

Deciding an Appeal:

The Last Best Chance to Get It Right



WAKE FOREST
UNIVERSITY

This training provides general legal advice about certain topics related to the U.S. Department of Education's regulation and enforcement of Title IX of the Education Amendments Act of 1972 and specifically with respect to the Title IX regulatory changes released on May 6, 2020 and effective on August 14, 2020.

This is a quickly-evolving area, and substantial changes to applicable law, rules, regulations, and enforcement policies in the near term seem likely. We assume no responsibility to update this training video notwithstanding changes in the law.

Please note that this presentation does not address state or local laws, rules, or regulations which may be material in evaluating the subject matter of this training. Finally, this presentation offers general guidance about its topic and does not offer specific legal advice about any particular circumstance, investigation, hearing, or matter.

- I. What are the qualifications for the position?
- II. Where do you fit into the big picture?
- III. What are the bases for an appeal?
- IV. What are the steps of the appellate process?

This is the second of two required training sessions for appellate hearing officers. Session one – training for all hearing officers – should be completed first.

1.

~~Title IX Coordinator~~
~~Investigator~~

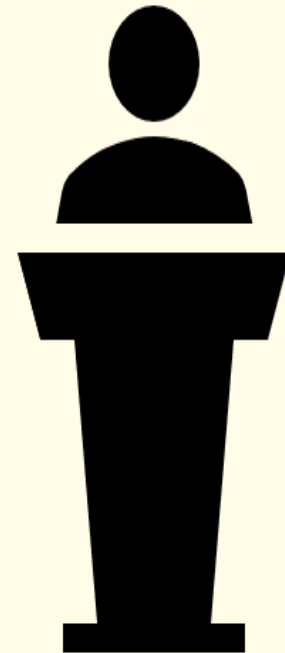
~~Original Decision Maker~~

2.



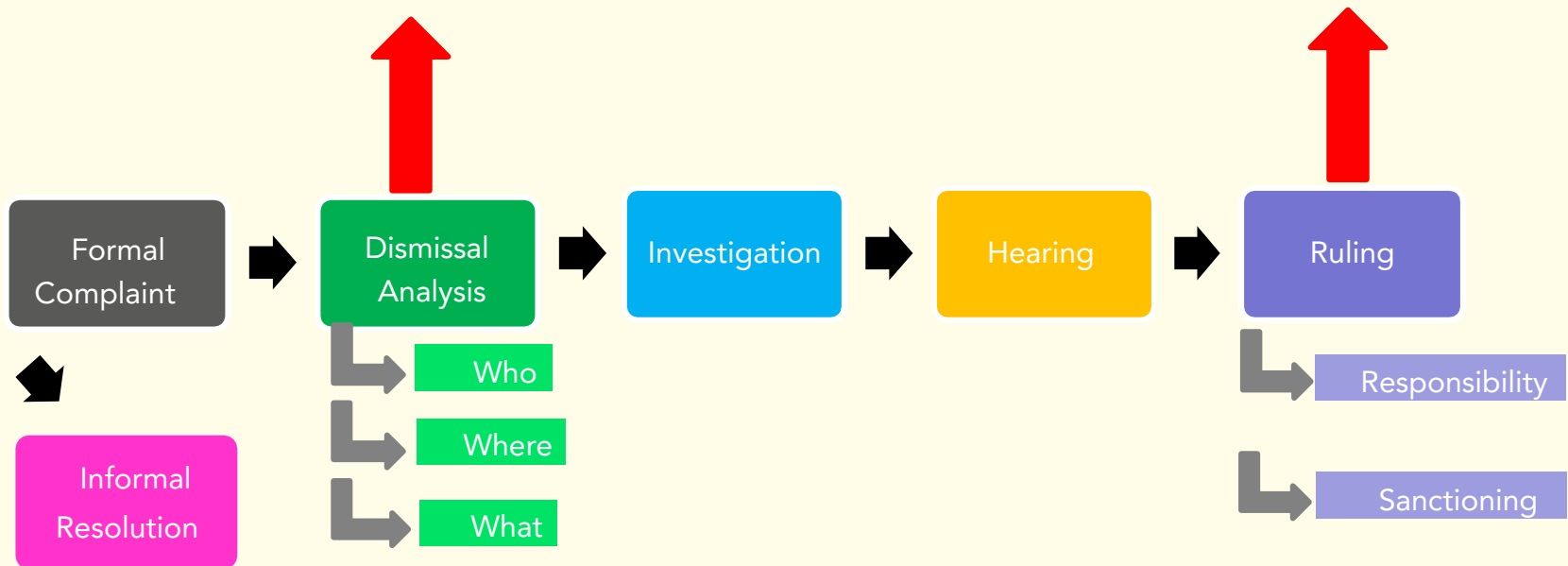
3.

Training



Appellate Process

Appeal of Dismissal/Appeal of Determination



Three (and only three) Bases for Appeal*

- 1 Procedural Irregularity
- 2 Conflict of Interest/Bias
- 3 New Evidence

* 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 the outcome I want.

You are not conducting a *de novo* review.



The Appellant must:

- Identify a procedural irregularity
- Make a case that it affected the outcome of the matter

Dismissal
Analysis

Investigation

Hearing

Ruling

Dismissal
Analysis

The Complainant's complaint was dismissed on the grounds that he was "not a person in the US" at the time of the incident because he is a Chinese national on an F-1 student visa. The Complainant appeals.

Procedural irregularity:

Misapplication of the rule – relevant issue is location, not national origin or immigration status

Affected the outcome:

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

Investigation

The investigator asked the Respondent to get a witness statement from anyone who could support her alibi. Respondent failed to do so. She ultimately was found responsible for stalking. The Respondent appeals.

Procedural irregularity:

The school bears the burden of gathering evidence, not either party.

Affected the outcome:

Yes, if lack of a corroborated alibi was a factor.

Ruling

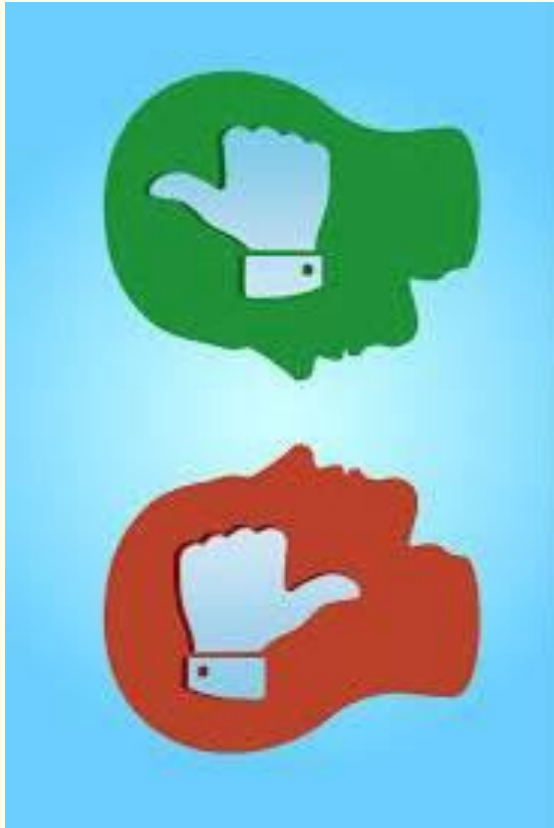
In finding the Respondent responsible, hearing officer cited details from a police report made the day of the incident. No police officer attended the hearing. Respondent appeals.

Procedural irregularity:

No consideration of statement if witness not available for cross examination

Affected the outcome:

Yes – information that should have been excluded was cited in the determination.



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

Hearing
Officers

Respondent found not responsible. Key witness (who testified that the Complainant consented to sexual contact) is the Respondent's cousin. Complainant appeals on the grounds that witness had a conflict of interest.

Conflict of interest:

No – applies only to Coordinator, investigator(s), and hearing officer(s)

Affected the outcome: N/A

In response to current events, professor pens an op-ed arguing that sexual harassment investigations have become “witch hunts” and that “no man is safe from accusations that his very existence is oppressive and traumatizing to victims of real or imagined advances.” Professor later serves as hearing officer and finds the male Respondent not responsible for sexual harassment.

Bias:

Yes, in favor of male Respondents

Affected outcome:

Reasonable conclusion based on factors

The Appellant must:

- Identify new evidence that was not reasonably available at time of determination
- Make a case that it affected the outcome of the matter



After being found responsible for Level 4 expressive harassment, Respondent goes to new lengths to retrieve old texts and produces texts demonstrating that Complainant regularly laughed at and expressed approval of communications he later alleged were unwanted and made him uncomfortable.

New Evidence:

Yes, but it was reasonably available previously

Affected outcome: N/A

Respondent is found not responsible for sexual assault. Two days later, one of his friends forwards the Title IX Coordinator an email chain in which the Respondent bragged of committing the assault. "I'm sorry I didn't bring this forward previously," the friend says. "I didn't want to get involved, but I won't be able to live with myself if I stay silent."

New Evidence:

Yes and unknown to investigators and Complainant

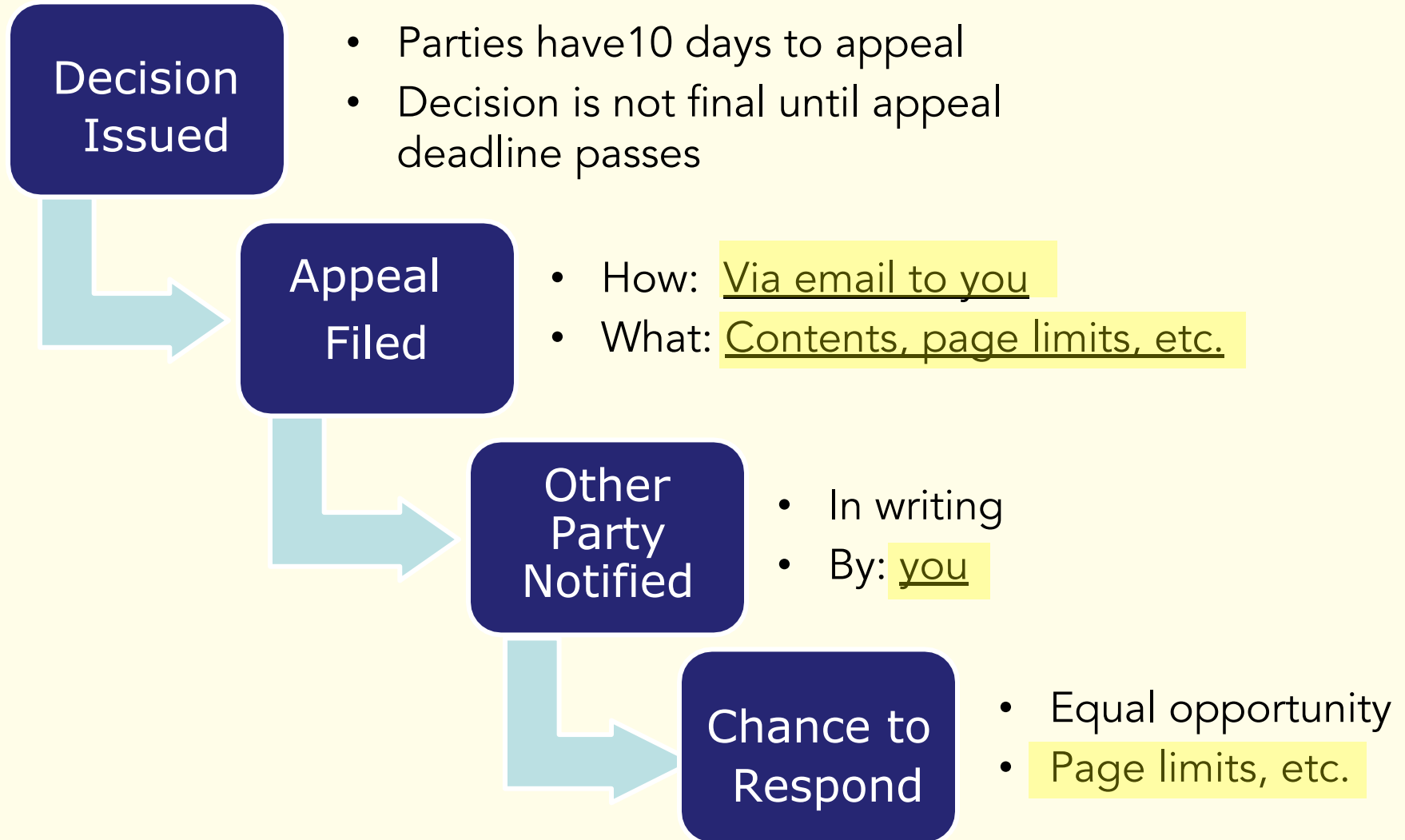
Affected outcome:

Reasonable assumption given that it is documentary evidence directly contradicting denial

1. List the alleged policy violations
2. Catalogue the elements
3. Consider whether the issue impacted the establishment of an element (either prevented it from being established or allowed it to be established)

OFFENSIVE SEXUAL TOUCHING

- 1 Intentional touching
- 2 Without consent
- 3 Of another person's intimate parts
(intimate part:penis)



What can
you
consider?

- Report, directly related evidence, transcript, decision
- Other: Interviews? Independent research?

Issue
Decision

- Result and rationale
- Timeframe: 10 days

Provide to
Parties

- In writing
- Simultaneously

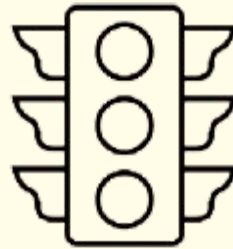
Remand?

New Evidence



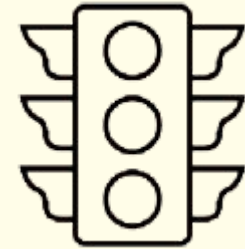
Remand for mini hearing to consider new evidence.

Procedural Irregularity



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

Bias/ Conflict



Can't remand to same biased participant.
Start over??

Your Parker Poe Title IX Team



For Title IX assistance, contact Team Lead Josh Whitlock at joshwhitlock@parkerpoe.com or 704-335-6622