

Deciding an Appeal: The Last Best Chance to Get It Right

Disclaimer

Portions of this presentation may qualify as “attorney advertising” in some jurisdictions. Parker Poe, however, intends for it to be used only for educational and information purposes.

The law is changing rapidly in this area. This presentation is our best attempt to summarize the current state of the law and is subject to change.

For Title IX assistance, contact Josh Whitlock at joshwhitlock@parkerpoe.com or 704.335.6622.

Session Agenda

- I. What are the qualifications for the position?
- II. Where do you fit into the big picture?
- III. What are the bases for an appeal?
- IV. What are the steps of the appellate process?

This is the second of two required training sessions for appellate hearing officers. Session one – training for all hearing officers – should be completed first.

Qualifications

1.

~~Title IX Coordinator~~

~~Investigator~~

~~Original Decision Maker~~

2.



3.

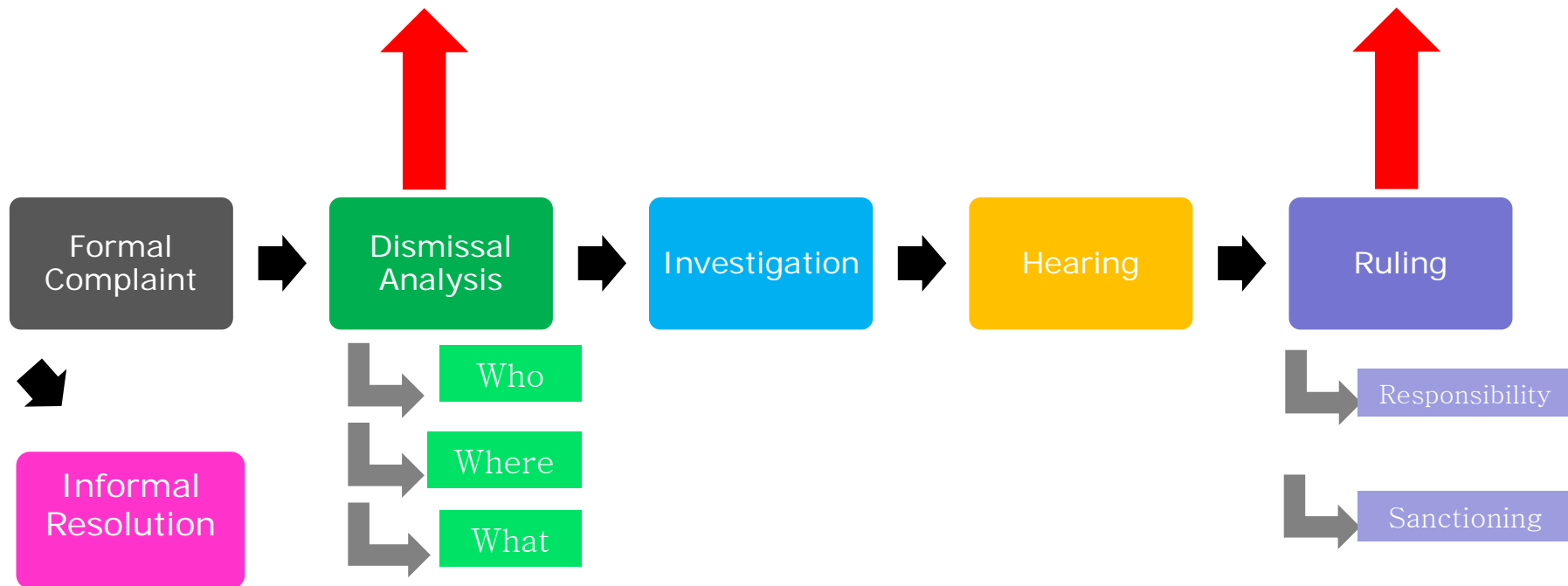
Training



Understanding the Big Picture

Appellate Process

Appeal of Dismissal/Appeal of Determination



Three (and only three) Bases for Appeal*

- ① Procedural Irregularity
- ② Conflict of Interest/Bias
- ③ New Evidence

* Unless your school chooses to allow more

Notice what is not listed



I don't like the outcome, and I want to see if someone else will give me the outcome I want.

You are not conducting a *de novo* review.

1 Procedural Irregularity



The Appellant must:

- Identify a procedural irregularity
- Make a case that it affected the outcome of the matter

Dismissal
Analysis

Investigation

Hearing

Ruling

Procedural Irregularity Example

The Complainant's complaint was dismissed on the grounds that he was "not a person in the US" at the time of the incident because he is a Chinese national on an F-1 student visa. The Complainant appeals.

Procedural irregularity:

Misapplication of the rule – relevant issue is location, not national origin or immigration status

Affected the outcome:

Yes – resulted in dismissal (unless it was not the sole grounds)

Procedural Irregularity Example

The investigator asked the Respondent to get a witness statement from anyone who could support her alibi. Respondent failed to do so. She ultimately was found responsible for stalking. The Respondent appeals.

Procedural irregularity:

The school bears the burden of gathering evidence, not either party

Affected the outcome:

Yes, if lack of a corroborated alibi was a factor

Procedural Irregularity Example

In finding the Respondent responsible, hearing officer cited details from a police report made the day of the incident. No police officer attended the hearing. Respondent appeals.

Procedural irregularity:

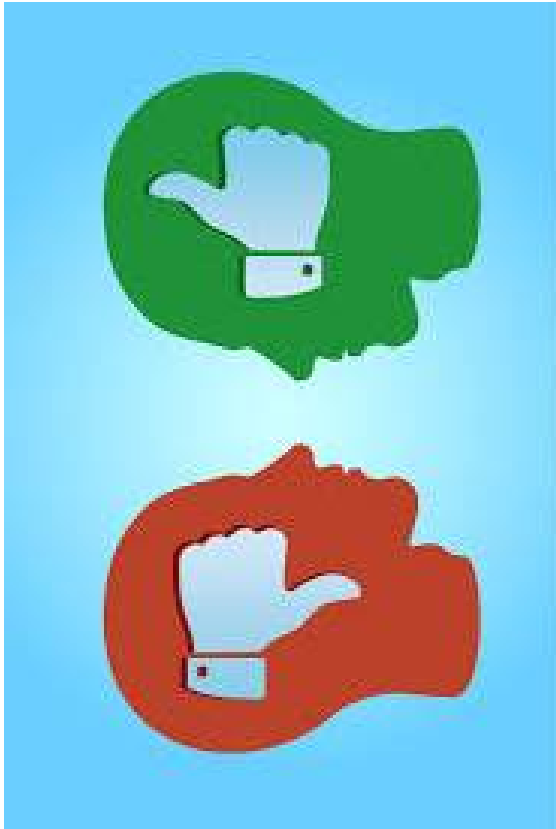
No consideration of statement if witness not available for cross examination

Affected the outcome:

Yes – information that should have been excluded was cited in the determination

2

Conflict of Interest/Bias



The Appellant must:

- Identify a conflict of interest or bias
- Make a case that it affected the outcome of the matter

Title IX
Coordinator

Investigators

Hearing
Officers

Conflict of Interest Example

Respondent found not responsible. Key witness (who testified that the Complainant consented to sexual contact) is the Respondent's cousin. Complainant appeals on the grounds that witness had a conflict of interest.

Conflict of interest:

No – applies only to Coordinator, investigator(s), and hearing officer(s)

Affected the outcome:

N/A

Bias Example

In response to current events, professor pens an op-ed arguing that sexual harassment investigations have become “witch hunts” and that “no man is safe from accusations that his very existence is oppressive and traumatizing to victims of real or imagined advances.” Professor later serves as hearing officer and finds the male Respondent not responsible for sexual harassment.

Bias:

Yes, in favor of male Respondents

Affected outcome:

Reasonable conclusion based on factors

3

New Evidence

The Appellant must:

- Identify new evidence that was not reasonably available at time of determination
- Make a case that it affected the outcome of the matter



New Evidence Example

After being found responsible for Level 4 expressive harassment, Respondent goes to new lengths to retrieve old texts and produces texts demonstrating that Complainant regularly laughed at and expressed approval of communications he later alleged were unwanted and made him uncomfortable.

New Evidence:

Yes, but it was reasonably available previously

Affected outcome:

N/A

New Evidence Example

Respondent is found not responsible for sexual assault. Two days later, one of his friends forwards the Title IX Coordinator an email chain in which the Respondent bragged of committing the assault. “I’m sorry I didn’t bring this forward previously,” the friend says. “I didn’t want to get involved, but I won’t be able to live with myself if I stay silent.”

New Evidence:

Yes and unknown to investigators and Complainant

Affected outcome:

Reasonable assumption given that it is documentary evidence directly contradicting denial

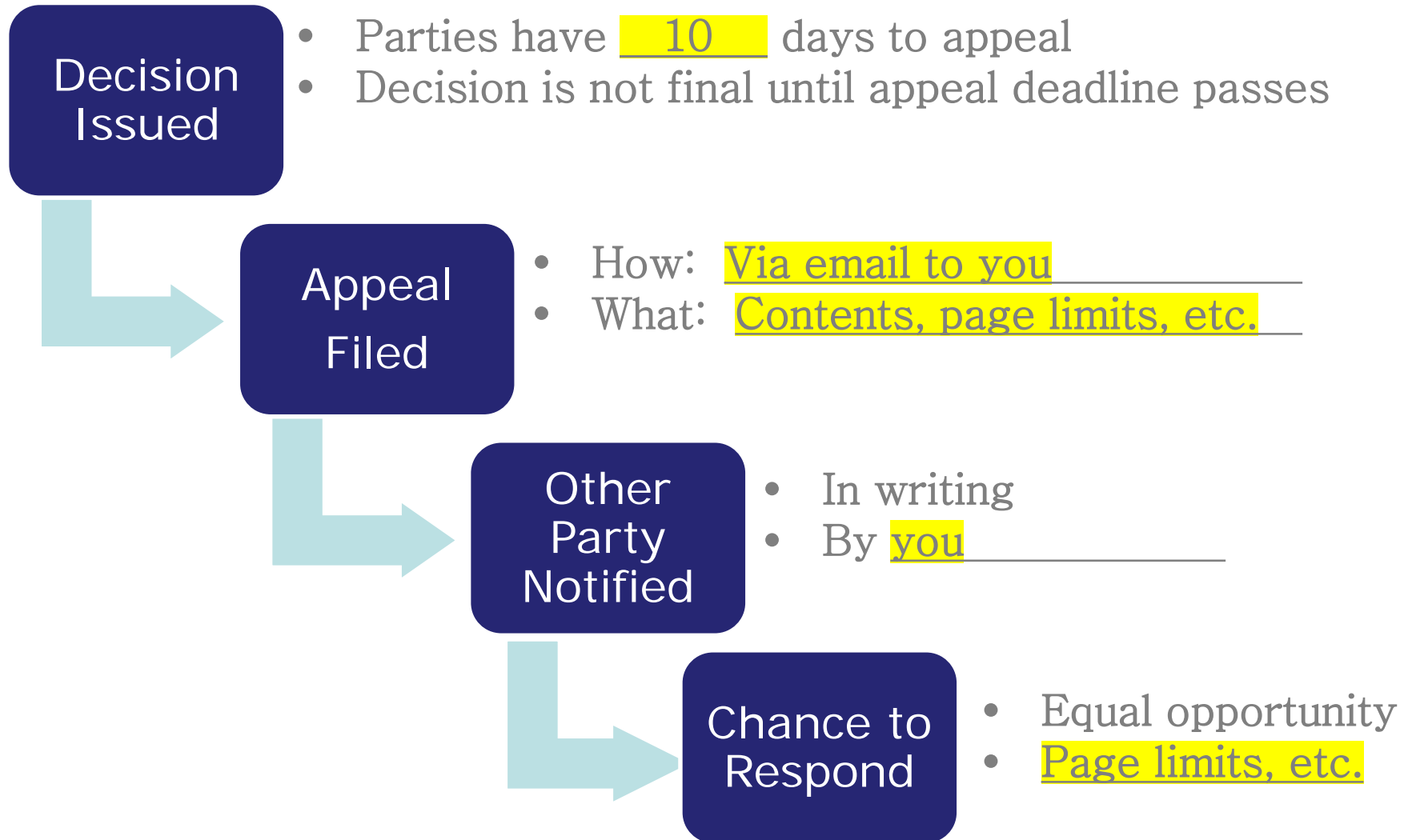
Did the issue affect the outcome?

1. List the alleged policy violations
2. Catalogue the elements
3. Consider whether the issue impacted the establishment of an element (either prevented it from being established or allowed it to be established)

OFFENSIVE SEXUAL TOUCHING

1. Intentional touching
2. Without consent
3. Of another person's intimate parts
(intimate part: penis)

Steps of the Appellate Process



Steps of Your Decision Process

What can you consider?

- Report, directly related evidence, transcript, decision
- Other: Interviews? Independent research?

Issue Decision

- Result and rationale
- Timeframe: 10 days

Provide to Parties

- In writing
- Simultaneously

Remand?

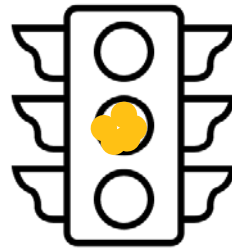
When is remand appropriate?

New Evidence



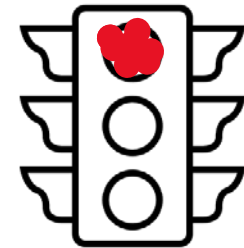
Remand for mini hearing to consider new evidence.

Procedural Irregularity



If reversal, you issue it. If do-over is necessary, remand.

Bias/Conflict



Can't remand to same biased participant. Start over??

Your Parker Poe Title IX Team



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