Deciding a Title IX Sexual Harassment Appeal
Your Role in Having the Last Word

Academic Year 2021-22
This is the **second** of two required training sessions for appellate decision makers. Session one – training for all decision makers – should be completed first.
Agenda

• Big Picture Considerations

• Three Core Questions

1. Does the appeal meet threshold requirements?

2. Should the appeal be granted?

3. What is the appropriate outcome?
Big Picture Process and Considerations
Qualifications to Serve as an Appellate Decision Maker

1. Sole Role
   - Title IX Coordinator
   - Investigator of the Matter
   - Original Decision Maker

2. Fair & Impartial
   - Conflict of Interest
   - Individual Bias
   - Generalized Bias

3. Trained
### Training for Appellate Decision Makers

<table>
<thead>
<tr>
<th>Topic</th>
<th>Description</th>
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<tbody>
<tr>
<td>Definition of Sexual Harassment (in Section 106.30)</td>
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<tr>
<td>Scope of the School’s Education Program or Activity</td>
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<td><strong>How to Conduct an Appeal</strong></td>
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<td>How to Serve Impartially</td>
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<td>Technology used for Live Hearing (as applicable)</td>
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<tr>
<td>Relevance of Questions &amp; Evidence</td>
<td>E.g. when Complainant’s sexual predisposition or prior sexual behavior are not relevant</td>
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</table>
Understanding the Big Picture of the Title IX Grievance Process

Appellate Stage
Appeal of Dismissal / Appeal of Determination

Formal complaint

Informal Resolution

Dismissal analysis

Who

Where

What

Investigation

Hearing

Determination

Responsibility

Sanctioning
Understanding the Big Picture of the Appellate Stage of the Title IX Grievance Process

1. Notify the other party in writing
2. Allow both parties to submit statements
3. Issue a written decision describing result and rationale
4. Provide written decision to both parties simultaneously

Dismissal

Ruling
General Principles

- Appeals are available equally to both parties
- Procedures apply equally to both parties
- Your review is limited to defined grounds, not de novo
De Novo v. Limited Review
A Familial Example Featuring…

16-year-old Jake as the “Party”
18-year-old Sidney as the Investigator
Mom as the Hearing Decision Maker
Dad as the Appellate Decision Maker
Questions for the Appellate Decision Maker

Does the appeal meet threshold requirements?
  - Does it meet filing requirements?
  - Is it made on one of the allowable bases?

Should appeal be granted?
  - Was there a problem?
  - Did the problem impact the outcome?

What is the appropriate outcome?
  - Reverse
  - Remand
Does the Appeal Meet Threshold Requirements?
Alert! Preliminary Question!
Who is going to make this determination?

Title IX Coordinator
Hearing Decision Maker
Appellate Decision Maker (Named when dismissal or ruling is announced)

Is appeal allowed?

- Does it meet the filing requirements?
- Is it made on one of the allowable bases?

Deadline
Format
There are Three – and only Three* – Bases for Appeal

1. Procedural irregularity that affected the outcome
2. Conflict of interest/bias that affected the outcome
3. New evidence that could have affected the outcome

* Unless your school chooses to allow more
Notice what is not listed

I don’t like the outcome, and I want to see if someone else will give me a different one
A contender for the list:

1. Procedural Irregularity
2. Conflict of Interest/Bias
3. New Evidence
4. “Either party may appeal on the basis that the sanction issued is disproportionate to the policy violation for which the respondent was found responsible.”
Procedural Irregularity

The Appellant must:

• Identify a procedural irregularity
• Make a case that it affected the outcome of the matter
Conflict of Interest / Bias

The Appellant must:

• Identify a conflict of interest or bias
• Make a case that it affected the outcome of the matter
New Evidence

The Appellant must:

• Identify new evidence that was not reasonably available at time of determination

• Make a case that it could affect the outcome of the matter
Did the identified problem affect the outcome? (or, if new evidence, could it affect the outcome)

- Look at the specific policy violation at issue
- Catalogue the elements
- Consider whether the problem impacted the establishment of an element (either prevented it from being established or allowed it to be established)
Should the Appeal be Granted?
What can you consider?

- Can you interview parties or witnesses?
- Can you interview school personnel?
- Can you search for additional information?

Appellate Decision

- Relevant & Directly Related Evidence
- Investigation Report
- Hearing Transcript
- Hearing Officer’s Written Determination
- Appeal Submissions
Bear in mind:

If an appellate process is going to feature hearing process activities...

E.g.
Witness testimony
Cross examination

E.g.
Consideration of evidence
Opportunity to review evidence

It should follow hearing process rules
Warning

An appeal is not an opportunity to throw the Title IX grievance process out the window and resolve the case the old-fashioned way
What is the Appropriate Outcome?
Three Choices on Appeals

1. Deny
   - Uphold/Affirm the determination of the initial decision maker

2. Grant
   - Vacate & Remand to the initial decision maker for further proceedings

3. Grant
   - Reverse the determination of the initial decision maker
When is reversal the best remedy?

The question calls for a clear up or down answer. No further examination of evidence or questioning of witnesses is necessary to reach a conclusion.

Example

Title IX Coordinator dismissed formal complaint of sexual assault in a residence hall because Complainant, a foreign student who holds Chinese citizenship, cannot be “a person in the United States.”
When is remand appropriate?

- **New Evidence**
  
  Remand for mini hearing to consider new evidence.

- **Procedural Irregularity**
  
  If reversal, you issue it. If do-over is necessary, remand.

- **Bias/Conflict**
  
  Can’t remand to same biased participant. Start over??
Practice Scenarios
The Complainant’s Formal Complaint was dismissed by the Title IX Coordinator on the grounds that it was not within the school’s program or activity. The incident took place off campus at an annual 10K organized by the campus acapella group as a fundraiser. The Complainant appeals.

<table>
<thead>
<tr>
<th>Grounds for appeal</th>
<th>Procedural irregularity – potential misapplication of the dismissal rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affected the outcome</td>
<td>Yes – resulted in dismissal (unless it was not the sole grounds)</td>
</tr>
<tr>
<td>Ruling on appeal</td>
<td>Granted. Regardless of its geographic location, this was a formal activity of a school-sponsored organization. Title IX Coordinator reversed. Case will now proceed to investigation and hearing.</td>
</tr>
</tbody>
</table>
After Respondent is found responsible for Level 4 expressive harassment, a new witness steps forward to state that the Complainant subjected her to very similar treatment. Respondent appeals.

<table>
<thead>
<tr>
<th>Grounds for appeal</th>
<th>New evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affected the outcome</td>
<td>No</td>
</tr>
<tr>
<td>Ruling on appeal</td>
<td>Denied. Determination of hearing Decision Maker upheld. Witness can file a complaint against Complainant.</td>
</tr>
</tbody>
</table>
After Respondent is found not responsible for sexual assault, Complainant appeals. In her appeal, Complainant, who is an honors scholar and accomplished musician, argues that she and the witnesses who supported her were much more serious and believable than Respondent and the witnesses who supported him.

<table>
<thead>
<tr>
<th>Grounds for appeal</th>
<th>No allowable grounds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affected the outcome</td>
<td>N/A</td>
</tr>
<tr>
<td>Ruling on appeal</td>
<td>Denied. Ruling of hearing Decision Maker upheld.</td>
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</table>
Following an investigation and hearing, Respondent is found not responsible for Sexual Harassment and stalking. Complainant appeals on the grounds that no one ever met with him to discuss supportive measures and his request for a safer parking space on campus was unreasonably denied without any explanation.

**Grounds for appeal**

Procedural irregularity – the Coordinator must contact the Complainant to discuss the availability of supportive measures and consider the Complainant’s wishes with respect to supportive measures.

**Affected the outcome**

No (at least not on these scant facts)

**Ruling on appeal**

Appeal denied. Hearing determination upheld.
Respondent is a star swimmer who has been accused of sexual assault. Decision Maker, who is the coach of the women’s basketball team, finds Respondent not responsible. Two days later, the school announces that the long-serving Athletic Director is departing and the coach of the women’s basketball team has been named Interim Athletic Director. Complainant appeals.

<table>
<thead>
<tr>
<th>Grounds for appeal</th>
<th>Conflict of interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affected the outcome</td>
<td>If pending appointment was known, arguably yes</td>
</tr>
<tr>
<td>Ruling on appeal</td>
<td>Granted and remanded for a new hearing with a different Decision Maker.</td>
</tr>
</tbody>
</table>
Dr. Kehl, the Chair of the Ecology Department, is one of the school’s most outspoken progressive activists. She has published numerous articles warning of the dangers of climate change denialism, and she was sharply critical of the Trump Administration’s energy policies. Dr. Kehl and an administrator from the athletic department were assigned to investigate a sexual assault case. Both the Complainant and the Respondent have leadership roles with the College Republicans. After the Respondent is found responsible for sexual assault, the Respondent appeals.

<table>
<thead>
<tr>
<th>Grounds for appeal</th>
<th>Bias</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Affected the outcome</strong></td>
<td>Tricky – can Respondent identify evidence of bias in the report or elsewhere?</td>
</tr>
<tr>
<td><strong>Ruling on appeal</strong></td>
<td>Denied. Determination of hearing Decision Maker upheld.</td>
</tr>
</tbody>
</table>
Respondent is charged with Sexual Harassment and stalking. During cross examination, Respondent’s advisor asks questions about Complainant’s prior dating relationships in which she seemingly tolerated worse behavior (one former boyfriend urinated on her car and another broke into her apartment). After Respondent is found not responsible, Complainant appeals on the grounds that the “rape shield” rule should have protected her from answering questions about prior relationships.

<table>
<thead>
<tr>
<th>Grounds for appeal</th>
<th>Procedural irregularity – failure to apply rape shield</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affected the outcome</td>
<td>No, because no error. Rape shield applies to sexual predisposition and behavior.</td>
</tr>
<tr>
<td>Ruling on appeal</td>
<td>Appeal denied</td>
</tr>
</tbody>
</table>
Thank you.
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