




**HIGHER ED TITLE IX  
APPELLATE DECISION-  
MAKER  
FOUNDATIONS & PRACTICUM**

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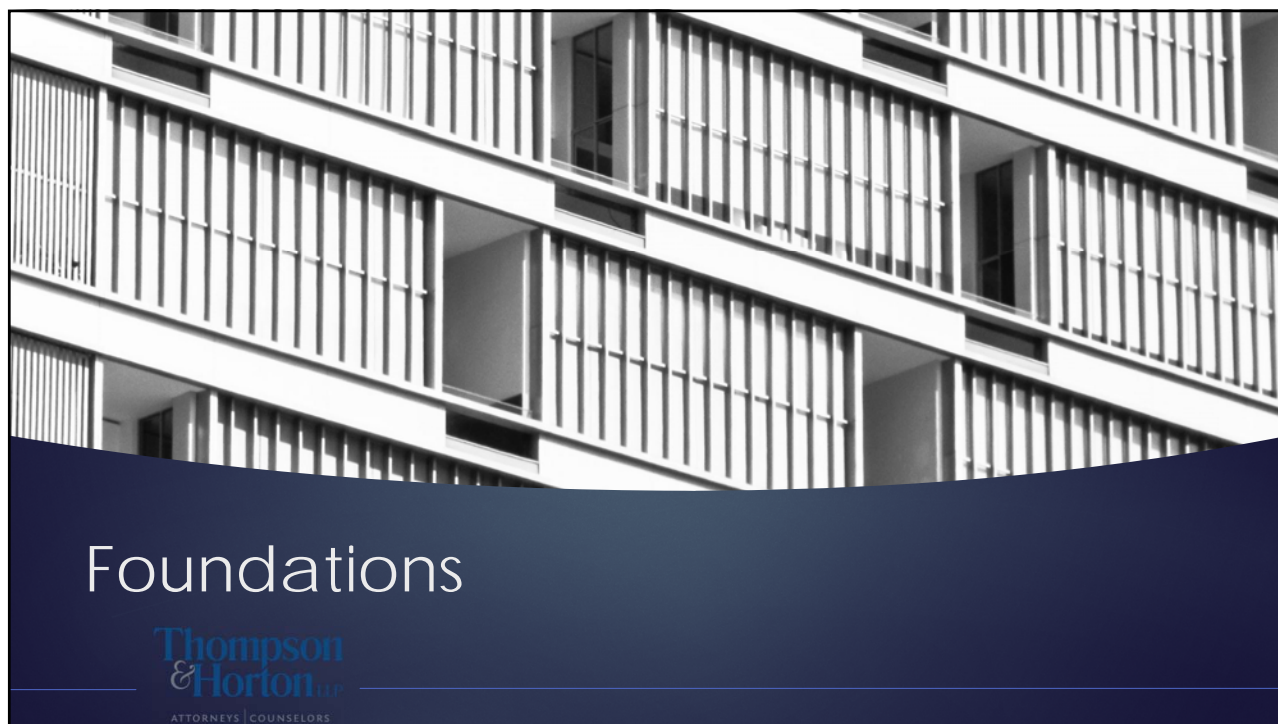
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### My institution has had... (choose all applicable)

- At least one successful appeal (appeal granted)
- At least one unsuccessful appeal (appeal denied)
- No appeals
- I'm not sure

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## Let's Start With the (Appeal) Basics

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# Title IX Appeal Basics

Any party to a Title IX formal complaint can appeal:

1. A **dismissal** of a formal complaint or allegation therein
2. A **written determination of responsibility** for a formal complaint or allegation therein



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# Title IX Appeal Basics

Three bases for appeals:

1. A **procedural irregularity** that affected the outcome
2. **Newly discovered evidence** that could affect the outcome
3. Title IX personnel had a **conflict of interest or bias** that affected the outcome

\*\*Can offer appeals on other bases if done equally



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# Title IX Appeal Basics

The appellate decision-maker:

1. Cannot be the same person as the Title IX Coordinator or the Title IX Coordinator's designee(s), the investigator(s), or the initial decision-maker(s) assigned to the case
2. Is not recommended to be the same person as the informal resolution facilitator on the case
3. Must be impartial (no bias, conflict of interest, or prejudice)



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Refresher: Title IX Process Steps

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# Title IX Process Steps

## Step 0.5: Intake

- ▶ Educational institutions are responsible any time an “official with authority” has “actual knowledge” of conduct that triggers the Title IX process
- ▶ It’s not always clear if Title IX is triggered; intake is a process to learn more about what is alleged



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# Title IX Process Steps

## Step 0.5: Intake

What triggers Title IX? An allegation of...

1. Title IX “**sexual harassment**”
2. In an “**education program or activity**” of the educational institution
3. Against a person “**in the United States**”



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# Title IX Process Steps

## Step 1: Supportive Measures Meeting

If any “official with authority” has notice of conduct that triggers Title IX, a supportive measures meeting must be held

- ▶ By the Title IX Coordinator or designee
- ▶ A minor student’s parents must be involved
- ▶ Discuss supportive measures and the Title IX formal complaint process



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# Title IX Process Steps

## Step 2: Removal of the Respondent

Even if no formal complaint is filed...

- ▶ **Emergency Removal:** A party (usually respondent) who is found based on an individualized analysis to pose an immediate threat to the physical health and safety of any person (including self) can be removed on an emergency basis
- ▶ **Administrative Leave:** An employee can be put on administrative leave subject to the educational institution’s normal leave policies



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**Only move to Step 3 if you have a Formal Complaint**

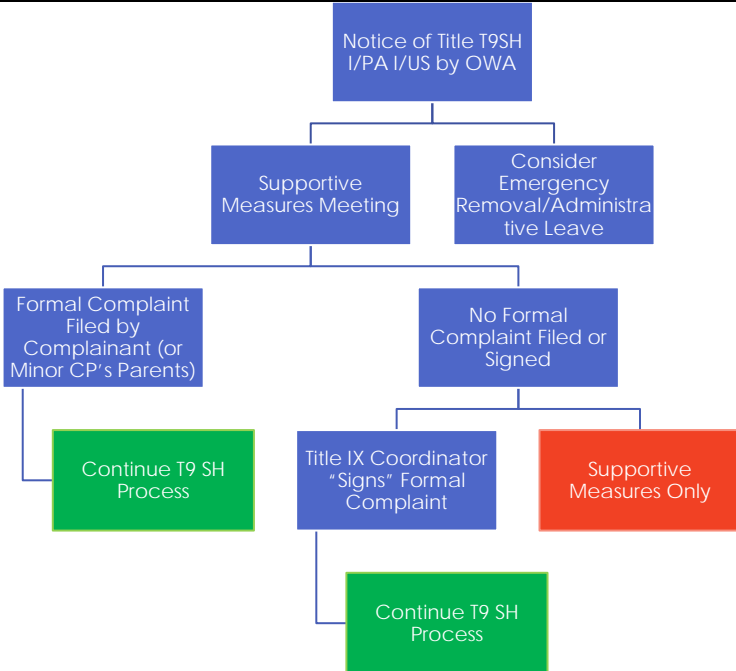
**- NO DISCIPLINE WITHOUT A FORMAL COMPLAINT-**

**But support, support, support**

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# Do You Keep Going?



```
graph TD; A[Notice of Title T9SH I/PA I/US by OWA] --> B[Supportive Measures Meeting]; A --> C[Consider Emergency Removal/Administrative Leave]; B --> D[Formal Complaint Filed by Complainant (or Minor CP's Parents)]; B --> E[No Formal Complaint Filed or Signed]; D --> F[Continue T9 SH Process]; E --> G[Title IX Coordinator "Signs" Formal Complaint]; E --> H[Supportive Measures Only]; G --> I[Continue T9 SH Process];
```

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# Title IX Process Steps

## Step 3: Notice of Allegations

Only if a formal complaint is filed...

- ▶ **Must include the names of the parties and details such as date, locations, and alleged conduct**
- ▶ **See T&H Guidebook – Documents 19 & 20**

Note: This notice is required before any first investigatory meeting/interview with the Respondent.



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# Title IX Process Steps

## Step 4: Consider Dismissal

Only if a formal complaint is filed...

- ▶ Consider if dismissal is required or warranted (at this stage and throughout the lifespan of the process)
- ▶ **See T&H Guidebook – Document 22**

Note: This is usually only necessary if the initial report comes in the form of a Formal Complaint



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## Dismissal Reasons

Mandatory Dismissals	Permissive Dismissals
Alleged conduct, if proved, would not be sexual harassment	Complainant asks Title IX Coordinator in writing to withdraw complaint
Alleged conduct, if proved, would not be in an educational program or activity	The respondent's enrollment or employment ends
Alleged conduct, if proved, would not be against a person in the U.S.	Circumstances prevent gathering sufficient evidence to reach a determination (non-cooperation by CP, length of time between incident and complaint, etc.)



Can use another policy or code of conduct



Cannot use another policy or code of conduct

## Written Notice and Appeal— Dismissals

- ▶ If the educational institution dismisses the complaint or allegations in the complaint, it must promptly send written notice of the dismissal and the reason for the dismissal to all parties
- ▶ Any party **can appeal** the dismissal decision

**APPEAL**

# Title IX Process Steps

## Step 5: Consider Informal Resolution

Only if a formal complaint is filed...

- ▶ Can be offered in certain cases (not in cases involving employee-on-student allegations)
- ▶ If successful, ends the Title IX process with no appeal rights

# Title IX Process Steps

## Step 6: Investigation

## Step 7: Decision

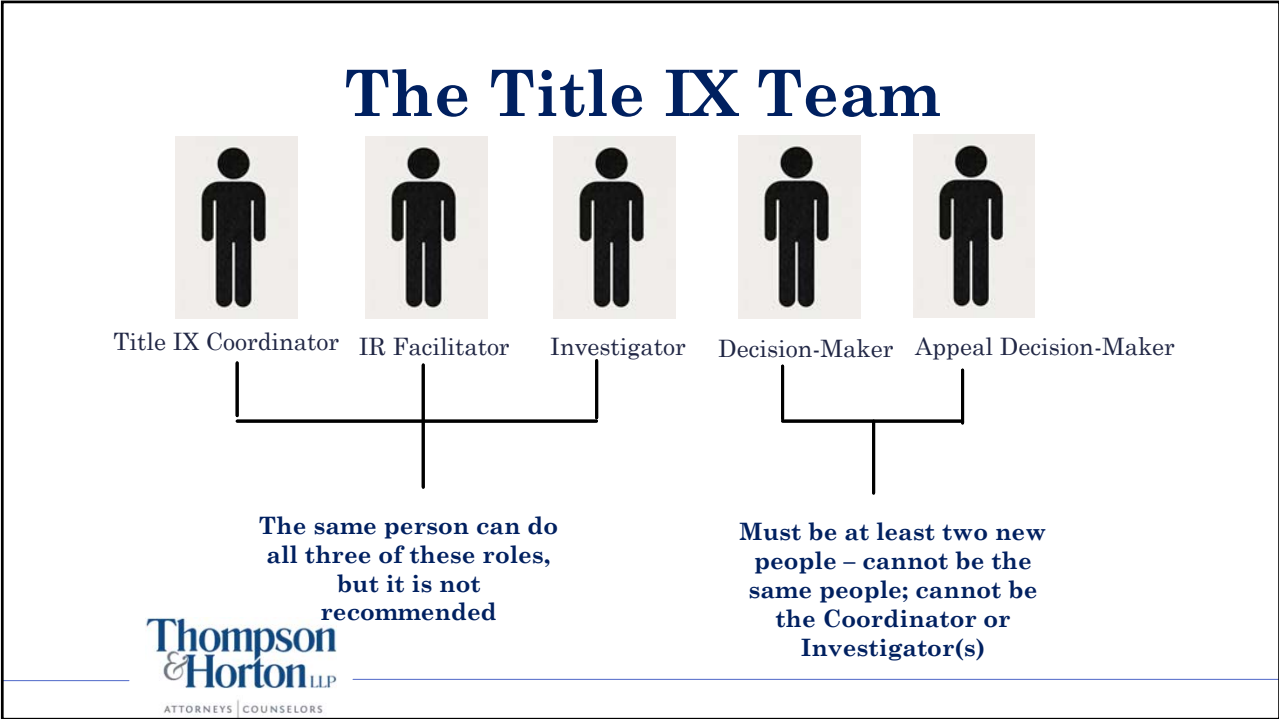
## Step 8: Appeal



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**NOTE: ALL STEPS include strict detailed requirements from the Title IX rules**



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**Appeals Roadmap**

**9 for IX**

1. Familiarization with the file
2. Verification of impartiality
3. Determining the validity of the appeal

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**Appeals Roadmap**


**9 for IX**

4. Notice to the parties
5. Timeframes and extensions
6. Analyzing the appeal

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**Appeals  
Roadmap**



**9 for IX**

7. Writing the appeal determination
8. Reversals and remands
9. Closing the file

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**THE FILE**

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# 1. Familiarization with the file

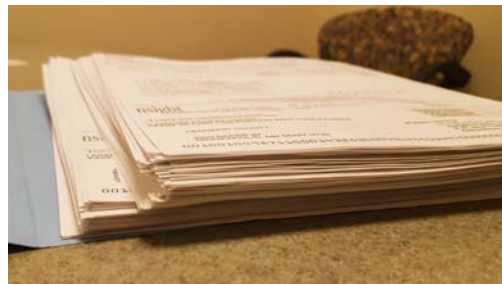
- ▶ Review all material provided by the Title IX Coordinator
- ▶ Create a checklist to ensure all steps in the process are met and to document compliance
  - T&H Guidebook Checklist D – Title IX Appellate Decision-Maker Checklist



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## The File Rules

- ▶ Appeals are not *de novo*
- ▶ Confine the review to the record + appeal documents



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## Our Case: Allegations

Student Charlie alleges that student Rei repeatedly asked Charlie out on dates, even when Charlie repeatedly said no, bought Charlie unwanted gifts, incessantly texted, emailed, and messaged Charlie, even after being blocked on certain message platforms, followed Charlie around in ways that made Charlie nervous for their safety, and told a mutual friend they would do “whatever it takes” to get Charlie to be with them.



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## Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ That:
  - Is one of the Title IX “Big Five” or
  - Creates a Title IX “Hostile Environment”
- ▶ In an “Education Program or Activity”
- ▶ Against a Person “in the United States”



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## Unwelcome Conduct

- ▶ Not solicited or invited, and the target considers it undesirable or offensive
- ▶ Acquiescence—even willing participation—or the failure to complain or report the conduct does not always mean the conduct was welcome
- ▶ Conduct welcomed on one occasion can be unwelcomed on a subsequent occasion
- ▶ Whether conduct is “welcome” can be impacted by age, disability, relationships, culture, and intoxication



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# Based on Sex

- ▶ “Sexual”
- ▶ “Sex-based”
  - Based on gender (e.g., stereotypes of women’s roles)
  - Based on sexual orientation
  - Based on gender identity



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# Title IX Sexual Harassment Is....

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## “Title IX Sexual Harassment”

**The Title IX “Big 5”** OR **Title IX “Hostile Environment”**



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## “Title IX Sexual Harassment”

**The Title IX “Big 5”** OR Title IX “Hostile Environment”



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## Title IX “Big 5”

- ▶ Employee Quid Pro Quo
- ▶ Sexual Assault\*\*
- ▶ Domestic Violence\*\*
- ▶ Dating Violence\*\*
- ▶ Stalking\*\*



\*\* as defined in the federal higher education laws, the Clery Act and the Violence Against Women Act (known as the “big four”)



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## #1 of the “Big 5” Employee Quid Pro Quo

- ▶ An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on an individual’s participation in unwelcome sexual conduct
- ▶ Examples include an employee:
  - Requesting sexual favors for a benefit or service
  - Threatening to remove a benefit or service unless a person engages in sexual favors
  - Expecting sexual favors for a benefit or service



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## #2 of the “Big 5” Sexual Assault (Clery Definition)

- ▶ **Rape:** Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact without consent
- ▶ **Fondling:** Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)
- ▶ **Incest**
- ▶ **Statutory Rape**



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# What is Consent?

- ▶ “Consent” comes into play in sexual assault cases, including those involving fondling
- ▶ Consent is not defined by OCR/the 2020 Title IX rules
- ▶ Must be defined in your policies/procedures



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## #3 of the “Big 5”

### Domestic Violence (VAWA Definition)

- ▶ Felony or misdemeanor crimes of violence
- ▶ By
  - A current or former romantic partner
  - Spouse
  - Former spouse
  - Intimate partner
  - Person who shares a child
  - A person similarly situated to a spouse
  - An adult against a person protected under domestic or family violence laws of the jurisdiction



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## #4 of the “Big 5”

### Dating Violence (VAWA Definition)

- ▶ Violence committed by a person who has been in a romantic or intimate social relationship with the victim
- ▶ Can include sexual, physical, emotional, or psychological violence
- ▶ Consider the complainant’s description of the length of the relationship, the type of relationship, and the frequency of the interaction



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## #5 of the “Big 5”

### Stalking (VAWA Definition)

- ▶ A course of conduct based on sex (2+ times)
- ▶ Directed at a specific person
- ▶ That would cause a reasonable person to:
  - Fear for the person’s safety or
  - Fear for the safety of others or
  - Suffer substantial emotional distress
- ▶ Can be direct or indirect



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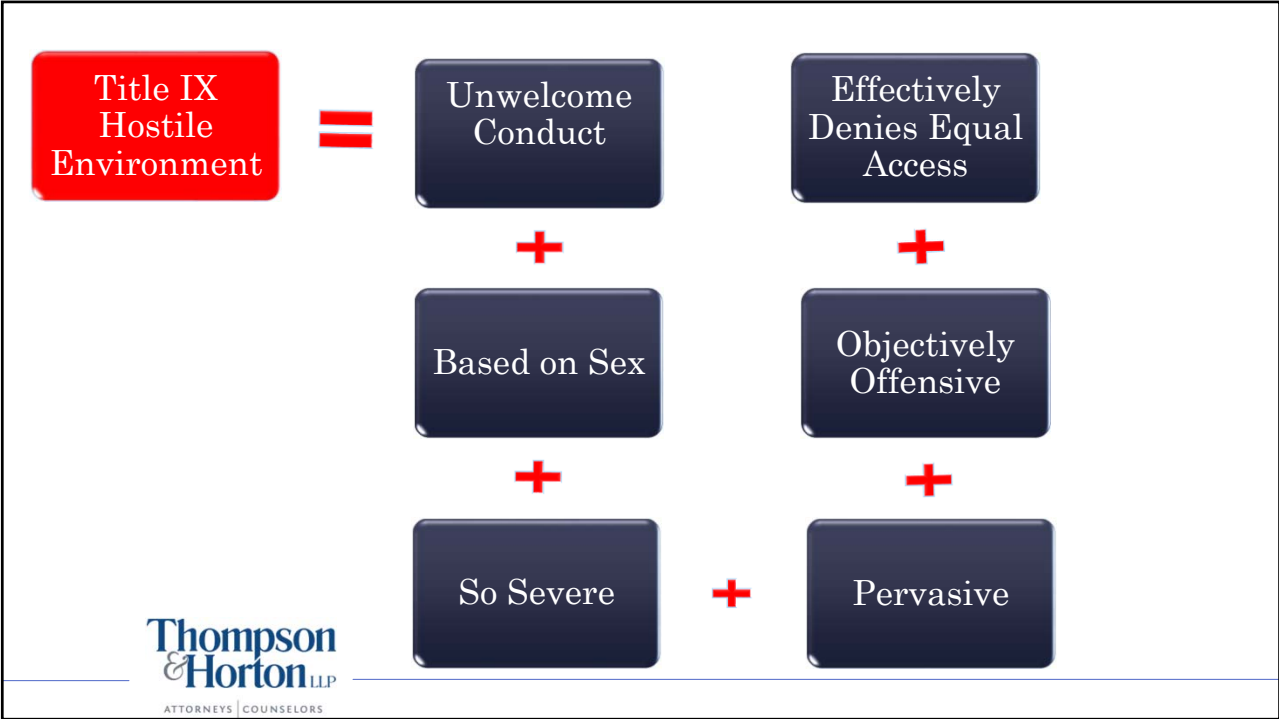


## “Title IX Sexual Harassment”

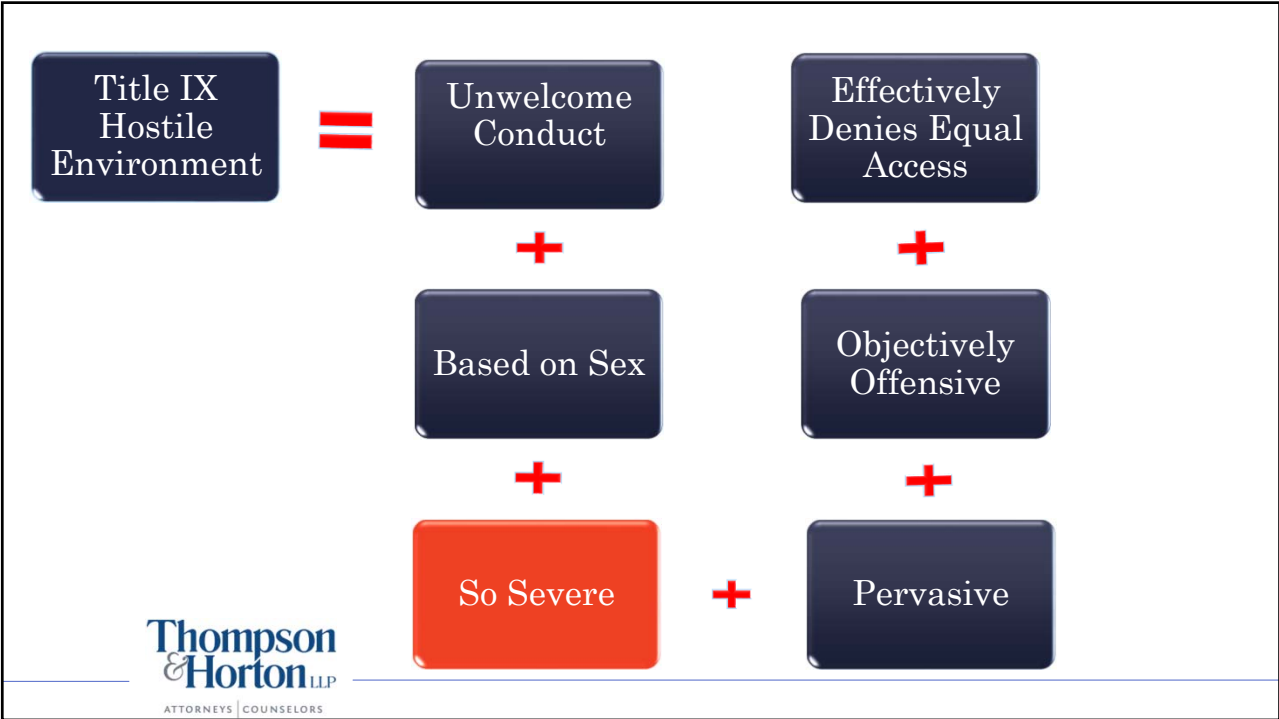
**The Title IX “Big 5”** OR **Title IX “Hostile Environment”**

## “Title IX Sexual Harassment”

**The Title IX “Big 5”** OR **Title IX “Hostile Environment”**



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# Dictionary Definition

## *“Severe”*

- ▶ Very bad, serious, or unpleasant; causing a lot of physical pain or suffering; very harsh (Merriam-Webster)
- ▶ Strict, austere or intense with disastrous consequences. (Black's Law Dictionary)



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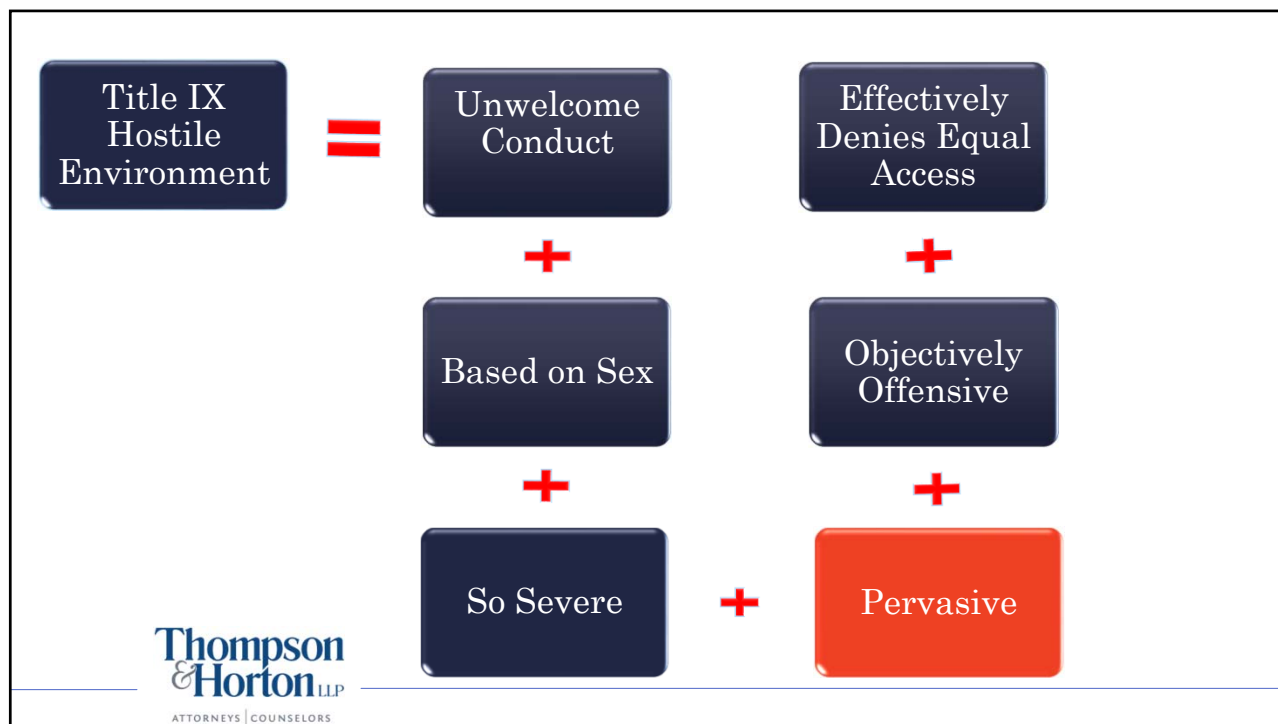
# Case Law Definitions

- ▶ “Severe” means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass.
- ▶ Simple acts of teasing and name-calling are not enough, even where these comments target differences in gender.

*Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)



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# Dictionary Definition

*“Pervasive”*

Spread over a large area, either metaphorically, or in a literal manner. For instance, rumors can be quite pervasive amongst people. (Black’s Law Dictionary)

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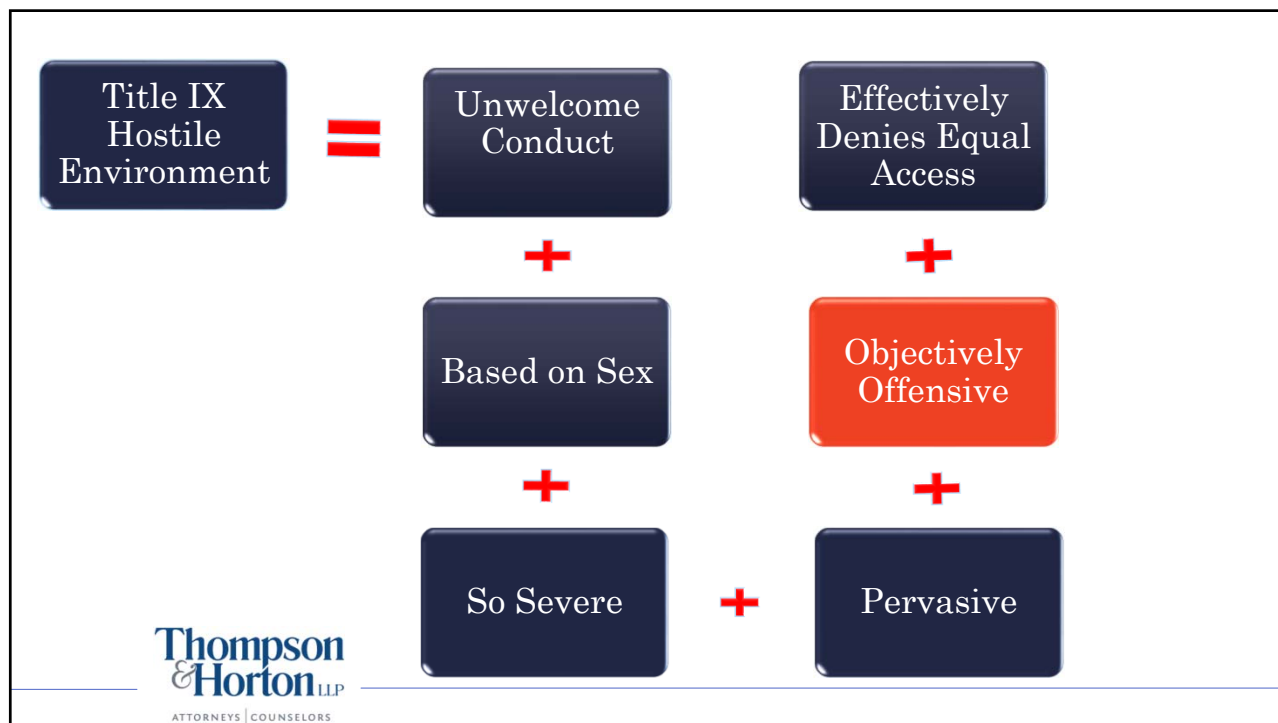
# Case Law Definitions

- ▶ “Pervasive” means “systemic” or “widespread.” For sexual harassment under Title IX, it also means multiple incidents of harassment; one incident of harassment is not usually enough.
- ▶ Most single incidents could be sufficiently severe that it would result in the articulated injury but a single incident would normally fall short of Title IX's requirement of “systemic” harassment.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)



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# Dictionary Definition

## *“Objectively Offensive”*

- ▶ “Objective”: Existing independently of perception or an individual's conceptions (Reverso)
- ▶ “Offensive”: Unpleasant or disgusting, as to the sense (Reverso)



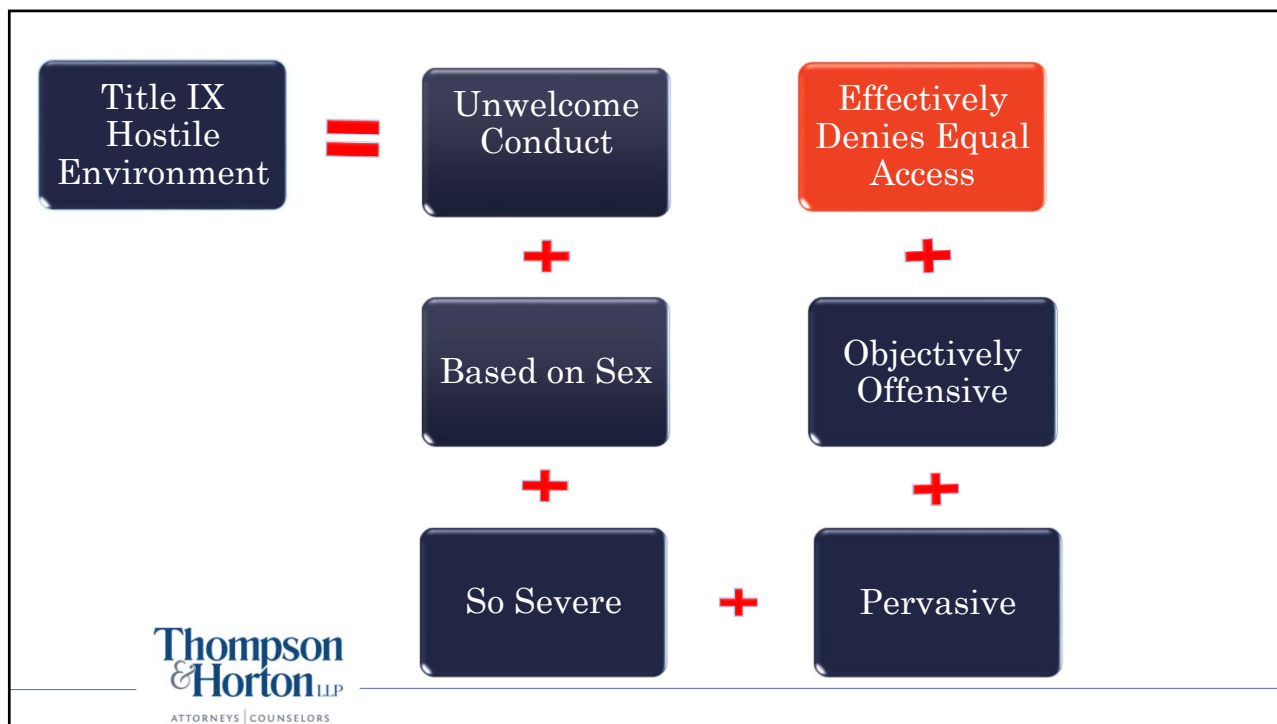
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# Case Law Definitions

- ▶ “Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.
- ▶ Consider the constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.
- ▶ The victim's perceptions are not determinative. The objective offensiveness is to be judged by reference to a reasonable person of the same age at whom the comments were aimed.



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# Effective Denial

Would a reasonable person in the alleged victim's position be effectively denied equal access to education compared to a similarly situated person who did not suffer the alleged sexual harassment

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# Effective Denial

Examples may include:

- ▶ Skipping class to avoid a harasser
- ▶ A decline in a student's grade point average
- ▶ Difficulty concentrating in class
- ▶ A student who quits a sports team but carries on with other school activities following sexual harassment by teammates



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# Effective Denial of Equal Access

- ▶ No concrete injury is required to prove an effective denial of equal access
- ▶ A complainant need not have already suffered a loss of education
- ▶ Does not require that a person's total or entire educational access has been denied



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**If Charlie's allegations are proved, the best category of "sexual harassment" for the allegations is:**

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**If Charlie's allegations are proved, the best category of "sexual harassment" for the allegations is:**

- Sexual assault
- Dating violence
- Stalking
- Hostile environment (severe, pervasive, objectively offensive)

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## Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
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## Education Program or Activity

The sexual harassment must occur within the school's educational program or activity



- Includes situations where conduct occurs as part of the school's "operations"
- "Includes locations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the sexual harassment occurs"

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**Which of the following allegations, if proved, would lead to a finding that the Conduct alleged by Charlie occurred in an education program or activity?**

The conduct occurred over the summer but Charlie fears seeing Rei at school

The conduct occurred via school technology

The conduct occurred on the weekend but in front of numerous fellow classmates

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**Which of the following allegations, if proved, would lead to a finding that the Conduct alleged by Charlie occurred in an education program or activity?**

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## In the United States

- ▶ The Title IX rules do not apply extraterritorially (such as study abroad programs or Spring Break abroad)
- ▶ As with any other conduct that falls outside Title IX, other code of conduct provisions can be used to address such conduct
- ▶ Support, support, support



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## 2. Verification of impartiality

Any individual designated as an appellate decision-maker may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

**34 C.F.R. § 106.45(b)(1)(iii)**

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# Impartial Approach

- ▶ The preamble to the 2020 Title IX rules call for educational institutions to use an objective, “common sense approach” to evaluating whether bias, conflict of interest, or prejudgment exists
- ▶ Remember that “objective” means whether a reasonable person would believe partiality exists
- ▶ The preamble says not to apply “generalizations” that might unreasonably conclude partiality exists



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**The appellate decision-maker is a huge fan of the school sports' teams and Rei is a star player**

This creates an impermissible risk of bias

This creates an impermissible risk of conflict of interest

This does not create a risk of bias or conflict of interest

This creates an impermissible risk of both bias and conflict of interest

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## The appellate decision-maker used to teach Charlie before becoming an administrator

- This creates an impermissible risk of bias
- This creates an impermissible risk of conflict of interest
- This does not create a risk of bias or conflict of interest
- This creates an impermissible risk of both bias and conflict of interest

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## What would not be evidence of prejudice?

- An investigator or decision-maker failing to analyze numerous arguments raised by one party but not the other
- An investigator repeatedly calling the Complainant "the victim" during interviews with parties and witnesses
- A decision-maker repeatedly finding in favor of Complainants in multiple cases in a row
- A Title IX Coordinator dismissing a complaint because the Complainant could not provide any witnesses or evidence to support their complaint

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# Impartiality Tips

- ▶ Be open with the Title IX Coordinator or their designee about any concerns—better to report something that turns out to be nothing than to ignore something that turns out to be a big deal
- ▶ When in doubt, disclose any concerns to the parties and get their agreement to allow you to continue in the role (with Title IX Coordinator)
- ▶ Show your work! The best way to avoid a claim of bias, conflict of interest, or prejudice is to methodically analyze the issues and write a solid appeal determination

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## 3. Determining the validity of the appeal

- ▶ The appeal must be on one of the three authorized bases:
  1. Procedural irregularity + affected outcome
  2. New evidence + could have affected outcome
  3. Bias or conflict of interest + affected outcome\*\*Can offer on additional bases if done equally between the parties
- ▶ Also consider whether the appeal is **timely** (consider your policy or timelines in determination of responsibility)



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## Who Decides?

- ▶ The Title IX Coordinator?
- ▶ The appellate decision-maker?



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# Procedural Error

- ▶ Did the appealing party identify a procedural irregularity?
  - Failure to follow policy/procedure steps
  - Failure to analyze all relevant evidence
  - Inappropriate disqualification of evidence or questions
- ▶ Did the appealing party identify how they believe the error affected the outcome/decision made?



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# New Evidence

- ▶ Did the appealing party identify new evidence that wasn't reasonably available at the time the decision being appealed was made?
- ▶ Did the appealing party identify how they believe the new evidence could outcome/decision made?



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# Bias or Conflict

- ▶ Did the appealing party identify an alleged bias or conflict of interest by a Title IX team member?
- ▶ Did the appealing party identify how they believe the bias or conflict affected the outcome?



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# Evaluation

- ▶ Remember, evaluation just considers whether a valid appeal basis is being raised
- ▶ It does not address the “weight” of the argument (how persuasive it is)



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# Our Case: Appeal

The written determination found that there was **insufficient evidence** to support the allegations.

Charlie appeals. Charlie points to the following concerns:

- ▶ The investigator and decision-maker both relied on evidence that Charlie had made unsubstantiated allegations of sexual assault against another student the previous year. Charlie claims this evidence is irrelevant and that reliance on the evidence is both a procedural error and a sign of bias.
  - ▶ After the decision, Rei reached out to Charlie on messenger with the following exchange:
    - Rei: Hey, I know we aren't supposed to talk. Just wanted to say I'm really sorry for everything
    - Charlie: What do you mean?
    - Rei: I just didn't mean for things to go so far.
    - Rei: I just liked you. I didn't think it would all bother you so much
- Charlie claims this is new evidence that Rei engaged in the alleged conduct.



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A screenshot of a mobile poll interface. At the top, it says "When poll is active, respond at pollev.com/thlaw411" and "Text THLAW411 to 22333 once to join". The main question is "Should Charlie's appeal proceed?". Below the question are three options: "Yes", "No", and "More evidence is needed (share your thoughts)". At the bottom, there is a footer: "Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app".

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## 4. Notice to the Parties

If the appeal is valid:

- ▶ Must notify both parties of appeal in writing
  - Can be from the Title IX Coordinator
- ▶ Must provide the parties equal opportunity to submit written statements for or against the appeal
- ▶ Must issue a written determination to both parties

See **T&H Guidebook Document 45 (Appeal Form) & 47 (Notice)**

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# Considerations

- ▶ Consider using an appeal form that requests “just the facts”
- ▶ Then request a written statement from both parties
- ▶ Avoids the appealing party feeling cheated that they did not get to respond the responding party’s appeal statement



## 5. Timeframes & Extensions

- ▶ Grievance process must include reasonably prompt time frames, including for filing and resolving appeals
- ▶ You can delay time frames for the grievance process temporarily for good cause with written notice – needs to be in process

See **T&H Guidebook Document 23**



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## OCR Examples

- ▶ Absence of a party, advisor, or witness
- ▶ Concurrent law enforcement activity
- ▶ Need for language assistance
- ▶ Need to accommodate disabilities



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# Notice of Delay

- ▶ Written Notice
- ▶ To all parties (complainants & respondents)
- ▶ Must include:
  - Reason for delay
  - Length of delay



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# Considerations

When deciding whether to grant a delay or extension, consider the interests of:

- ▶ Promptness
- ▶ Fairness to the parties
- ▶ Accuracy of adjudications



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**The appellate decision-maker has other job responsibilities and they blow up shortly after being assigned the appeal**

---

Good cause                      Not good cause

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**Rei requests access to the (lengthy) directly related evidence and 10 additional days to review and write the appeal**

---

Good cause                      Not good cause

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## Should you grant 10 days?

Yes, if there is good cause you must grant the extension requested

Yes, because the DRE in the case is particularly voluminous

No, you must also consider the interests of promptness and fairness to the parties

No, you are not required to grant any specific length of extension requested

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## Must you also grant the extension and provide the DRE to Charlie?

No, the rules do not require it

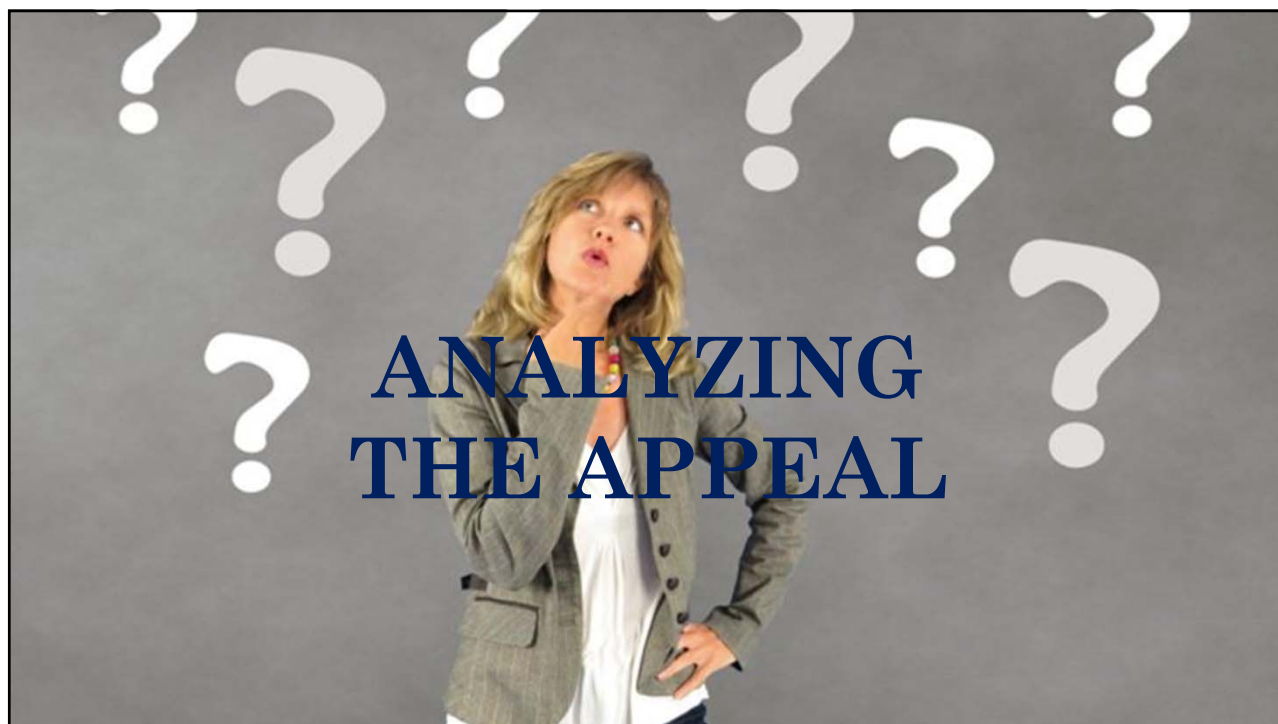
No, but you should to be fair

Yes, because it would not be fair if you didn't

Yes, the rules require that you treat the parties equally during the appeal

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## 6. Analyzing the Appeal

- ▶ This is where you consider the “weight” of the arguments made in the appeal
- ▶ Make sure to consider arguments raised by both sides

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# Typical Appeal Issues

## #1: Dismissals



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**The T9 Coordinator dismisses a complaint of fondling because the circumstances make clear there is no way the conduct was for purposes of sexual gratification (no other reason)**

Procedural error, did not affect the outcome

Procedural error, affected the outcome

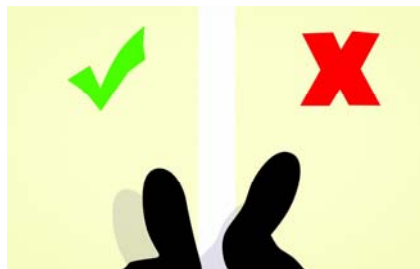
Not a procedural error

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# Typical Appeal Issues

## #2: Team Member Second-Guessing



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**A party appeals based on the investigator's failure to interview witnesses on a key issue. According to the investigator, the witnesses refused to participate.**

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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**A party's advisor was removed from the process for being disruptive and the party was not allowed to secure another advisor before moving forward**

Procedural error, did not affect the outcome  
Procedural error, affected the outcome  
Not a procedural error

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**The grievance process lasted 6 months and the Title IX team failed to provide notice of the need for extensions**

Procedural error, did not affect the outcome  
Procedural error, affected the outcome  
Not a procedural error

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# Typical Appeal Issues

## #3: New Evidence



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**After a determination of insufficient evidence, the Respondent sends a text message to the Complainant admitting the conduct and laughing because "double jeopardy" means nothing can be done to them.**

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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**After a determination of insufficient evidence, a classmate comes forward to say the Respondent admitted the conduct to them shortly after the incident**

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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# Typical Appeal Issues

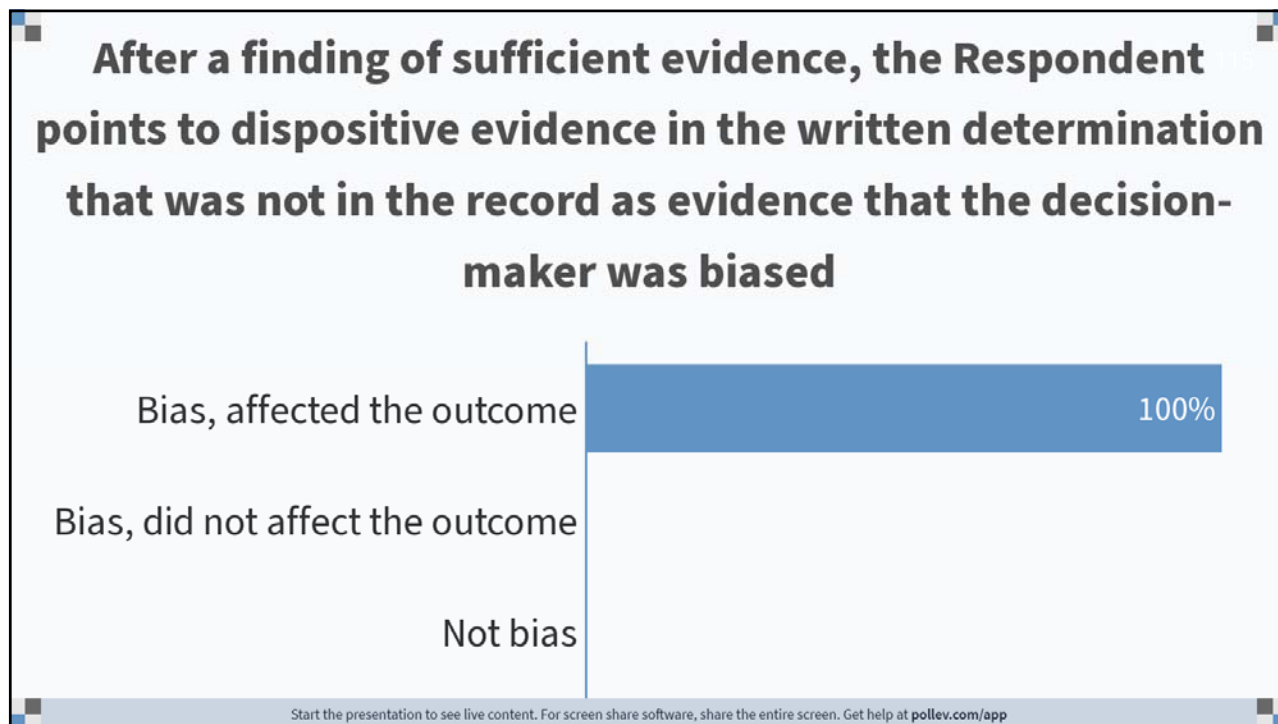
## #4: Impartiality



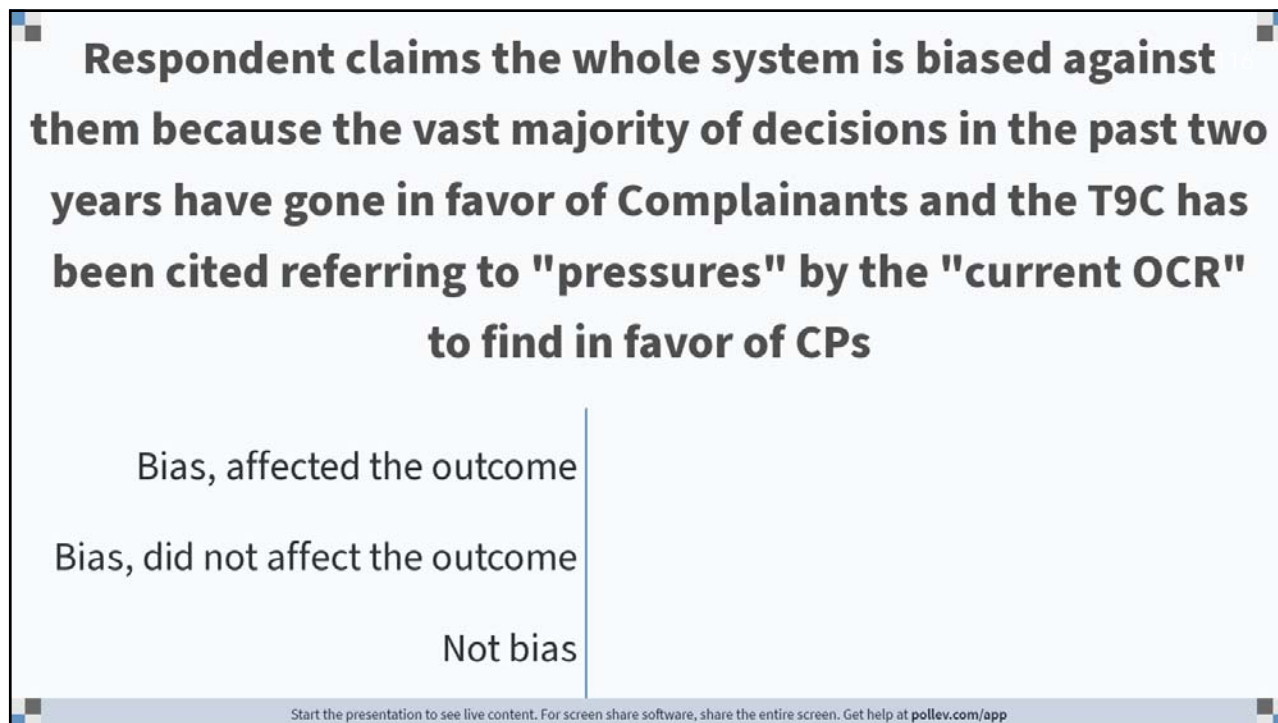
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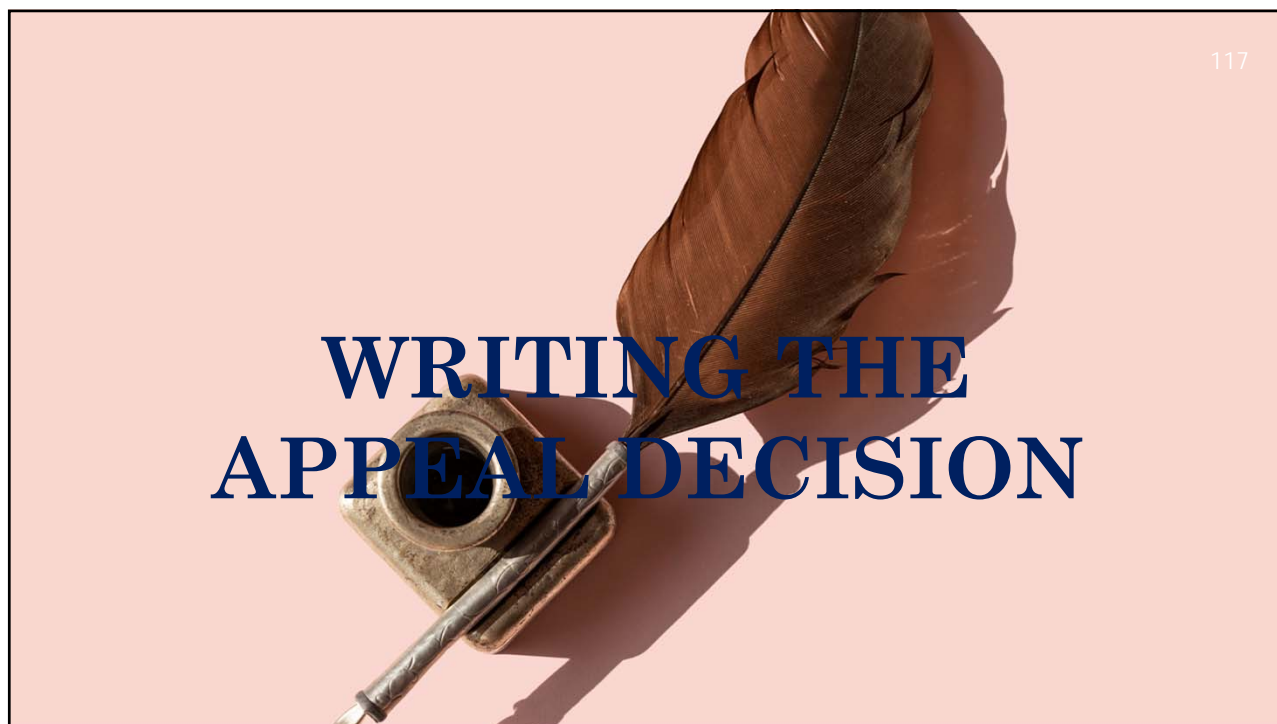
114



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## 7. Writing the Appeal

- ▶ This is where you “show your work” on the analysis

See **T&H Guidebook Document 48**

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# Decision Elements

- ▶ Introduction
- ▶ Appeal Determination
- ▶ Relevant Procedural Background (for timeliness)
  - ▶ Dismissal/decision date
  - ▶ Appeal date
  - ▶ Date(s) for responses to appeals
- ▶ Standard of Review
- ▶ Summary of Written Determination/Dismissal



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# Decision Elements

- ▶ Written Statements For/Against the Appeal
- ▶ Analysis and Decision
  - Consider each appeal basis separately
- ▶ Conclusion



120

# Analysis & Decision

- ▶ Consider all factors for/against the appeal basis/argument – **SHOW YOUR WORK!**
- ▶ Include policy definitions and procedural requirements
- ▶ Assess whether there is sufficient evidence of impact on the outcome



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# Remember the Standard

- ▶ For most educational institutions,  
“preponderance of the evidence”
  - “More likely than not”
  - “50 percent and a feather”



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## 8. Reversals & Remands

- ▶ Reversal: Where the appeal makes clear the decision was incorrect
- ▶ Remand: Where more information is needed

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## 9. Finalizing and transmitting the file

- ▶ Files related to Title IX complaint must be maintained for seven years
- ▶ If you'd like to avoid being called on in six years to find your files, compile and send them to the Title IX Coordinator now
- ▶ Think broadly!

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## Practicum

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# Our Case: Appeal

The written determination found that there was insufficient evidence to support the allegations.

Charlie appeals. Charlie points to the following concerns:

1. The investigator and decision-maker both relied on evidence that Charlie had made unsubstantiated allegations of sexual assault against another student the previous year. Charlie claims this evidence is irrelevant and that reliance on the evidence is both a procedural error and a sign of bias.
2. After the decision, Rei reached out to Charlie on messenger with the following exchange:  
Rei: Hey, I know we aren't supposed to talk. Just wanted to say I'm really sorry for everything  
Charlie: What do you mean?  
Rei: I just didn't mean for things to go so far.  
Rei: I just liked you. I didn't think it would all bother you so much  
Charlie claims this is new evidence that Rei engaged in the alleged conduct.

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## Appeal Claim

The investigator and decision-maker both relied on evidence that Charlie had made unsubstantiated allegations of sexual assault against another student the previous year.

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# Charlie's Position

- ▶ Charlie claims this evidence is irrelevant and that reliance on the evidence is both a procedural error and a sign of bias.
- ▶ Alleged bases for irrelevance:
  - The evidence is of “past sexual history”
  - The evidence is not relevant because in the Title IX process you cannot consider “character evidence” or “prior bad acts”



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# Relevance

- ▶ Does the evidence apply or relate to a “fact” or “issue” in this matter?
- ▶ Is the fact or issue in dispute?
- ▶ Does the evidence make the fact or issue more or less likely to be true?



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## Relevant Evidence Includes

### “Inculpatory Evidence”

- Evidence that makes it **more likely** that a disputed fact or issue is true



### “Exculpatory Evidence”

- Evidence that makes it **less likely** that a disputed fact or issue is true

## Never relevant without consent

Evidence subject to legal privilege

Evidence related to a complainant’s past sexual history unless:

1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent

A party’s records made or maintained by a medical professional or paraprofessional made and maintained in connection with the provision of treatment of the party

## Rei's Position

- ▶ Rei does not respond to the appeal
- ▶ In an email, Rei explains that this situation has been exhausting and that they just can't defend themselves any more for something they didn't do



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## Group Discussion

The investigator and decision-maker both relied on evidence that Charlie had made unsubstantiated allegations of sexual assault against another student the previous year. Charlie claims this evidence is irrelevant and that reliance on the evidence is both a procedural error and a sign of bias.

- ▶ Does it matter that Rei did not argue against the appeal? Why or why not?
- ▶ How would you analyze this issue? Consider both procedural error and bias.



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# Evidence From Decision

The decision cites the following evidence as support for the insufficient evidence determination:

- ▶ There is no documentary evidence to back up the alleged requests for dates, incessant texting, emailing, and messaging alleged
- ▶ No witnesses reported seeing or hearing the conduct
- ▶ The only outcry witness provided by Charlie was their best friend who has a past history of conflict with Rei
- ▶ Rei said – and the mutual friend corroborated – that when Rei said they would do “whatever it takes” to get Charlie to be with them, they did not mean anything malicious or threatening
- ▶ Charlie had made a similar complaint that was deemed unfounded against another student the previous year



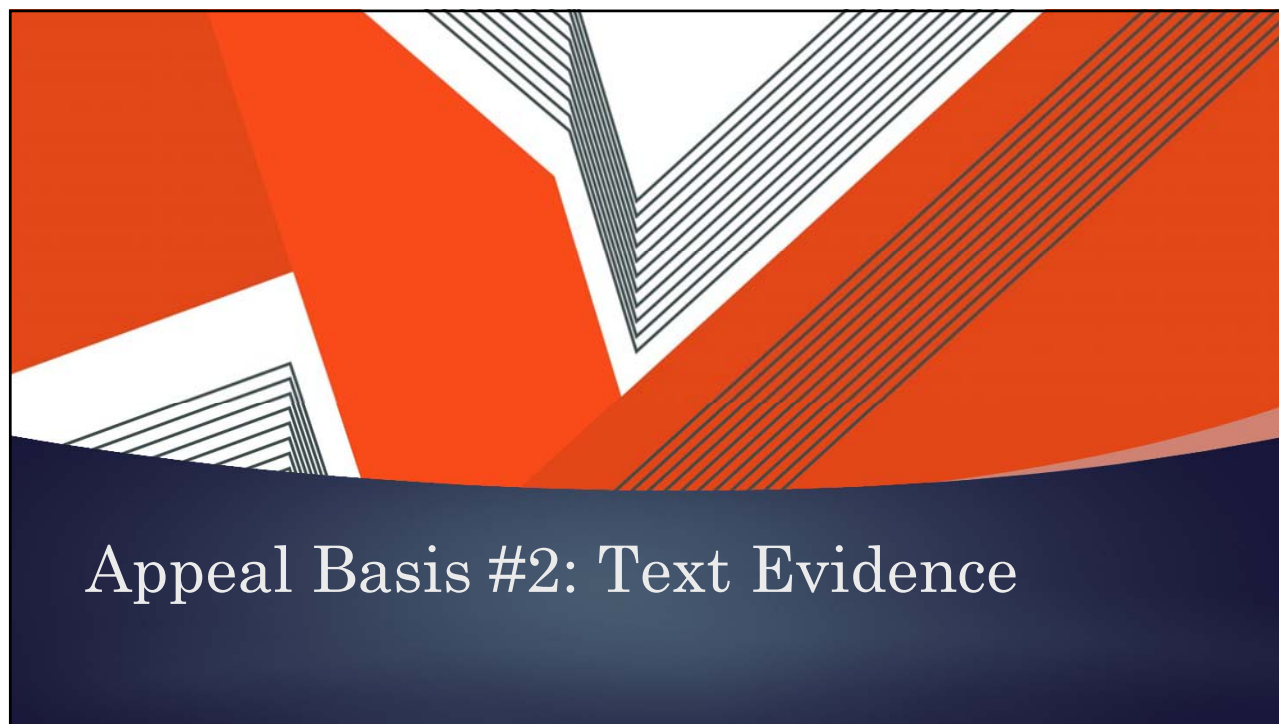
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# Group Discussion

- ▶ Assuming you found a procedural error or bias, did it affect the outcome? Why or why not?
- ▶ If you find that it affected the outcome, what is the appropriate appeal result (reverse, remand, etc.). Does it matter if you found procedural error, bias, or both?



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## The Parties' Positions

- ▶ Charlie claims this is a new admission and so the case should be reopened
- ▶ Rei says they were just apologizing about having to go through the whole Title IX process, not admitting to the conduct. Rei also argues this would not be enough to overturn the decision.

140

# Group Discussion

After the decision, Rei reached out to Charlie on messenger with the following exchange:

Rei: Hey, I know we aren't supposed to talk. Just wanted to say I'm really sorry for everything

Charlie: What do you mean?

Rei: I just didn't mean for things to go so far.

Rei: I just liked you. I didn't think it would all bother you so much

Charlie claims this is new evidence that Rei engaged in the alleged conduct.

- ▶ What should be the outcome of the appeal? How would you analyze the issue?



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# Writing the Appeal

## Introduction

- ▶ What is this document?
- ▶ Who are the key players and allegations?



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# Practice: Introduction

This is [what?] regarding a sexual harassment formal complaint filed with College ABC under Title IX of the Education Amendments of 1972 on September 1, 2022. The formal complaint alleged that [who?] engaged in the following conduct against [whom?]: [describe]. Such conduct, if proved, would be [conduct] in violation of College ABC's Title IX Policy #123.



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## Our Case: Allegations

Student Charlie alleges that student Rei repeatedly asked Charlie out on dates, even when Charlie repeatedly said no, bought Charlie unwanted gifts, incessantly texted, emailed, and messaged Charlie, even after being blocked on certain message platforms, followed Charlie around in ways that made Charlie nervous for their safety, and told a mutual friend they would do “whatever it takes” to get Charlie to be with them.



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## Writing the Appeal

### Appeal Determination

- ▶ After considering the appeal documents, any written statements submitted supporting or challenging the appeal, the underlying decision on review, and other relevant documentation, I grant the appeal.



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# Writing the Appeal

## Relevant Procedural Background

- ▶ Date appeal was filed
- ▶ Date of decision challenged
- ▶ Date of notice of appeal
- ▶ Date statements in support of or challenging the appeals were received
- ▶ Date the appeal decision-maker submitted the appeal determination to the Title IX Coordinator or designee



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# Writing the Appeal

## Standard of Review

- ▶ Under [policy name], the appeal decision-maker should show deference to the judgment of the initial decision-maker, making changes to the initial decision-maker's findings only when there is clear error and to the sanction/responsive action only if there is a compelling justification to do so.
- ▶ Appeals are not intended to provide for a full, complete (de novo) re-hearing of the allegations.
- ▶ In most cases, appeals are confined to a review of the written documentation or record of the original hearing and pertinent documentation regarding the specific grounds for appeal.
- ▶ Once an appeal is decided, the outcome is final and any further appeals of the decision are not permitted.



148

# Writing the Appeal

## Summary of Written Determination

- ▶ What did the written determination find as to each allegation?
- ▶ Include a summary of the reasoning if important to the appeal decision



149

# Evidence From Decision

The decision cites the following evidence as support for the insufficient evidence determination:

- ▶ There is no documentary evidence to back up the alleged requests for dates, incessant texting, emailing, and messaging alleged
- ▶ No witnesses reported seeing or hearing the conduct
- ▶ The only outcry witness provided by Charlie was their best friend who has a past history of conflict with Rei
- ▶ Rei said – and the mutual friend corroborated – that when Rei said they would do “whatever it takes” to get Charlie to be with them, they did not mean anything malicious or threatening
- ▶ Charlie had made a similar complaint that was deemed unfounded against another student the previous year



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## Practice: Determination Summary

The written determination found that there was insufficient evidence to support the allegations. The initial decision-maker cited the lack of corroborating evidence in support of the decision:  
[insert bullets]



151

## Writing the Appeal

### Summary of Written Statements

- ▶ Both parties were given a reasonable, equal opportunity to submit a written statement supporting or challenging the appeal. Both parties submitted written statements; the Complainant on [date] and the Respondent on [date].
- ▶ Summarize the salient points.



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## Practice: Statement Summaries

### *The Complainant's Written Submission*

In their statement supporting the appeal, Charlie identifies as evidence of [appeal basis] [state evidence]. The Complainant argues [describe argument].



153

# Writing the Appeal

## Analysis and Decision

- ▶ After considering the appeal documents, the parties' statements, and other parts of the record relevant to the appeal, including the formal complaint, written notice of allegations, investigative report, hearing transcript, written determination documents, and exhibits, I [grant/deny] the appeal. This section contains my analysis and decision.
- ▶ Go through each appeal basis with full analysis – SHOW YOUR WORK



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# Writing the Appeal

Consider using “IRAC”

- ▶ State the **ISSUE**

The first issue is whether the Title IX team inappropriately relied on evidence of Charlie’s prior unsubstantiated report of sexual assault against another student last year as evidence in this case.

- ▶ Test yourself:

The second issue is whether the text message submitted by the Complainant is new evidence that could have impacted the outcome and needs to be reviewed by the investigator for consideration and inclusion in the case file.



155

# Writing the Appeal

Consider using “IRAC”

- ▶ State the **RULE**

- Consider elements, definitions, exceptions, limitations, defenses the Title IX team member might provide

Under the College’s Title IX policy, evidence of a complainant’s prior sexual behavior or sexual predisposition is not relevant unless used to show that someone other than the RP engaged in the alleged conduct or prior conduct between the parties to show consent. There is no rule under the College’s Title IX policy prohibiting the use of “character evidence” or evidence of “prior bad acts.”

- ▶ Test yourself:

Under the educational institution’s Title IX policy, new evidence is evidence that was not reasonably available at the time the decision was made **and that, had it been available, could have affected the outcome.**



156

# Writing the Appeal

Consider using “IRAC”

- ▶ State the **ANALYSIS**
  - > Key word: “because”

Here, it was proper for the Title IX team members to consider the evidence of the prior report *because* there is no rule against using character evidence or prior bad acts in a Title IX grievance proceeding and the evidence is relevant to the question of whether the alleged conduct occurred in this case—even if it may not warrant significant weight.

Test yourself: Here, the evidence **is** new evidence *because* was not reasonably available at the time the decision was made **because the message was sent after the decision was made. Had the evidence been available, it could have affected the outcome because Charlie claims that Rei is admitting to the conduct and because there was a finding of insufficient evidence because there was no evidence of the conduct alleged.**



157

# Writing the Appeal

Consider using “IRAC”

- ▶ State the **CONCLUSION**

This is just a restatement of the issue as a conclusion.

**Issue:** The first issue is whether the Title IX team inappropriately relied on evidence of Charlie’s prior unsubstantiated report of sexual assault against another student last year as evidence in this case.

**Conclusion:** Accordingly, I find that the Title IX team appropriately relied on evidence of Charlie’s prior unsubstantiated report of sexual assault and that the action is not a procedural error that affected the outcome.



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# Practice: IRAC

With respect to the second appeal basis (new evidence),

**Issue:** The first issue is whether the Title IX team inappropriately relied on evidence of Charlie’s prior unsubstantiated report of sexual assault against another student last year as evidence in this case.

**Rule:** Under the College’s Title IX policy, evidence of a complainant’s prior sexual behavior or sexual predisposition is not relevant unless used to show that someone other than the RP engaged in the alleged conduct or prior conduct between the parties to show consent. There is no rule under the College’s Title IX policy prohibiting the use of “character evidence” or evidence of “prior bad acts.”

**Analysis:** Here, it was proper for the Title IX team members to consider the evidence of the prior report *because* there is no rule against using character evidence or prior bad acts in a Title IX grievance proceeding and the evidence is relevant to the question of whether the alle

**Conclusion:** : Accordingly, I find that the Title IX team appropriately relied on evidence of Charlie’s prior unsubstantiated report of sexual assault and that the action is not a procedural error that affected the outcome.



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## K-12 TITLE IX APPELLATE DECISION-MAKER FOUNDATIONS & PRACTICUM

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