

# Robbins Schwartz

## Title IX Appellate Decision-Maker Webinar for K-12 School Districts

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# Title IX Appellate Decision-Maker Training for K-12 School Districts

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

August 9, 2022

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## Overview

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

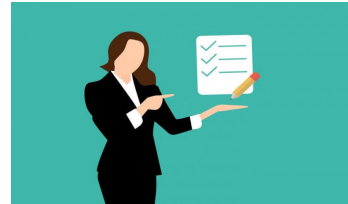


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## Appellate Decision-Maker's Role Generally

- 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 Decision-Maker.
- 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 Formal Title IX Sexual Harassment Complaint Grievance Process (2:265-AP2).

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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.

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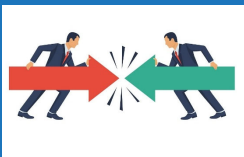
## Conflicts of Interest

- 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 the District's Superintendent. You recently participated in a decision to place an employee Respondent on paid administrative leave pending an investigation. The District 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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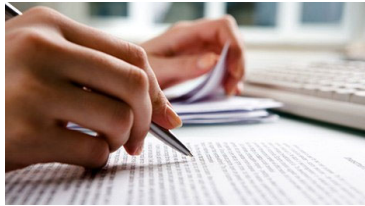
Written  
Request for  
Appeal

- The Complainant or Respondent may request an appeal of any determination regarding responsibility or dismissal of a formal complaint (or allegations therein) within ten (10) school 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.
- The Title IX Coordinator will promptly 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

- Upon receipt of a request for appeal, the Title IX Coordinator must notify the other party in writing that an appeal has been filed.
  - Robbins Schwartz Notice of Appeal

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## Notice of Appeal

- Notifies both 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, within 5 school business days, in support of or challenging the outcome.



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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 include:

- a) A procedural irregularity that affected the outcome of the matter
- b) New evidence now available that could affect the outcome of the matter but that was not reasonably available at the time of the determination
- c) The Title IX Coordinator, Investigator or Initial Decision-Maker had a conflict of interest or bias that affected the outcome of the matter

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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 club. 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 Decision-Maker was a former teacher of the Complainant.
  - On what basis is the Respondent appealing the determination regarding responsibility?
  - 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
  - Written questions and answers submitted to the Decision-Maker
  - 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

**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 teacher of the Respondent, and when the Respondent was in his class, the Decision-Maker had unfairly given him detention for a dress code violation.
  - 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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## Hypothetical: Relevant Materials

- You receive an appeal request in a case of student-student sexual harassment. The Respondent alleges in his appeal that:
  - the Investigator did not interview all of the witnesses who had knowledge of the case; and
  - many questions he submitted to the Decision-Maker were dismissed as irrelevant and therefore, the Complainant did not provide responses.
- What information and materials would be relevant to your review of this appeal?

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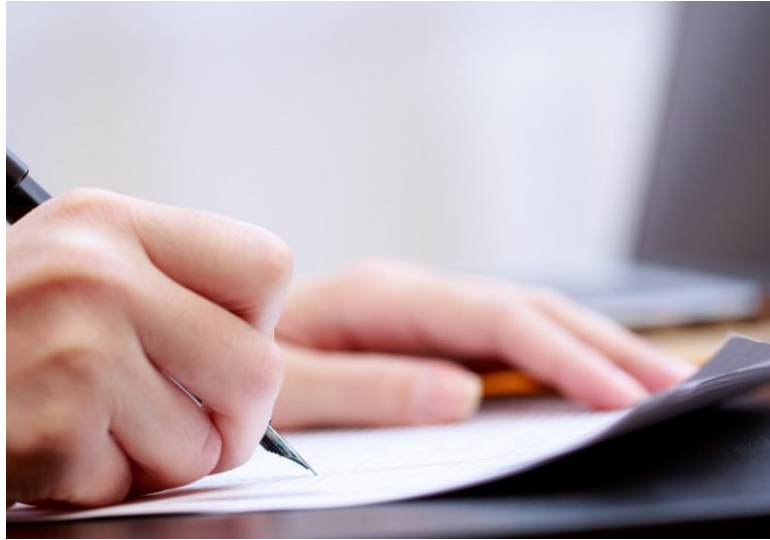
## Questions??



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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.
- 2:265-AP2 provides that the parties will be given at least five (5) school business days from their receipt of the Notice of Appeal to submit written statements.

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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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## Timeline

- Within 30 school business days of the Appellate Decision-Maker's receipt of the appeal request, the Appellate Decision-Maker must make the 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 submitted written questions to be asked of the Complainant, to which the Complainant submitted answers.

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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 Decision-Maker.
  - 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 Decision-Maker, 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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## 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 Decision-Maker determined that the Respondent was not responsible for Title IX sexual harassment.
- The Complainant has appealed, alleging that the Decision-Maker is the Respondent's football coach and is therefore biased. In her written statement, the Complainant admits that she knew the Decision-Maker was the Respondent's coach when he was appointed to that role. However, after the determination was issued, she found out that the Decision-Maker 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 Decision-Maker seemed to ignore in making the determination regarding responsibility.
  - What are your next steps?

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## STEP 8: Issue Written Determination



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## Timeline

- Within five (5) school business days after making the appeal determination, the Appellate Decision-Maker must simultaneously issue a written decision to both parties.

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## Written Determination



Describes result of appeal



Describes rationale for result



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  
Higher Education  
Special Education  
Student Discipline

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U.S. Court of Appeals for the Seventh Circuit

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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.

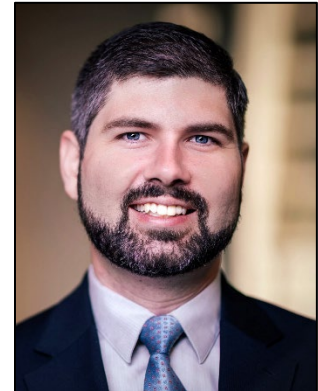
### **RECENT PUBLICATIONS**

*"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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