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Title IX Administrators

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Managing Appeals

An ATIXA Best Practices Seminar

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Introduction

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The primary focus of this seminar is to explain the appeal process, including the difference between identifying appeal grounds and rendering a determination on the appeal itself.



Appeal Decision-makers must exercise restraint and undertake a narrow review of the issues identified in the appeal.



Our goal is to equip participants with the knowledge and skills they need to execute the Appeal Decision-maker role and avoid common pitfalls.

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Appeal Decision-Maker Training

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Training Requirements

Appeal Decision-makers (ADM) **must** be trained on:

- Scope of the education program or activity
- Definition of sexual harassment
- Title IX policy and procedures
- How to conduct the Formal Grievance Process, including appeals
- How to serve impartially
- Meaning and application of the term “relevant”
- Bias and conflicts of interest



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Training Best Practices

ADMs **should** receive training on:

- Appeal grounds
- Limited scope of review, deference
- Process to make an appeal determination
- Possible appeal outcomes
- Writing a rationale
- Standard of evidence



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Appeals in Context

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Title IX Grievance Process Overview

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INCIDENT	INITIAL ASSESSMENT	FORMAL INVESTIGATION	HEARING	APPEAL
▪ Complaint/ Notice to TIXC	▪ Jurisdiction ▪ Dismissal ▪ Supportive Measures ▪ Emergency Removal ▪ Referral to Another Process ▪ Informal/ Formal Resolution	▪ Notice of Investigation and Allegations ▪ Interviews ▪ Evidence Collection ▪ Draft Report ▪ Party Review/ Comment ▪ Follow Up ▪ Final Report	▪ Questioning ▪ Credibility Assessment ▪ Determination and Rationale ▪ Sanctions ▪ Remedies	▪ Appeal Grounds ▪ Determination and Rationale

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Mandatory Dismissal

TIXC must dismiss the complaint at any time prior to a determination, if:

1. The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. The conduct did not occur in the Recipient's education program or activity, or
   - No control over the context
3. The conduct did not occur against a person in the United States, or
4. At the time of filing a formal complaint, a Complainant is not P/ATP
   - **AND** the TIXC determines they do not need to sign a formal complaint

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Discretionary Dismissal

TIXC may dismiss the complaint (or a portion of it) at any time prior to a determination, if:

- Complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any portion thereof
- Recipient no longer employs or enrolls Respondent
- Specific circumstances prevent the Recipient from gathering sufficient evidence for a determination

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Investigation Steps

1. Receive Notice/Complaint
2. Initial Assessment & Jurisdiction Determination
3. Determine Basis for Investigation
4. Notice of Investigation and Allegations (NOIA)
5. Establish Investigation Strategy
6. Formal Comprehensive Investigation
7. Draft Investigation Report
8. TIXC Reviews Draft Report & Evidence
9. Parties Review Draft Report & Evidence
10. Final Investigation Report



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Decision-Making

Decision-maker(s):

- Facilitate decision-making/hearing process, including questioning
- Determine relevance
- Assess credibility
- Make findings of fact
- Determine whether policy was violated
- Assign sanctions (if applicable)
- Write determination rationale
  - This rationale, any hearing recording/transcript, the investigation report, and the investigation file will be the primary source materials upon which ADMs rely

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Appeal Purposes & Process

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Appeal Overview

Appeal of Final Determination

INCIDENT	INITIAL ASSESSMENT	FORMAL INVESTIGATION	HEARING	APPEAL
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Appeal of Dismissal

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Appeals Process

- A final request from any party to review a **dismissal** decision or **final determination**
  - But **not** emergency removal – those challenges are different
- Determine if an error occurred in the Grievance Process that needs correction
  - Provide direction to correct the problem
- Not intended as a rehearing or "do-over," but if an error is found, may result in:
  - Reconsideration
  - Re-investigation (in full or in part)
  - Rehearing
  - New decision-making/hearing process
- Not an opportunity to substitute judgment or second-guess
- Review is very narrow in scope

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Purpose of Appeals

- Appeals serve an important due process function
  - Review for **clear errors** impacting the integrity of the Grievance Process
  - Guard against **bias** or **conflicts of interest**
  - Engender confidence in the process
- **ATIXA recommendations:**
  - One level of appeal review
  - Close in time to original decision (5-7 days to submit request for appeal)
  - Limited, defined grounds
  - Equal opportunity for parties to appeal

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Appeal Grounds

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Reasons for Appeal

Must offer appeals on the following grounds:

1. Procedural irregularity that affected the outcome of the matter
2. New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter
3. Conflict of interest or bias by the TIXC, Investigator, DM that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

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Procedural Irregularity

- Parties must identify specific procedural irregularities in their written appeal
- The irregularity that affected the outcome of the matter
- Examples:
  - DM did not allow Respondent to include a relevant witness who saw the Complainant immediately after the alleged incident
  - DM disallowed potentially exculpatory evidence as “too prejudicial”
  - TIXC failed to tell the Respondent about their right to an Advisor
  - Investigator failed to send parties all the evidence during the review period
  - Investigator told Complainant not to discuss the allegations with anyone
  - TIXC did not send an adequate Notice of Investigation and Allegations

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New Evidence

- New evidence that was **not reasonably available** at the time the determination regarding responsibility, or dismissal was made, that could affect the outcome
- Requires evidence to be truly **unavailable** or **unknown**
  - Statements from a party or witness who chose not to participate do not qualify
    - Including if someone did not provide a statement because of a criminal investigation
  - Intentionally withheld evidence does not qualify
- Example:
  - Witness with relevant texts was part of a remote wilderness program for a semester and learned about the complaint upon returning to campus; produced texts

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Conflict of Interest or Bias

- TIXC, Investigators, and DMs (including ADMs) must **not have a conflict of interest or bias** for or against:
  - Complainants, generally
  - Respondents, generally
  - The parties involved with a complaint
  - Subject matter or details of the complaint itself
- Party must demonstrate substantiated bias, not merely perception of bias
- Bias or conflict of interest must have affected the outcome of the matter



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What's the Difference?

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Conflict of Interest

Refers to situations in which:

- An **actual** (or perceived) clash,
- Between the role and
  - A current or previous relationship/situation with one of the parties
- That prevents neutrality or objectivity
- **Example:** A Residence Life Director serving as DM for a complaint filed by one of their Resident Assistants

Bias

Refers to a tendency for or against **a person or group,** or an unwillingness/inability to be influenced by factual evidence

- A preference or tendency to like or dislike
- Implicit or explicit
- Can be intentional, but generally unintentional or at least unconscious
- **Example:** An investigator who believes respondents cannot be trusted to tell the truth

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Making an Appeal Determination

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Gatekeeping Function

- ADM determines whether an appeal is timely and contains sufficient detail
  - Submitted within appeal timeframe, as outlined by policy
- Parties should submit a written document with all arguments and information they want the ADM to consider
  - No specific format required
  - “Kitchen sink approach” to appeals is common
    - Can be challenging to identify grounds
- TIXC role may support the ADM but does not serve as the gatekeeper
  - If TIXC is the subject of the appeal, a backup should serve as support

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Appeal Determination Process

If ADM rejects appeal as not timely or grounded:

- Parties receive written notice, and the decision is final

If the appeal is timely and identifies appropriate grounds, the ADM (or panel) should:

- Notify all other parties of the appeal and offer an opportunity to respond in writing
  - Typically offer the same amount of time as the appealing party had to appeal
  - Each party may submit their own appeal, as well as respond to the original appeal
- Solicit response(s) from Investigator(s), DMs, or TIXC as appropriate
- Pose written questions to parties, as necessary
- Have access to and review the entire record
- Typically, limit review to evaluating the issues the parties raised in their written submissions

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File Review

- Review the complaint file
  - ADM must **limit** their analysis to the grounds in the appeal
- Review carefully and thoroughly
  - Budget time for an extensive record, or to listen to an entire recording
- May require multiple reads
- If there is an appeal panel, the panel should meet to discuss and decide
  - No live hearing for appeals



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Action Steps

ADM may need to take **additional steps** before making a determination on the appeal:

- Gather any evidence that is relevant to the appeal
- Examples:
  - Review social media posts the party argues are relevant to allegations of a TIXC's bias toward the Complainant
  - Contact a law enforcement agency to inquire about their practices/timelines for sharing evidence with a Respondent (to determine if evidence is "new")



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Action Steps Cont.

- **Retrieve documentation** (e.g., obtain documentation regarding whether a party received sufficient notice)
- **Meet with relevant individuals** (e.g., meet with a party about past experiences and concerns with the DM's bias)
- **Determine whether an issue could have been raised/cured earlier** (e.g., examine whether a party should or could have reasonably raised a concern about the DM's conflict of interest when the TIXC did a conflicts check)
  - Not automatically fatal to the appeal
  - ADM may just want to understand why the error was not raised earlier

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Making a Determination

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According the available, relevant evidence, determine the following:

- Whether an error occurred, according to the standard of evidence
- Whether the error **affected** or **could have affected** the outcome, according to the standard of evidence; standard differs depending upon the appeal ground
  - The ADM may decide the error occurred but would **not** have affected the outcome
    - Examples:
      - The NOIA had a few minor errors but still provided adequate notice
      - TIXC's perceived bias did not impact the jurisdictional assessment that resulted in dismissal
- If the error could have affected the outcome, according to the standard of evidence, determine the appropriate cure for the error

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Limiting Review to Appeal Request

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- Generally, ADMs are constrained to the four corners of the appeal request
  - If an error exists, but the parties have not raised it in their appeal request(s), the ADM may be limited in their ability to grant that appeal
  - Examples:
    - The Complainant asserts a procedural irregularity, but the record reveals bias, and no party raises the issue of bias
    - The Respondent alleges a procedural irregularity about the questioning at the hearing, but the record shows there was a procedural irregularity based on insufficient opportunity to review evidence prior to the hearing
  - If procedures are unclear on this, clarify with the TIXC

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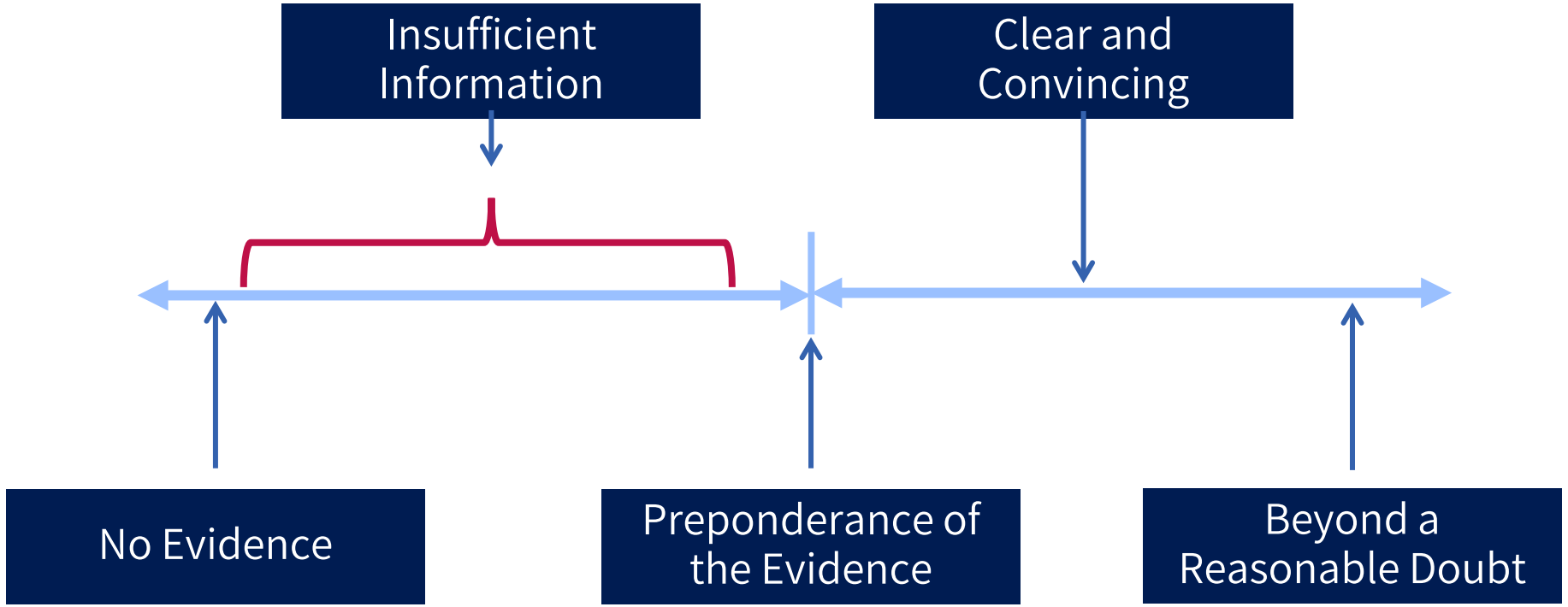
Standard of Evidence



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Dismissal Appeal Outcomes

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Dismissal affirmed

Dismissal reversed

Dismissal remanded for further consideration

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Final Determination Appeal Outcomes

Common Outcomes:

- Appeal denied, outcome stands
- Remand to original Investigator(s) for further investigation
- Remand to new Investigator(s) for new investigation
- Remand to original DM(s) for additional consideration
- Remand to new DM(s) for new determination/hearing
- Decision modified (not recommended, does not show deference)



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Cure the Error

- Connect the outcome of the appeal to the error
  - Case-by-case, fact-dependent analysis
- Examples:
  - If the hearing did not permit cross examination:
    - Order the hearing to reconvene for cross examination, vacate decision and sanctions, or
    - Order a new hearing if original DM can no longer provide impartial decision since they already viewed impact statements during the original sanctioning phase
- Provide specific instructions for how to cure, if inclined to do so and permissible under procedures

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Appeal Determination Letter

- Written determination must be provided to the parties simultaneously
- Determination letter should include:
  - Grounds for appeal, including the grounds ADM considered or rejected
  - Any procedural steps or other actions the ADM took during the appeal, if applicable
  - Decision and rationale for how decision was reached
- TIXC is responsible for implementing the ADM's decision

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Finality

- ADM's decision is final
  - Unless policy permits another round of appeal (**not recommended**)
  - Sanctions/corrective actions take effect when the decision is final
- If the ADM remands the complaint for further proceedings, the process restarts at the appropriate point
- Procedures should clarify whether the results of a remand can be appealed, and if so, under what circumstances



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Appeal Documentation

- Maintain communication log
  - Emails, phone calls
- Document action steps
  - Documents reviewed
  - Meetings convened
- Written outcome letter

Provide the TIXC with all documentation related to the appeal for recordkeeping purposes at the conclusion of appeal phase



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Activity

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Scenario 1

- The Respondent's post-determination appeal argued that the original DMs did not receive the Respondent's investigation report feedback from the Investigator and the DMs viewed Complainant's impact statement prior to making a responsibility determination

What information would you seek or what steps would you take?

What may be an appropriate cure for this appeal?

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Scenario 2

- A Complainant's dismissal appeal alleged that the TIXC is biased against the Complainant because the Complainant:
  - Protested a past Title IX co-sponsored program and disrupted the event with a megaphone
  - Wrote an op-ed in the student newspaper arguing the TIXC was incompetent, and their office was full of a bunch of law school washouts

What information would you seek or what steps would you take?

What may be an appropriate cure for this appeal?

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Scenario 3

- A Complainant's post-determination appeal raised, for the first time, the issue that one of the two Investigators had a conflict of interest with the Respondent because the Investigator's son is a teammate of the Respondent
  - Respondent is the quarterback of the football team and the Investigator's son is a wide receiver
  - If Respondent does not play as a result of suspension, the Investigator's son may have a below average season, causing him to miss out on athletic scholarships

What information would you seek or what steps would you take?

What may be an appropriate cure for this appeal?

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Common Appeal Pitfalls

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Common Pitfalls

- Failure to train ADMs
  - Too few trained ADMs
- Disregard narrow appeal scope
- Rubberstamping (too much deference)
- Too many appeal layers
- Improper influence
  - Senior Administrator
  - Athletics
  - Others



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