

The logo for Husch Blackwell, consisting of a stylized white 'H' and 'B' stacked vertically on a blue background.

HUSCH BLACKWELL

Title IX Appeal Officials Training

Spring 2021



Goals

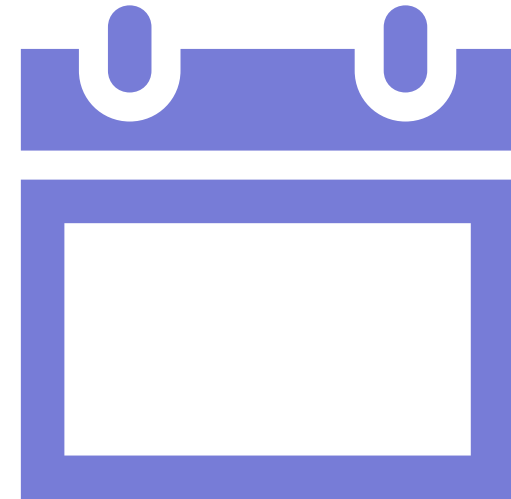
- Title IX fundamentals for appeals officials
- Appeal procedures including common grounds for appeal
- Appeal options and best practices
- Preparing a strong written appeal decision



Agenda



- Title IX Key Legal Principles Review
- Applicable Policy Requirements
- Bias, Stereotypes, Conflicts & Trauma
- Appeal Procedures
- Written Appeal Decisions



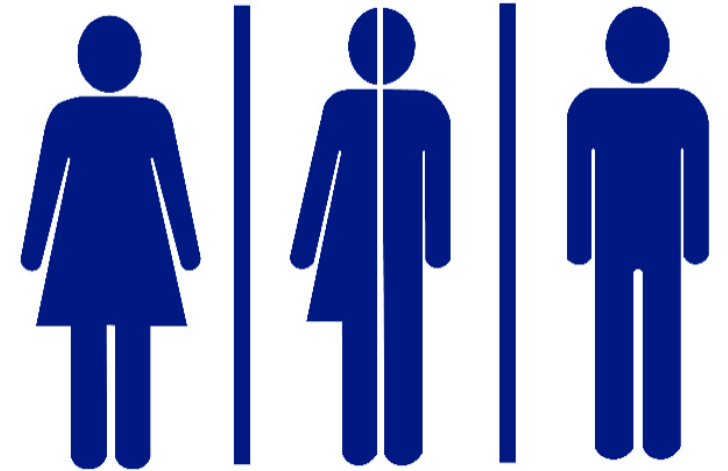
Title IX Key Legal Principles Review



What is Title IX?

“[N]o 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 education program or activity receiving federal financial assistance.”

32 C.F.R. § 106.31





When were the new regs effective?



- August 14, 2020
- Do not apply to Sexual Harassment that allegedly occurred prior to effective date
 - Assessed according to guidance and regulations in place at time alleged conduct occurred

What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
- Title IX does not apply to private conduct occurring in a private location that is not part of an education program/activity



What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on-campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

Does Title IX apply to off-campus sexual harassment?



Yes, if the conduct at issue occurs in the context of an education program or activity



Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization



No, if it occurs in a private location and is not part of an institution's education program or activity

Applicable Policy Requirements



Burden of Proof

- An institution's grievance process must...
 - “State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment”

85 Fed. Reg. 30,026, 30,575 (May 19, 2020) (to be codified at 34 C.F.R. § 106.45(b)(1)(vii)).



Standard of Evidence



Preponderance of the
evidence

=

“more likely than not”

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo
harassment

Hostile environment
harassment

Sexual
assault

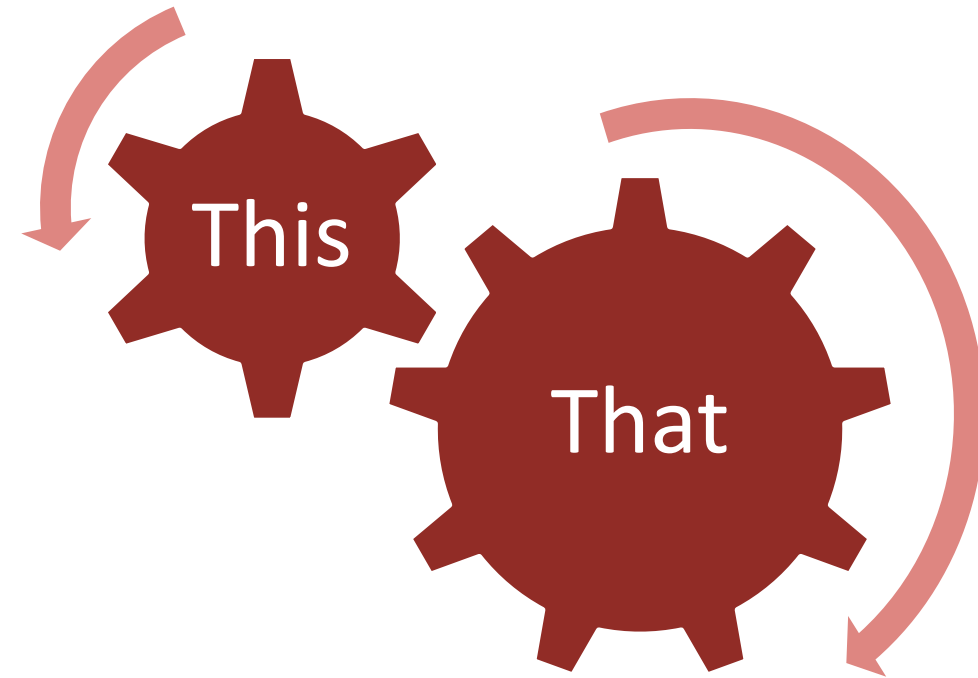
Relationship
violence

Stalking



What is quid pro quo?

- ***Title IX-designated***
- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
 - Often arises in the employment context or where an employee holds a position of authority over a student





Example of quid pro quo

Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager.

Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.





What is hostile environment?

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.





How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person



Example of hostile environment

—
Bookworm student repeatedly gropes Social Butterfly student's buttocks when the two are in the elevator of their shared dormitory. Butterfly has no romantic interest in Bookworm and has told Bookworm to stop. But Bookworm persists, causing Butterfly to use the stairs instead of the elevator and to avoid Bookworm in other areas of the dormitory.





What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:

Rape

Sodomy

Sexual assault
with an object

Fondling

Incest



What is rape?

Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.



What is consent?

- Policy definition – read it carefully
- Words or actions that a reasonable person in the respondent’s perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent



What is incapacity?

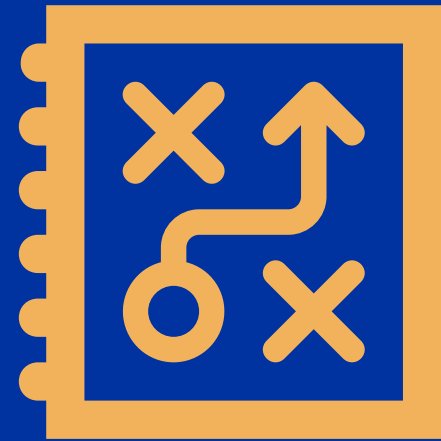
Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.





Example (incapacitated)

Short student has had ten cocktails over the course of two hours. Sober student takes Short student to Sober's apartment. Short student cannot walk without support, forgets Sober's name, and passes into a stupor when Sober places Short student on Sober's bed. Sober then engages in sexual activity with Short student.

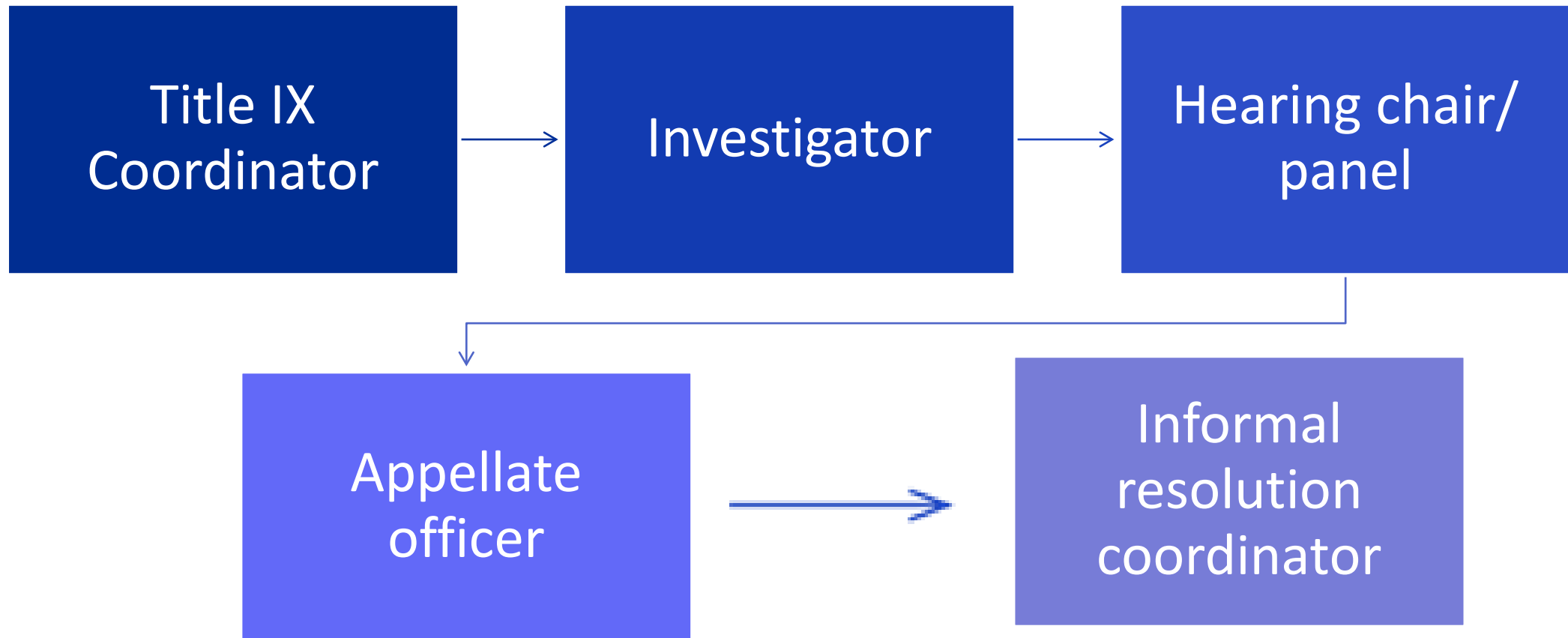




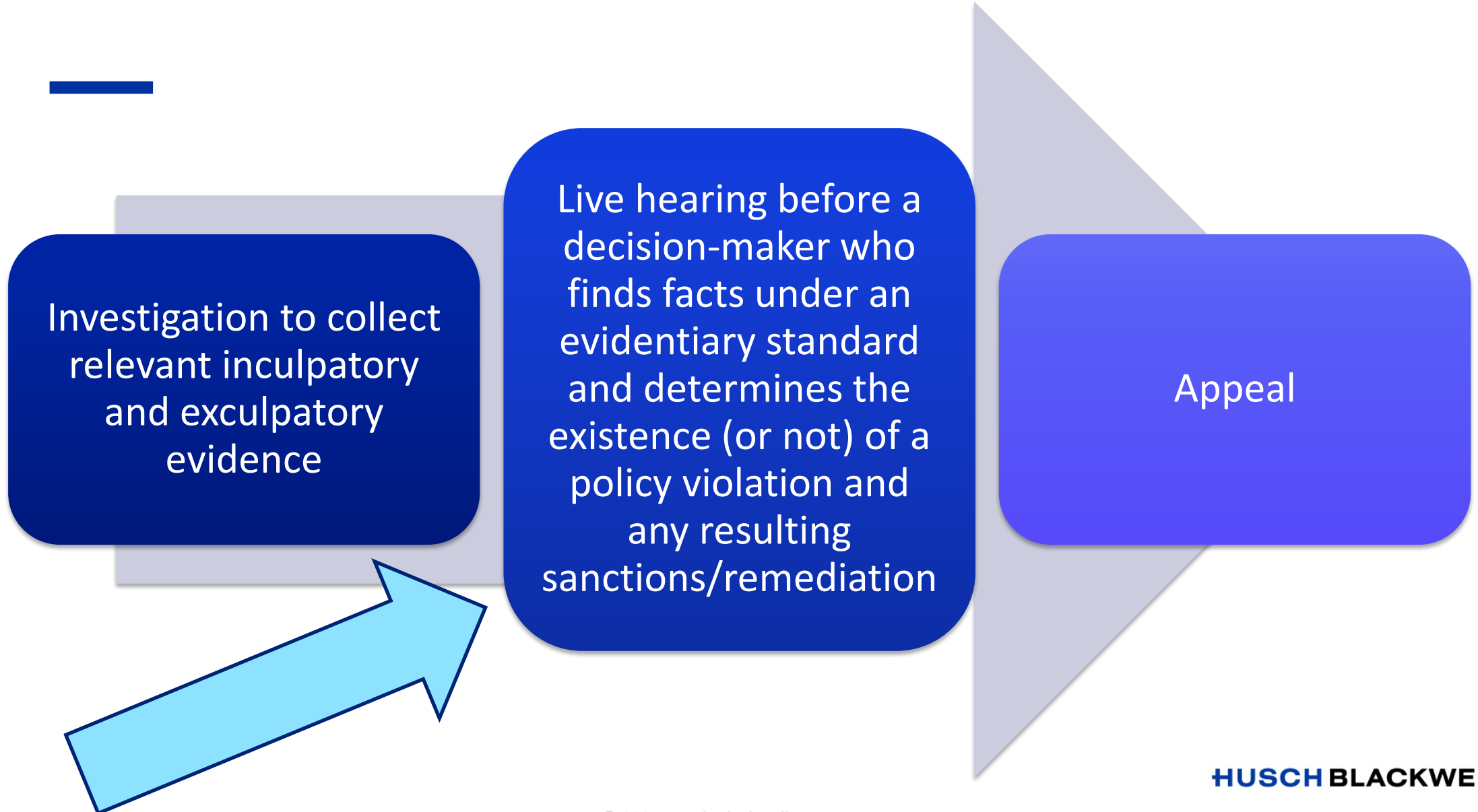
Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy (34 C.F.R. § 106.71)

Who are the key institutional actors in the grievance process?



What is the grievance process?





How does “due process” apply in Title IX proceedings?

- ***Equitable treatment*** of complainants and respondents
- ***No stereotypes*** based on a party’s status as complainant or respondent
- ***Conflict and bias-free*** institutional participants
- ***Presumption*** respondent did not violate policy unless and until a determination is made after hearing



What steps does due process require under the grievance process?

- Examples of due process safeguards under Title IX include:
 - ***Written notice*** to parties of complaints, dismissals, and rights;
 - ***A meaningful opportunity*** to be heard free of bias or conflicts of interests, including an opportunity for advisors to question witnesses and parties;
 - ***Written explanation*** of the decision-maker's determination; and
 - ***An opportunity to appeal.***

85 Fed. Reg. 30,026, 30,053 (May 19, 2020) (citations omitted).



Are Sexual Harassment cases confidential?

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used only as required by Title IX itself





Must a university appeal official maintain confidentiality?

- Yes
- As a University employee, you must abide by the same confidentiality rules as the University itself, including FERPA
- You must maintain the confidentiality of the process and not disclose information to any third-party except as the process itself requires

Bias, Stereotypes, Conflicts & Trauma



Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also ***permit parties to raise concerns*** of conflicts of interest and bias
- *Individual institutional actors should ***self-police*** conflicts of interest and self-identify bias

Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”



Example of bias

—
An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."





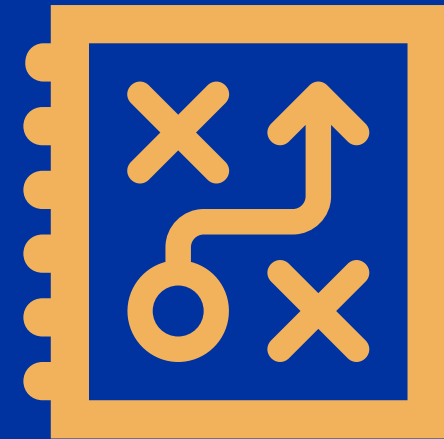
What is a conflict of interest?

- When an individual has a ***material connection to a dispute***, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



Example of conflict of interest

—
Student Soccer Goalie files a formal complaint of sexual harassment against a student Lacrosse Midfielder. One of the hearing panel members selected is Midfielder's faculty advisor who has previously written letters of recommendation for Midfielder's application to law school in which faculty advisor wrote that Midfielder is "honest to a fault."





Balance

- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
 - Candace Jackson, Acting Asst. Secretary of ED (2017)

Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame



Trauma might affect a party

- Not in every case
- Not just one party
- Never assume anyone participating in a hearing has suffered any trauma
- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time

Appeal Procedures



Practice Point: Stay within the scope of the appeal



- It is best practice for an appeals process to be designed to **catch errors** and ensure that the underlying investigation and adjudication process was **fair and thorough**.
- In contrast to an appeal process that provides another party the opportunity to second-guess decisions, absent clear error.



Policy Language: Standard of Review

- Defining the appeal officer's scope of responsibility:
 - Grounds for changing the substantive hearing decision?
 - For example: "clear error," "arbitrary and capricious," or "abuse of discretion"
 - Grounds for changing the sanction or other remedial measure?
 - For example: "compelling reason" or "abuse of discretion"



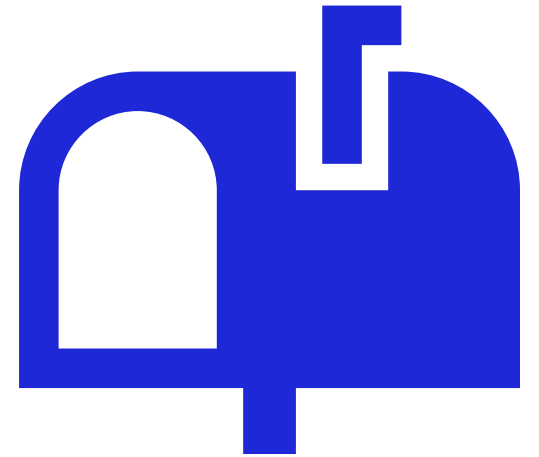
Policy Language: Other Considerations

- Format of the appeal submissions?
- What is the time frame for party submissions and the appeal officer's response?
- Are sanctions stayed while the appeal is pending?
 - Any exceptions (immediate removal standard)?
- Do supportive measures remain in place while the appeal is pending? Do they need to be changed/updated in some way during this time?



Appeal rights

- Either party may appeal
- Who should receive the appeal?
 - Title IX Coordinator
 - Appeal Officer
- Right to respond





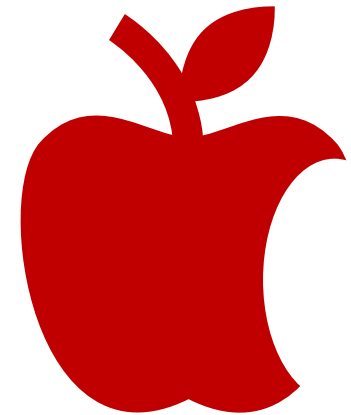
Appeal officers

- Designated in the policy
- Often depends on the parties
 - Student respondents: Student Affairs office
 - Faculty respondents: Academic Affairs
 - Staff respondents: Area vice president
 - Or designees for each
 - Outsourced?



Appeal officer obligations

- No conflict of interest
- In most cases, the appellate review is limited to review of the written decision and the appeal and response documents submitted by the parties.
- However, the appellate officer may be allowed to request and review additional information from the campus Title IX office





Appeal grounds

- Grounds for appeal are often limited to:
 - Procedural error or omission
 - New evidence
 - Conflict of interest





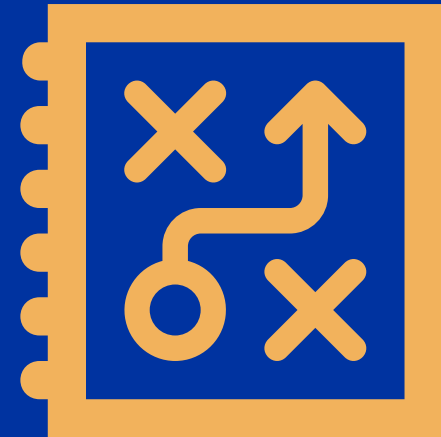
Procedural error



- Typically, the procedural error or omission that impacted the outcome: meaning it must be ***material***.
- A procedural error affecting the decision or the written determination may include, *i.e.:*
 - A failure to follow the university's procedures;
 - A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence; or
 - A determination regarding what evidence was excluded as irrelevant.

For discussion

- Complainant contends that the investigator failed to interview 19 witnesses who have knowledge of an alleged sexual assault based on discussions with Complainant or Complainant's friends following the incident.
- Investigator only interviewed 11 of the witnesses.
- Procedural error?





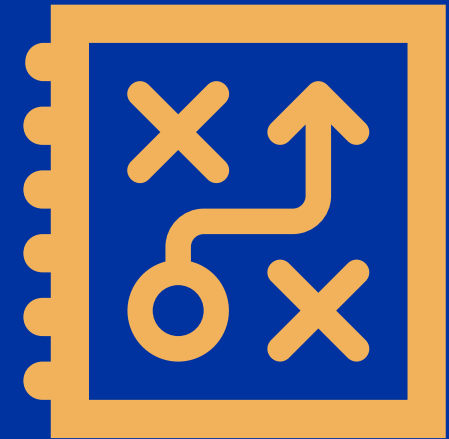
New evidence

- New evidence has come to light that ***was previously unknown or not reasonably available*** at the time ***that has potential to substantially impact the outcome.***
- Practice Tip: Evidence presented prior to the time the designation or written determination is issued **does not qualify** as new evidence that was not reasonably available



For discussion

- Witness A testifies at the hearing.
- Respondent later identifies a new witness that would contradict Witness A's testimony.
- Does this constitute “new evidence” for purposes of an appeal?





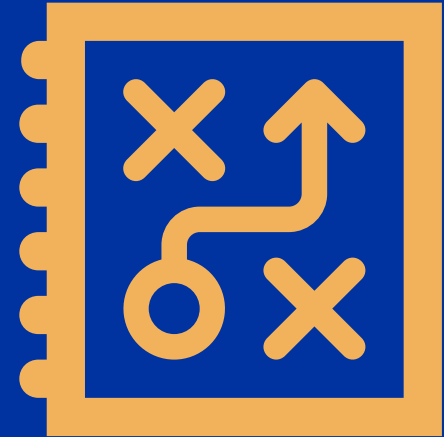
Conflict of interest

- The Title IX Officer (or designee), Investigator, or Decision-Maker (Adjudicator, Hearing Chair or Member of Hearing Board) had a conflict of interest or bias affecting the outcome:
 - For or against Complainants or Respondents generally or
 - For or against an individual Complainant or Respondent.
- Practice Tip: Claims of conflict of interest or bias should be based on the current case and process in question and will be assessed accordingly.

For discussion

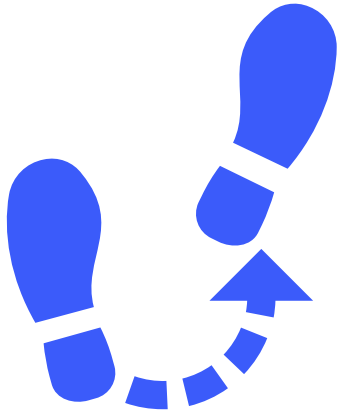
Do the following circumstances or relationships constitute conflicts of interest?

- Respondent faculty member and the hearing officer previously disagreed about a university curriculum matter.
- Complainant is currently a student in a hearing panel member's class.
- Respondent is a staff member in the Title IX Coordinator's office.





Procedures

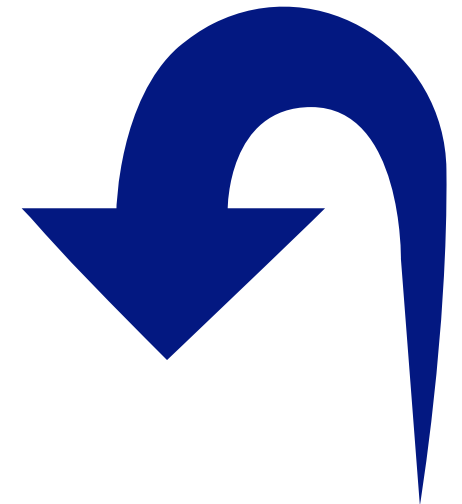


- Appeals commonly limited to written submissions
- Response specifications (timeline and coordination through appeal officer or Title IX Coordinator)
- Typically, there is no live interaction (either in-person or virtual), but may have discretion in order to gather relevant information
- Timeline for issuing the written decision
- Confirm there is no “second” appeal to a governing board (check local law and/or corporate bylaws)



Appeal options

- Appeals granted for procedural error or new evidence ***should be remanded back*** to the original investigator and/or decision-maker (hearing panel or adjudicator) for reconsideration.
 - Appeal officer should provide rationale and specific instructions defining the scope of the issues.
 - Instructions for return of the case to the appeal officer, if appropriate (e.g., revised findings)
 - Appeal officer to make a final determination.
- In rare cases where a procedural error cannot be cured (as in cases of bias) the appeal officer may order a new hearing.
 - May prescribe a new decision-maker
 - Decisions from a new hearing may be appealed
- In cases where an appeal results in reinstatement or resumption of privileges, all reasonable attempts will be made to restore the respondent to prior status.



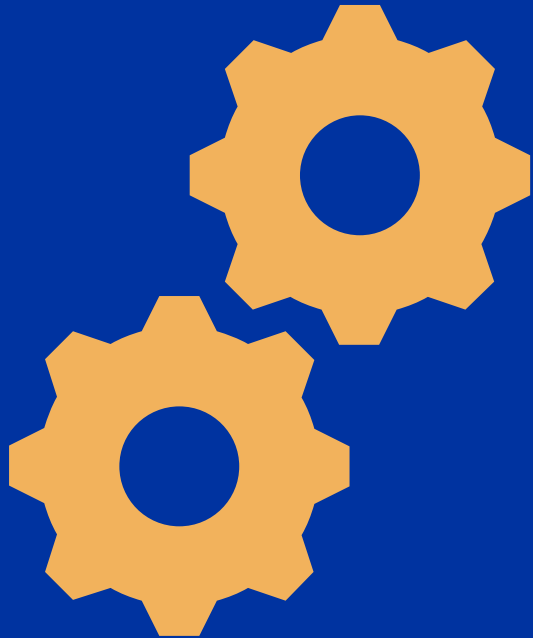


Appeal preparation

- **Step 1: Review relevant policy and procedures**
- **Step 2: Review appeal and any response (and supporting documents)**
 - What arguments have been raised in the appeal?
 - What arguments have been raised in the response?
- **Step 3: Consider whether the grounds have been satisfied**
 - If yes, proceed; if no, prepare explanation of decision
- **Step 4: Review investigative report, hearing transcript, outcome letter, and any sanction decision**
 - Do you understand what decision was reached and why?



Group Scenario



Respondent GTA appeals a finding that he violated the sexual harassment policy by conditioning Complainant Student's grades on unwelcome sexual favors. Specifically, Student alleged that sometime in March, GTA told Student that GTA would make sure Student received an A if Student would have sex with GTA. GTA contended that their sexual relationship was consensual.

GTA appeals the finding on three grounds:

- GTA contends that there is new evidence in the form a friend who will testify that Student told the friend sometime after the alleged incident that Student was in love with GTA and considering postponing graduate school in order to be with GTA. GTA's appeal states that Student was out of the country during the investigation.
- GTA contends that he was confused by some of the questions he was asked by Student's advisor during the cross-examination period of the hearing and the adjudicator would not let him confer with his advisor.
- GTA contends that he had been a student of the adjudicator and that the adjudicator had a conflict of interest based on the fact that GTA had complained about the grade he was given by the adjudicator in their class.

Written Appeal Decisions



Appeal decision letter

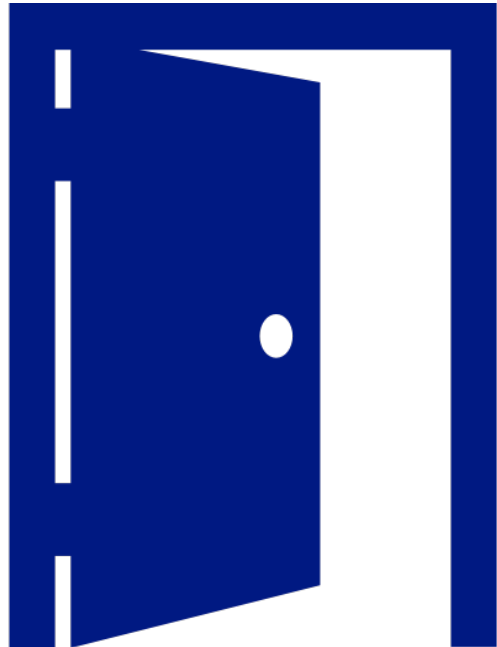
Structure of a Decision Letter

- ***(I) Background Information***
 - When was complaint submitted?
 - What was alleged?
 - What did investigation find?
 - What sanction was found, if any?
 - When was appeal submitted and was it timely?
- ***(II) Summary of Appeal***
 - What is the appealing party alleging, and is that allowable under policy?
 - Address cross appeals in same way.





Grounds for appeal (again)



- Procedural error or omission
- New evidence
- Conflict of interest



Appeal decision letter

- **Structure for a Decision Letter**
 - ***(III) Analysis of each basis of appeal, separately***
 - What factors support or contradict the appeal argument?
 - If error is alleged, did an error occur?
 - If an error occurred, would it have been sufficient to significantly impact the outcome of the investigation?
 - ***(IV) Conclusion***
 - Is the appeal granted or denied?
 - If granted, what outcome?





Practice Point:

Documenting the decision

- Summarizes appeal official's decision, *upfront*
- Address the appeal grounds
- Address all arguments raised in appeal, cross-appeal, and in any response
- Address all relevant policy definitions and procedural provisions
- Consult with Title IX Coordinator and legal counsel regarding any procedural or legal questions or issues
- ***Show your work:*** explain what decision you reached and why
- **It is a best practice for appeal decision letters to tell the whole story within the “four corners” of the letter.**

For discussion

Following the submission of all appeal materials but prior to issuing your decision, you learn that the respondent contacted two potential witnesses during the investigation and convinced them to change their stories prior to meeting with the investigator.

- How should this be addressed in your appeal decision, if at all?



Questions



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