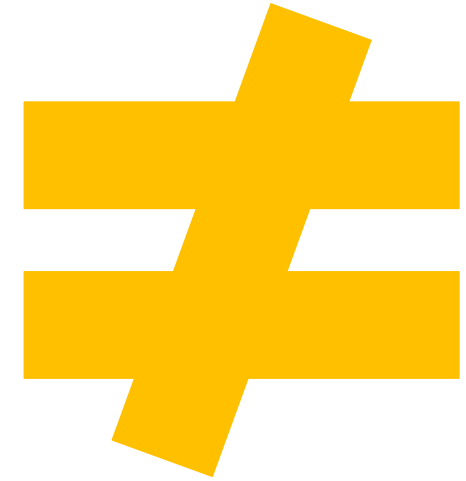
Assists in coming to the conclusion – it is “of consequence”

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



GRAND RIVER SOLUTIONS

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**

GRAND RIVER SOLUTIONS

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

06

GRAND RIVER SOLUTIONS



Deliberations

GRAND RIVER SOLUTIONS

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

GRAND RIVER SOLUTIONS



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



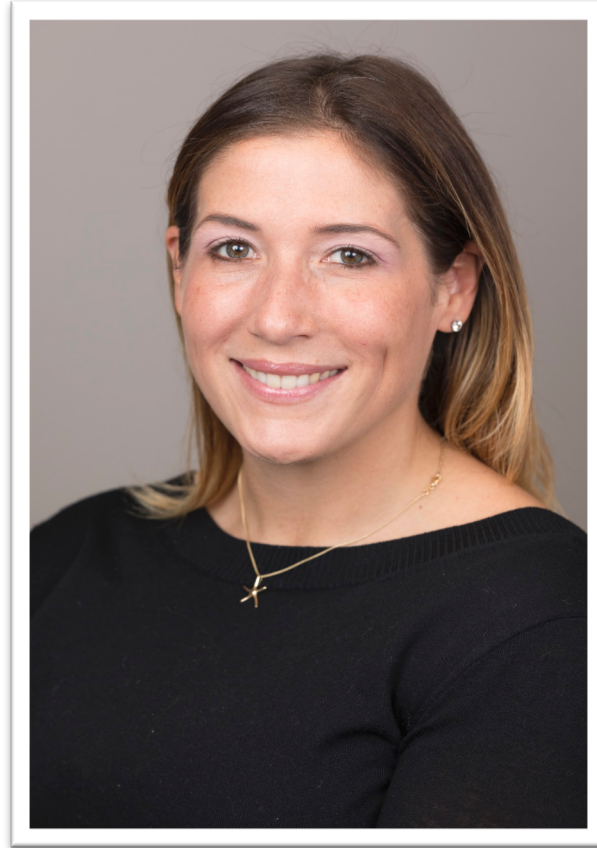
Questions?





Jody Shipper

Jody@grandriversolutions.com



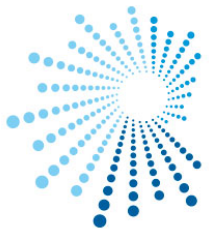
Chantelle Cleary

Chantelle@grandriversolutions.com



©Grand River Solutions, Inc., 2020. Copyrighted material. Express permission to post training materials for those who attended a training provided by Grand River Solutions is granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). These training materials are intended for use by licensees only. Use of this material for any other reason without permission is prohibited.





GRAND RIVER | SOLUTIONS

Hearings in the New Era: *Are You Ready?*

Day Two

Jody Shipper and Chantelle Cleary



Overview of the Day

1. Pre-Hearing Preparation
2. Testimony and Cross Examination
3. Things that go boom

Pre-Hearing

GRAND RIVER SOLUTIONS



Rapid Fire Recap

The investigation is complete and it is time to schedule the hearing.

Using the chat box, share your "To Do" List for coordinating the hearing.

GRAND RIVER SOLUTIONS





Rapid Fire Recap

You and your team did a great job scheduling the hearing and arranging all of the logistics.

It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quite time by yourself) to prepare for the hearing.

Use the chat box to share what you plan to discuss/think about during the prehearing meeting.

Break Out!

Say hi!

Pick a scribe

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Groups 1-2: Follow up questions for Complainant
- Groups 3 and 4: Follow up questions for Respondent
- Group 5 and 6: Follow up questions for the witnesses

Email your responses to Jody and Chantelle

- jody@grandriversolutions.com
- chantelle@grandriversolutions.com

The Hearing

GRAND RIVER SOLUTIONS

Break Out! (again)



Say hi again



Select a member of your group to take notes and to report out to the whole group



Discuss the following



Break Out! (again)

The hearing is well underway, opening instructions have been provided and the parties have delivered opening statements. It is time for testimony. The parties have each provided a list of proposed questions.

In your break-out groups, discuss the list of proposed questions and whether or not you will permit them during the hearing. If you are not going to permit them, indicate the reason for your ruling. At the conclusion of the breakout, one member of each group will be asked to discuss one or two (your choice) of the proposed questions.

Report Out

GRAND RIVER SOLUTIONS

Things That Go Boom!

GRAND RIVER SOLUTIONS

We would like you to take a few minutes to think about the one thing that keeps you up at night, and if you're comfortable, share that privately with Chantelle/Jody in the chat. Chantelle will pick some of your fears, will share them with the group and Jody will share some thoughts about what you might do if those nightmares become a reality!

GRAND RIVER SOLUTIONS



Questions?

GRAND RIVER SOLUTIONS

