

Are You Compliant?

How To Train Your Title IX Appeals Officers

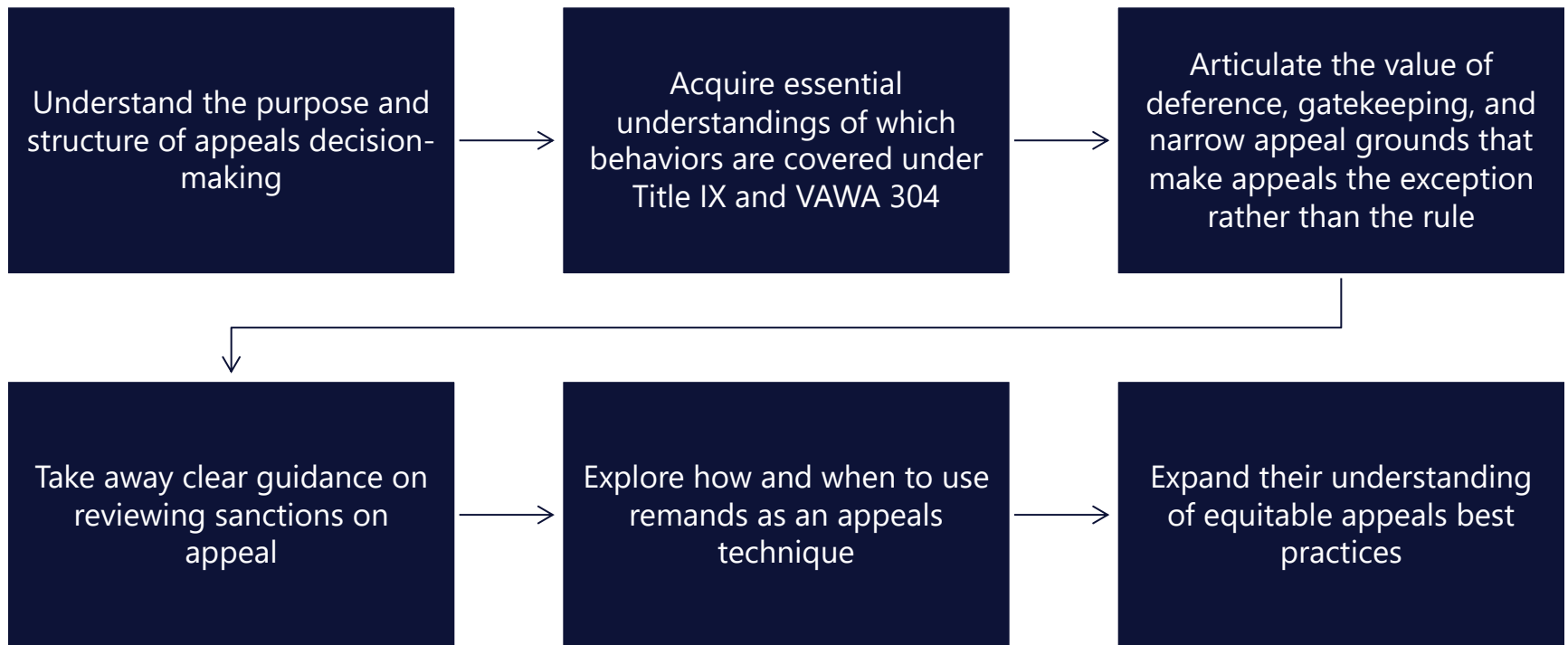
Brett A. Sokolow, Esq

President & CEO

The NCHERM Group, LLC



Objectives



Chat Question I

How many layers of appeal do you have in Title IX cases on your campus? 1 / 2 / 3 / 4



Please use the chat feature to submit your reply.

Chat Question II

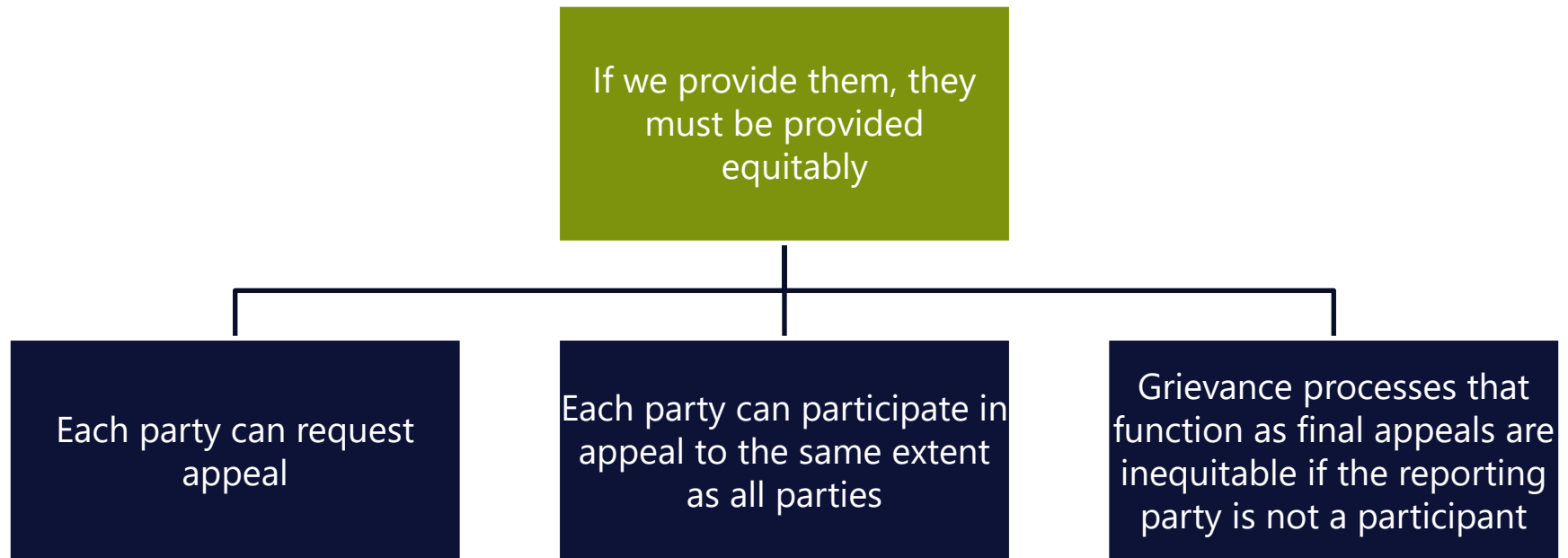
Do you have the same number of layers for all respondents, whether faculty, students or staff?

Yes or no?

Please use the chat feature to submit your reply.

Introduction

- Title IX, VAWA Section 304 and Appeals Best Practices
- Appeals are not required by federal law



What is Covered?

- Under VAWA Section 304, and Title IX, the principles of appeals covered in this webinar apply to:
 - Sexual Violence
 - Dating Violence
 - Domestic Violence (IPV)
 - Stalking
 - Sexual Harassment
 - Other forms of physical and non-physical sexual, sex-based or gender-based discrimination (could include hazing, bullying, bias offenses, etc.)

Appeals: Key Elements

One level of appeal is all you need

Limit the grounds for appeal

Show deference to initial decision

- Clear error in finding; Compelling justification to change sanctions

Sanctions usually take effect immediately

Short window to request an appeal (3-7 days is common)

- Can always grant an extension if necessary

Document-based and recording review

- Limited interviews; NOT *de novo*

Appeals should not be automatic; based on request

Preponderance of evidence is standard for decision

The Philosophical Basis for Appeals

- Making sure the procedures were followed to a fair result
- That result may not be how you would have decided it, but the goal is to show deference on appeal unless there is **clear error**.
- Initial investigation and decision should be presumptively sufficient until evidence shows otherwise.
- Under Title IX, many appeals now implicate sufficiency of investigation, a new concern.

The Philosophical Basis for Appeals

- With the investigation now under a microscope on appeal, a layer of Title IX Coordinator sign-off after investigation is critical to the integrity of the investigation process (Facebook example)
- You may disagree with sanction, but there must be a **compelling justification** to change it, not mere disagreement
- Sanctions must bring an end to discrimination and reasonably prevent its reoccurrence (Title IX)
- Remedies must repair the harm; make whole the victim and the community

When Appeals Go Off the Rails

Interventionist appeals officers who believe it is their job to second-guess

Granting appeals for the chance at an education conversation/to teach a lesson

The liability risk of a too strong appellate authority

Hierarchs as appeals officers -- a common practice and often a mistake

Failure of adequate training

Too much deference can also bite you (if the initial decision is wrong, or results from lack of training, you do have to set things right)

Appeals Best Practices

- Remand. Your judgment is not better than that of others in the process. If there is a problem and you can send it back, do so.
- Problems with investigation can be repaired by reopening the investigation, or in rare cases, by re-investigation.
- Problems with hearings can often be fixed by limited re-hearing. Re-dos should be rare.
- 80-90% of appeals should be denied. Of the remaining 10-20%, almost all should be remanded.

Appeals Best Practices

- Joinder. Title IX sets up the potential for appeals of appeals of appeals.
- To avoid this (and you want to avoid it), you'll need a one-level appeal process (more levels are just bureaucracy and are not needed) where all parties are joined in the appeal regardless of whether they petition for it, and irrespective of what grounds are asserted.
- All viable grounds should be joined in one reconsideration with all parties participating.

Appeals Best Practices

- Appeals are typically in writing.
- Review the investigation report, the hearing record and all available documents.
- Interview the investigators, Coordinator, and/or hearing officers/panelists
- You may conduct limited interviews with the parties or witnesses as necessary, but avoid a full re-hearing. If needed, remand.
- Make an independent and impartial determination.
- Grounds for appeal or changes must be shown by evidence that is “more likely than not” under Title IX.

Appeals Best Practices

- Letters of outcome, including finding, any sanctions, and rationale therefore are applicable to appeals decisions under VAWA Section 304.
- Rights to advisors of the parties' choosing are as applicable to appeals as to any other stage in the process.
- If you are not eligible to hear appeals (Provost, President, etc.), refer the angry parent on the phone to whomever is the proper official.

Appeals Best Practices

- If the initial decision is presumptively correct, implement the sanctions immediately, not pending appeal.
- Coordinators or other administrators should have discretion to stay implementation of sanctions on a case-by-case basis, but the default should be that they go into effect immediately.
- Otherwise, we are saying the sanctions are presumptively incorrect until the appeal says they are ok.
- If that is the case, why not just skip the hearing and go right to the appeal?

Appeals: Grounds for Appeal

A procedural error or omission occurred that significantly impacted the finding (e.g. substantiated bias, material deviation from established procedures).

To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.

- A summary of this new evidence and its potential impact must be included.

The sanctions imposed are substantially disproportionate to the severity of the violation [or: The sanctions fall outside the range of sanctions the University/College has designated for this offense and the cumulative record of the accused individual].

Appeals Logistics

Petition for Appeal
– Reviewed by
single administrator

Initial review of appeal
to determine whether
it states grounds upon
which relief can be
granted

Petition Denied or
Accepted; If
accepted...

Two models: Single
Administrator or
Panel

Single Trained
Administrator

- E.g.: VPSA, Director of HR,
Associate Provost,
Coordinator

Trained Appeals Panel

- Three panelists from the
pool who have not yet
otherwise participated or
had knowledge of the facts

Communication Protocols

The status of the appeal is part of the status of the investigation. The reporting party is entitled to regular updates on this status.



When one party requests an appeal, the other party(ies) should be notified, and joined, either on the same basis that the appeal has been requested, or on other bases that they wish to assert as grounds.

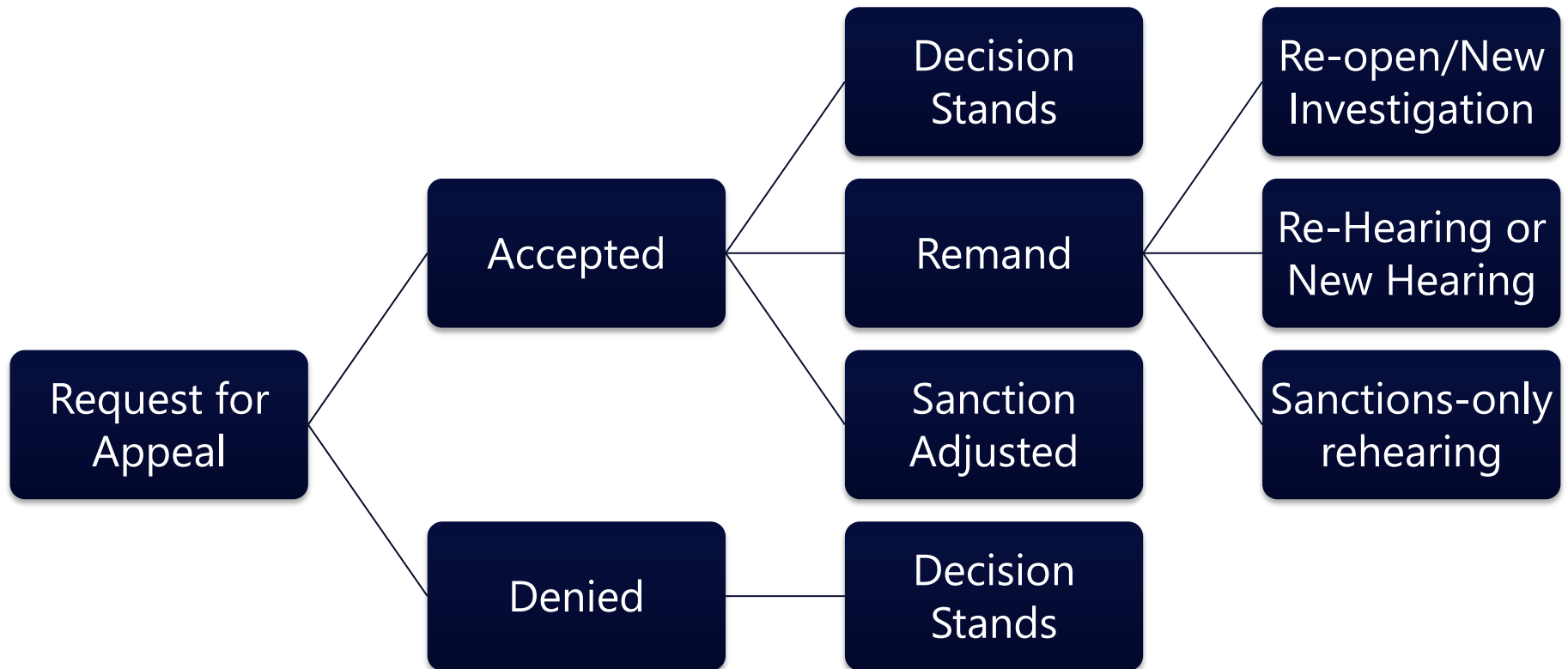


Exchange the appeals documents and requests between the parties, with an opportunity to respond.

Appeals: Possible Outcomes

- Request for appeal denied
 - Decision stands
- Request for appeal granted
 - Decision stands
 - This should be the norm
 - Remand
 - To correct a procedural error or address new evidence
 - Re-open investigation (full redo uncommon)
 - Re-Hearing (usually partial, unless full rehearing required)
 - To adjust the sanction
 - Remand or sanction adjustment by Appellate Body

Appeals: The Process



WWW.ATIXA.ORG

The screenshot shows a web browser window with the URL <https://atixa.org/>. The page features a prominent header with the ATIXA logo, which consists of the lowercase letters 'atIXa' in a stylized font where the 'IX' is larger and red, with 'at' and 'a' in black. Below the logo is the text 'Association of Title IX Administrators'. To the right of the logo is a 'Member Login' box containing fields for 'Username' and 'Password', a 'Remember Me' checkbox, and a red 'LOGIN' button. Below the header is a navigation menu with the following items: 'ATIXA' (highlighted in red), 'About', 'Join', 'Members', 'Resources', 'Events', 'Partners', and 'Contact'. The main content area is divided into two sections. On the left is a 'ATIXA News' sidebar with a list of links: 'Dept of Ed FAQs and WH Task Force Report', '2015 ATIXA Conference', 'Membership Details', 'Certification Events', 'Register as a Title IX Coordinator', 'Free Resources', 'News', and 'FAQ'. On the right is a large image of a diverse group of smiling professionals in business attire. Overlaid on the bottom of this image is the ATIXA logo and the text 'Welcome to ATIXA'.

Member Login

Username

Password

Remember Me **LOGIN**

ATIXA About Join Members Resources Events Partners Contact

ATIXA News

- [Dept of Ed FAQs and WH Task Force Report](#)
- [2015 ATIXA Conference](#)
- [Membership Details](#)
- [Certification Events](#)
- [Register as a Title IX Coordinator](#)
- [Free Resources](#)
- [News](#)
- [FAQ](#)

ATIXA Member Benefits

atIXa

Welcome to ATIXA

Questions?



Innovative Educators

Supporting Academic & Professional Growth In Higher Ed



Brett A. Sokolow, Esq
President & CEO
The NCHERM Group, LLC
BRETT@NCHERM.ORG