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The Last, Best Chance to Get it Right:

Designing and Implementing Effective Title IX Appeal Procedures

Stetson Law Webinar

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Agenda

1. Scope and Caveats
2. Upsides and Downsides
3. 10 Tips
4. Case Law Sample

Upsides and Downsides


Downsides

- ✓ Can torpedo whole process
- ✓ Potential insertion of bias, lack of training, and other problematic elements
- ✓ Can tarnish party experiences

Upsides

- ✓ Can save and/or enhance process
- ✓ Potential to successfully address bias, lack of training, and other problematic elements
- ✓ Can reaffirm positive party experiences and/or mend negative party experiences

Title IX Sexual Harassment Appeals: Top Ten

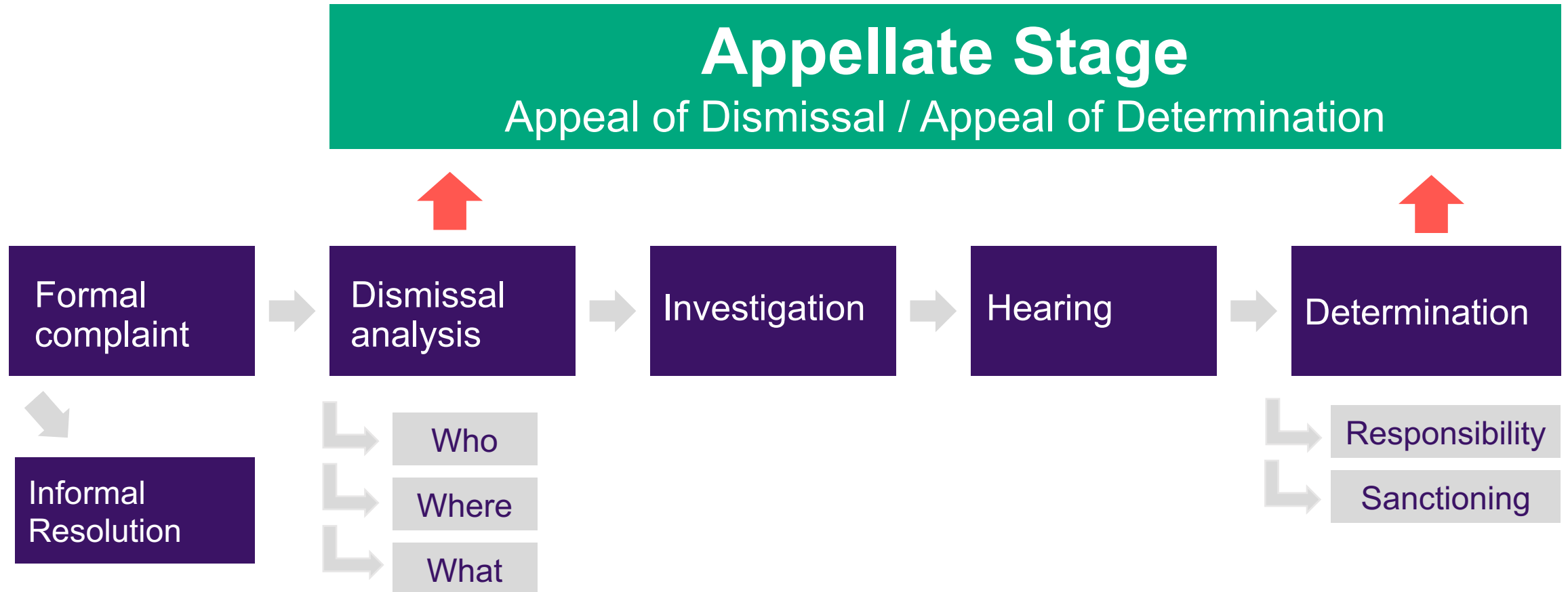


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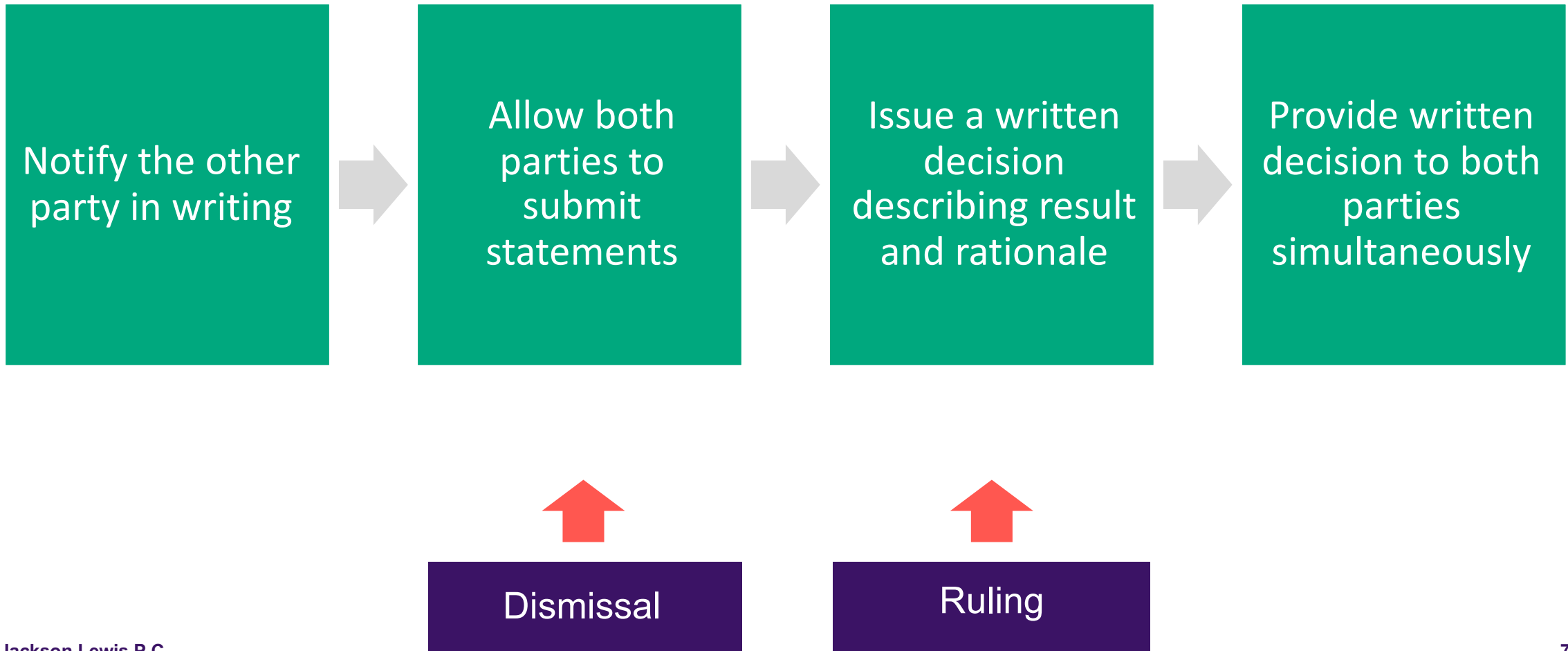
Clearly set forth appeal bases and procedures in Title IX Sexual Harassment Grievance Procedures

- Title IX Final Rule (May 2020 Regulations)
- Other factors, including practicality, logistics, institutional culture

Understanding the Big Picture of the Title IX Grievance Process



Understanding the Big Picture of the Appellate Stage of the Title IX Grievance Process



General Principles

Appeals are available
equally
to both parties

Procedures
apply **equally** to
both parties

Your review
is **limited** to
defined grounds, not
de novo

There are Three – and only Three* – Bases for Appeal

- 1 Procedural irregularity that affected the outcome
- 2 Conflict of interest/bias that affected the outcome
- 3 New evidence that could have affected the outcome

* Unless your school chooses to allow more



A contender for the list:

- 1 Procedural Irregularity
- 2 Conflict of Interest/Bias
- 3 New Evidence
- 4 “Either party may appeal on the basis that the sanction issued is disproportionate to the policy violation for which the respondent was found responsible.”



**Set forth clear timelines and
deadlines for:
appeal window, appointment (and
challenging) of appeal decision-
maker, submission of written
materials (including any response),
and final determination**



**Carefully select the
appeal decision-maker**

Qualifications to Serve as an Appellate Decision Maker

1

Sole Role

~~Title IX Coordinator~~
~~Investigator of the Matter~~
~~Original Decision Maker~~

2

Fair & Impartial

~~Conflict of Interest~~
~~Individual Bias~~
~~Generalized Bias~~

3

Trained





**Allow parties to challenge
appointment of appeal decision-
maker on limited grounds and
within specified window**

SAMPLE DESIGNATON / CHALLENGE LANGUAGE

Upon receipt of an appeal, the Title IX Coordinator, in consultation with _____ will appoint an appeal officer. Within two days of such appointment, the Complainant or the Respondent may identify to the Title IX Coordinator in writing alleged conflicts of interest or bias created by appointment of that appeal officer. The Title IX Coordinator will carefully consider such statements and will promptly assign a different appeal officer if the Title IX Coordinator determines that a material conflict of interest or material bias exists.



5

**Carefully consider the
role of counsel**



6

**Provide training that empowers
appeal decision-maker for
success and withstands scrutiny**

- Baseline requirements
- Create sustained excellence through cross-training for multiple roles + timely spot training

Training for Appellate Decision Makers

Definition of Sexual Harassment (in Section 106.30)

Scope of the School's Education Program or Activity

How to Conduct an Appeal

How to Serve Impartially

Technology used for Live Hearing (as applicable)

Relevance of Questions & Evidence

E.g. when Complainant's sexual predisposition or prior sexual behavior are not relevant



Provide the parties access to a well-developed record

- Investigation report, other evidence, hearing recording
- Meet on the bones of determinations (including for dismissal)



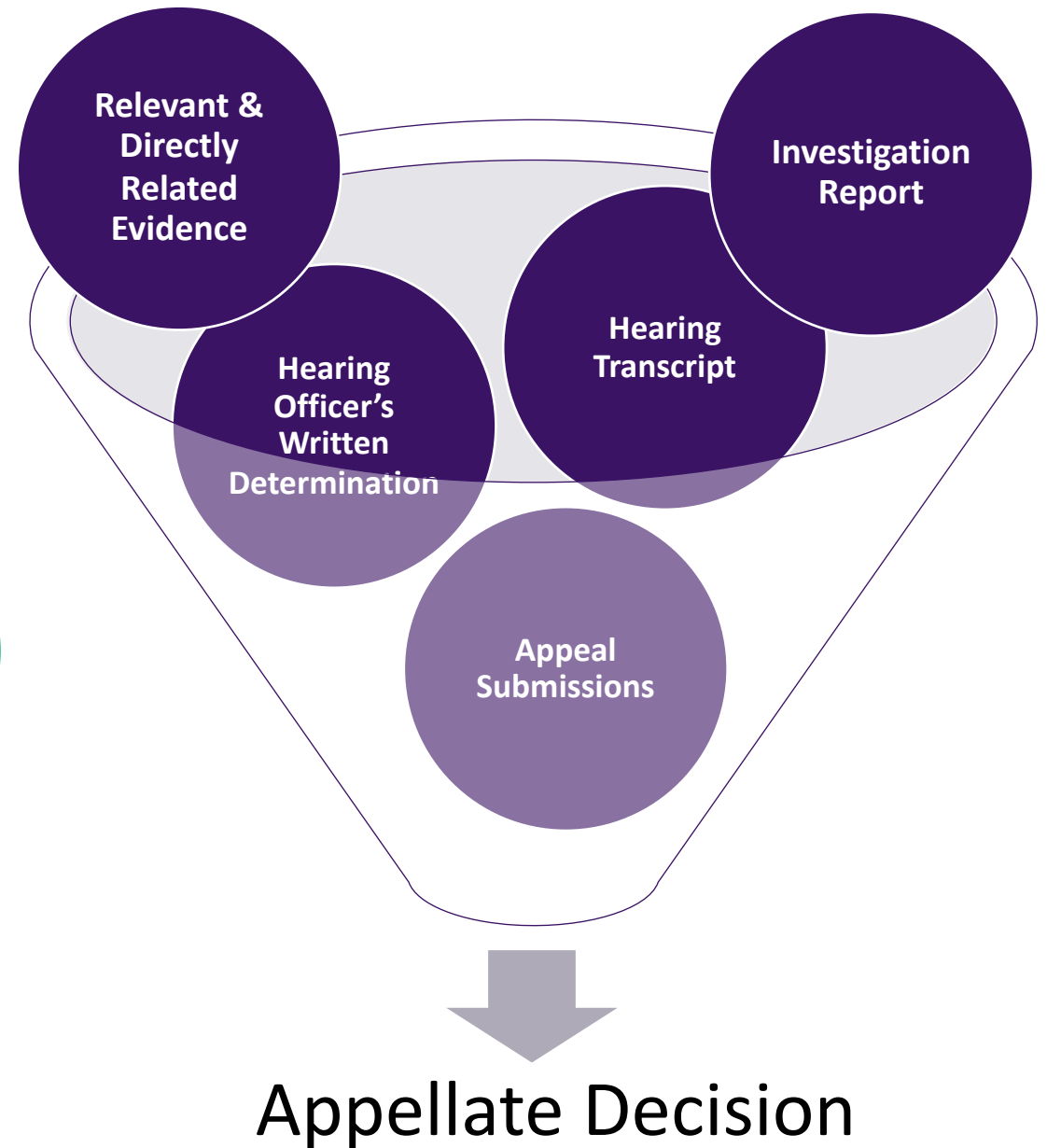
**Ensure parity and
transparency in
communications with,
and opportunities for, the
parties**

What can you consider?

Can you
interview
parties or
witnesses?

Can you
interview
school
personnel?

Can you search
for additional
information?



Bear in mind:

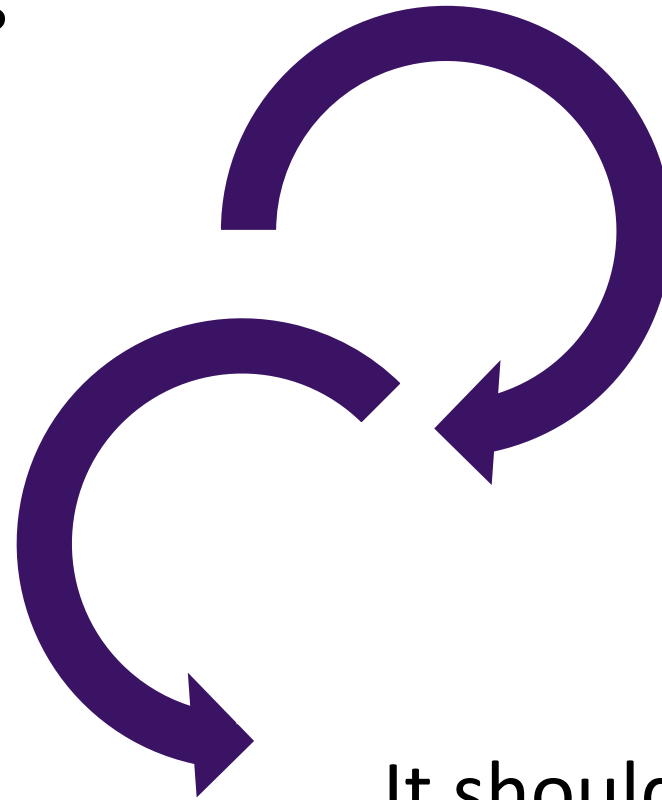
If an appellate process is going to feature hearing process activities...

E.g.

Witness testimony



Cross examination



E.g.

Consideration of evidence



Opportunity to review evidence

It should follow hearing process rules

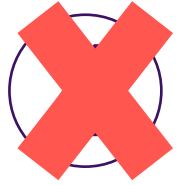


Avoid *de novo*

Warning

An appeal is not an opportunity to throw the Title IX grievance process out the window and resolve the case the old-fashioned way.

Notice what is **not** listed



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



De Novo v. Limited Review

A Familial Example Featuring...



16-year-old Jake as
the “Party”



18-year-old Sidney as
the Investigator



Mom as the Hearing
Decision Maker



Dad as the Appellate
Decision Maker



**Give the designee
options:
affirm, reverse, remand,
seek additional
information**

Three Choices on Appeals

1.

Deny

Uphold/Affirm

the determination
of the initial
decision maker

2.

Grant

Vacate & Remand

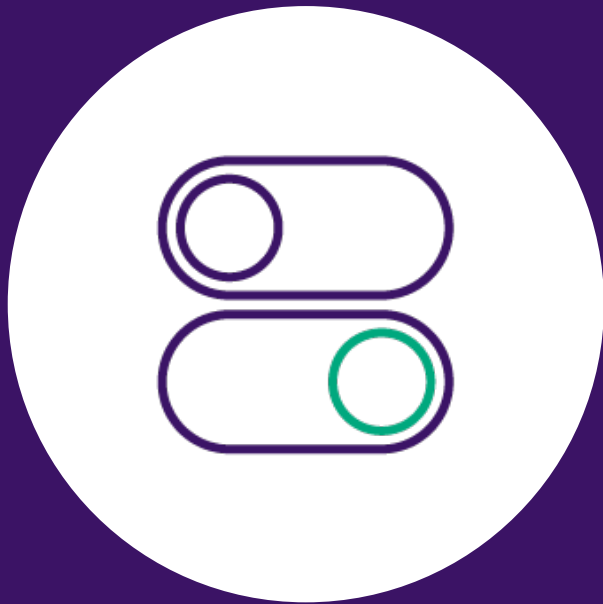
to the initial
decision maker for
further proceedings

3.

Grant

Reverse

the determination
of the initial
decision maker



When is reversal the best remedy?

The question calls for a clear up or down answer

No further examination of evidence or questioning of witnesses is necessary to reach a conclusion

Example

Title IX Coordinator dismissed formal complaint of sexual assault in a residence hall because Complainant, a foreign student who holds Chinese citizenship, cannot be “a person in the United States.”

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??

Case Law Sample

- *Doe v. Coastal Carolina Univ.*, 359 F. Supp. 3d 367, 372 (D.S.C. Jan. 9, 2019).
- *Doe v. Univ. of St. Thomas*, 368 F. Supp. 1309, 1322-23 (D. Minn. 2019).
- *Doe v. Grinnell College*, 473 F. Supp. 3d 909, 924 (D. Iowa 2019).
- *Park v. Temple Univ.*, 757 Fed. Appx. 102, 106-07 (3d Cir. 2018).
- *Doe v. George Washington Univ.*, 321 F. Supp. 3d 118, 122, 128 (D.D.C. 2018).
- *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 580, 586, 591 (E.D. Va. 2018).
- *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602 (E.D. Va. 2016).
- *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 581, 599 (D. Mass. 2016).
- *Doe v. Alger*, 228 F. Supp. 3d 713, 730-31 (W.D. Va. 2016).
- *Doe v. Vanderbilt Univ.*, 2019 U.S. Dist. LEXIS 173269, at *38, 42-43 (M.D. Tenn. Sept. 30, 2019). [unreported]
- *Gulyas v. Appalachian State Univ.*, 2017 U.S. Dist. LEXIS 137868 (W.D.N.C. 2017). [unreported]
- *Prasad v. Cornell Univ.*, 2016 U.S. Dist. LEXIS 161297, at *20-21 (N.D.N.Y. 2016). [unreported]

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Thank **you.** Questions?