

JacksonLewis

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

Definition of Sexual Harassment (in Section 106.30)

Scope of the School's Education Program or Activity

How to Conduct an Appeal

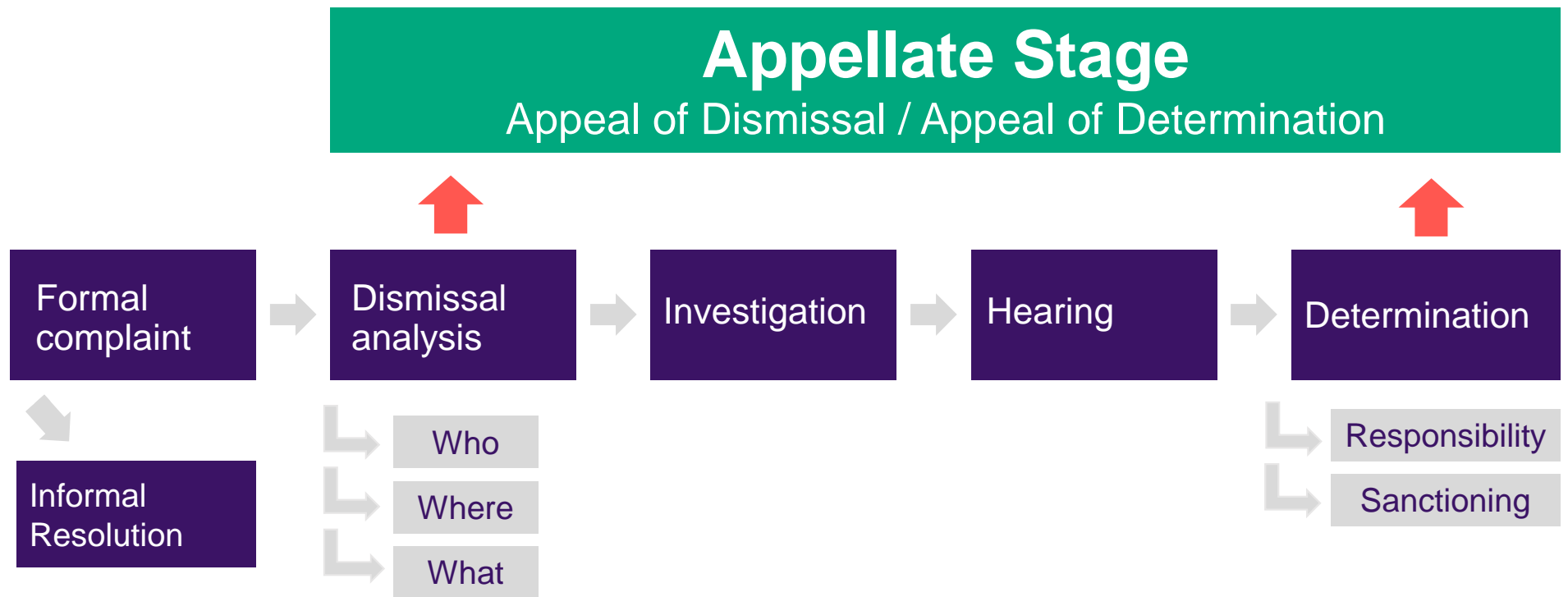
How to Serve Impartially

Technology used for Live Hearing (as applicable)

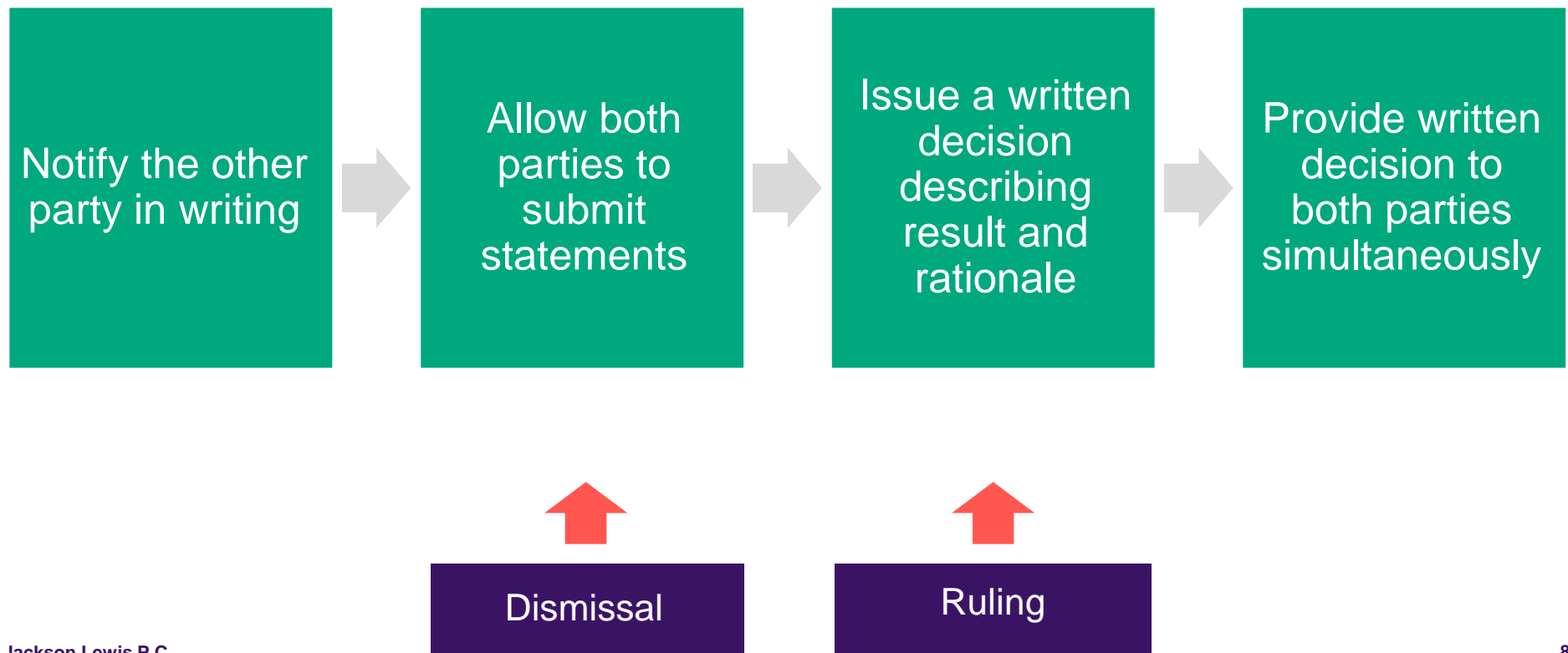
Relevance of Questions & Evidence

E.g. when Complainant's sexual predisposition or prior sexual behavior are not relevant

Understanding the Big Picture of the Title IX Grievance Process



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



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?**

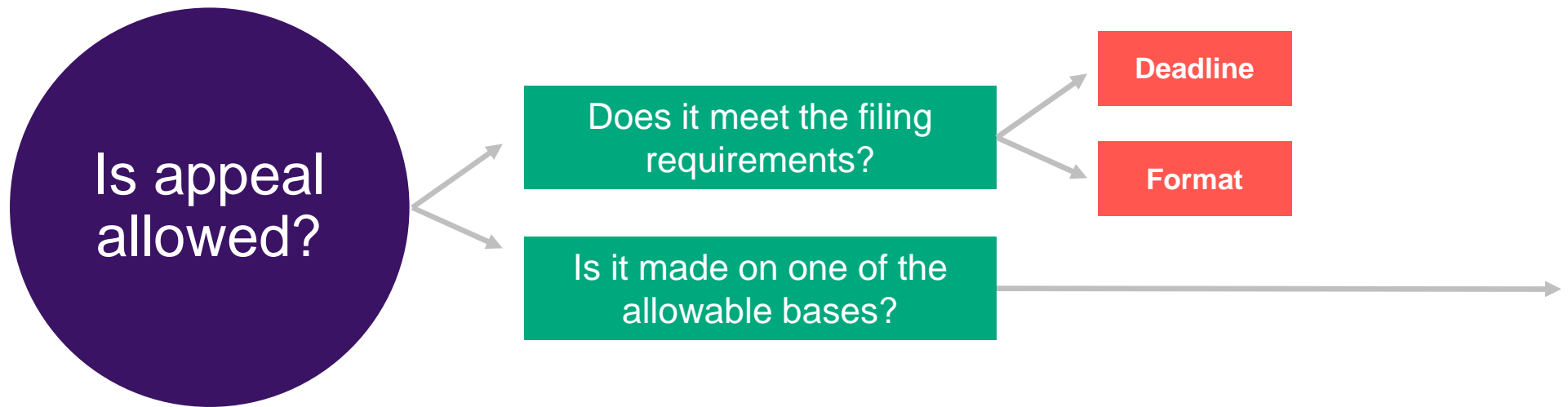
Alert! Preliminary Question!

Who is going to make this determination?

~~Title IX Coordinator~~

~~Hearing Decision Maker~~

Appellate Decision Maker (Named when dismissal or ruling is announced)





3

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





4

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

Intake &
Notice

Dismissal
Analysis

Investigation

Hearing

Ruling

2

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

Title IX
Coordinator

Investigators

Decision
Makers



3

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

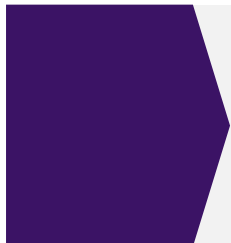
Did the identified problem affect the outcome? (or, if new evidence, could it affect the outcome)



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)

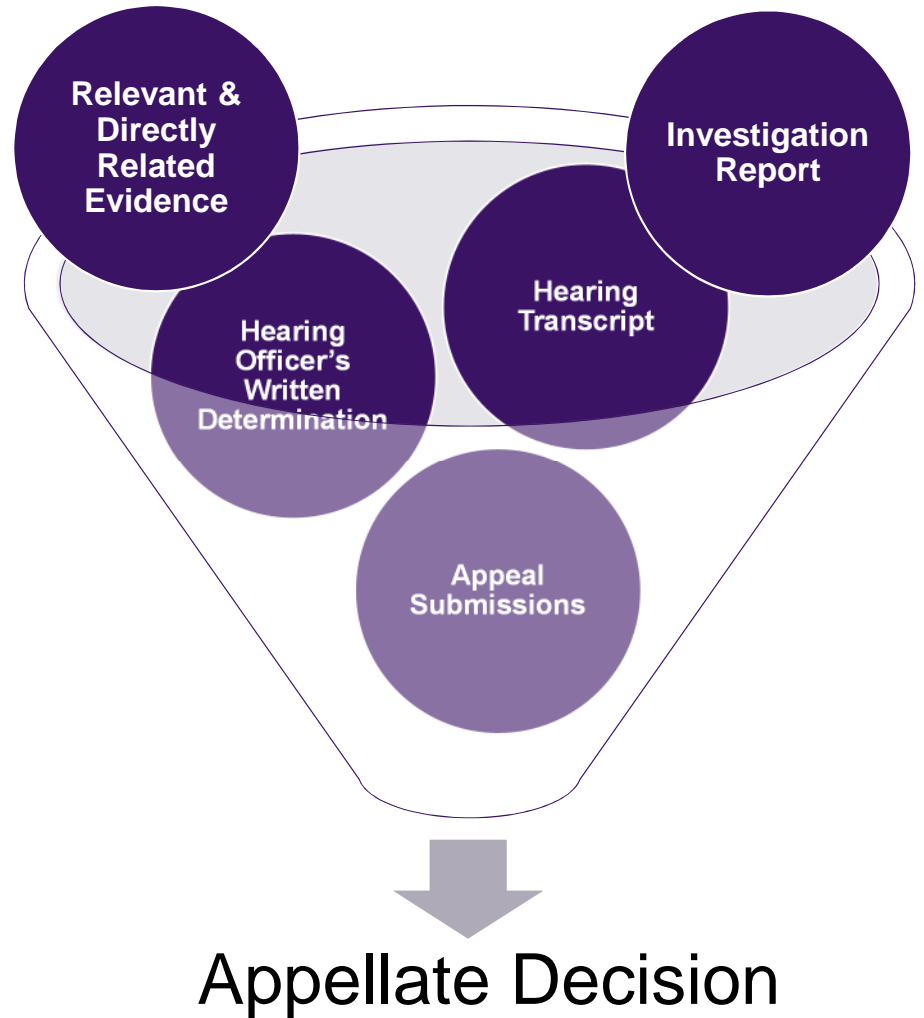
**Should the
Appeal be Granted?**

What can you consider?

Can you interview parties or witnesses?

Can you interview school personnel?

Can you search for additional information?



Bear in mind:

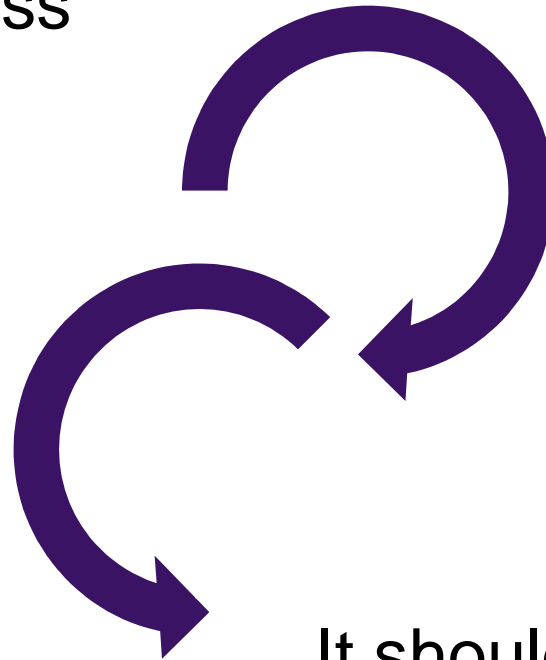
If an appellate process is going to feature hearing process activities...

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.

Grounds for appeal

Procedural irregularity – potential misapplication of the dismissal rules

Affected the outcome

Yes – resulted in dismissal (unless it was not the sole grounds)

Ruling on appeal

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.



2

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.

Grounds for appeal

New evidence

Affected the outcome

No

Ruling on appeal

Denied. Determination of hearing Decision Maker upheld. Witness can file a complaint against Complainant.



3

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.

Grounds for appeal

No allowable grounds

Affected the outcome

N/A

Ruling on appeal

Denied. Ruling of hearing Decision Maker upheld.



4

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.



5

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.

Grounds for appeal

Conflict of interest

Affected the outcome

If pending appointment was known, arguably yes

Ruling on appeal

Granted and remanded for a new hearing with a different Decision Maker.



6

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.

Grounds for appeal

Bias

Affected the outcome

Tricky – can Respondent identify evidence of bias in the report or elsewhere?

Ruling on appeal

Denied. Determination of hearing Decision Maker upheld.



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.

Grounds for appeal

Procedural irregularity – failure to apply rape shield

Affected the outcome

No, because no error. Rape shield applies to sexual predisposition and behavior.

Ruling on appeal

Appeal denied

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Thank **you.**

Your Jackson Lewis Title IX Team



**Joshua D.
Whitlock**



**Sarah Ford
Neorr**



**Carol R.
Ashley**



**Susan D.
Friedfel**



**Monica H.
Khetarpal**



**Crystal L.
Tyler**



**Nicholas A.
Simpson**



**Laura A.
Ahrens**

To get in touch with the team,
please contact **Josh Whitlock.**

Josh.Whitlock@JacksonLewis.com
(980) 465-7242

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