



HUSCH BLACKWELL

Appeal Panel Training

Fall 2021



Appeal Panel

- “Appeal body: The panel of University faculty and/or staff who are responsible for reviewing the appeal to determine the merits of the case and whether the outcome should be upheld, overturned, or remanded.”

- Pool of possible panelists
 - Panel will consist of three people
 - Will be selected once appeal filed
 - Ensure no conflict



What is a conflict of interest?

- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position



Who is responsible for identifying conflicts of interest and bias?



- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should self-police conflicts of interest and self-identify bias



Appeal Panel

- Scope: Substantive categories of issues?
 - Any violations of Nondiscrimination Policy or Sexual Misconduct Policy
 - Sexual harassment or misconduct
 - Discrimination based on other protected categories (race, color, religion, sex, pregnancy, disability, national origin, citizenship status, ancestry, age, genetic information, marital status, sexual orientation including gender identity, arrest record status, military or veteran status)
 - Disability – discrimination and accommodation issues
 - Retaliation



Appeal Panel

- Scope: WHO?
 - Anyone who feels mistreated on protected class basis by a University employee
 - Admissions, employment, and access to and treatment in University programs and activities
 - Can be invoked by students, applicants, visitors, faculty, staff, employees, and former employees



What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review





Our Goals Today – Part I

- Other anti-discrimination laws/University policy
 - Title VI
 - Title VII
 - Retaliation
 - ADA (discrimination and accommodation)



Title VI

- Single overriding purpose: “to make sure that the funds of the United States are not used to support racial discrimination.”
 - prohibits discrimination on the basis of race, color, national origin, or status as a language minority, in all programs that receive federal financial assistance.
 - Adopt and publish grievance procedures designed for prompt and equitable resolution of student and employee complaints that allege any action that would constitute a violation of Title VI.
 - Requires colleges and universities, upon notice of such activity, to take immediate action in response to harassment from professors or peers based on race, color, national origin, or language status that is sufficiently serious to create a hostile environment.



Title VII – Bases for Protection

- Race or Color
- National Origin
- Gender
- Disability
- Age
- Sexual orientation or identity
- Military status
- Retaliation



Retaliation

- Protected Activity
 - Reasonable Belief
 - Opposition or Participation
- Adverse Action
 - “Reasonably dissuade”
- Causal Link
 - Often easier to prove than discrimination



Retaliation (continued)

- “Payback” for “protected activity”
 - Filing internal complaint
 - Participating in internal investigation, court/agency proceeding
- Common “human” reaction
 - If not “guilty” – may be indignant and offended by accusation
 - If “guilty” – may be worried and defensive
 - Anyone – being challenged about illegal motive at work, which raises emotions and presents challenge to manage
- Can transform perfectly legal initial decision into actionable claim (e.g., if no harassment occurred)

ADA



- Prohibit discrimination and retaliation based on disability
- Require reasonable accommodation of disabled employees
- Three primary requirements relate to discrimination, accommodation, non-retaliation
- Embedded requirement of “interactive process”



The Obligation Not to Discriminate Means...

- DO NOT make assumptions
- DO NOT make diagnoses and conclusions about appropriate accommodations without documentation
- DO respect disabled person's privacy and right to ask for accommodations or NOT
- DO treat employee equally (no better, no worse), except in context of request for reasonable accommodation . . .



Providing Reasonable Accommodations

- What's reasonable?
 - To modify the way employees perform their role without causing an "undue burden"
- What's not reasonable?
 - To fundamentally alter the essential requirements of a the job or change role drastically; OR
 - To place undue hardship or burden upon company
- But these concepts require careful consideration of multiple factors
- And we can't make assumptions about what is essential or burdensome



Use Interactive Process

- A structured exchange with employee with a disability to explore
 - Medical condition and impact on ability to work
 - Particular aspects of job
 - Previous experiences
 - Past use of accommodations, current needs
- Balance what employee reports with other sources
 - Observations
 - External documentation (medical records, etc.)



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Appeal Process



Addressing Harassment and Discrimination Complaints

- Intake
- Informal Resolution
- Formal Resolution
- Appeal



Process for Appeals

- Complainant or Respondent submits appeal to OAE
- OAE contacts pool of panelists for availability
- Identify mutual availability for three panelists
- Send panelists appeal and investigator's report and establish in-person review date



Process for Appeals

- Independently review appeal, investigative report, and accompanying documents
- Discuss basis for appeal and whether evidence submitted supports the basis
- Vote and draft collective response
- Submit response to OAE within 7 days of convening
- OAE sends decision to appellant

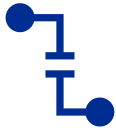


Process for Appeals – Deliberation Meeting

- OAE’s Associate Director or Director provides introductory remarks – addressing process, answering procedure-based questions
- Panel has “opportunity to ask questions”
 - Investigator
 - Chair of hearing panel
- Deliberation discussion
 - OAE staff “not involved”
 - Non-voting individuals may be present in advisory role
 - University counsel
 - Potentially others
 - Respondent and Complaint “not allowed to attend”

What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter



New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, that could affect the outcome of the matter; or



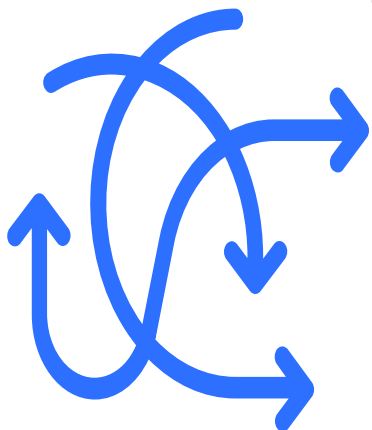
Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter



Policy language

- Clearly erroneous standard applies to appeal
 - “The appeal panel is charged with overturning or remanding a determination only if they are left with a definite and firm conviction that a mistake has occurred”

Procedural error

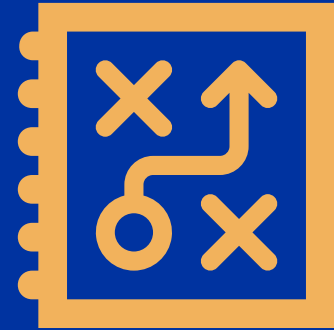


- Typically, the procedural error or omission that impacted the outcome—i.e., it must be material
- A procedural error affecting the outcome may include:
 - A failure to follow the institution's procedures;
 - A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence; or
 - A determination regarding what evidence was excluded as irrelevant.



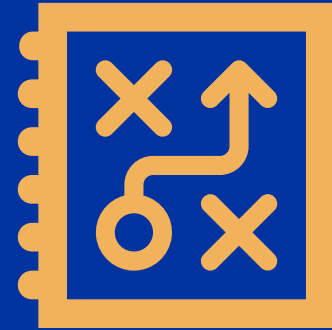
For discussion

- Complainant contends that the investigator failed to interview 19 witnesses who have knowledge of an alleged sexual assault based on discussions with Complainant or Complainant's friends following the incident.
- Investigator only interviewed 11 of the witnesses.
- Procedural error?



For discussion

- Respondent contends that the hearing panel improperly considered statements from Witness Z (who did not testify at the hearing). Written determination found Complainant more credible than Respondent on issue of consent for several different reasons. One reason was Complainant's explanation that Witness Z's posts of selfies from another state on the night of the incident countered Witness Z's statement to investigators that Complainant told Witness Z in person that same night "I loved every second of that hook up." Panel also found Respondent probably talked to Witness Z about what to tell investigators to help Respondent's case, based on Respondent's testimony and text messages.
- Procedural error? Material?



New evidence

- New evidence has come to light that was previously unknown or not reasonably available at the time that has potential to substantially impact the outcome
- Evidence presented to decision maker prior to the time the designation or written determination is issued does not qualify as new evidence that was not reasonably available





For discussion

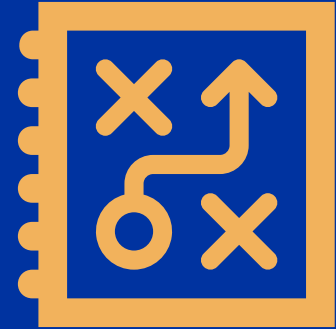
- Witness testifies at the hearing in way that offers different information from investigation interview.
- Respondent later identifies a new witness that would contradict Witness's testimony.
- Does this constitute "new evidence" for purposes of an appeal?





For discussion

- Respondent told investigators Roommate saw Complainant leaving lobby of his dormitory on date of sexual interaction and talked to Complainant, who was jovial; Complainant confirmed this at hearing; Roommate was never interviewed.
- On appeal, Respondent presents new affidavit from Roommate recounting same conversation with Complainant but also stating that Respondent told Roommate about sexual interaction at issue the night it happened; Respondent had not shared that conversation during investigation or hearing.
- Does this constitute “new evidence” or “procedural error” for purposes of an appeal?





Conflict of interest

- The Title IX officer, investigator, or decision maker had a conflict of interest or bias affecting the outcome:
 - For or against Complainants or Respondents generally or
 - For or against an individual Complainant or Respondent
- Claims of conflict of interest or bias should be based on the current case and process in question and will be assessed accordingly



For discussion

—
Do the following circumstances or relationships constitute conflicts of interest?

- Respondent faculty member and the hearing officer previously disagreed about a curriculum matter
- Complainant is currently a student in a hearing panel member's class
- Respondent is a staff member in the Title IX Coordinator's office





Appeal officer obligations

- No conflict of interest
- In most cases, the appellate review is limited to review of the written decision and the appeal and response documents submitted by the parties
- However, the appellate officer may be allowed to request and review additional information from the campus Title IX office



What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



Appeal is granted and determination is changed by the appeal officer

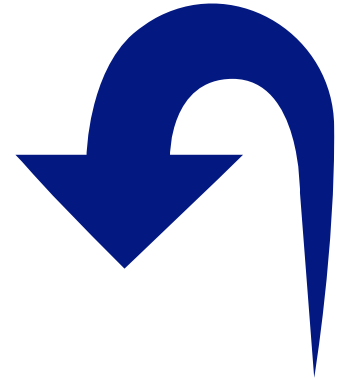


Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found



Appeal options

- Appeals granted for procedural error or new evidence should be remanded back to the original investigator and/or decision maker (hearing panel or adjudicator) for reconsideration.
 - Appeal officer should provide rationale and specific instructions defining the scope of the issues.
 - Instructions for return of the case to the appeal officer, if appropriate (e.g., revised findings)
 - Appeal officer to make a final determination.
- In rare cases where a procedural error cannot be cured (as in cases of bias) the appeal officer may order a new hearing.
 - May prescribe a new decision maker
 - Decisions from a new hearing may be appealed
- In cases where an appeal results in reinstatement or resumption of privileges, all reasonable attempts will be made to restore the respondent to prior status





Appeal preparation

- Step 1: Review relevant policy and procedures
- Step 2: Review appeal and any response (and supporting documents)
 - What arguments have been raised in the appeal?
 - What arguments have been raised in the response?
- Step 3: Consider whether the grounds have been satisfied
 - If yes, proceed; if no, prepare explanation of decision
- Step 4: Review investigative report, hearing transcript, outcome letter, and any sanction decision
 - Consider decision was reached and reasoning
- Step 5: Determine whether appealed error occurred and outcome





Practical Tips & Suggestions

- Do you think you need any additional information –
 - from the investigator? (e.g., why was a witness interviewed or not interviewed?)
 - from the sanctioner? (e.g., how does this sanction compare to sanctions in other similar cases?)
 - from either party?
 - from anyone else?
- What have you learned from any deliberations or discussions with your fellow Appeal Panel members?



Practical Tips & Suggestions

Does the information you have reviewed/gathered do any one of the following:

- (1) constitute new evidence or information sufficient to alter initial decision
 - Three Issues: (i) new evidence?; (ii) was it reasonably available at time (of investigation/hearing); (iii) does it matter?
- (2) show that the investigator deviated from procedures in a way that substantially altered outcome or influenced nature of sanction
 - Two Issues: (i) procedural error?; (ii) does it matter?



What is the format of a typical appeal decision?

- Structure
 - (I) Background Information
 - When was complaint submitted?
 - What was alleged?
 - What did investigation find?
 - What sanction was found, if any?
 - When was appeal submitted and was it timely?
 - (II) Summary of Appeal
 - What is the appealing party alleging, and is that allowable under policy?
 - Address cross appeals in same way.





Appeal decision letter format (cont.)



- (III) Analysis of each basis of appeal, separately
 - What factors support or contradict the appeal argument?
 - If error is alleged, did an error occur?
 - If an error occurred, would it have been sufficient to significantly impact the outcome of the investigation?
- (IV) Conclusion
 - Is the appeal granted or denied?
 - If granted, what outcome?



What are some best practices for documenting the appeal decision

- Summarize appeal official's decision, upfront
- Address the appeal grounds
- Address all arguments raised in appeal, cross-appeal, and in any response
- Review and address all relevant policy definitions and procedural provisions
- Consult with Title IX Coordinator and legal counsel regarding any procedural or legal questions or issues
- Show work: explain what decision and reasoning



For discussion

Following the submission of all appeal materials but prior to issuing an appeal decision, Appellate Officer learns from new emails that Respondent contacted two potential witnesses during the investigation and convinced them to change their stories prior to meeting with the investigator.

- How should this be addressed in your appeal decision, if at all?





For discussion

During consideration of appeal in case where Respondent found not responsible, Appeal Panel member learns from a second Complainant (student in Appeal Panel member's class) of a new allegation of similar sexual misconduct against Respondent. Appeal panel had already reviewed all reports, met to deliberate, and had decided to remand finding for hearing panel to consider evidence it had excluded.

- Can Appeal Panel continue with drafting written decision?





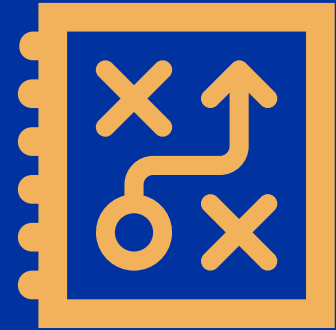
For discussion

Appeal Panel reviews investigation report, transcript of hearing, and hearing panel's written determination and, while a close call, unanimously believes that credibility determinations underlying a finding of "responsibility" should have gone in Respondent's favor.

During deliberation, hearing panel Chair answers questions and confirms that hearing panel also believed case was a close call on credibility issues and voted 2-1 in favor of "responsibility" finding.

Appeal Panel reviews procedural error issues raised on appeal and determines they are unfounded. No other grounds were raised.

Appeal Panel would like to remand for further deliberation on the credibility issues – is that permissible?



Questions



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