

GRAND RIVER | SOLUTIONS

Title IX Appeals

Xavier University of Louisiana

Martha Compton | February 14, 2022



Martha Compton

she/her/hers

Director of Strategic Partnerships
& Client Relations

Meet Your Facilitator

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA's Gehring Academy, and was part of the core team that developed ASCA's Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.

About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity



Title IX

Overview of regulations & requirements

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Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1972).

On May 19, 2020 . . .

The Department of Education promulgated regulations that went into effect August 14, 2020.



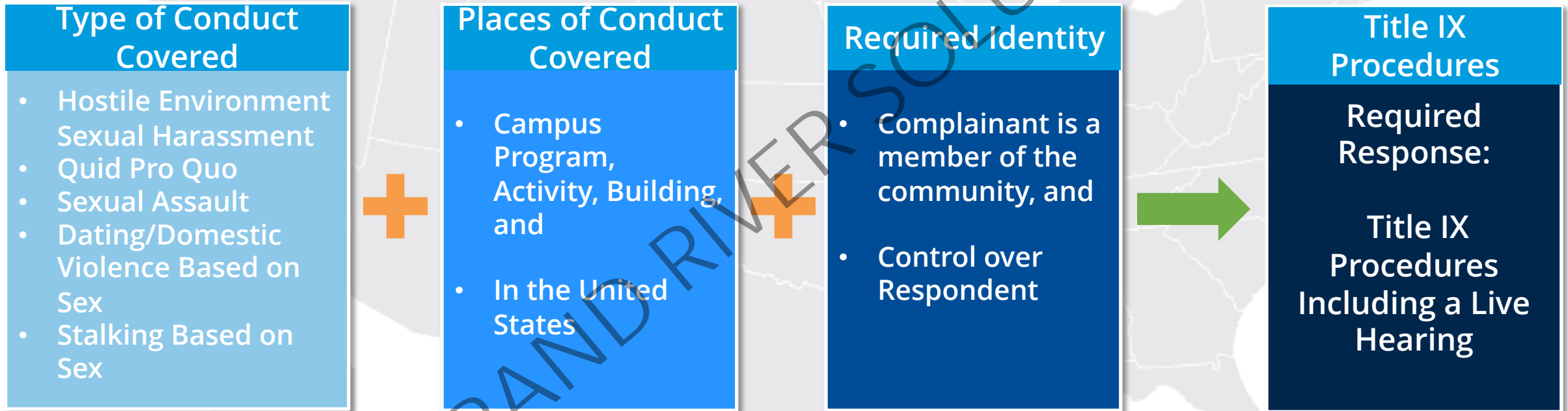
These regulations limited the scope of Title IX to a very specific set of cases that must meet a new definition of sexual harassment and jurisdictional requirements.



If a case meets all the required elements, then it will proceed under the Title IX grievance process, which includes a live hearing.

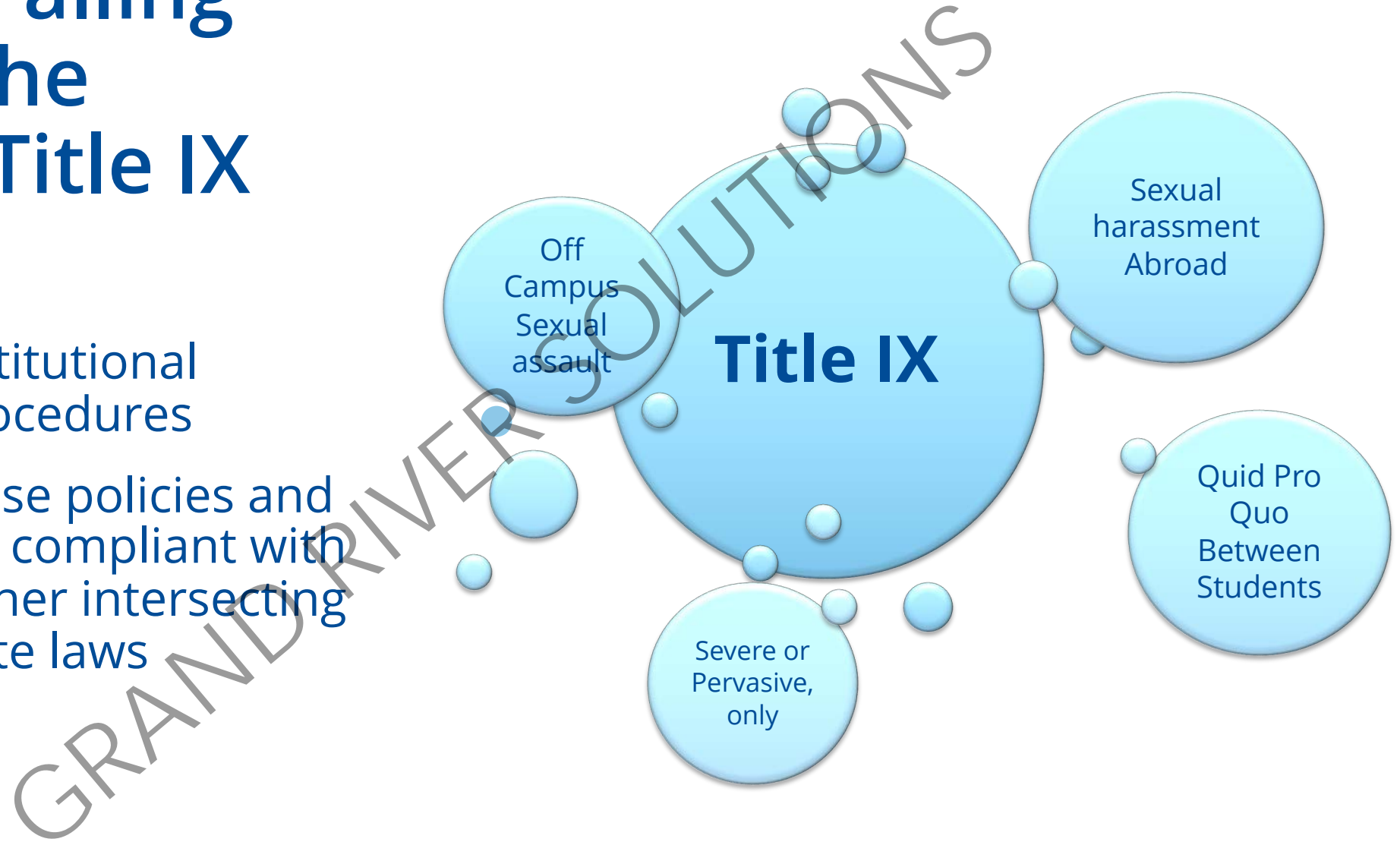
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Overview of the Title IX Requirements as of August 14, 2020



Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



Procedural Requirements for Investigations



Notice to both parties



Equal opportunity to present evidence



An advisor of choice



Written notification of meetings, etc., and sufficient time to prepare



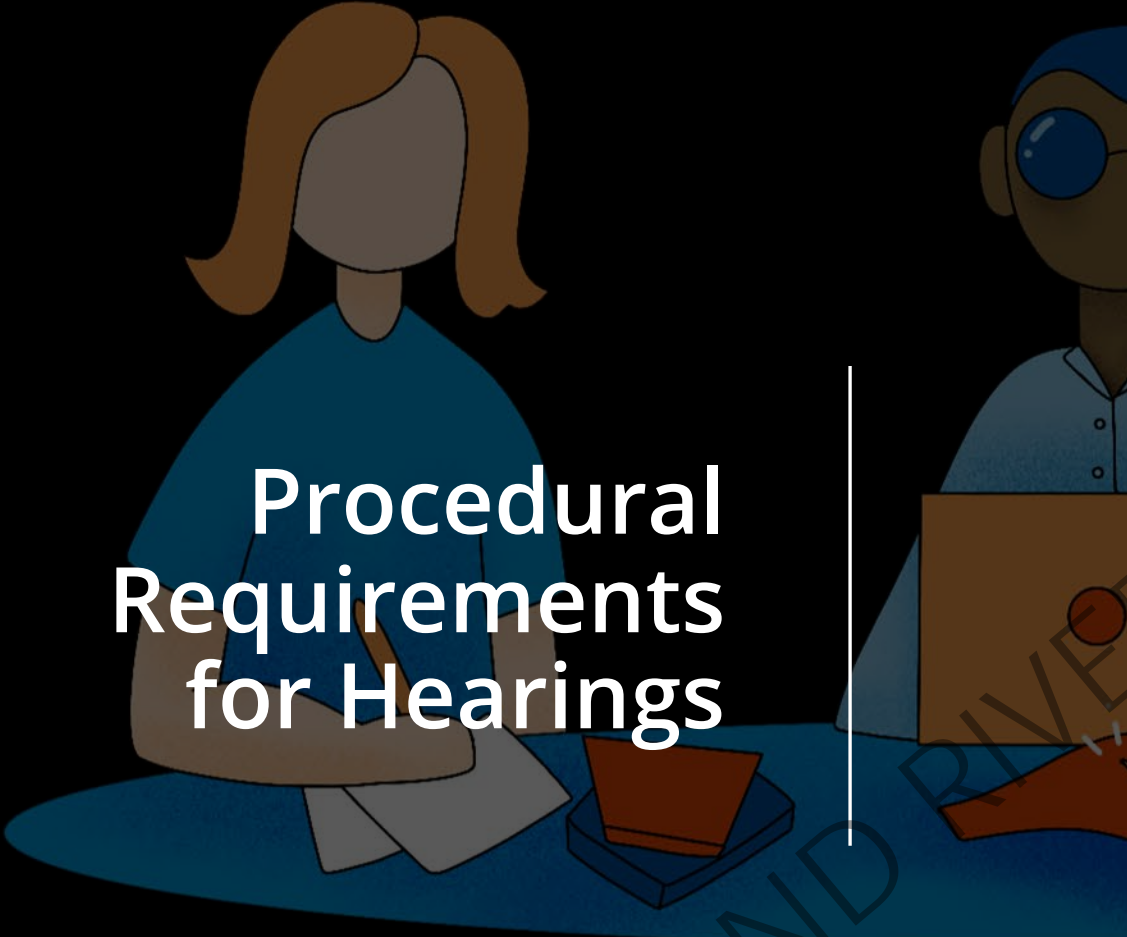
Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report



Report summarizing relevant evidence and 10 day review of report prior to hearing



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Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or advisor provided by the institution

Decision maker determines relevancy of questions and evidence offered

Exclusion of evidence if no cross examination

Written decision must be issued that includes finding and sanction

Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.



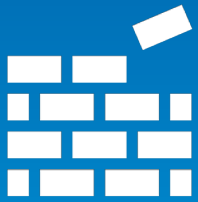
All hearings must be recorded.

Audio-Visual
Audio Only



Participants must be able to communicate during the hearing

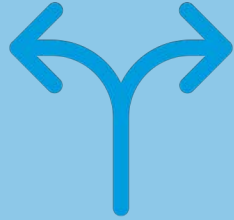
The parties with the decision maker(s)
The parties with their advisors



Appeal Fundamentals

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Who Can File an Appeal?



Either party has the right to file an appeal, which is reviewed by an annually trained appeal reader, who does not have any other role in the process. Only decisions reached through a hearing can be appealed and must be submitted in writing within 48 hours of the written determination regarding responsibility.



QUESTION: If a party did not attend the hearing, can they appeal?

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Grounds for Appeal

Regulatory Requirements

- i. Procedural irregularity that affected the outcome;
- ii. New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome;
- iii. The Title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.



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Grounds for Appeal – XULA Policy

- a. Where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or,
- b. where a sanction is substantially disproportionate to the findings.

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Was an appeal filed?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.

What Does This Mean?

- You are reviewing the appeal for what it says, not how it is said.
- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.





Reviewing the Appeal

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Evaluating Appeals

Procedural, or

- Bias/Conflict of Interest
- Error

New Information, and

- Unknown at the time
- Reasonably unavailable

Affected the Outcome

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Bias



- What constitutes bias?
- The investigator was biased against me because...
- The investigator was biased against (complainants/respondents generally) because . . .

Allegations for Bias

“Pro-victim bias does not equate to anti-male bias.”

-Doe v. University of Colorado

Anti-violence bias does not equate to anti-male bias.

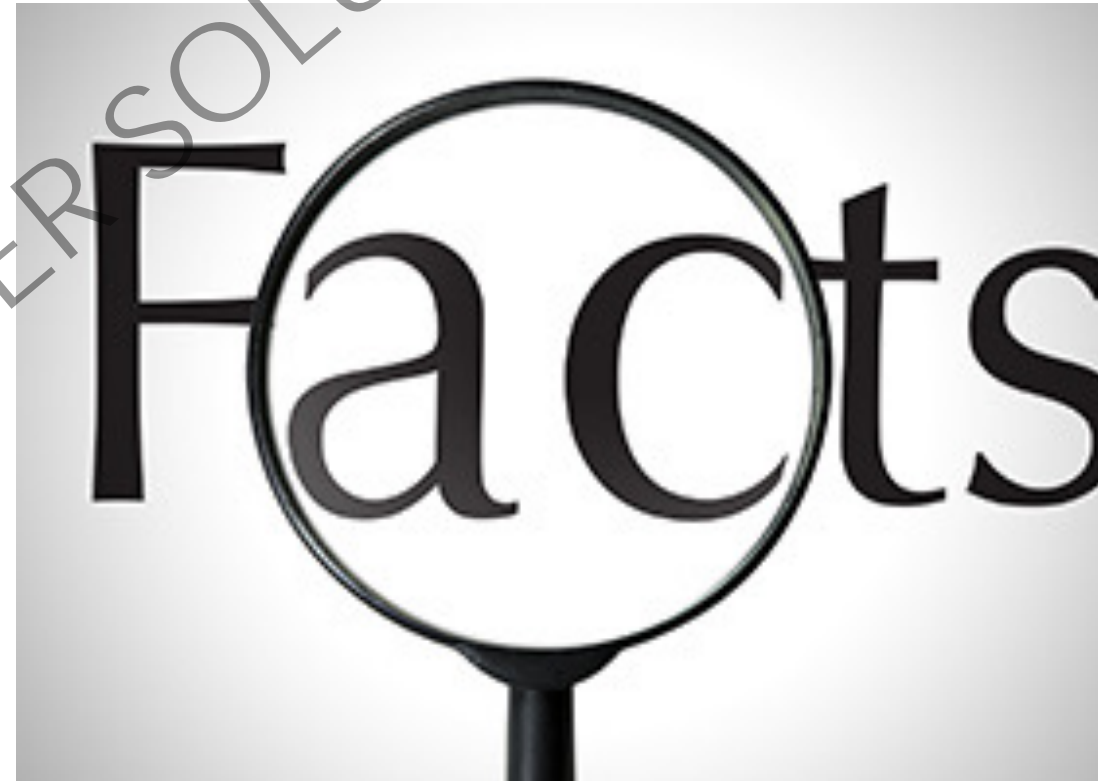
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Allegations of Bias as the Basis for Appeal

An allegation of bias without factual support “no longer passes muster”.

-Doe v. University of Colorado



Procedural Error

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent

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Parties Cannot be Denied a Process You Don't Offer



Representation



Discovery



Subpoena / compel
witnesses

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Sometimes Institutions Do the Wrong Thing



- ❖ Missing deadlines for providing materials
- ❖ Misunderstanding of affirmative consent
- ❖ Errors at a hearing

New Information

- Is it really new?
- If it is new, would it change the findings/outcome
- Who investigates or authenticates new information?
- Timeline



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New Evidence: What Would You Do?

Appeal states there is
new evidence...

Evidence not provided
with the appeal

How do you know it is
new?

It is new but is it relevant
and reliable?



Common Errors in Appeals

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Evidence

- Direct
- Circumstantial
- Character



Evidence – Knowing What to Consider

Drunk vs. Intoxicated
vs. Incapacitated

Language matters

Clarity and consistency of application

Who has to prove
consent?

Know the language of your policy

De Novo
Appeals

DANGER

**DO NOT
ENTER**

Appeals Panels That Exceed Their Authority

- Stay in your lane
- How do you know
- How to correct



Adjusting Sanctions



Incorrect Finding

The sanctions are now incorrect because the finding was incorrect.

Disproportionate

Upon review, it was found that the sanction was substantially disproportionate to the findings.



Decision Making

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You've Identified the Problem... What Now?

The parties will receive written decision regarding the appeal describing the results of the appeal and the rationale for each result. If an appeal is denied, the matter shall be considered final. If the appeal is granted, there are several options for proceeding.

Options when an appeal is granted

- Return the matter to the original decision maker
 - Appropriate when there is new evidence to consider
- Refer the matter back for a new hearing with a new decision maker
 - Appropriate in matters of bias or procedural error
- Appellate reviewer adjusts sanction
 - Appellate reviewers should only adjust sanctions if they meet the disproportionate criteria

Documenting the Appeal Decision

- Policy and Procedure
 - Rights
 - How notified
 - Who decides
 - Step-by-step process
 - Communications
- Outcome
 - Notification
 - Decision
 - Rationale
 - Record-keeping
 - Office of record

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