

## 2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

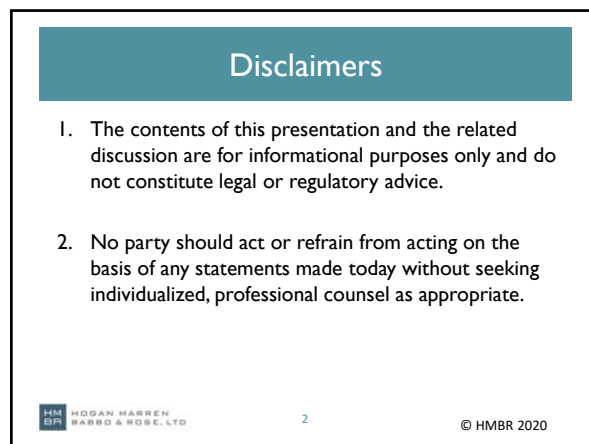


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**Title IX Sexual Harassment  
Training  
August 2020**

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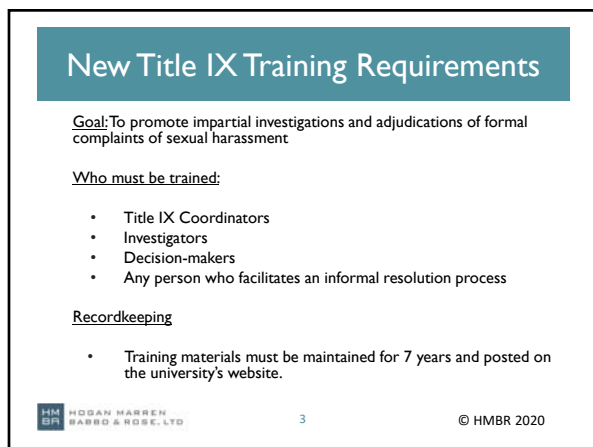
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2. No party should act or refrain from acting on the basis of any statements made today without seeking individualized, professional counsel as appropriate.

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**New Title IX Training Requirements**

Goal: To promote impartial investigations and adjudications of formal complaints of sexual harassment

Who must be trained:

- Title IX Coordinators
- Investigators
- Decision-makers
- Any person who facilitates an informal resolution process

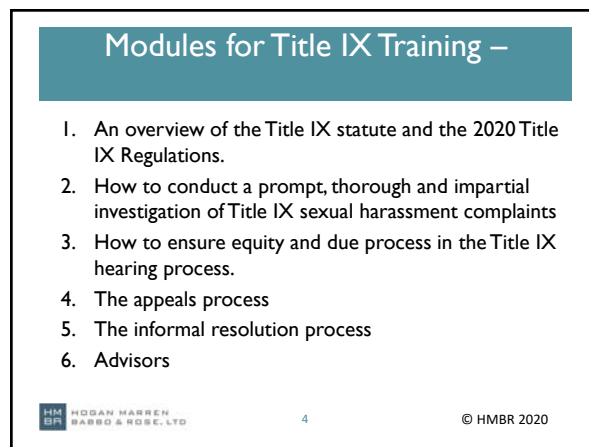
Recordkeeping

- Training materials must be maintained for 7 years and posted on the university's website.

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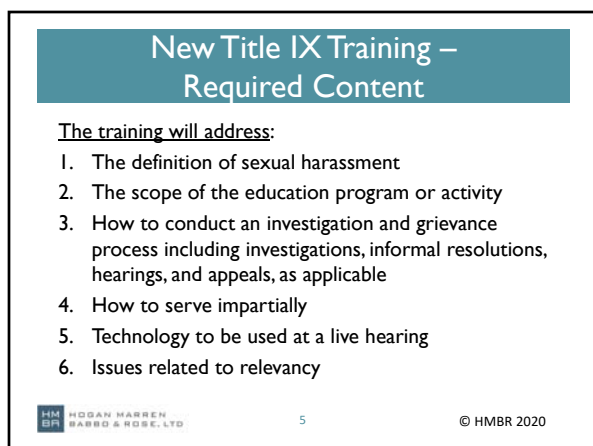
**Modules for Title IX Training –**

1. An overview of the Title IX statute and the 2020 Title IX Regulations.
2. How to conduct a prompt, thorough and impartial investigation of Title IX sexual harassment complaints
3. How to ensure equity and due process in the Title IX hearing process.
4. The appeals process
5. The informal resolution process
6. Advisors

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**New Title IX Training –  
Required Content**

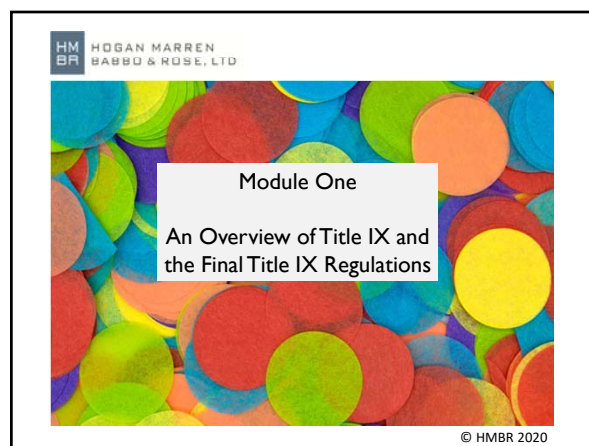
The training will address:

1. The definition of sexual harassment
2. The scope of the education program or activity
3. How to conduct an investigation and grievance process including investigations, informal resolutions, hearings, and appeals, as applicable
4. How to serve impartially
5. Technology to be used at a live hearing
6. Issues related to relevancy

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**Module One**

An Overview of Title IX and  
the Final Title IX Regulations

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### Module One - Agenda

1. The scope of the 2020 Title IX regulations
2. Applicable state law requirements
3. Obligation to respond to actual notice of sexual harassment in an education program or activity
4. Roles and responsibilities of the participants
5. Supportive measures
6. Title IX policies and grievance processes
7. Title IX procedural requirements

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### Part One

## The Scope of the 2020 Title IX Regulations


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### What is Title IX?

Title IX is a federal statute that prohibits sex discrimination in education programs and activities that receive federal financial assistance.

*"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."*

Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681(a)



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### 2020 Title IX Regulations



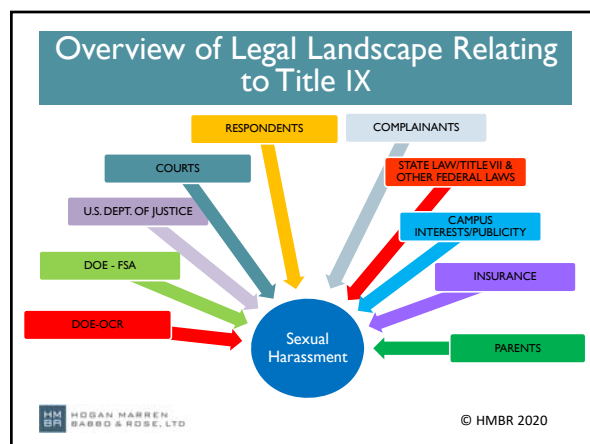
- Announced May 6, 2020
- Effective August 14, 2020
- Ongoing federal litigation
- First Title IX sexual harassment regulations; considered more legally binding than policy guidance
- Regulations are not retroactive

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### Key Concepts

- Deliberate indifference is set as the liability standard for administrative proceedings
- Updated and more detailed procedural requirements: Title IX Coordinator, nondiscrimination notice, grievance procedures, retaliation, recordkeeping
- Revised definition of sexual harassment
- Universities have discretion as to how to address sexual misconduct outside the scope of the Title IX regulations

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### Civil Litigation Claims

Complainants	Respondents
<ul style="list-style-type: none"> <li>• Title IX – deliberate indifference</li> <li>• Tort law – negligence/duty of care</li> <li>• Breach of contract</li> <li>• Intentional infliction of emotional distress</li> <li>• +More</li> </ul>	<ul style="list-style-type: none"> <li>• Title IX – gender bias</li> <li>• Due process</li> <li>• Breach of contract</li> <li>• Intentional infliction of emotional distress</li> <li>• Defamation</li> <li>• +More</li> </ul>

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### Part Two

## Applicable State Law Requirements

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### Tennessee State Law

A person may not serve as, assist or advise an administrative judge or hearing officer in the same proceeding if the person:

- Served as an investigator, prosecutor or advocate in the contested case
- Is subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in the contested case
- Participated in a determination of probable cause or other equivalent preliminary determination in the contested case

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### Tennessee State Law

- A person may serve as an administrative judge or hearing officer at successive stages of the same contested case, unless a party demonstrates grounds for disqualification
- A person who has participated in a determination of probable cause or other equivalent preliminary determination or participated in or made a decision that is on administrative appeal in a contested case may serve as an agency member in the contested case where authorized by law and not subject to disqualification or other cause

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### Part Three

## Obligation to Respond to Actual Notice of Sexual Harassment in an Education Program or Activity

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### Title IX Liability Standard

A university with **actual knowledge** of **sexual harassment in an education program or activity** of the university **against a person in the United States** must respond in a manner that is **not deliberately indifferent**.

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## Actual Knowledge

- Notice or allegations of sexual harassment made to a Title IX Coordinator or to any official of the university who has authority (OWA) to institute corrective measures on behalf of the university
- Notice may be in the form of a report or complaint
- Notice can be provided in writing or orally
- Notice may be provided anonymously

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## Sexual Harassment

1. Quid pro quo
2. Violence Against Women Act (VAWA) categories:
  - Sexual assault
  - Domestic violence
  - Dating violence
  - Stalking
3. Hostile environment

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## Sexual Harassment – Quid Pro Quo

An *employee* of the university conditioning the provision of an aid, benefit, or service of the university on an individual's participation in unwelcome sexual conduct

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## Sexual Harassment – VAWA Categories

- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

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## Sexual Assault

As defined in the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the FBI uniform crime reporting system, which defines "forcible rape" as "the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." The FBI defines "forcible fondling" as "the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity."

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## Dating Violence

As defined by VAWA at 34 U.S.C. §12291 (a)(10), means violence committed by a person—

- A. who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- B. where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - (i) The length of the relationship.
  - (ii) The type of relationship.
  - (iii) The frequency of interaction between the persons involved in the relationship.

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## Domestic Violence

As defined by VAWA at 34 U.S.C. §12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

## Stalking

"Stalking," as defined by VAWA at 34 U.S.C. §12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- fear for his or her safety or the safety of others; or
- suffer substantial emotional distress.

## Sexual Harassment – Hostile Environment

- Unwelcome conduct
- Of a sexual nature
- As determined by a reasonable person
- That is so severe *and* pervasive *and* objectively offensive
- That it effectively denies a person equal access to an education program or activity

## An Educational Program or Activity

- Locations, events, or circumstances over which the university exercised substantial control over both the Respondent and the context in which the sexual harassment occurs
- Any building owned or controlled by a student organization that is officially recognized by a university

## Against a Person in the United States

- Based on the text of the statute, "No person in the United States" shall be discriminated against on the basis of sex
- Title IX does not apply to sexual harassment that occurs outside of the United States
- Study abroad programs – sexual harassment in these programs is not covered, even if it is a university study abroad program

## Deliberate Indifference

- Same Title IX liability standard for private and administrative (OCR) litigation
- Defined by the regulations as "clearly unreasonable"
- Institutions must maintain records that demonstrate that the institution's response to Title IX sexual harassment was not deliberately indifferent –
  - Records relating to supportive measures and reasons provided or not provided
  - Records relating to the investigation and resolution of a formal complaint

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## Formal Complaint

- Formal complaints must be signed and filed by a Complainant who is enrolled or employed (or an applicant)
- May also be filed by Title IX Coordinator
- A university may dismiss complaint against a Respondent who is no enrolled or employed

## Part Four

### Roles and Responsibilities

## The Players in a Title IX Investigation and Grievance Process

- The parties (students, employees, visitors) and witnesses
- Title IX Coordinator
- “Official with authority to take corrective action”
- Investigator(s)
- Informal Resolution Facilitator
- Hearing officer or hearing panel (also called “Decision-maker”)
- Appeals Decision-maker

## Obligation to Serve Impartially

- Avoid prejudice of the facts at issue
- No bias or conflicts of interest
  - For the individual Complainant
  - For the individual Respondent
  - For Complainants or Respondents generally
- Apply the relevant facts to the appropriate policy

## The Parties

### Complainant

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- The university must dismiss the complaint if, at the time of filing a formal complaint, the Complainant was not participating in or attempting to participate in the education program or activity of the university.

### Respondent

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- The university may dismiss a formal complaint if the Respondent is no longer enrolled or employed by the university.

## The Title IX Coordinator

- Responsible for coordinating overall Title IX compliance
- Responsible for the implementation of supportive measures and remedies
- Receives reports and formal complaints of Title IX Sexual Harassment
- Provides information to the parties about the process
- Cannot be a Decision-maker
- Evaluates requests for confidentiality
- Decides whether to investigate or dismiss an allegation or complaint
- Determines if emergency removal or administrative leave is appropriate
- Must receive Title IX training
- Retains all the records

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## Official with Authority (OWA)

### Official with Authority (OWA):

An employee explicitly vested with the responsibility to implement corrective measures for sexual harassment on behalf of the university.

### Not the same as a Responsible Employee:

An employee who is required by university policy to report any sexual harassment that they observe or learn about.

## Investigator

- Must receive Title IX training
- Conducts the investigation of a formal complaint
- Conducts interviews of the Complainant, Respondent, and witnesses
- Collects evidence
- Sends evidence to parties for inspection, review and response
- Prepares an investigation report that fairly summarizes relevant evidence
- Provides draft investigation report to the parties for inspection and response
- Prepares final investigation report, which does not include findings

## Informal Resolution Facilitator

- Conducts the informal resolution process if and when the Complainant and the Respondent voluntarily consent to participate
- Explains the informal resolution process to the Complainant and the Respondent
- Obtains the voluntary, written consent from the Complainant and the Respondent agreeing the informal resolution process
- Prepares a written informal resolution agreement if needed

## Hearing Officer

- May be a single hearing officer or a hearing panel
- Presides over the hearing (in person or using synchronous virtual methods)
- Determines if questions are relevant, during the hearing
- Enforces the rules of order and decorum in the hearings
- Maintains a record (audio, audiovisual or transcript) of hearing
- Prepares a written determination of responsibility and of any applicable sanctions
- Sends the written determination simultaneously to the Complainant and the Respondent

## Advisor

- “Advises” one of the parties throughout the investigation and resolution process
- May or may not be an attorney
- Must abide by institution’s procedural requirements relating to participation
- Conducts cross-examination of the opposing party and witnesses at the hearing
- If a party does not have an advisor for the hearing, the institution will provide a qualified Advisor free of charge

## Appeal Officer

- Decides on an appeal filed by either party
- If an appeal is filed, the other party is notified in writing.
- Provides a reasonable time from the date in the notice for the Complainant and the Respondent to submit their arguments in writing in support of or against the Hearing Officer’s written determination
- Prepares a written appeal determination
- Sends the written appeal decision determination simultaneously to the Complainant and the Respondent

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**Part Five**

**Supportive Measures**

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**Supportive Measures**

Required with actual knowledge of sexual harassment within the scope of Title IX

Non-disciplinary, non-punitive individualized services

Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Offered to the Complainant and the Respondent

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**Supportive Measures**

Title IX Coordinator must:

- Promptly contact and inform the Complainant of the availability of supportive measures
- Consider Complainant's wishes & use interactive process
- Document decisions relating to supportive measures
- Coordinate the implementation of supportive measures

The university must maintain as confidential any supportive measures provided, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the measures.

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**Examples of Supportive Measures**

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

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**Part Six**

**Title IX Policies and Grievance Processes**

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**Written Title IX Grievance Process – Basic Requirements**

- Treat Complainants and Respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Mandatory training for:
  - Title IX Coordinator(s)
  - Investigator(s)
  - Decision-maker(s)
  - Informal resolution facilitator(s)
- Presumption that the Respondent is not responsible

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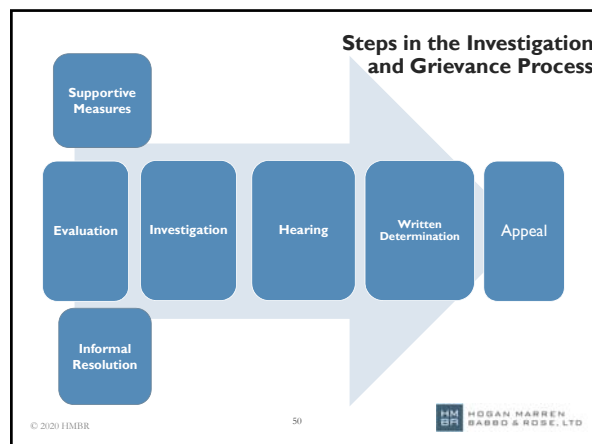


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### Written Title IX Grievance Process – Basic Requirements

- Reasonably prompt timeframes, with extensions for good cause
- Standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
- Possible disciplinary sanctions and remedies
- Appeal procedures (mandatory)
- Supportive measures available to both parties
- Restrictions relating to privilege

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### Evaluation

Is the conduct within the scope of Title IX?

1. If no, the Title IX regulations do not apply and the university can dismiss the complaint.
2. If yes, the university must respond in a manner that is not deliberately indifferent.
  - By providing supportive measures in all cases.
  - And, if a formal complaint was filed, by following the specific grievance process requirements.

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### Evaluation

Is the alleged misconduct within the scope of Title IX?

↓ YES

- In all cases,**
  - Must not respond with deliberate indifference
  - Must offer supportive measures
- Was a **formal complaint** filed?
  - If **yes**, must also comply with Title IX grievance requirements

↓ NO

- Must dismiss formal complaint as *Title IX matter*
- May address as a non-Title IX matter

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### Dismissals – Mandatory

Mandatory – must dismiss if the conduct alleged in the formal complaint:

1. Would not constitute sexual harassment as defined even if proved,
2. Did not occur in the university’s education program or activity, or
3. Did not occur against a person in the United States

Upon dismissal, must provide written notice of the dismissal (and rationale for the dismissal) to the parties.

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### Dismissals – Permissive

Permissive – may dismiss at any time if:

1. The Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
2. The Respondent is no longer enrolled or employed by the university; or
3. Specific circumstances prevent the university from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon dismissal, must provide written notice of the dismissal (and rationale for the dismissal) to the parties.

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## Informal Resolution

- Not available for allegations that an employee sexually harassed a student
- May not be required by the university
- May not offer an informal resolution process unless a formal complaint is filed
- Must obtain the parties' voluntary, written consent
- At any time prior to agreeing to a resolution, any party may withdraw from the informal resolution process and resume the grievance process

## Informal Resolution

Informal Resolution process may be used at any time prior to reaching a determination regarding responsibility, provided that university provides written notice of:

- The allegations
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

## Specific Requirements for the Investigation

- No single-investigator model
- Initial and continuing written notice to parties of all of the allegations under investigation
- The burden of proof and the burden of gathering evidence rest on the university, not the parties
- Equal opportunity for parties to present witnesses, including fact and expert witnesses
- No gag orders

## Specific Requirements for the Investigation

- Advisor of choice
- Written notice of hearings, interviews and other meetings
- Opportunity to inspect and review evidence
- Evidence provided to the parties for review and response prior to the draft investigation report
- Draft investigation report given to the parties for review and response prior to the hearing

## Hearing

- Live hearing with opportunity for cross-examination required
- To be conducted by the Hearing Officer or Hearing Panel
- The Hearing Officer cannot be the same as the Title IX Coordinator(s) or Investigator(s)
- Must provide the parties with access to the evidence during hearing
- May be held in the same geographic location or virtually
- Specific location to be determined by the university
- Technology must allow the parties, their advisors and the Hearing Office/Panel to see and hear one another and any witnesses
- Recording or transcript of hearing required

## Cross-Examination

- Must allow Advisors to cross-examine parties and witnesses
- Cross-examination must be conducted directly, orally, and in real time
- Must provide free advisor for a party at a hearing if the party does not have an advisor for the hearing
- If a party or witness does not submit to cross examination at the live hearing, the hearing officer or hearing panel must not rely upon any statement in reaching a determination regarding responsibility

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## Written Determination

- Must provide the written determination to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the university provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely

## Written Determination

### Determination must include:

- Allegations potentially constituting sexual harassment
- Procedural steps
- Findings of fact
- Conclusions regarding the application of the policy to the facts
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the university imposes on the Respondent, and whether remedies will be provided by the university to the Complainant
- Appeal procedures available to both parties and the permissible bases for an appeal

## Appeals

The Respondent or the Complainant may appeal:

- The dismissal of a formal complaint or any allegations
- A determination regarding responsibility and sanctions, if applicable

## Appeals

Appeals may be filed based on the following:

- Procedural irregularity
- New evidence that was not reasonably available at the time of the determination
- Bias or conflict of interest

## Appeal Requirements

- Notify the other party in writing when an appeal is filed
- Ensure that the Appeal Decision-maker(s) is not the same person as the Hearing Officer, the Investigator(s), or the Title IX Coordinator
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue a written decision describing the result of the appeal and the rationale for the result
- Provide the written decision simultaneously to both parties

## Part Seven

### Title IX Procedural Requirements

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## Nondiscrimination Notice - Content

- A university must notify persons entitled to a notification that:
- The university does not discriminate on the basis of sex in the education program or activity that it operates
  - The university is required by the Title IX statute and regulations not to discriminate on the basis of sex
  - The requirement not to discriminate in the education program or activity extends to admission and employment
  - Inquiries about the application of the Title IX statute and regulations may be referred to the university's Title IX Coordinator; to the U.S. Department of Education, Office for Civil Rights (OCR), or to both

## Nondiscrimination Notice – Distribution

- Each university must prominently display the contact information for the Title IX Coordinator and the nondiscrimination policy on its website, if any, and in each handbook or catalog.
- Notice must be provided to applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the university.

## Title IX Coordinator

- Each university must designate a Title IX Coordinator
- The Title IX Coordinator cannot be the same as the Hearing Officer(s) or the Appeals Decision-maker(s)
- The following contact information for the Title IX Coordinator must be included in the notice of nondiscrimination:
  - name or title,
  - office address,
  - electronic mail address, and
  - telephone number

## Title IX Coordinator

- Any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- A report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

## Grievance Procedures

- Each university must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX.
- For formal complaints of sexual harassment as defined by the 2020 Title IX regulations, the grievance process must comply with new specific requirements in the regulations.
- A university must provide notice of its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination or of sexual harassment, and how the recipient will respond.

## Retaliation

- No university or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the Title IX statute or regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.
- Retaliation includes intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sexual harassment

## 2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

## Retaliation

Except as noted below, the university must keep confidential the identify of:

- Any individual who has made a Title IX report or complaint of sex discrimination or sexual harassment
- Any Complainant
- Any individual who has been reported to be the perpetrator
- Any Respondent
- Any witness

**Exception:** As may be permitted by the FERPA statute or regulations, or as required by law, or to carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding.

## Retaliation

- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under the Title IX regulations.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

## Recordkeeping

Must maintain for a period of seven (7) years records of –

- Each sexual harassment investigation, including:
  - any determination regarding responsibility
  - any audio or audiovisual recording or transcript of the hearing or, if applicable, other meetings
  - any disciplinary sanctions imposed on the Respondent and any remedies provided to the Complainant
- Any appeal and the result of the appeal
- Any informal resolution and the result of the informal resolution process
- All Title IX training materials used to train officials involved in the investigation and resolution of Title IX sexual harassment cases

## Recordkeeping

With respect to the university's response to a report or formal complaint of sexual harassment, the university must create and maintain for a period of seven (7) years:

- Records of any actions, including any supportive measures
- Documentation as to the basis for its conclusion that its response was not deliberately indifferent, and that it has taken measures designed to restore or preserve equal access to the university's education program or activity
- If supportive measures are not provided to the Complainant, the university must document the reasons why its response was not clearly unreasonable in light of the known circumstances

## Presenter's Contact Information



**Debbie Osgood**  
dlo@hmb.com  
312-540-4427

- Partner, *Hogan Marren Babbo & Rose, Ltd.*, Chicago, Illinois;
- Title IX Compliance Services
  - External Investigator
  - Hearing Officer
  - Appeal Decision-maker
  - Policies and procedures review
  - Compliance assessments and recommendations
  - Training
  - General Title IX advice and consultation
  - <https://www.hmb.com/news-insight/title-ix-compliance/>
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

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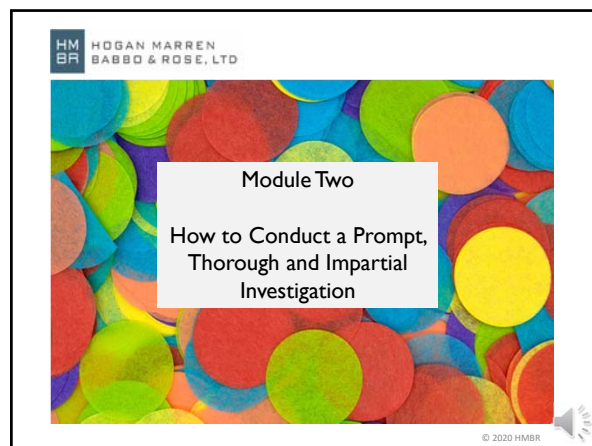


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**Title IX Sexual Harassment Training August 2020**

**Presenter:**  
Debbie Osgood  
Partner  
Hogan Marren Babbo & Rose, Ltd.  
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312-540-4427

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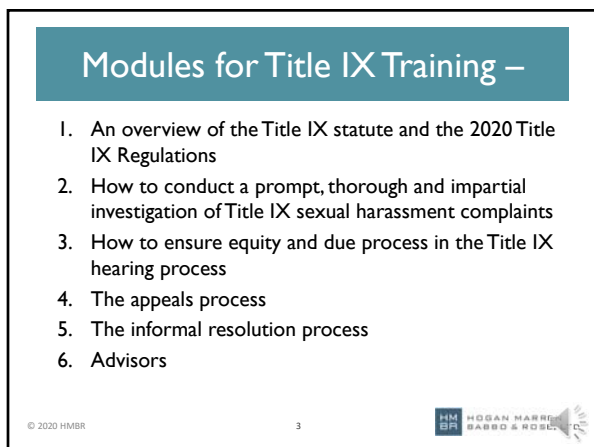


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**Module Two**

**How to Conduct a Prompt, Thorough and Impartial Investigation**

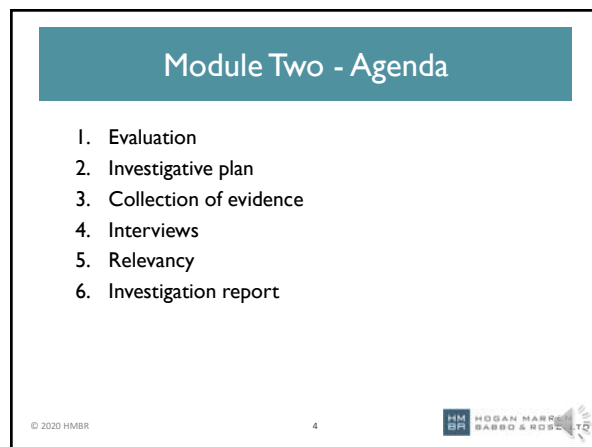
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**Modules for Title IX Training –**

1. An overview of the Title IX statute and the 2020 Title IX Regulations
2. How to conduct a prompt, thorough and impartial investigation of Title IX sexual harassment complaints
3. How to ensure equity and due process in the Title IX hearing process
4. The appeals process
5. The informal resolution process
6. Advisors

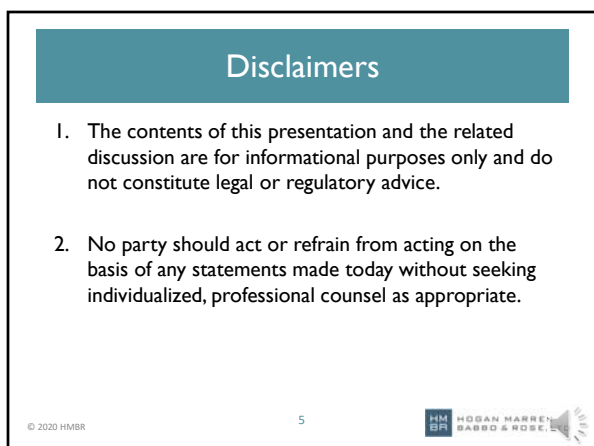
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**Module Two - Agenda**

1. Evaluation
2. Investigative plan
3. Collection of evidence
4. Interviews
5. Relevancy
6. Investigation report

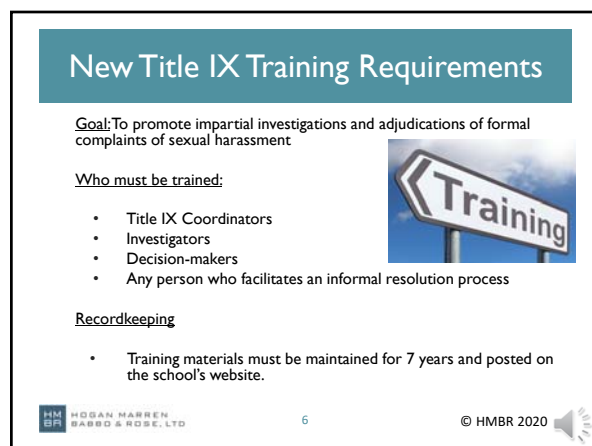
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**New Title IX Training Requirements**

**Goal:** To promote impartial investigations and adjudications of formal complaints of sexual harassment

**Who must be trained:**

- Title IX Coordinators
- Investigators
- Decision-makers
- Any person who facilitates an informal resolution process



**Recordkeeping**

- Training materials must be maintained for 7 years and posted on the school's website.

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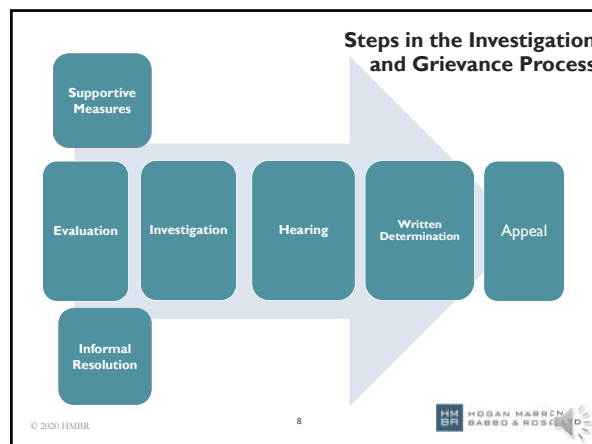
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### New Title IX Training – Required Content

**The training will address:**

1. The definition of sexual harassment
2. The scope of the education program or activity
3. How to conduct an investigation and grievance process including investigations, informal resolutions, hearings, and appeals, as applicable
4. How to serve impartially
5. Technology to be used at a live hearing
6. Issues related to relevancy

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### To keep in mind ...

**Grievance Process Requirements**

The grievance process must:

1. Treat Complainants and Respondents equitably
2. Require an objective evaluation of all relevant evidence
3. Prohibit bias and conflict of interest
4. Include a presumption that the Respondent is not responsible
5. Include reasonably prompt timeframes, with extensions for good cause

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### To keep in mind (cont.) ...

**Grievance Process Requirements**

6. Include a standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
7. List the possible disciplinary sanctions and remedies
8. Describe the appeal procedures (mandatory)
9. Describe the supportive measures available to both parties
10. Restrict the use of information protected by privilege

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### To keep in mind (cont.) ...

**Obligation to serve impartially**

- Avoid prejudice of the facts at issue
- No bias or conflicts of interest
  - For the individual Complainant
  - For the individual Respondent
  - For Complainants or Respondents generally
- Apply the relevant facts to the appropriate policy

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### To keep in mind (cont.) ...

- Appeals may be filed of the dismissal decision or written determination
- Three possible bases:
  - Procedural irregularity that affects the outcome
  - New evidence that was not reasonably available at the time of the determination that affects the outcome
  - Bias or conflict of interest that affects the outcome

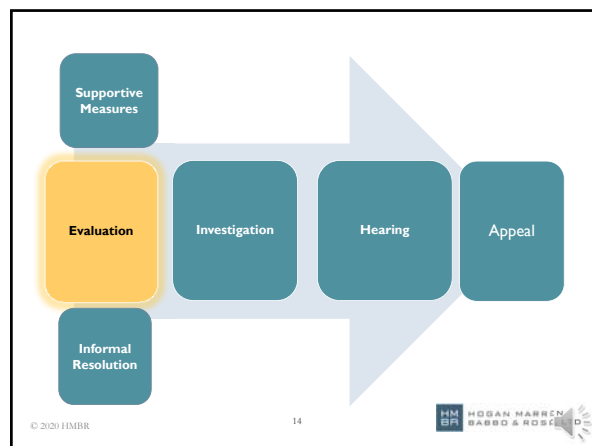
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**Part One**

**Evaluation**

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**Individuals Involved in Evaluation**

- Title IX Coordinator and/or the Investigator
- Complainant and/or reporter
- Respondent (maybe)

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**Evaluation**

Must determine whether the alleged misconduct is within the scope of Title IX:

1. If no, the Title IX regulations do not apply and the school can dismiss the complaint.
2. If yes, the school must respond in a manner that is not deliberately indifferent.
  - By providing supportive measures in all cases.
  - And, if a formal complaint was filed, by following the specific grievance process requirements.

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**Evaluation**

**Is the alleged misconduct within the scope of Title IX?**

**YES**

- In **all cases**,
  - Must not respond with deliberate indifference
  - Must offer supportive measures
- Was a **formal complaint** filed?
  - If **yes**, must also comply with Title IX grievance requirements

**NO**

- Must dismiss formal complaint as Title IX matter
- May address as a non-Title IX matter

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**Dismissals – Mandatory**

Must dismiss if the conduct alleged in the formal complaint:

1. Would not constitute sexual harassment as defined even if proved,
2. Did not occur in the school's education program or activity, or
3. Did not occur against a person in the United States

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### Dismissals – Permissive

May dismiss at any time if:

1. The Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
2. The Respondent is no longer enrolled or employed by the school; or
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

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### Dismissals – Notice and Recordkeeping

Notice

- Upon dismissal of allegation or complaint, must provide written notice to the parties of (1) the dismissal and (2) the rationale for the dismissal.
- Dismissal decision may be appealed by either party

Recordkeeping – recommended:

- Include records of any dismissal determination with other Title IX records for 7 years

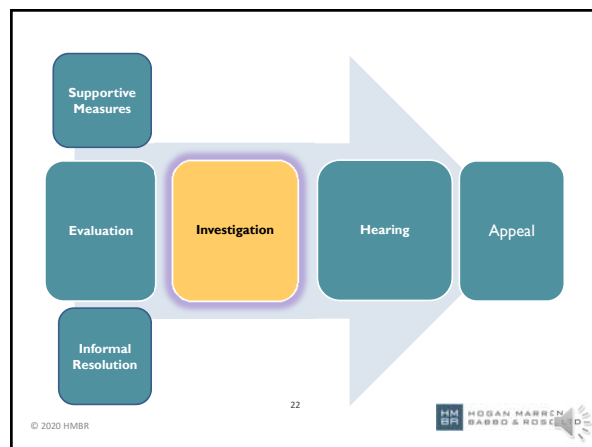


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## Part Two


### Investigative Plan

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### Individuals Involved in the Investigation

- Title IX Coordinator
- Investigator
- The parties
- Witnesses



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### What's My Role?

- To conduct an *impartial* investigation as to whether a University policy or procedure was violated
- Not an advocate for the Complainant
- Not an advocate for the Respondent



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### Specific Requirements for Investigation

In any investigation, the school must:

1. Provide written notice of the investigation and of hearings, interviews and other meetings
2. Ensure that the burden of proof and the burden of gathering evidence rest on the school, not the parties
3. Provide equal opportunity for the parties to present witnesses, including fact and expert witnesses
4. Not impose any gag-orders
5. Allow advisor of choice
6. Provide an equal opportunity for parties to inspect and review evidence
7. Use reasonably prompt timeframe for the investigation and notify the parties of any delays and the reasons for the delay

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### Written Notice of the Investigation


The written notice of the investigation to the parties must:

- Describe the grievance process including any informal resolution
- List the allegations, including sufficient details (the identities of the parties, the alleged misconduct, and the date and location of the misconduct).
- Include a statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the process
- Inform the parties that they may have an advisor of their choice and may inspect and review evidence
- Describe any provision that prohibits knowingly making false statements or knowingly submitting false information
- Be updated as necessary if new or different allegations arise

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### Investigator's To Do List


- Review complaint and supporting documents
- Interview the Complainant and the Respondent
- Identify and interview witnesses
- Gather relevant physical or documentary evidence
- Send evidence to parties for review and response
- Prepare draft investigation report that "fairly summarizes" the evidence collected and submit to parties for review and response
- Review any responses
- Prepare and issue final investigation report



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### Investigation Plan and Strategy


- Gathering Sufficient Relevant Information
- Have a roadmap!
- Identify requirements for violation of policy
  - Prohibited conduct
  - Consent
  - Incapacitation
- Identify Evidence
  - Documents and testimony
- What are you looking for?
  - Timelines work
  - Who, what, where, how, and when



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### Investigation Plan and Strategy

- Who should be interviewed?
- Conducting effective interviews
  - Asking "good questions"
  - Recording interviews?
- Obtaining relevant physical evidence – types?
- Documenting the investigation
  - Identification of evidence and records
  - Allowing review and input on investigative report



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### Investigation Plan and Strategy


## QUIZ TIME

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### Learning Exercise #1

Test your knowledge!



1. Go to:  
<http://www.quiz-maker.com/QS8LBJID>

2. Answer Questions 1 - 3


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### Part Three

## Collection of Evidence

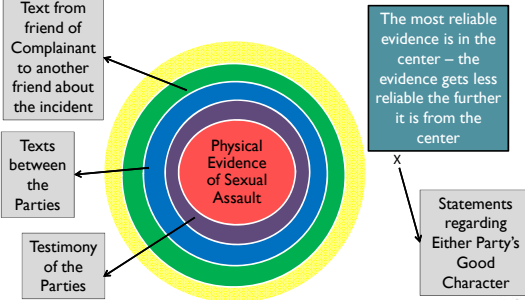
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### Preponderance of the Evidence



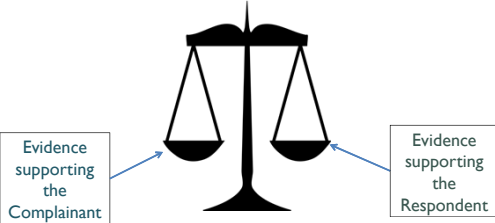
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### Evaluating the Evidence - Bulls Eye



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### Evaluating the Evidence



Which has the greater weight?  
"More likely than not?"

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### Collecting Evidence - Testimonial Evidence

- Interview all relevant witnesses
- To extent practicable, all witnesses identified by the parties
- Tiers of witnesses
  - Parties and all other individuals with "first-hand" knowledge
  - Individuals with "second-hand" knowledge
  - All other witnesses identified by parties

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## Collecting Evidence - Physical Evidence

- Closely review complaint or report
- Obtain relevant physical evidence
  - Medical evidence
  - Emails
  - Phone records (text/voice-mail messages, photos, videos)
  - Snapchat, Instagram, Facebook, and other forms of social media
  - Surveillance videos (security cameras, residence halls); swipe card information
  - Security or police reports, if any
- Preserve physical evidence



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## Documentation

### Maintain Detailed Records

- Explanations for any delays in the investigation or witnesses not identified
- Circumstances of file documentation (include names and dates)
- Names of Complainant, accused student, and witnesses
- Names of individuals involved in handling complaint
- Date of complaint and how filed
- Statements or other evidence submitted or collected
- Source(s) of information collected
- Interview notes
- Student communications: text messages, social media (Instagram, Snapchat)
- Other evidence: videos

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## Part Four

## Interviews

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## Interview Introduction

- ✓ If applicable, permission to record interview?
- ✓ Investigator name
- ✓ Applicable policy and procedures, preponderance of the evidence standard
- ✓ Investigator's role (to conduct prompt, thorough, fair and impartial investigations; do not represent any of the parties; neutral fact-gatherer)
- ✓ Note for the record whether advisor is present
- ✓ Allegation
- ✓ Equal opportunity to be heard, to submit information and corroborating evidence, to identify witnesses who may have relevant information, and to submit questions that they believe should be directed by the Investigator to each other or to any witness
- ✓ Information provided in the interview will be incorporated into investigation report

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## Interview Introduction (cont.)

- ✓ Statements will be available to other party and advisor
- ✓ Confidentiality of statements cannot be guaranteed, but Investigator and University will treat information with care
- ✓ Encourage interviewee to share their perspective
- ✓ No gag order Prohibition against retaliation
- ✓ Availability of breaks during interview
- ✓ "I'm not sure" or "I don't know"
- ✓ Contact later if think of misstatement in interview or something else to add
- ✓ Do you have any questions?
- ✓ Do you agree to participate in this interview?

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## Interview Questions

### Basic Interview Questions

- Who committed the alleged act?
- Was anyone else involved?
- What exactly occurred?
- What was said and by whom?
- When did the act occur?
- Where did the act occur?
- How did you react? How did the incident affect you?
- Are there other individuals who may have relevant information?
- Did you talk to anyone of the incident?
- Ask for available evidence (e.g., social media)
- What else do you want to tell me about what happened?

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Interview Techniques – Do’s and Don’ts		
	Do	• Don’t
<b>General Principles</b>	<ul style="list-style-type: none"> <li>• Be empathetic</li> <li>• Ask open ended questions</li> <li>• Ask questions that address the five senses (sight, hearing, taste, touch, smell)</li> <li>• Listen</li> <li>• Give interviewee plenty of time to answer question</li> <li>• Clarify conflicting information</li> </ul>	<ul style="list-style-type: none"> <li>• Ask leading questions</li> <li>• Ask negative questions</li> <li>• Ask questions that imply judgment</li> <li>• Ask multiple choice questions</li> </ul>
<b>Examples</b>	<ul style="list-style-type: none"> <li>• Tell me about ...</li> <li>• Can you explain ...</li> <li>• Tell me about your thought process when ...</li> <li>• Tell me what you were feeling when ...</li> <li>• Would you be willing to say more about ...</li> <li>• What did you mean when you said ...</li> <li>• What do you remember about ...</li> </ul>	<ul style="list-style-type: none"> <li>• Why didn't you ...</li> </ul>


### Special Considerations for Virtual Investigations


- Need to be familiar with technology
- Ask for permission for audio or audiovisual recording
- Provide necessary accommodations to individuals with disabilities
- Checking who is in the room with the witness

### Assessing Credibility

EEOC says to consider:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be lying or telling the truth?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:**
  - Witness testimony? (eye-witnesses, people who saw the person discussed the incident with the witness soon after or at around the time that the incident occurred)
  - Physical evidence? (such as written documentation)
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?






QUIZ TIME

### Learning Exercise #2

Test your knowledge!



1. Go to: <http://www.quiz-maker.com/QS8LBJID>
2. Answer Questions 4 - 9

### Part Five

## Relevancy

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## Issues of Relevancy

- The Investigation Report must fairly summarize the relevant information.
- At the Hearing, only relevant cross-examination and other questions may be asked of a party or witness.

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## Issues of Relevancy

Evidence Law: The Rule of Relevance and Admissibility of Character Evidence



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## Sexual Predisposition and Prior Sexual Behavior

Questions and evidence about the Complainant's sexual predisposition and prior sexual behavior are *not relevant*, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that:

- Someone other than the Respondent committed the conduct alleged by the Complainant, or
- If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent

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# QUIZ TIME

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## Learning Exercise #3

Test your knowledge!



1. Go to:  
<http://www.quiz-maker.com/QS8LBJID>

2. Answer Questions  
10 - 11

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## Part Five

# Investigation Report

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## Investigation Report

- **Evidence:** Provide the evidence to the parties for review and response prior to the draft investigation report (10 days review period)
- **Draft Investigation Report:** Provide the draft investigation report to the parties for review and response prior to the hearing (at least 10 days before hearing)
- **Final Investigation Report:** Issue final investigation report to the parties – does not include findings of responsibility


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Access to Evidence

Throughout the process, must provide both parties an equal opportunity to inspect and review any evidence that is directly related to the allegations, including:

- The evidence upon which the school does not intend to rely in reaching a determination and
- Inculpatory or exculpatory evidence

### EVIDENTIARY CONCEPTS

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## Investigation Report

**Include:**

- Allegations potentially constituting sexual harassment
- Applicable policy
- Procedural steps taken from complaint receipt through final investigation report, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence
- Accounts provided by parties and witnesses
- Description of relevant evidence obtained

**Do not Include:**

- Conclusions regarding the determination of responsibility

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## Presenter's Contact Information



**Debbie Osgood**  
[dlo@hmbrr.com](mailto:dlo@hmbrr.com)  
 312-540-4427

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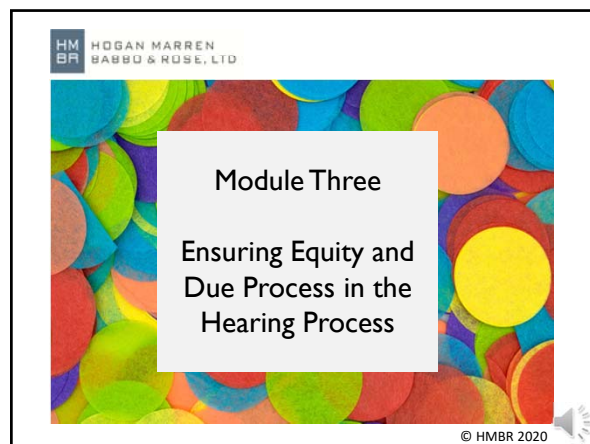


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**Title IX Sexual Harassment Training  
August 2020**

**Presenter:**  
Debbie Osgood  
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312-540-4427

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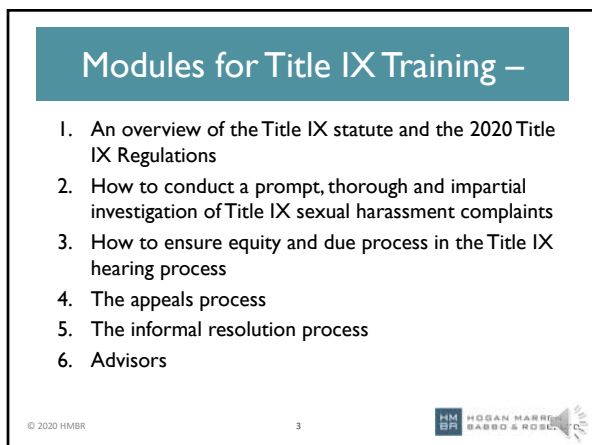


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**Module Three**

**Ensuring Equity and Due Process in the Hearing Process**

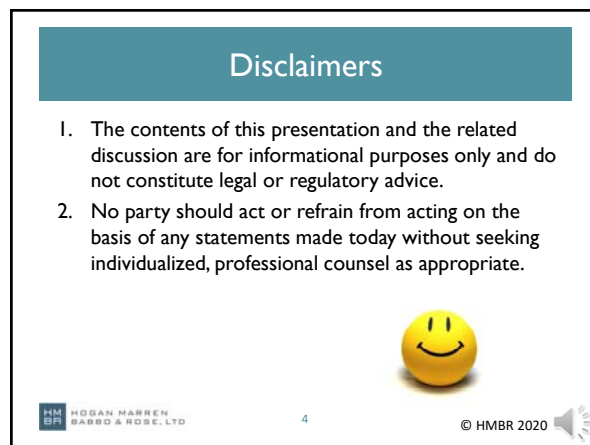
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**Modules for Title IX Training –**


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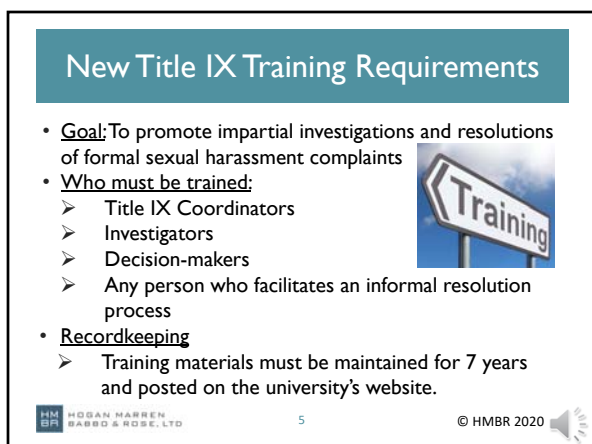


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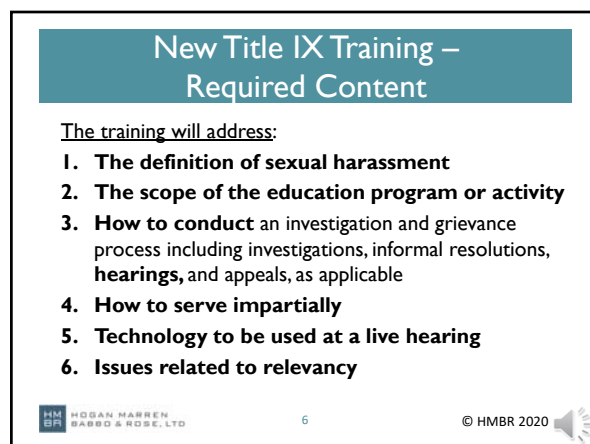


**New Title IX Training Requirements**

- **Goal:** To promote impartial investigations and resolutions of formal sexual harassment complaints
- **Who must be trained:**
  - Title IX Coordinators
  - Investigators
  - Decision-makers
  - Any person who facilitates an informal resolution process
- **Recordkeeping**
  - Training materials must be maintained for 7 years and posted on the university's website.



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**New Title IX Training – Required Content**

The training will address:

1. **The definition of sexual harassment**
2. **The scope of the education program or activity**
3. **How to conduct** an investigation and grievance process including investigations, informal resolutions, **hearings**, and appeals, as applicable
4. **How to serve impartially**
5. **Technology to be used at a live hearing**
6. **Issues related to relevancy**

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### Agenda Hearings


1. Hearing structures and roles
2. Preparing for and presiding over the hearing
3. Relevancy determinations
4. Making the decision about responsibility
5. Sanctions
6. The written determination

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### To keep in mind ...

**Grievance Process Requirements:** The grievance process must:

1. Treat Complainants and Respondents equitably
2. Require an objective evaluation of all relevant evidence
3. Prohibit bias and conflict of interest
4. Include a presumption that the Respondent is not responsible
5. Include reasonably prompt timeframes, with extensions for good cause




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### To keep in mind (cont.) ...

**Grievance Process Requirements**


6. Include a standard of evidence: *Preponderance or Clear and Convincing*
7. List the possible disciplinary sanctions and remedies
8. Describe the appeal procedures (mandatory)
9. Describe the supportive measures available to both parties
10. Restrict the use of information protected by privilege



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### To keep in mind (cont.) ...

- Appeals may be filed of the dismissal decision or written determination
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  - New evidence that was not reasonably available at the time of the determination that affects the outcome
  - Bias or conflict of interest that affects the outcome



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## HYPOTHETICAL SCENARIO

Creative College  
9021 Hamilton Lane, Shoreview, CA 90210

INVESTIGATION REPORT

**TO:** Holly Sanders, Associate Vice President and Provost  
**FROM:** Marissa Gettleman, Title IX Investigator  
**DATE:** March 2, 2019  
**SUBJECT:** Complainant of Sexual Misconduct by Susan Specter (Complainant) against Peter Janson (Respondent)

**I. Background**

On January 3, 2019, Creative College (the "College") learned of possible sexual misconduct involving the Complainant, Susan Specter, and the Respondent, Peter Janson. On that date, the College's Title IX Coordinator, Jessie Fanta, met with the Complainant in the Title IX Office at Frisbee Hall. The Complainant requested that the College conduct a formal investigation of the alleged violation by the Respondent of the College's Sexual Misconduct Policy.<sup>1</sup> Specifically, the Complainant reported that in

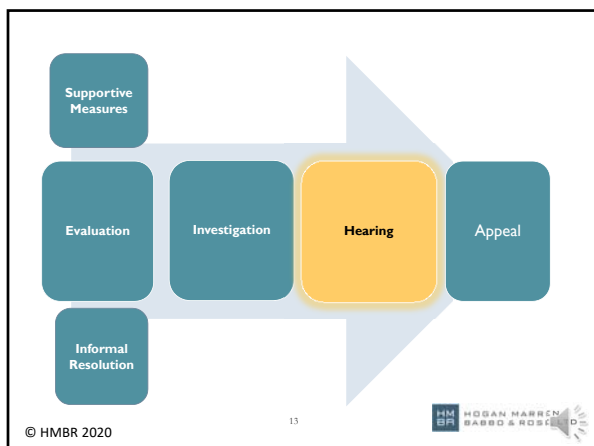
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## Part One

### Hearing Structures and Roles

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### Hearing Requirement

- Previously, universities had a choice as to how to conduct investigation and resolution process – single investigator model, hearing model, or hybrid of two
- With the new regulations, the universities must provide live hearing with opportunity for cross-examination

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### What is a Title IX Hearing?

- After the final investigation report, a live hearing must be held for PSE institutions
- Advisor for each party allowed to conduct cross-examination of other party and witnesses
- Hearing Officer/Hearing Panel issues written determination of responsibility and, if applicable, sanctions

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### Title IX – Hearing Requirement

DOE reasoned that:

- “[P]art of a meaningful opportunity to be heard includes the ability to challenge the testimony of parties and witnesses”
- “[C]ross-examination is a valuable tool for resolving the truth of serious allegations”

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### Federal Court – Hearing Requirement

**Sixth Circuit Court of Appeals**

“Due process requires that public institutions provide a hearing with an opportunity for cross-examination where credibility is at issue.”

**Doe v. Baum** Sept. 2018

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### Hearing – Individuals Involved

- Hearing officer or member of a hearing panel
- The Complainant
- The Respondent
- Witnesses
- Title IX Coordinator (in an administrative, not substantive role)
- The Investigator (as a possible witness)

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### Hearing – Location and Logistics




- May be held in the same geographic location or virtually
- Either party may request separate rooms
- Virtual hearing may be held at university's discretion
- Technology must allow the parties, their advisors and the Hearing Office/Panel to see and hear one another and any witnesses

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### Qualifications of the Hearing Officer


- Must receive mandated Title IX training
- May not be the same person as the Title IX Coordinator, the Investigator(s), or the Appeal Decision-maker
- Must be impartial and unbiased
- Must be free from conflicts of interest



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### Hearing Officer – Responsibilities

- Makes an impartial determination as to whether a university policy or procedure was violated
- Presides over the hearing
- Determines relevancy of questions
- Enforces the rules of order and decorum in the hearings
- Issues written determination of responsibility and sanctions




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### Hearing Officer – Ethical Considerations

- Neutrality -- not an advocate for the Complainant or the Respondent
- Must be unbiased
- Must not have conflicts of interest
  - A conflict of interest is any direct or indirect financial or personal interest in the outcome or any existing or past relationships with any of the parties, representatives, or witnesses.
- Must maintain confidentiality – before, during and after hearing

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### Potential Roles



- Hearing Officer (Administrative)
- Hearing Officer (Sole decision maker)
- Hearing Panel Member

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### Administrative Hearing Officer

- Sets tone for the hearing
- Deals with advisors
- Maintains order and decorum of hearings
- Ensures that the hearing follows university's written procedures
- Makes relevancy determinations before each question is answered





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## Hearing Officer – Sole Decision-Maker

Everything the administrative officer does, plus:

- Weighs the evidence
- Makes credibility determination
- Writes report of hearing results with rationale


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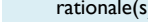

## Hearing Panel Member

Everything the other two do,

Plus:


- Confers with fellow panelists to
  - Weigh the evidence
  - Make credibility determinations
  - Write the report of the hearing results with rationale(s)





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## For all kinds of hearing processes, the role of the Hearing Officer is:



- Limited
- NOT to collect information in the first instance
- To oversee the hearing, including cross-examination
- To make relevancy determinations



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## Part Two

### Preparing for and Presiding over the Hearing

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## What the hearing officer needs to know


1. Applicable laws and regulations (Title IX, VAWA, state)
2. Applicable university policies and procedures
3. How to run an orderly hearing
4. Rights of the Complainant and Respondent
5. Questioning and deliberation techniques
6. How to make relevancy determinations
7. How to evaluate types of evidence
8. How to assess credibility
9. Analytical approach in determining if a policy was violated



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## Pre-Hearing Preparation

Hearing Officer should:

- Review Final Investigation Report
- Consider submissions by the parties in advance of hearing
- Know the university's policy and procedures, including any specific hearing procedures
- Identify areas needing clarification or where you have additional questions
- Prepare opening and closing comments



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### Orderly Hearings: Setting ground rules


- Hearing officer has complete authority
- Participation of advisors – cross-examination
- No ex parte communications
- Interact respectfully
- No interruptions
- Limitations on evidence (timing, etc.)
- Direct procedural questions to hearing officer

## RULES

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### Orderly Hearings: Logistics to think about beforehand

- Information parties should have before the hearing
- Inform yourself of any accommodations required by the parties
- Physical space and use of remote technology—before, during and after hearing
- Plan for order of hearing
- Plan for recording hearing
- Plan for handling/keeping evidence
- Have contact information for Title IX Coordinator/counsel



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### Technology for Hearing

- No specific technology required
- Examples: Zoom; Microsoft Teams meetings
- Must be in real time
- Must enable hearing attendees to see and hear one another
- Be sure the technology has the necessary security protections
- Provide accommodations for individuals with disabilities
- Train hearing officer(s) how to use the specific technology for the hearing


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## QUIZ TIME

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### Learning Exercise #1

Test your knowledge!



1. Go to:  
<http://www.quiz-maker.com/Q8Z9PNKPP>
2. Answer Questions  
# 1 - 3

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### Part Three


## Relevancy Determinations

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### Asking Questions


- First and foremost, always remember your role
- Rapport-building stage—what does this look like in a hearing? And why is this important?
- Connect your questions to the elements of the prohibited conduct—stay focused
- If asking a sensitive question, explain why



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### Asking Questions (cont'd)

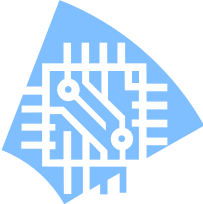
- Use hearing to get clarification of any aspects of investigation report
- Use the hearing to ask about inconsistencies you noted in the evidence
- Ask why just learning new information now
- Ask the challenging party how/what the investigator got wrong



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### Access to the Evidence

Parties must be allowed with access to the evidence during the hearing



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### Issues of Relevancy at the Hearing



- Only relevant cross-examination and other questions may be asked of a party or witness.
- The Hearing Officer or Hearing Panel must decide if question is relevant before it is answered at the hearing and explain any decision to exclude a question.

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### Sexual Predisposition and Prior Sexual Behavior

Questions and evidence about the Complainant's sexual predisposition and prior sexual behavior are *not relevant*, unless offered to prove that:


- Someone other than the Respondent committed the conduct alleged by the Complainant, or
- If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent

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### Relevancy – Character Evidence

Evidence Law: The Rule of Relevance and Admissibility of Character Evidence


Exceptions to the Rule Against Character Evidence



<https://lawshelf.com/shortvideoscontentview/evidence-law-the-rule-of-relevance-and-admissibility-of-character-evidence/>  
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### Cross-Examination



- Live hearing must provide opportunity for cross-examination of parties and witnesses
- To be conducted by advisors
- Cross-examination must be conducted directly, orally, and in real time

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### Hearing – Provision of an Advisor

If a party does not have an advisor present at the live hearing, the university must provide without fee or charge to that party, an advisor of the university's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

**ADVISOR**

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### Hearing – Exclusion of Statements

- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- The hearing officer cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. ❌

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### Hearing – Recording or Transcript

An audio or audiovisual recording, or transcript, must:

- Be created of any live hearing
- Made available to the parties for inspection and review
- Maintained with university records for seven years



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# QUIZ TIME


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### Learning Exercise # 2

Test your knowledge!

1. Go to:  
<http://www.quiz-maker.com/Q8Z9PNKPP>

2. Answer Questions  
 # 4 - 12



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## Part Four

### Making the Decision about Responsibility

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## Making the Decision


- Understanding the evidence
- Determining credibility
- Weighing and analyzing the evidence



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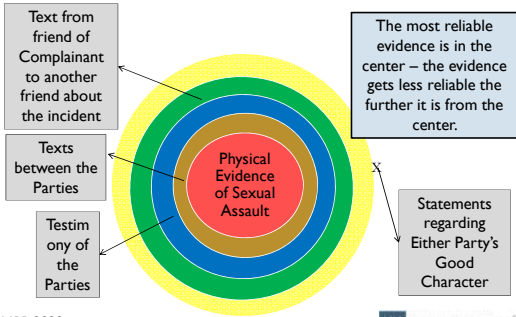
## Preponderance of the Evidence

### Levels of Proof



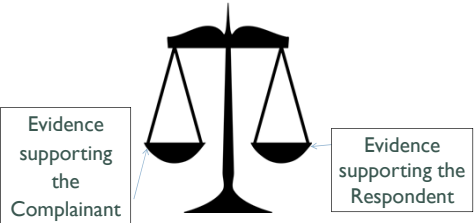
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## Evaluating the Evidence - Bulls Eye



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## Evaluating the Evidence




Which has the greater weight?  
"More likely than not"?

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## Assessing Credibility

EOEC says to consider:

1. **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
2. **Corroboration:**
  - Witness testimony? (eye-witnesses, people who saw the person discussed the incident with the witness soon after or at around the time that the incident occurred)
  - Physical evidence? (such as written documentation)




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### Assessing Credibility (cont.)

EEOC says to consider:




3. Demeanor: Did the person seem to be lying or telling the truth?
4. Motive to falsify: Did the person have a reason to lie?
3. Past record: Did the alleged harasser have a history of similar behavior in the past?

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## QUIZ TIME


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### Learning Exercise #3

Test your knowledge!



1. Go to: <http://www.quiz-maker.com/Q8Z9PNKPP>
2. Answer Questions # 13 – 16

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## Part Five

### Sanctions


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### Considerations for the Imposition of Sanctions


- The nature of the conduct at issue
- The impact of the conduct on the Complainant
- The impact of the conduct on the community or the university, including protection of the university community
- Prior misconduct by the Respondent, including the Respondent's relevant prior discipline history, both at the university or elsewhere, including criminal convictions
- Maintenance of a safe and respectful environment conducive to learning

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### Other things to consider



- Consistency: Sanctions that have been imposed for the same category of prohibited conduct, and how this matter is similar and different to those matters
- Proportionality: Sanctions should ultimately be proportional to the behavior
- Explanation: Sanctions must be objectively explained in the written determination

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## Part Six

### The Written Determination

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## Written Determination

- Must provide the written determination to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the university provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely



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## Written Determination

Determination must include:

- Allegations potentially constituting sexual harassment
- Procedural steps
- Findings of fact
- Conclusions regarding the application of the policy to the facts using the applicable standard of evidence
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the university imposes on the Respondent, and whether remedies will be provided by the university to the Complainant
- Appeal procedures available to both parties and the permissible bases for an appeal

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## Format of Final Letter

1. Allegation(s)
2. Procedural history
3. Applicable policies and procedures
4. Information considered during investigation (witnesses questioned, documents and other evidence)
5. Findings of fact
6. Analysis and conclusion – whether the alleged conduct violated the policy
7. Evidentiary standard -- preponderance of the evidence
8. Sanctions and/or remedies, if any
9. Rationale for the decision and sanction(s)
10. Appeal procedures

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## More important points for the final letter

- Use standard format and language
- Start by stating your scope of review and evidence standard  
Identify the materials you reviewed and considered
- State material findings of fact
- Identify inculpatory and exculpatory evidence
- Address significant pieces of evidence that are contrary to your finding(s) and why you do not find them persuasive
- Summarize your reasoning and process of applying the policy to the facts found
- State that you considered the totality of the circumstances

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## Hearing -- Recordkeeping



Must maintain for a period of seven (7) years records of each sexual harassment investigation, including:


- any determination regarding responsibility
- any audio or audiovisual recording or transcript of the hearing or, if applicable, other meetings
- any disciplinary sanctions imposed on the Respondent and/or remedies provided to the Complainant


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### Recap – Dos and Don'ts


- Be knowledgeable about your university's policies and procedures
- Carefully review and consider all the investigative materials (report and documentation) and relevant evidence
- Remain impartial, calm and patient
- Allow parties to tell their stories
- Make findings decisions based on the evidence and policy
- Write clear and thorough final determination letters




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### Recap – Do's and Don'ts

- Prejudge either party
- Allow the introduction of
  - Evidence of prior sexual activity (except in limited circumstances)
  - Character evidence
  - Information protected by privilege
- Make public (or private) statements suggesting gender bias
- Be afraid to ask the questions you need to ask
- Breach a confidence



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### Presenter's Contact Information



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- Title IX Compliance Services
  - External Investigator
  - Hearing Officer
  - Appeal Decision-maker
  - Policies and procedures review
  - Compliance assessments and recommendations
  - Training
  - General Title IX advice and consultation
  - <https://www.hmb.com/news-insight/title-ix-compliance/>
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

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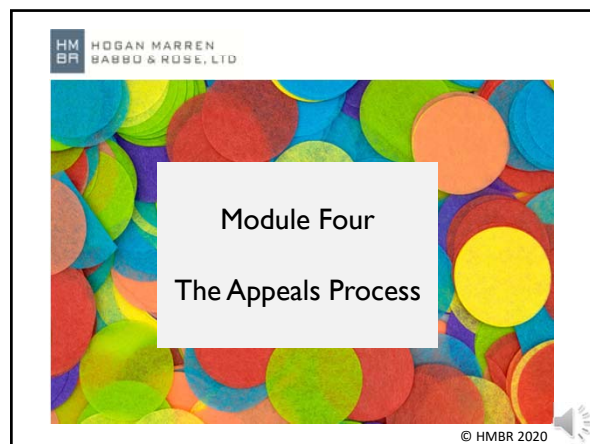


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**Title IX Sexual Harassment Training August 2020**

**Presenter:**  
Debbie Osgood  
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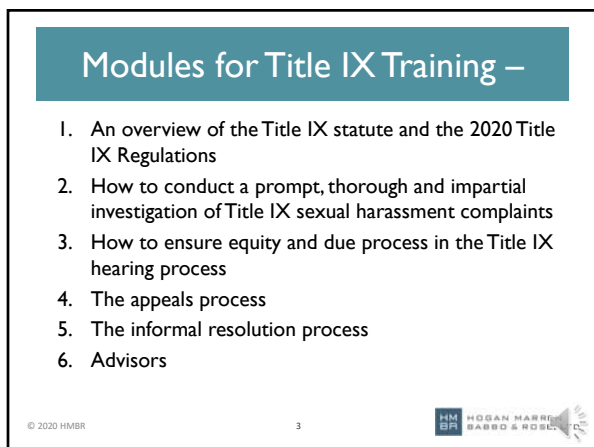
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**Module Four**  
**The Appeals Process**

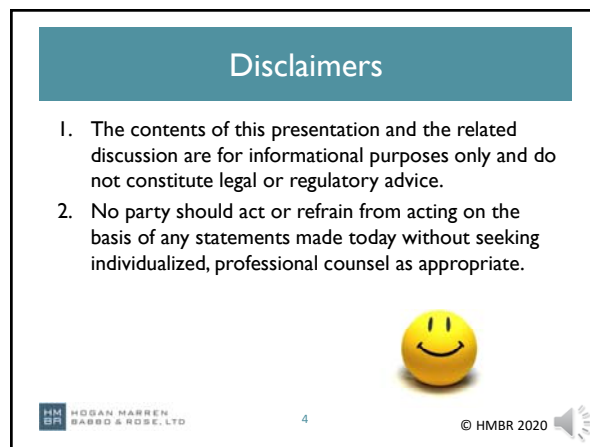
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**Modules for Title IX Training –**


1. An overview of the Title IX statute and the 2020 Title IX Regulations
2. How to conduct a prompt, thorough and impartial investigation of Title IX sexual harassment complaints
3. How to ensure equity and due process in the Title IX hearing process
4. The appeals process
5. The informal resolution process
6. Advisors

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2. No party should act or refrain from acting on the basis of any statements made today without seeking individualized, professional counsel as appropriate.



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**New Title IX Training Requirements**


Goal: To promote impartial investigations and adjudications of formal complaints

Who must be trained:

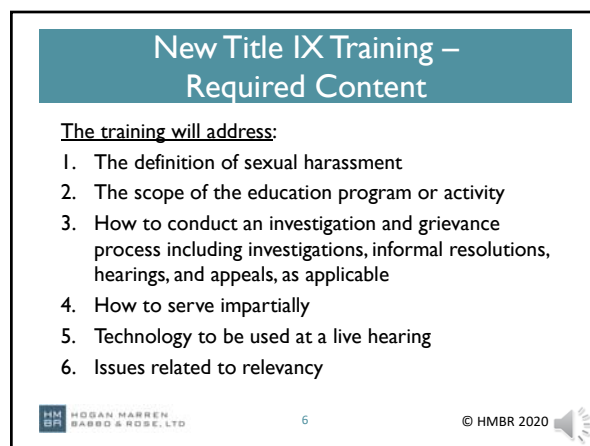
- Title IX Coordinators
- Investigators
- Decision-makers
- Any person who facilitates an informal resolution process

Recordkeeping

- Training materials must be maintained for 7 years and posted on the school's website.



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**New Title IX Training – Required Content**

The training will address:

1. The definition of sexual harassment
2. The scope of the education program or activity
3. How to conduct an investigation and grievance process including investigations, informal resolutions, hearings, and appeals, as applicable
4. How to serve impartially
5. Technology to be used at a live hearing
6. Issues related to relevancy


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### Agenda The Appeals Process


This module will address the following topics:

- The applicable Title IX requirements
- Permissible grounds for appeal
- Appeal procedures
- Available remedies





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### What is the Appeals Process?




- The final step in the Title IX investigation and resolution process
- Allows either party to challenge a dismissal decision or the written determination regarding responsibility and/or sanctions (if applicable)





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### What is the Appeals Process?





- The final step in the Title IX investigation and resolution process
- Complainant Allows either party to challenge the Hearing Officer's or Hearing Panel's written determination regarding responsibility and/or sanctions (if applicable)




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### Individuals Involved in the Appeal Process



- The Complainant
- The Respondent
- The Appeal Decision-maker





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### Qualifications of the Appeal Decision-maker

- Must receive mandated Title IX training
- May not be the same person as the Hearing Officer, the Investigator(s), or the Title IX Coordinator
- Must be impartial and unbiased
- Must be free from conflicts of interest






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### Title IX -- Appeal Requirements

- The appeal option is a *mandatory* part of the grievance process
- Available to either party
- Three specific permissible bases for appeal
- Information about the appeal process must be included in the written grievance procedures

APPEALS




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### Title IX – Appeal Requirements (cont.)

- Information must also be included in the dismissal letter and/or the written determination letter issued to both parties
- The timeframe for appeal process must be specifically designated in the grievance procedures



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### Title IX – Appeal Requirements (cont.)




- Information about the appeal process must be included in the written grievance procedures and the written determination letter issued to both parties
- Parties are provided written notice of the appeal and an equal opportunity to submit statements to the Appeal Decision-maker
- Appeal Decision-maker reviews information and issues Appeal Decision

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### Appeals

Either the Respondent and/or the Complainant may appeal:




- The dismissal of a formal complaint or any allegations
- A determination regarding responsibility and sanctions, if applicable

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### Appeals

Appeals may be filed based on the following:

- Procedural irregularity
- New evidence
- Bias or conflict of interest



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### Example -- Appeal of a Dismissal


A complainant appeals a dismissal by asserting that:

- newly discovered evidence demonstrates that the misconduct in fact does meet the definition of sexual harassment under the Title IX regulations, or
- there was procedural irregularity because the alleged conduct in fact does meet the definition of sexual harassment and thus mandatory dismissal was inappropriate

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### After an appeal is filed by one party . . .


- The other party is notified in writing that an appeal has been filed
- The institution must give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome



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### Information to be Considered



The Appeal-decision maker will consider:


- The written determination issued by the Hearing Officer or the Hearing Panel
- The written request for an appeal
- The written responses submitted by each of the parties to support their positions

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### Appeals

Appeals may be filed based on the following:


1. Procedural irregularity
2. New evidence
3. Bias or conflict of interest
4. Optional: Another basis selected by the institution and equally available to both parties



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### Appeals – Procedural Irregularity

1. Procedural irregularity - examples:
  - Institution's failure to evaluate all relevant evidence
  - Erroneous relevancy determinations by hearing officer
2. Must affect the outcome of the matter



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### Appeals – New Evidence




1. The “new” evidence was not reasonably available at the time of the determination, and
2. Must affect the outcome of the matter

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### Appeals – Bias or Conflict of Interest


1. The Title IX Coordinator, investigator, or Hearing Officer (or member of a hearing panel) had a conflict of interest or bias:
  - For or against the individual Complainant
  - For or against the individual Respondent
  - For or against Complainants or Respondents generally
2. The conflict of interest or bias affected the outcome of the matter.



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### Written Appeal Decision

- Appeal Decision-maker issues a written decision describing the result of the appeal and the rationale for the result
- Provides the written decision simultaneously to both parties
- The appeal decision is final




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## Possible Appeal Outcomes

- Dismiss the appeal
- Change the determination of responsibility
- Change the sanctions decision
- Send case back to hearing officer/hearing panel to reconsider determination of responsibility and/or sanctions
- Send the case back to Title IX office for new investigation because of bias in the previous investigation



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## Presenter's Contact Information



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  - Policies and procedures review
  - Compliance assessments and recommendations
  - Training
  - General Title IX advice and consultation
  - <https://www.hmb.com/news-insight/title-ix-compliance/>
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

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**Title IX Sexual Harassment  
Training  
August 2020**

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**Module Five  
The Informal Resolution  
Process**

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**Modules for Title IX Training –**


1. An overview of the Title IX statute and the 2020 Title IX Regulations
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**New Title IX Training Requirements**


Goal: To promote impartial investigations and adjudications of formal complaints

Who must be trained:

- Title IX Coordinators
- Investigators
- Decision-makers
- Any person who facilitates an informal resolution process

Recordkeeping

- Training materials must be maintained for 7 years and posted on the school's website.



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**New Title IX Training –  
Required Content**

The training will address:

1. The definition of sexual harassment
2. The scope of the education program or activity
3. How to conduct an investigation and grievance process including investigations, informal resolutions, hearings, and appeals, as applicable
4. How to serve impartially
5. Technology to be used at a live hearing
6. Issues related to relevancy

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### Agenda

## The Informal Resolution Facilitator

1. Title IX provisions relating to informal resolution
2. Using informal resolution as an effective resolution tool
3. Types of informal resolution

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## Why Informal Resolution ?

From the perspective of the parties:

- To achieve more control over the process
- To avoid the formal resolution process, including the investigation and the hearing
  - Less formal
  - Less intimidating
  - Fewer people involved (no witnesses)
- To resolve the matter more quickly
- May be a more fair and equitable result?
- To reach a creative resolution that may not be possible under the formal resolution process (e.g., apology)

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## Why Informal Resolution ?

From the institution's perspective:

- A more educational and less punitive process
- Requires fewer resources
- Quicker resolution
- Less antagonistic process
- Avoid Title IX Coordinator burnout?

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## Why Informal Resolution? A Recap

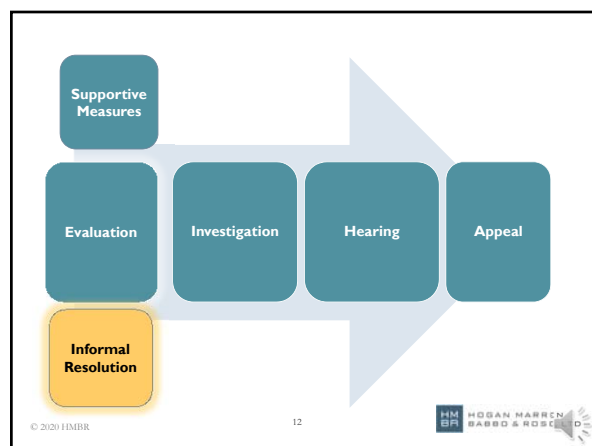
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## Part One

### Title IX Provisions relating to Informal Resolutions

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### Informal Resolution - Timing

Informal resolution is available at any time:


- After filing of a formal complaint
- Before a determination of responsibility is reached



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### Informal Resolution – Voluntary


- School may not require that the parties use informal resolution
- School must obtain the parties' voluntary, written consent to informal resolution
- At any time prior to agreeing to a resolution, any party may withdraw from the informal resolution process and resume the grievance process



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### Informal Resolution

- Not available for allegations that an employee sexually harassed a student
- A school may not require, as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, a waiver of the right to a formal investigation and adjudication of a formal complaint of sexual harassment.




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### Informal Resolution – Written Notice

Written notice to the parties must describe:


- The allegations
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, and

Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared



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### Informal Resolution – Recordkeeping



Must maintain for a period of seven (7) years records of any informal resolution and the result of the informal resolution process

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### Part Two


## Using Informal Resolution as an Effective Resolution Tool

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### Informal Resolution – Players

- Title IX Coordinator
- Informal Resolution Facilitator
- The Parties



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### Informal Resolution Facilitator

- Conducts the informal resolution process if and when the Complainant and the Respondent voluntarily consent to participate
- Impartial
- Trained on Title IX and informal resolution techniques
- Maintains confidentiality

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### Structural


- Include clear descriptions of the informal resolution procedures in the policy and other information
- Separate investigation and informal resolution process and personnel
- Maintain separate records for informal resolution and formal investigation and hearing process

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### Promoting Informal Resolution

It is important to promote the informal resolution option:

- in the training provided to students and employees
- in the institution's written Title IX policy and grievance procedures
- in informational materials relating to sexual harassment
- in discussions between the Title IX Coordinator and each of the parties



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### Success Stories


- An increase in university informal resolutions vs. formal investigations and hearings
- Increased and successful use of informal resolution by federal civil rights agencies



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### Possible Results

- Counselling
- No-contact agreements
- Modifications of work or class schedules
- Additional training
- Possible accommodations to meet the interests and/or needs of the parties



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**Part Three**

**Types of Informal Resolution**

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**Spectrum of Conflict Resolution**

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**Principles of Mediation**

- Empower Participants
  - Providing opportunity for dialogue between parties
  - Immediate Parties Only
- Trained Personnel in Mediation
  - Mediator’s Role is a True Neutral
- No Blame
- Limited Safeguards
  - Question of confidentiality
- Focus on Shared Interests
- Seek Mutually Satisfying Resolutions

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**The Mediation Process**

- Mediator’s Opening Remarks
- Opening Statements by Parties/Counsel
- Parties Share Perspectives
- Parties Identify Issues
- Parties Generate and Evaluate Options
- Parties Negotiate to Arrive at Mutually Agreeable Resolution
- Mediator Drafts Memo that Captures What Parties Agreed Upon

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**Principles of Restorative Justice**

- Acceptance of responsibility
- Focus on repairing the harm caused
- Empower participants: the people most affected by the incident should be able to participate in its resolution
- Providing opportunities for dialogue between parties
- Community and institutional stakeholder participation
- Trauma-informed safeguards


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**The Restorative Justice Process**

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**Presenter's Contact Information**



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  - Hearing Officer
  - Appeal Decision-maker
  - Policies and procedures review
  - Compliance assessments and recommendations
  - Training
  - General Title IX advice and consultation
  - <https://www.hmb.com/news-insight/title-ix-compliance/>
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

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# 2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

**HM BR** HOGAN MARREN BABBO & ROSE, LTD

**Title IX Sexual Harassment Training  
August 2020**

**Presenter:**  
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**Module Six  
The Role of the Advisor**

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**Modules for Title IX Training**

1. An overview of the Title IX statute and the 2020 Title IX Regulations
2. How to conduct a prompt, thorough and impartial investigation of Title IX sexual harassment complaints
3. How to ensure equity and due process in the Title IX hearing process
4. The appeals process
5. The informal resolution process
6. Advisors

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**Disclaimers**

1. The contents of this presentation and the related discussion are for informational purposes only and do not constitute legal or regulatory advice.
2. No party should act or refrain from acting on the basis of any statements made today without seeking individualized, professional counsel as appropriate.



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**Agenda  
The Role of the Advisor**

1. Title IX provisions relating to Advisors
2. The Advisor's role and responsibilities
  - During the investigation
  - At the hearing

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**Part One**


**Title IX Provisions  
relating to Advisors**

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### Key Title IX Provisions related to Advisors


“The institution must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice** . . .” (Emphasis added.)



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### Key Title IX Provisions related to Advisors


The Advisor “may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”



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### Title IX Regulations related to Advisors

“At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”



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## Part Two

### The Advisor’s Role and Responsibilities

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### The role of the Advisor


- Provides advice and/or support to a Complainant or Respondent during the investigation and resolution process
- Accompanies the party to interviews, the hearing, and any other meetings
- Not required to be impartial or unbiased



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### Advisor Qualifications

- May be a friend, family member, advocate, employee, or other person chosen by the party
- May be an attorney, but is not required to be an attorney
- An institution may form a pool of individuals, including members of the campus community, who may serve as Advisors as long as the choice of an Advisor by either party is not limited to the pool




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### Advisor Qualifications

- No specialized training or experience
- The Advisor should be someone who is:
  - Compassionate and supportive
  - Familiar with the Title IX regulations and the institution's Title IX sexual harassment policy and process
  - Capable of understanding the purpose and scope of cross examination
  - Capable of conducting cross examination of the other party and witnesses






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### Who cannot be an Advisor






- Someone who is involved in the situation
- Someone who is a possible witness


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### Limitations on Advisor's Participation

- The Advisor must abide by the institution's procedural rules.
- With the exception of cross examination during the hearing, the institution may impose restrictions on the participation of the Advisor in the investigation and resolution process.
- Any restrictions on the Advisor's participation must be applied equally to both parties.







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### Limitations on Advisor's Participation

According to OCR, institutions may:


- Restrict an advisor's role, such as prohibiting the advisor from speaking during the proceeding, addressing the disciplinary tribunal, or questioning witnesses
- Remove or dismiss advisors who become disruptive or who do not abide by the restrictions on their participation.






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### Example (pre-2020 Title IX policy)


- It is up to the complainant and respondent to present their information in meetings, interviews, or hearings.
- Advisors cannot speak for a student and do not have an active role during any meetings, interviews, or hearings unless permitted by the Code of Student Conduct.
- For instance, an Advisor, even if an attorney, does not provide active representation of an individual the way that an attorney ordinarily would in a formal legal proceeding.






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### Confidentiality


The Advisor must keep confidential the information shared during meeting and through the investigation and resolution process.




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### During the Investigation




- The parties are told in the initial written notice of the investigation that they may have an attorney of their choice
- The Advisor may accompany the party to any meeting related to the grievance process
- An advisor's absence is considered "good cause" for temporarily delaying the investigation

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### During the Investigation


The Advisor advises and assists the party with:

- Inspecting any evidence that is directly related to the allegations
- Reviewing and responding to the evidence provided to the parties by the investigator at the end of the investigation
- Reviewing and responding to the draft investigation report prepared by the investigator and provided to the parties



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### At the Hearing – Cross Examination



- The Advisor conducts cross-examination of the opposing party and witnesses at the hearing
- The cross-examination must be conducted directly, orally, and in real time by the Advisor

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### Free Advisor?




- If a party does not have an Advisor for the hearing, the institution must provide a qualified Advisor free of charge to that party
- No requirement as to who may be an Advisor
- Options: law student, employee trained to conduct cross-examination, lawyer

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### Relevant Cross-Examination

- The Advisor may ask relevant questions, including those challenging credibility
- The Hearing Officer must determine whether the question is relevant before it is answered.



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### Exclusion of Statements



If a party or witness does not submit to cross-examination, then that individual's statement may not be relied upon the hearing officer/panel in reaching a determination of responsibility.



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### Complainant's Sexual Predisposition and Prior Sexual History

Generally, the Complainant's sexual predisposition and prior sexual history are not relevant, except where offered to prove:


- Someone other than the Respondent committed the misconduct at issue
- The parties have a prior sexual relationship and the information is provided to show consent


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### Relevancy and Character Evidence

Evidence Law: The Rule of Relevance and Admissibility of Character Evidence

Exceptions to the Rule Against Character Evidence






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### Adequacy of Cross-Examination



**Question to OCR:**  
 Suppose the respondent's advisor isn't well-prepared and forgets to cross-examine the complainant during the hearing on a key statement related to credibility. What is the effect of this on the statement made by the complainant – may or may not the decision-maker consider it, and please explain why or why not?





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### Adequacy of Cross-Examination

**OCR's Answer:** The new Title IX Rule requires that postsecondary institutions hold a live hearing at which each party has the opportunity to cross-examine other parties and witnesses, where such cross-examination is conducted by a party's advisor and never by a party personally. [citation omitted]. If a party [through their advisor] does not pose a cross-examination question to the other party, then the answering party cannot be said to have "not submitted" to cross-examination, and the provision of [the Title IX provision] prohibiting the decision-maker from relying on the statements of a party who has not submitted to cross-examination would not apply to the regulations are necessary.



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- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

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