

Title IX Appellate Decision-Maker Webinar for Higher Education Institutions

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Title IX Appellate Decision-Maker Training for Higher Education Institutions

Presented By: Emily P. Bothfeld and Matthew M. Swift

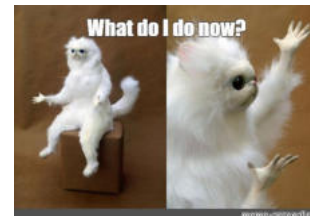
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Overview

- You have been appointed to serve as the Appellate Decision-Maker in a formal Title IX proceeding. Now what?



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Appellate Decision-Maker's Role Generally

- Review and decide appeals of:
 - Determinations of responsibility; and
 - Dismissals of formal complaints.
- Ensure appeal procedures are implemented consistently and equitably.
- Issue written determination to both parties simultaneously within appropriate timeframe.



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Appellate Decision-Maker's Role: A Step-by-Step Look

- 1) Check for potential conflicts of interest.
- 2) Obtain written appeal request.
- 3) Ensure Notice of Appeal was issued to both parties.
- 4) Review written appeal request and identify ground(s) for appeal.

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Appellate Decision- Maker's Role: A Step-by- Step Look

- 5) Gather relevant materials from Title IX Coordinator and/or Hearing Officer.
- 6) Allow parties to submit written statements in support of or challenging appeal.
- 7) Review relevant evidence and make appeal determination.
- 8) Prepare and issue written determination within timeframe required under Sex-Based Misconduct Procedures.

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STEP 1: Check for Potential Conflicts of Interest



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Conflicts of Interest

- The Title IX Regulations provide that any individual designated by an institution as a Decision-Maker must not have a conflict of interest.
 - This includes Appellate Decision-Makers.
- The Preventing Sexual Violence in Higher Education Act requires that an institution have a sufficient number of individuals trained to resolve complaints so that:
 - A substitution can occur in the case of a conflict of interest; and
 - An individual with no prior involvement in the initial determination or finding hear any appeal brought by a party.

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Conflicts of Interest

- Key question: Does the Appellate Decision-Maker's prior or existing relationship with or knowledge of a party prevent them from serving impartially?

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Conflicts of Interest



- Where you self-identify a conflict of interest, notify the Title IX Coordinator that you will need to recuse yourself.
- Where a party believes that you have a prohibited conflict of interest, the party may contact the Title IX Coordinator to request a substitution .
 - The Title IX Coordinator may request information from you to help them evaluate the claim.

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Hypothetical: Conflicts of Interest

- You serve as an Executive Vice President of Administration and Finance. You recently participated in a decision to place an employee Respondent on paid administrative leave pending an investigation. The College subsequently conducted a Title IX investigation with respect to the Respondent, and you have now been appointed to serve as the Appellate Decision-Maker for the case.
 - Must you recuse yourself from serving as the Appellate Decision-Maker?

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STEP 2:
Obtain Written
Appeal Request



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Written
Request for
Appeal

- The Complainant or Respondent may request an appeal of any determination regarding responsibility or dismissal of a formal complaint (or allegations therein) within seven (7) business days of receipt of the written determination or dismissal notice.

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Written Request for Appeal



- The request for appeal should be sent directly to the Title IX Coordinator and should identify the ground(s) on which the party seeks to appeal the determination or dismissal.
- Within seven (7) business days of receiving the appeal request, the Title IX Coordinator will forward the appeal request to the Appellate Decision-Maker.

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STEP 3:
Ensure Notice of
Appeal was
issued to both
parties.



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Notice of Appeal

- Within seven (7) business days of the Title IX Coordinator's receipt of the appeal request, the Title IX Coordinator must issue the Notice of Appeal to both parties.

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Notice of Appeal

- Notifies parties that an appeal has been filed.
- Identifies the Appellate Decision-Maker appointed to review the appeal.
- Informs parties of their right to submit a written statement in support of or challenging the appeal.



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STEP 4:
Review appeal
request and
identify
ground(s) for
appeal.



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**Permissible
Grounds for
Appeal**

The permissible grounds for appeal under the Title IX Regulations and Preventing Sexual Violence in Higher Education Act include:

- a) A procedural irregularity occurred
- b) New evidence or information exists that could affect outcome of the matter
- c) The Title IX Coordinator, Investigator or Hearing Officer had a conflict of interest or bias that affected the outcome of the matter
- d) The sanction is disproportionate with the violation

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Hypothetical: Establishing Sufficient Grounds for Appeal

- The Respondent, a student, was found to have engaged in Title IX sexual harassment against a fellow student in the Debate Society. The Title IX Coordinator forwards you the Respondent's appeal request, in which Respondent claims that he is entitled to appeal the determination of responsibility because the Hearing Officer was a former professor of the Complainant.
 - Has the Respondent established sufficient grounds to bring an appeal?
 - What are your next steps?



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Hypothetical: Establishing Sufficient Grounds for Appeal

- The Complainant, a student, accused her softball coach of Title IX sexual harassment, claiming that he made ongoing inappropriate comments to her, both during and outside of practices.
- Following an investigation, the Decision-Maker determined that there was insufficient evidence to find that the Respondent engaged in Title IX sexual harassment.
- The Complainant appealed the determination, claiming that another student on the team told her that she witnessed the Respondent's inappropriate comments on at least two occasions.
 - On what basis is the Complainant appealing the determination regarding responsibility?

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Hypothetical: Establishing Sufficient Grounds for Appeal

- You receive a written appeal request submitted by an employee Complainant. The request states: “The Title IX Coordinator dismissed my formal Title IX sexual harassment complaint even though I gave screenshots of the Respondent’s sexist comments, and I want to appeal this unfair result.”
 - Has the Complainant established sufficient grounds for bringing forth an appeal?
 - What should you do?

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STEP 5: Gather relevant materials from Title IX Coordinator and/or Decision- Maker.



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Relevant Materials

- Relevant materials should include, at a minimum:
 - Investigation Report
 - Parties' written responses to the Investigation Report
 - Hearing transcript/recording, other evidence gathered during investigation and/or presented during live hearing
 - Determination of Responsibility or Notice of Dismissal

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Relevant Materials

- Other relevant materials, if additional information is needed, depending on basis for appeal:
 - Prior discipline records of Respondent
 - New evidence submitted by appealing party
 - Documentation of past interactions between parties and Title IX personnel

RELEVANT

Tip: You may gather information beyond that contained in the investigation record if necessary to thoroughly review and consider the appeal.

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Hypothetical: Relevant Materials

- A Respondent was determined to have engaged in Title IX sexual harassment. The Respondent requests an appeal of the determination regarding responsibility, alleging that the Decision-Maker has a bias against him, which resulted in the finding of responsibility.
- According to the appeal request, the Decision-Maker was a former instructor of the Respondent, and when the Respondent was in his class, the Decision-Maker had unfairly reported him for a Code of Conduct violation based on a message on his t-shirt.
 - What materials would be relevant to your review of this appeal?

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Hypothetical: Relevant Materials

- An employee submits an appeal request after being determined responsible for engaging in quid pro quo sexual harassment toward a student. The employee claims that there were several procedural irregularities during the investigation, including:
 - The employee did not receive sufficient notice of relevant investigatory meetings
 - The employee's union representative was not allowed to meaningfully participate during the employee's investigatory interview
- What materials would be relevant to your review of this appeal?

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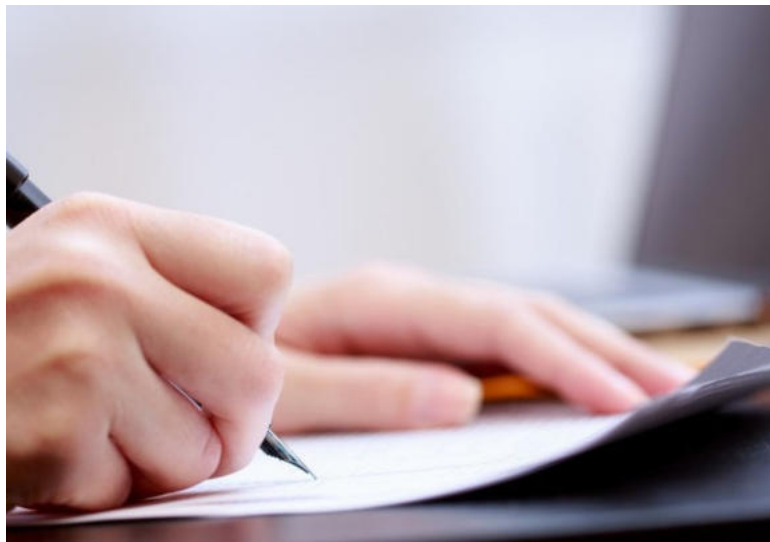
Questions??



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STEP 6:
Allow parties
to submit
written
statements in
support of or
challenging
appeal.



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Written Statements

- Before reaching a determination regarding an appeal, both parties must be given an opportunity to submit a written statement in support of or challenging the appeal.
- As a best practice, we recommend directing the parties to submit their written statements directly to the Appellate Decision-Maker.
- Title IX does not delineate a timeframe for submission of the written statements.
 - Robbins Schwartz Notice of Appeal directs parties to submit written statements within five (5) business days after their receipt of the Notice of Appeal.

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Written Statements Q&A



- Q: Are the parties required to submit written statements?

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Hypothetical: Written Statements

- You are reviewing an appeal in a student-student Title IX sexual harassment proceeding. Both parties have submitted written statements concerning the appeal.
- In reviewing the Complainant's written statement, it appears that the statement was written by the Complainant's advisor (who is an attorney) and not by the Complainant himself.
 - What should you do?

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STEP 7: Review relevant evidence and make appeal determination.



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Possible Outcomes of Appeal



Affirm



Reverse



Modify



Dismiss

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Appeal Determination: Relevant Considerations

Questions to Ask:

1. Did the requesting party establish sufficient grounds to bring an appeal?
 - If no, you may dismiss the appeal.
 - If yes, proceed to question 2.
2. Did the grounds for appeal affect the outcome and/or result in prejudice to the requesting party?
 - If no, you should affirm the underlying determination or dismissal.
 - If yes, proceed to question 3.
3. Is the evidence sufficient to warrant reversal or modification of the determination of responsibility (or associated sanction) or dismissal?

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Best Practices for Considering Appeals

- The appealing party has the burden of demonstrating why the dismissal or determination of responsibility (or an associated sanction) should be overturned.
- The Appellate Decision-Maker is not required to meet with the parties or other individuals when reviewing/considering the appeal.
 - In most cases, meeting with the parties or other individuals will not be necessary; the Appellate Decision-Maker should not “re-investigate” the matter.



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Best Practices for Considering Appeals

- In cases where the appeal is based on an alleged procedural error, consider whether such procedural error was harmless.
 - If so, you may affirm the finding notwithstanding the procedural error.
 - Example: The Respondent did not receive certified mail copy of the initial written notice of the allegations, but it is documented that the Respondent received the notice via e-mail and had an opportunity to review and respond to the allegations during an in-person interview with the Investigator. The Respondent also participated in the live hearing and was able to cross-examine the Complainant and several witnesses.

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Best Practices for Considering Appeals

- In cases where a party's appeal is based on the discovery of new evidence, determine whether the new evidence would have impacted the outcome if it were considered by the Hearing Officer.
 - If not, you may affirm the finding despite the new evidence.



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Best Practices for Considering Appeals

- In cases where a party's appeal is based on an alleged conflict of interest or bias on the part of the Title IX Coordinator, Investigator or Hearing Officer, consider:
 - Whether the individual in question had a prior or existing relationship with or knowledge of the Complainant or Respondent that impacted their ability to serve impartially
 - Whether such relationship or knowledge affects the outcome of the case
- You may need to gather additional information from the individual in question concerning their relationship with or knowledge of the parties.

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Best Practices for Considering Appeals

- In cases where a party's appeal is based on an allegation that the sanction is disproportionate with the violation, consider:
 - The severity of the misconduct for which the Respondent was found responsible
 - The rationale for the sanction imposed
 - This information should be contained in the determination of responsibility.
 - The Respondent's disciplinary history (if prior discipline was relevant to the determination of an appropriate sanction)
 - The appealing party's rationale or explanation for why the sanction was disproportionate

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Considering Appeals Q&A

- Q: Where a party's appeal is based on an allegation that the sanction is disproportionate with the violation, may the Appellate Decision-Maker consider prior cases involving similar misconduct by other individuals when reviewing the appeal?



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Hypothetical: Appeal Determination

- A student Complainant filed a formal complaint alleging that another student made inappropriate sexual advances toward her over a period of three months. After a lengthy investigation, the Hearing Officer determined that the Respondent was not responsible for Title IX sexual harassment.
- The Complainant has appealed, alleging that the Hearing Officer is the Respondent's football coach and is therefore biased. In her written statement, the Complainant admits that she knew the Hearing Officer was the Respondent's coach when he was appointed to that role. However, after the determination was issued, she found out that the Hearing Officer is also close friends with the Respondent's parents and sees the Respondent almost every weekend.
 - What information would be relevant when reviewing this appeal?

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Hypothetical: Appeal Determination



- As part of your review, you obtain a copy of the investigation report. You note that the investigator interviewed several witnesses who reported that they saw the Respondent make inappropriate sexual advances toward the Complainant—information that the Hearing Officer seemed to ignore in making the determination regarding responsibility.
 - What are your next steps?

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Hypothetical: Appeal Determination

- A Respondent's appeal request states that the sanction issued by the Hearing Officer (a one semester suspension and requirement to participate in sexual harassment training) is disproportionate with the violation ("hostile environment" sexual harassment).
- What information should you consider when reviewing the Respondent's appeal?

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Hypothetical: Appeal Determination

- An employee supervisor was determined to have engaged in quid pro quo sexual harassment by demoting his employee after she refused to submit to the supervisor's explicit sexual advances.
- The Complainant has appealed the determination of responsibility on the ground that the sanction the Hearing Officer recommended (a two-day suspension without pay) is disproportionate with the violation. The Complainant asserts that the Respondent should have been terminated.
- What information should you consider when reviewing the Complainant's appeal?
- If you determine that the recommended sanction is disproportionate with the violation, what should you do?

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STEP 8: Issue Written Determination



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Written Determination



Must be issued to both parties simultaneously within 7 business days of the conclusion of the appeal review



Affirms, reverses or amends the determination of responsibility or notice of dismissal (or dismisses appeal if request failed to establish sufficient grounds for appeal)



Describes outcome and rationale
Notes that decision by Appellate Decision-Maker is final



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Questions?



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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

RECENT PUBLICATIONS

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

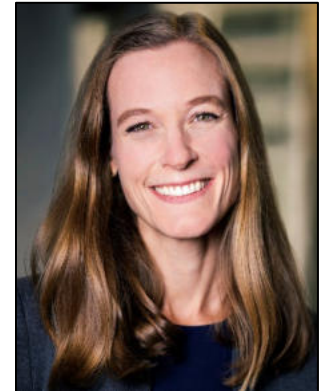
RECENT PRESENTATIONS

Legal Gymnastics in the Age of COVID and Other Challenges, Illinois Council of Community College Presidents Retreat (January 2022)

Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA, and PIPA and Strategies for Compliance, Secured Schools K-12 Data Privacy and Cybersecurity Conference (January 2022)

Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges' Risk Management Practices, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

A Student's "Right" to a College Education: Due Process Rights in Academic and Non-Academic Discipline, Illinois Community College Chief Student Services Officers' Summer Meeting (June 2019)



PRACTICE AREAS

Education Law
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Student Discipline

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B.S., *cum laude*, Vanderbilt University

ADMITTED TO PRACTICE

U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

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Matthew is a member of the labor and employment practice group. He counsels employers in various aspects of labor and employment law, such as employee discipline, labor relations, wage and hour, and employment discrimination matters under both federal and state laws such as the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, Title VII of the Civil Rights Act, and Illinois Human Rights Act. He also represents clients in state and federal courts and advises on Illinois Freedom of Information Act and Open Meetings Act matters.

Before he joined Robbins Schwartz, Matthew served as in-house counsel and FOIA Officer for the Illinois Office of the Governor. In that role, he counseled dozens of agencies on compliance with sensitive FOIA requests, advised on current and potential litigation issues, and served as a legal liaison to the Illinois Department of Human Rights and the Illinois Human Rights Commission.

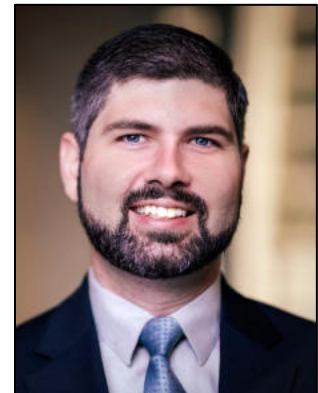
RECENT PUBLICATIONS

"All Together Now – Employment Law Issues in the New Title IX Rules,"
Chicago Daily Law Bulletin (2020)

"Life After Leave: Bringing Employees Back in a COVID-19 Age" Best Practices
Magazine, American Association of School Personnel Administrators (2020)

RECENT PRESENTATIONS

Red Light, Green Light? Responding to Recent Decisions about COVID-19
Mitigations, ED-RED's Virtual Member Meeting (February 2022)



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