

# Robbins Schwartz

## Title IX Appellate Decision-Maker Training for Higher Education Personnel

December 2, 2020

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**Title IX Appellate Decision-Maker Training:**  
Presented in Partnership with the Illinois Community College Chief Student Services Officers Commission

Presented By: Emily P. Bothfeld and Michelle L. Weber  
December 2, 2020

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**Overview**

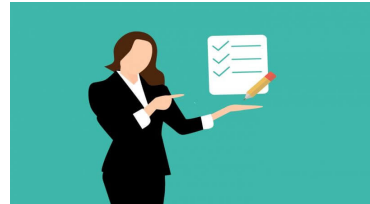
- You have been appointed to serve as the Appellate Decision Maker in a formal Title IX proceeding. Now what?

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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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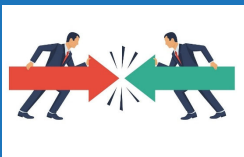
## Conflicts of Interest

- Key question: Does the Appellate Decision-Maker's prior or existing relationship with or knowledge of a party prevent the Hearing Officer 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 must contact the Title IX Coordinator to request a substitution.
  - The Title IX Coordinator may request information from you to help him/her evaluate the claim.

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## Hypothetical: Conflicts of Interest

- You serve on the College's Behavioral Intervention Team. At a BIT meeting several months ago, you took part in a decision to remove a respondent from the College's educational program on an emergency basis. The College subsequently conducted a Title IX investigation with respect to that respondent, and you have just been appointed to serve as the Appellate Decision-Maker for the case.
  - Do you have a conflict of interest?

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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 of responsibility or dismissal of a formal complaint (or allegations therein) within 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.

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## Written Request for Appeal



- Within seven (7) business days of the Title IX Coordinator's receipt of 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

- Informs parties that an appeal has been filed.
- Notifies parties of 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 his Philosophy class. 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 instructor of Title IX sexual harassment, claiming that he made ongoing inappropriate comments to her, both during and outside of class. Following an investigation and hearing, the Hearing Officer 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 in the class told her that she witnessed the Respondent's inappropriate comments on at least 2 occasions.
  - Has Complainant established sufficient grounds for an appeal?
  - What additional information might be helpful in making this determination?

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## Hypothetical: Establishing Sufficient Grounds for Appeal

- You receive a written appeal request submitted by a Complainant. The request states: "The Title IX Coordinator dismissed my formal Title IX sexual harassment complaint. I don't agree and I want to appeal."
  - 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 Hearing  
Officer.



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## Relevant Materials

Investigation Report

Determination of Responsibility or  
Notice of Dismissal

Evidence gathered during investigation  
and/or presented during live hearing

Other relevant materials, depending  
on basis for appeal (e.g. prior discipline  
records of Respondent, new evidence  
submitted by appealing party,  
documentation of past interactions  
between parties and Title IX  
personnel).

*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 of responsibility, alleging that the Hearing Officer has a bias against him, which resulted in the finding of responsibility.
- According to the appeal request, the Hearing Officer was a former instructor of the Respondent, and when the Respondent was in his class, the Hearing Officer had accused the Respondent of cheating and had given him an F in the course.
- 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 multiple procedural irregularities that occurred during the investigation and hearing, including the following:
  - The employee did not receive sufficient notice of before relevant meetings and hearings;
  - The employee was not permitted to sufficiently cross-examine the Complainant or Complainant's witnesses during the hearing.
- What materials would be relevant to your review of this appeal?

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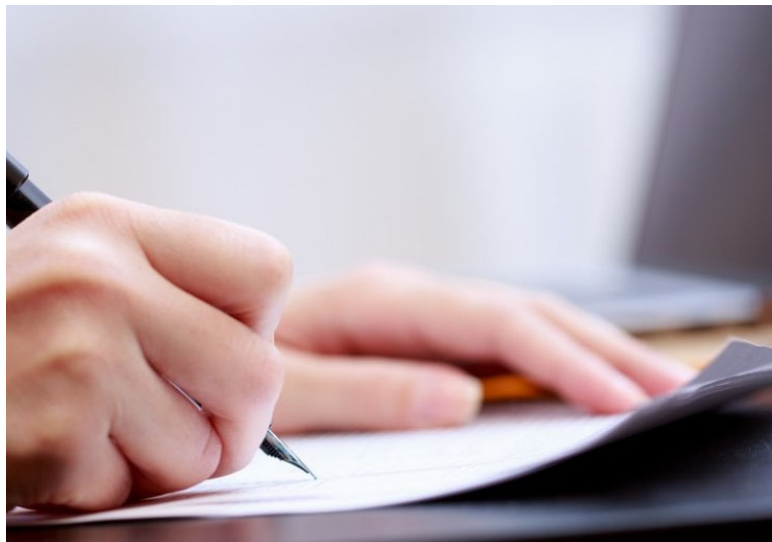
Questions??



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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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## Written Statements Q&A

- Q: Are the parties required to submit written statements?
  - A: No. So long as the College affords each party an opportunity to submit a written statement, a party may elect not to submit a statement.

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## Hypothetical: Written Statements

- The Title IX Coordinator issues the Notice of Appeal to both parties via email and regular mail on Monday, November 30. The parties' deadline to submit their written statements is Monday, December 7. On Wednesday, December 9, you return to your office for the first time in three weeks and find the Respondent's handwritten statement sitting on your desk. The statement is not dated.
  - Should you accept the Respondent's written statement?

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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 forward an appeal?
  - If no, you may dismiss the appeal.
  - If yes, proceed to question 2.
2. Did such 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 such 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 determination of responsibility (or associated sanction) or dismissal decision 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 elsewhere 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 his/her 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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## Considering Appeals Q&A

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

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## Hypothetical: Appeal Determination

- The Complainant and Respondent are both students. The Complainant filed a formal complaint alleging that the Respondent made inappropriate sexual advances toward her over a period of three months. After a lengthy investigation and live hearing, the appointed 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 at the time he was appointed to serve as the Hearing Officer; however, after the hearing was held and the determination of responsibility was issued, the Complainant found out that the Respondent and Hearing Officer regularly go out for beers after practice.
  - 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 hearing transcript and determination of responsibility. In the hearing transcript, you note that the Complainant brought forth several witnesses who testified that they saw the Respondent make inappropriate sexual advances toward the Complainant—information that the hearing officer seemed to ignore in the making the written determination.
  - 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 that the Respondent participate in sexual harassment training) is disproportionate with the violation in which the Respondent was found to have engaged ("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 the employee refused to submit to the supervisor's advances. The complainant has appealed the determination of responsibility on the ground that the sanction the Hearing Officer recommended (probation) 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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Michelle practices in the area of education law with a focus on special education and student matters. She counsels school districts and community colleges regarding the IEP process, due process, Section 504, student discipline, board policy and student records.

Prior to joining Robbins Schwartz, Michelle worked as an attorney for Waukegan Public Schools and Chicago Public Schools, focusing in special education. She has experience counseling IEP teams and school administrators, representing districts in complex due process hearings and developing policies and procedures for school districts. Prior to starting law school, Michelle was a Middle School Language Arts Teacher in Los Angeles, CA.

### **RECENT PUBLICATIONS**

"DeVos Rollbacks Could Hit Schools Hard," *Chicago Daily Law Bulletin* (2017)

### **RECENT PRESENTATIONS**

*Risk Assessments, Threat Assessments and the Impact on Students with Disabilities*, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)

*Escalating Student Behavior and Safety Concerns: Legal Options and Considerations*, Illinois Alliance of Administrators of Special Education Winter Conference (February 2019)

Student Bullying Legal Framework & Recommended Practices, In-Service (August 2018)



### **PRACTICE AREAS**

Education Law  
Special Education  
Student Discipline

### **EDUCATION**

J.D., Loyola University  
College of Law

M.A., Loyola Marymount  
University

B.A., Trinity College

### **ADMITTED TO PRACTICE**

Supreme Court of Illinois

### **ORGANIZATIONS**

Chicago Bar Association

Illinois Council of School  
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## EMILY P. BOTHFELD

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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)

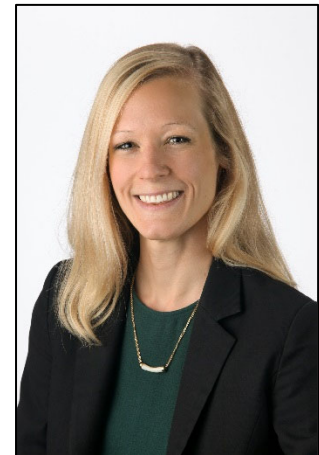
### RECENT PRESENTATIONS

*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)

*Updates and Recent Developments out of the U.S. Department of Education*, Chicago Bar Association Education Law Committee Spring Seminar (March 2019)

*Legal Hot Topics for Nursing Program Administrators and Faculty*, Illinois Organization of Associate Degree Nursing (March 2019)



### PRACTICE AREAS

Education Law  
Special Education  
Student Discipline

### EDUCATION

J.D., *with honors*, George Washington University Law School

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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Illinois Council of School Attorneys

National Council of School Attorneys