

2021 ANNUAL TRAINING

On Issues Relating To Sexual Violence, Sexual Harassment, Domestic Violence, Dating Violence And Stalking




Debbie Osgood Partner, HMBR
dlo@hmb.com 312-540-4427


Linh Nguyen Associate, HMBR
ltn@hmb.com 312-279-0527


www.hmb.com

1

Disclaimers

 The contents of this presentation and the related discussion are for informational purposes only and do not constitute legal or regulatory advice.

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



© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 2

2

Agenda

- Session 1:** 2021 Overview of the Applicable Federal and State Laws
- Session 2:** Ensuring Equity and Due Process
- Session 3:** The Investigation Process
- Session 4:** The Hearing Process and the Written Determination
- Session 5:** A Combined Session: The Role of Advisors, Informal Resolution Options and the Appeals Process
- Session 6:** Questions and Answers and Looking Forward

3

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.

4

Title IX Training Requirements – 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

5

Illinois State Law Training Requirements

Illinois Preventing Sexual Violence in Higher Education Act

Who Needs to be Trained: Individuals responsible for resolution of complaints of *student* sexual violence, domestic and dating violence, and stalking

Length of Training: 8 hours minimum

Topics to be Covered:

1. Issues relating to sexual violence, domestic and dating violence, and stalking
2. How to conduct the school's complaint resolution procedures
3. Training must address:
 - The college's/university's comprehensive policy
 - The relevant Federal and State laws
 - The roles of the college/university, medical providers, law enforcement and community agencies
 - The types of conduct that constitute sexual violence, domestic violence, dating violence, and stalking, including same-sex violence
 - Consent and the roles drugs and alcohol use can have on the ability to consent
4. Training must also be designed to improve the trainee's ability to:
 - Respond with cultural sensitivity
 - Provide services to or assist in locating services for the complainant
 - Communicate sensitively and compassionately

6

What's Happened Since Last Year?

- New Title IX Regulations
- New Supreme Court Justice – Amy Coney Barrett
- New President – Joe Biden
- New Secretary of Education Dr. Miguel Cardona
- Possible New State Law Survey Requirement



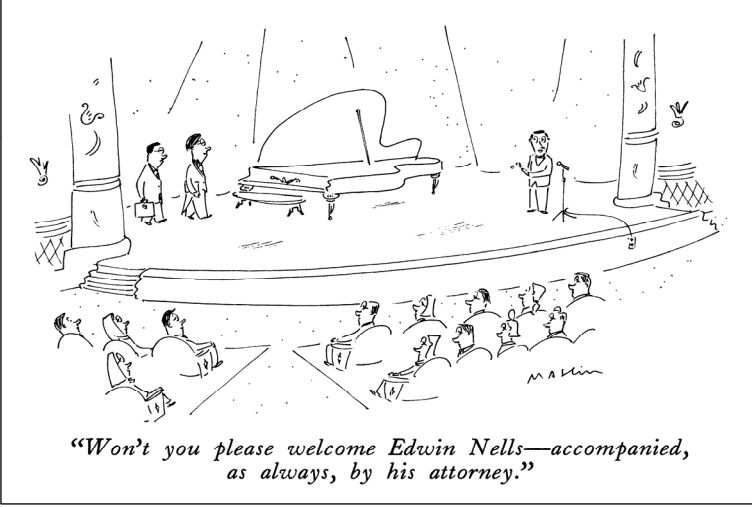
7

Session I

2021 Overview of the Applicable Federal and State Laws

8

How Did We Get Here?

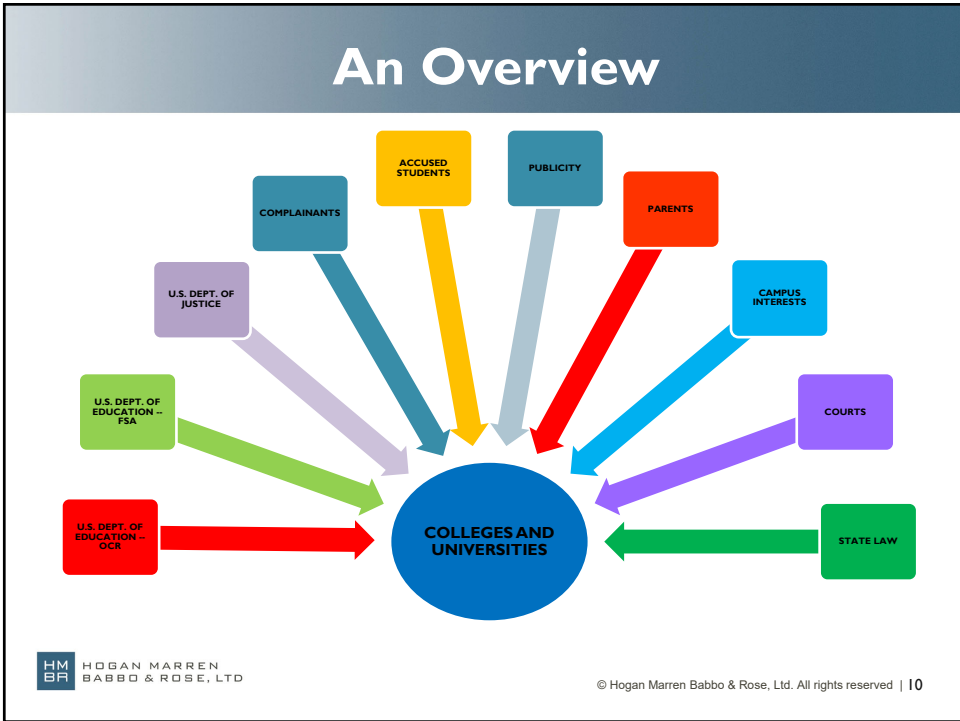


“Won’t you please welcome Edwin Nells—accompanied, as always, by his attorney.”

HM BR HOGAN MARREN BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 9

9



10

State Law

11

Illinois State Law Public Notice

Publish and update on website:

- “Comprehensive policy”
- Options and resources for “survivors”
- Title IX Coordinator(s) name, contact information
- Explanation of the role, reporting obligations and level of confidentiality for:
 - Title IX coordinator(s)
 - Responsible employees
 - Campus security authorities (Clery)
 - Mandated reporters (state law)
- Contact information for confidential advisors, counseling services, and confidential resources
- Contact information for community-based, State and national hotlines



12

Illinois State Law Complaint Procedures

- Procedure should “begin promptly and proceed in a timely manner”
- Names of individuals who will resolve complaints and opportunity to request substitution for conflict of interest or recusal
- Preponderance of the evidence standard
- Information on how to obtain available interim protective measures and accommodations
- Protect privacy of both parties and witnesses in any proceeding, meeting or hearing
- Both parties must have the opportunity to provide or present witnesses
- Parties may not directly cross examine one another, but may – at discretion of the presiding official -- suggest and have questions posed to the other party
- Have an advisor at any meeting or proceeding
- Right to appeal
- School shall not disclose identify of either party, except as necessary to resolve complaint, implement interim measures and accommodations as when provided by State or federal law

13

Illinois State Law: Notice of Rights and Options

Must provide complainants with concise written notice “in plain language” of their rights and options, including:

1. The right to report or not report the incident to the school, law enforcement or both, including information about the right to privacy and which reporting methods are confidential;
2. Contact information for the Title IX coordinator(s), confidential advisors, a community-based sexual assault crisis center, campus law enforcement, and local law enforcement;
3. The right to request and receive assistance from campus authorities in notifying law enforcement;
4. The ability to request interim protective measures and accommodations for survivors, including without limitation changes to academic, living, dining, working, and transportation situations, obtaining and enforcing a campus-issued order of protection or no contact order, if such protective measures and accommodations are reasonably available, and an order of protection or no contact order in State court;
5. The school’s ability to provide assistance, upon request, in accessing and navigating campus and local health and mental health services, counseling, and advocacy services;
6. A summary of the school’s complaint resolution procedures, if the complainant reports a violation of the comprehensive policy.

14

Illinois State Law: Notice of Rights and Options

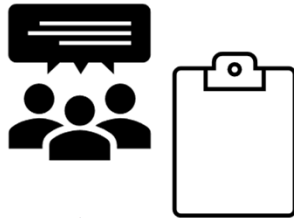


Additional requirements:

- Response due within 12 hours of receipt of report
- Amnesty policy
- Appeal rights
- Extensive training
- Annual reports to state

15

Coming Soon? Sexual Misconduct Climate Survey



(110 ILCS 155/35 new)

Sec. 35. Sexual misconduct climate survey.

(a) As used in this Section:

"Base survey" means a base set of common questions recommended by the Task Force on Campus Sexual Misconduct Climate Surveys and approved by the Executive Director of the Board of Higher Education.

- Institutions will be required to conduct a sexual misconduct climate survey of all students every two years
- Task Force on Campus Sexual Climate Surveys will develop and recommend a base survey to be used by colleges and universities
 - Institutions can add questions to the base survey if they do not require disclosure of PII and are trauma-informed
- Institutions must compile a summary of survey results to publish on their website and submit to the Attorney General
- Fines up to \$150,000 per violation for noncompliance

16

Federal Law

17

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)



18

What are we talking about when we talk about Title IX?

- Statute
- Regulations
- Federal guidance documents
 - Issued by U.S. Department of Education's Office of Civil Rights ("OCR")
- Federal court cases
- Individual resolution agreements between federal government and institutions

Regulations at 34 C.F.R. Part 106:

- Nondiscrimination Notice
- Title IX Coordinator
- "Prompt and Equitable" Grievance Procedures
- Prohibition on Sex Discrimination
- Retaliation

19

2020 Title IX Regulations



- Announced May 6, 2020
- Effective August 14, 2020
- Ongoing federal litigation
- First Title IX sexual harassment *regulations*
- Regulations are not retroactive

20

Key Concepts

- Deliberate indifference
- Updated procedural requirements – generally for sex discrimination, and specifically for sexual harassment
- Revised scope of Title IX sexual harassment
- Explicit discretion to address sexual misconduct outside the scope of Title IX sexual harassment



21

OCR Update

- OCR Assistant Secretary – status of nomination of Catherine Llamon
- Possible Changes to OCR's Approach to Investigations and Resolutions:
 - A revised *Case Processing Manual*
 - Systemic?
 - Disparate impact?
 - Proactive technical assistance



22

How OCR Works

- Technical Assistance
- Complaints
- Proactive Reviews (Compliance reviews, directed investigations)
- Possible options:
 - dismissal or administrative closure
 - investigation
 - resolution with an agreement and monitoring
 - facilitated resolution between the parties
 - rapid resolution process
 - administrative enforcement

23

Transgender and Sexual Orientation

- U.S. Supreme Court *Bostock* decision (2020)
- U.S. Department of Justice (DOJ) confirms that Title IX prohibits discrimination on the basis of sexual orientation and gender identity in educational settings. (April 5, 2021)

24

More Revisions to Title IX Regulations?

- U.S. Department of Justice (DOJ) confirms that Title IX prohibits discrimination on the basis of sexual orientation and gender identity in educational settings. (April 5, 2021)
- OCR announced plans to being comprehensive review of its Title IX regulations
 - In accordance with Biden Administrations Executive Orders, Including Sexual Orientation or Gender Identity (January 21 and March 8, 2021)
 - June 2021 public hearings
 - Planned new Notice of Public Rulemaking to revise Title IX regulations
 - Goal: Revised regulations in 2022

THE WHITE HOUSE
BRIEFING ROOM

Executive Order on Preventing and Combating
Discrimination on the Basis of Gender Identity
or Sexual Orientation

BRIEFING ROOM

Executive Order on Guaranteeing an
Educational Environment Free from
Discrimination on the Basis of Sex, Including
Sexual Orientation or Gender Identity

MARCH 08, 2021 - PRESIDENTIAL ACTIONS

HM HOGAN MARREN
BR BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 25

25

Civil Litigation

Increased federal and state court action concerning the process and outcome of Title IX grievance procedures:

- Cases filed by complainants *and* respondents
- Possible injunctions and monetary damage awards
- Court decisions generally issued early in the case
- Most cases concern suspensions or expulsions

HM HOGAN MARREN
BR BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 26

26

Civil Litigation Claims

Complainants

- Title IX – deliberate indifference
- Tort law – negligence/duty of care
- Breach of contract
- Intentional infliction of emotional distress

Respondents

- Title IX – gender bias
- Due process
- Breach of contract
- Intentional infliction of emotional distress
- Defamation

27

Doe v. Purdue University

- 7th Circuit – US Court of Appeals
- June 19, 2019
- Decision written by then Circuit Court Judge Amy Coney Barrett
- Male student found responsible for sexual violence – suspended for a year – expelled from Navy ROTC program (lost ROTC scholarship)
- Supreme Court remanded cases
- Challenged on due process grounds and Title IX gender bias



28

Doe v. Purdue University

“We see no need to superimpose doctrinal tests on the statute. All of these categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university’s decision to discipline a student. We prefer to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against John “on the basis of sex”?

– Judge Amy Coney Barrett

29

Title IX Procedural Requirements



- Notice of nondiscrimination
- Title IX Coordinator
- Grievance procedures
 - General -- Sex Discrimination
 - Specific -- Sexual Harassment
- Retaliation
- Recordkeeping

30

Nondiscrimination Notice - Content

The notice must state that:

- The school does not discriminate on the basis of sex in the education program or activity that it operates
- The school is required by the Title IX statute and regulations not to discriminate on the basis of sex
- The nondiscrimination requirement extends to admission and employment
- Inquiries about Title IX may be referred internally to the Title IX Coordinator, externally to the U.S. Department of Education, Office for Civil Rights (OCR), or to both

31

Nondiscrimination Notice – Distribution

Notice must:

- Include the Title IX Coordinator’s contact information
- Be prominently displayed on the website and in each handbook or catalog
- Be provided to applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school

32

Title IX Coordinator

- Each school must designate at least 1 Title IX Coordinator
- The Title IX Coordinator cannot be the same person as the Hearing Officer(s) or the Appeals Decision-maker(s)
- Contact information for the Title IX Coordinator must be included in the nondiscrimination notice:
 - name or title,
 - office address,
 - electronic mail address, and
 - telephone number

33

Grievance Procedures - General

A school 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.
- Adopt and publish grievance procedures for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by Title IX.
- For formal complaints of sexual harassment, the grievance process must comply with new specific requirements in the Title IX regulations.

34

Title IX Grievance Process for Sexual Harassment – 10 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



35

Title IX Grievance Process for Sexual Harassment – 10 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



36

Retaliation



No school 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.

37

Retaliation

Retaliation includes 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

Retaliation does not include:

- 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, provided that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
- Exercising rights protected under the First Amendment

38

Retaliation

The school must keep confidential the identity of:

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

CONFIDENTIAL

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.

39

Recordkeeping

Must maintain for 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



40

Recordkeeping

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

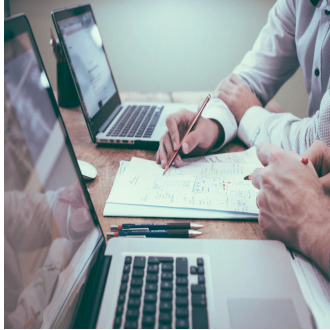
- Records of any actions, including any supportive measures
- Documentation as to the basis for its conclusion that its response was not deliberately indifferent, and that it has taken measures designed to restore or preserve equal access to the school's education program or activity
- If supportive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

41

Roles and Responsibilities

42

The Players in the Investigation and Grievance Process



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

43

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.

44

Title IX Coordinator

- Each school must designate at least 1 Title IX Coordinator
- The Title IX Coordinator cannot be the same person as the Hearing Officer(s) or the Appeals Decision-maker(s)
- Contact information for the Title IX Coordinator must be included in the nondiscrimination notice:
 - name or title,
 - office address,
 - electronic mail address, and
 - telephone number

45

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 parties to submit their arguments in writing in support of or against the dismissal or written determination
- Prepares a written appeal determination
- Sends the written appeal decision simultaneously to the parties

46

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 school.

Not the same as a Responsible Employee:

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

47

The Title IX Coordinator

- Responsible for coordinating overall Title IX compliance
- Cannot be a Decision-maker at the hearing or appeals stage
- 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
- 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

48

Investigator

- Must receive Title IX training
- Cannot be a Decision-maker
- Conducts the investigation of a formal complaint
- Conducts interviews of the parties and witnesses
- Collects evidence
- Sends evidence to parties for review and response
- Prepares an investigation report
- Provides draft investigation report to the parties for review and response
- Prepares final investigation report



49

Informal Resolution Facilitator



- Conducts the informal resolution process
- Obtains the voluntary, written consent from the Complainant and the Respondent before beginning the informal resolution process
- Prepares a written informal resolution agreement if needed

50

Hearing Officer

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

51

Title IX 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
- Not the same as “Confidential Advisor” required by Illinois state law



52

Responding to Misconduct within the Scope of Title IX

53

Title IX Liability Standard

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



54

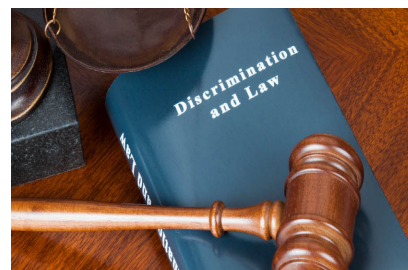
Actual Knowledge

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

55

Sexual Harassment

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



56

Sexual Harassment – Quid Pro Quo



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

Sexual Harassment – VAWA

Sexual Assault	Dating Violence
Domestic Violence	Stalking

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.”

59

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.

60

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.

61

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.

62

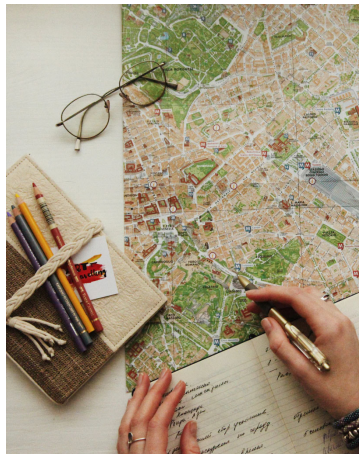
Sexual Harassment – Hostile Environment

- 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



63

An Educational Program or Activity

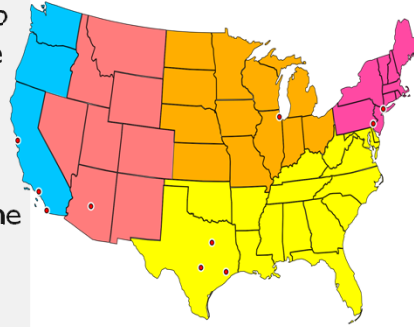


- Locations, events, or circumstances over which the school exercised substantial control over both the Respondent and the context in which the sexual harassment occurs
- Any building owned or controlled by a student organization that is officially recognized by a school

64

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 school study abroad program



65

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, including records relating to:
 - Supportive measures
 - The investigation and resolution of a formal complaint

66

Formal Complaint



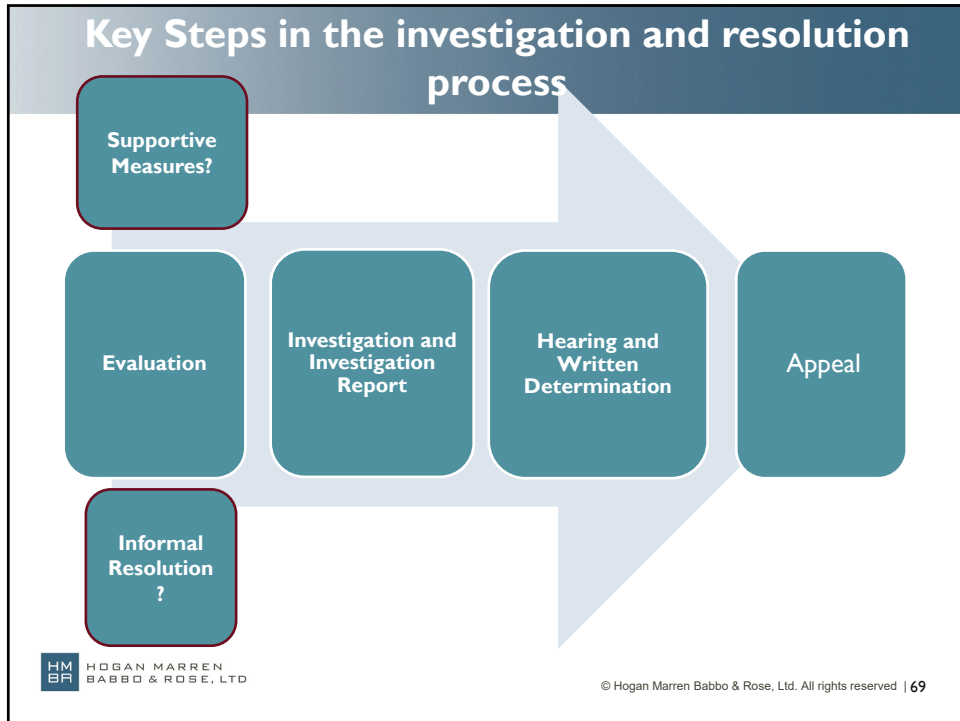
- Formal complaints must be signed and filed by a Complainant who is enrolled or employed (or an applicant)
- May also be filed by Title IX Coordinator
- A school may dismiss complaint against a Respondent who is no enrolled or employed

67

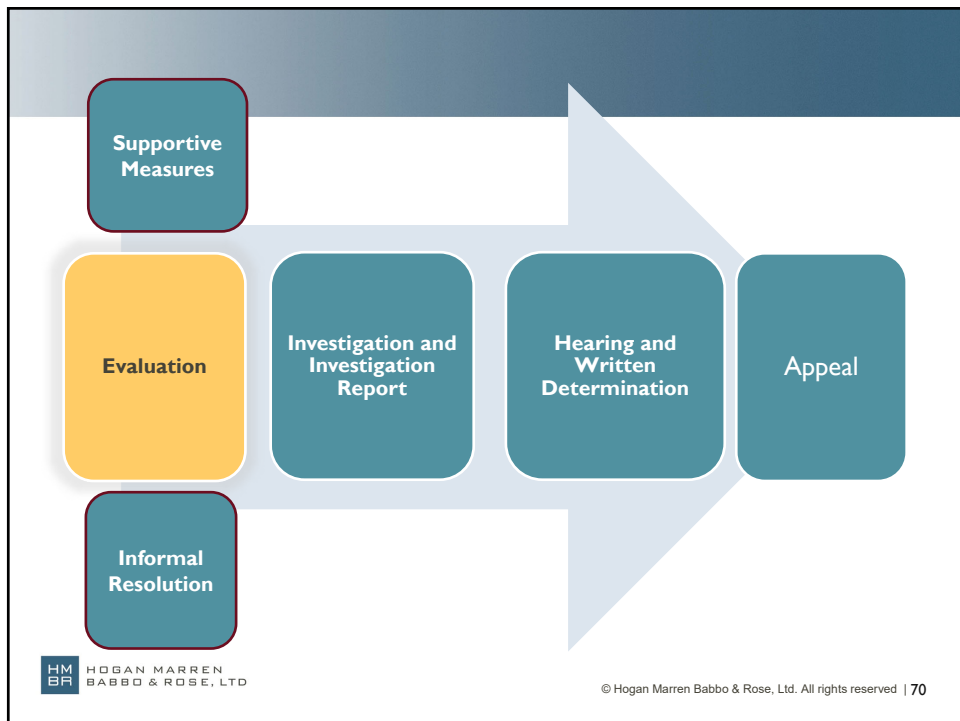
Reports of Sexual Harassment

- 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.

68



69



70

Evaluation - Players

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



71


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.

72

Is the alleged misconduct within the scope of Title IX?



YES



NO


➤ **In all cases,**

- *Must not respond with deliberate indifference*
- *Must offer supportive measures*

➤ **Was a *formal complaint* filed?**

- If yes, *must* also comply with Section 106.45 requirements
- If no, *must* offer supportive measures

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




© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 73


73

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



© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 74

74

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.

75

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

76

Written Notice of Investigation

The written notice 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

77

Title IX+: Addressing Sexual Misconduct Outside the Scope of Title IX

Final regulations are a floor, not a ceiling

Schools may go *beyond Title IX*

If the alleged conduct in a formal complaint is outside the scope of Title IX (would not constitute sexual harassment *or* did not occur in an educational program *or* did not occur against a person in the United States), the school:

Must dismiss the formal Title IX complaint as a Title IX matter

May address the conduct with non-Title IX procedures

78

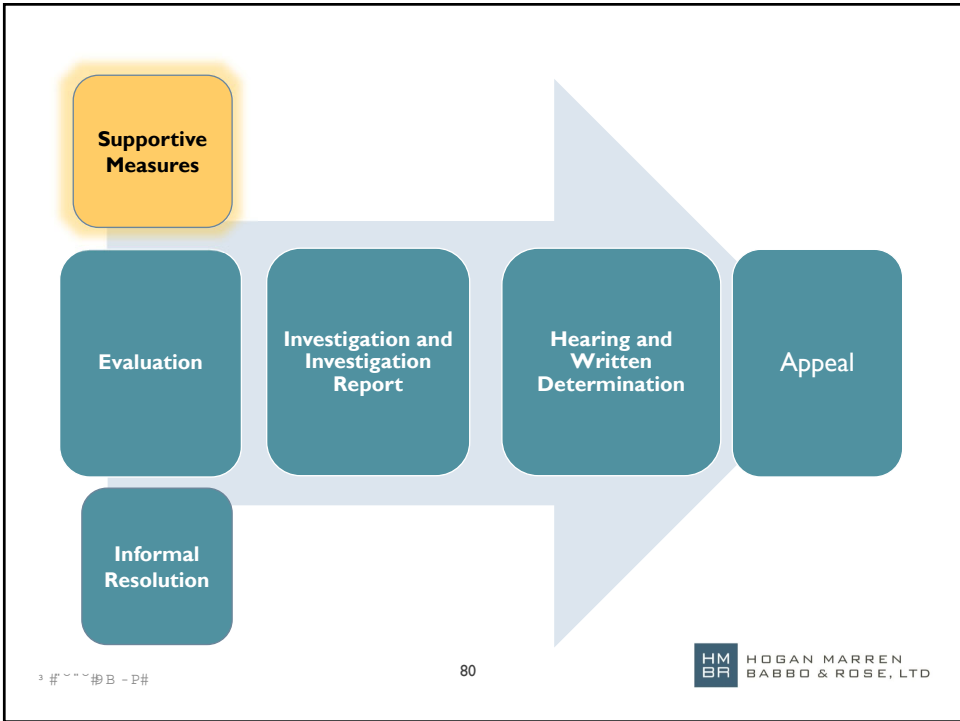
Supportive Measures

- Must provide supportive measures – without or without a formal complaint of sexual harassment when the sexual harassment is within the scope of Title IX
- Designed to restore or preserve equal access to the 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.
- Non-disciplinary, non-punitive individualized services

HM
BR HOGAN MARREN
BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 79

79



80

Supportive Measures

- Use interactive process to determine supportive measures – consider “wishes” of the complainant
- Must document decisions relating to supportive measures.
- Offer internal grievance process for challenging adequacy or burden of supportive measures
- 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.

81

Supportive Measures -- Players



- Title IX Coordinator
- The Complainant
- The Respondent
- University departments involved in implementing supportive measures

82

Supportive Measures

The Title IX Coordinator must:

- promptly contact and inform the Complainant of the availability of supportive measures
- consider the Complainant's wishes and use an interactive process
- document decisions relating to supportive measures
- coordinate the implementation of supportive measures

Offered to the Complainant and the Respondent

83

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

84

Supportive Measures - Recordkeeping

With respect to the school's response to a report or formal complaint of sexual harassment, the school 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 school's education program or activity
- If supportive measures are not provided to the Complainant, the school must document the reasons why its response was not clearly unreasonable in light of the known circumstances

85

Session 2

Ensuring Equity and Due Process

86

Balanced and Fair Process

Ensure that a fair process is provided throughout the investigation and hearing processes.

- Ensure that the interviews of both parties are conducted in a compassionate and unbiased manner.
- Examine the institution's written policies, outreach materials, and training materials for possible bias and revise as needed.
 - Review materials for balance in perspectives
 - Use gender neutral terms in policies, procedures, and training
 - Offer services for complainants *and* accused students

87

Roles of Investigator and Decision-maker

- To make an ***impartial*** determination as to whether a University policy or procedure was violated
- Not an advocate for the complainant or the respondent

88

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

89

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.



90

What is Implicit Bias?

Bias that results from the tendency to process information based on unconscious associations and feelings, even when these are contrary to one's conscious or declared beliefs.

--Dictionary.com

91

Conducting a Trauma-Informed Investigation

Possible impact on memory and memory recall

Inconsistent or incomplete descriptions of facts


Counterintuitive behaviors

92

Conducting a Trauma-Informed Investigation

Does not mean that the result is inaccurate or biased in favor of the complainant

To the contrary, it helps to ensure that the evidence is considered in a thoughtful and informed manner.

 HOGAN MARREN
BABBO & ROSE, LTD

93


© Hogan Marren Babbo & Rose, Ltd. All rights reserved |


93

For Review – Part I

Implicit Bias Test
(10 -15 minutes):

<https://implicit.harvard.edu/implicit/takeatest.html>



 HOGAN MARREN
BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 94

94

For Review – Part 2

Trauma Informed Investigations
Resource: Three-part video
interview with Dr. Rebecca
Campbell (2012) (15 minutes)

- https://www.youtube.com/watch?v=khUfN58RUo8&ab_channel=NationalInstituteofJustice
- https://www.youtube.com/watch?v=usmj0YEPOec&ab_channel=NationalInstituteofJustice
- https://www.youtube.com/watch?v=k7S8CJGQ9XU&ab_channel=NationalInstituteofJustice

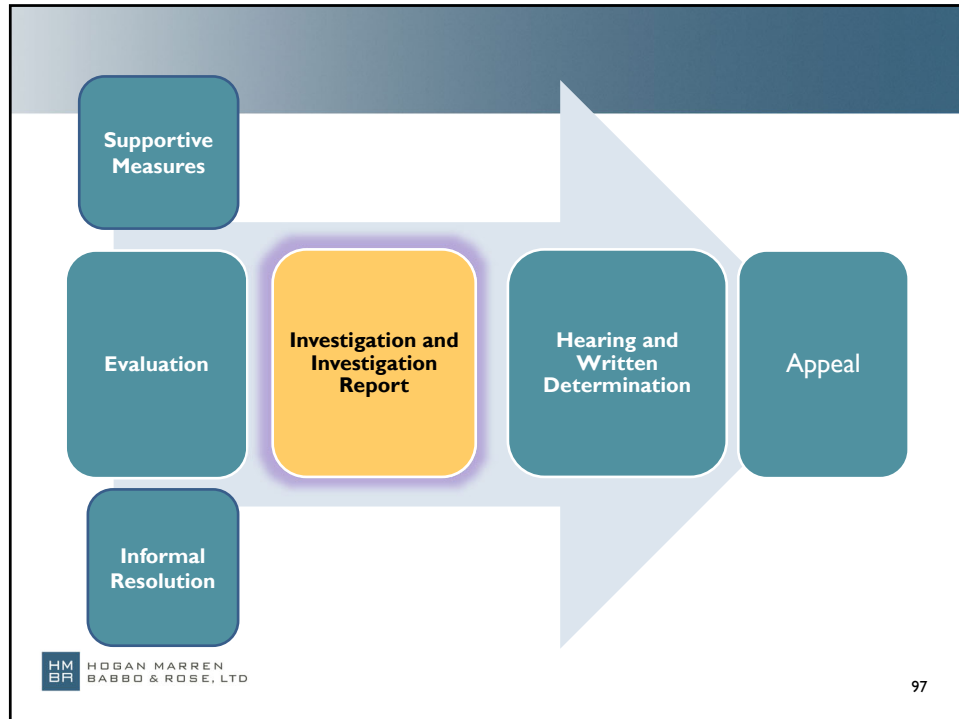


95

Session 3

The Investigation Process

96



97

Grievance Process Requirements

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



HM
BR HOGAN MARREN
BABBO & ROSE, LTD

98

98

Grievance Process Requirements (cont.)

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



99

Investigation -- Players

- Title IX Coordinator
- Investigator
- The parties
- Witnesses



100

Specific Requirements for Investigation

In every investigation,

1. Ensure that the burden of proof and the burden of gathering evidence rest on the school, not the parties
2. Provide equal opportunity for the parties to present witnesses, including fact and expert witnesses
3. Not impose any gag-orders
4. Allow advisor of choice
5. Provide written notice of hearings, interviews and other meetings

101

Specific Requirements for the Investigation (cont.)

6. Provide an equal opportunity for parties to inspect and review evidence
7. Provide the evidence to the parties for review and response prior to the draft investigation report
8. Create an investigation report “that fairly summarizes relevant information” – does not include findings of responsibility
9. Provide the draft investigation report to the parties for review and response prior to the hearing
10. Provide live hearing – no single-investigator model

102

Issues of Relevancy

- The Investigation Report must fairly summarize the *relevant* information.
- 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

103

Adequate, Reliable, and Thorough Investigation

Key Tenets:

- Follow the University's policies and procedures.
- Investigate *all* allegations of sexual violence and sexual harassment.
- Gather sufficient relevant information:
 - Interview all relevant witnesses and, to extent practicable, all witnesses identified by the parties.
 - Obtain relevant physical and documentary evidence, including evidence that corroborates witness statements.

104

Investigative Plan

At the start of the investigation: Have a *roadmap* for your investigation of what information you need to collect and how you want to collect this information.

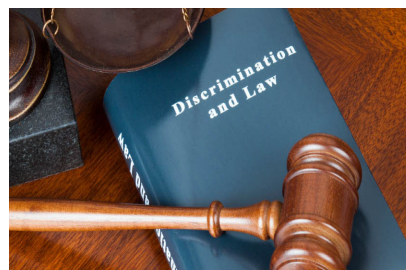


At the end of the investigation: Use the roadmap to write the investigation report and written determination.

Investigative Plan – Identifying the elements of a policy violation

Sexual Harassment

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



Investigative Plan – Identifying the elements of a policy violation

Sexual Assault – penetration

Policy Definition:

The forcible or nonforcible 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.

Elements (example)

1. Penetration
 - forcibly (or against will)
 - no matter how slight
 - Of vagina or anus
 - With any body part or object
2. Consent/incapacitation

107

Investigative Plan – Identifying the elements of a policy violation

Sexual Assault – fondling

Policy Definition

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 where the victim is incapable of given consent.

Elements (example)

1. Touching of private body part of another person
2. For the purpose of sexual gratification
3. Forcibly and/or
4. Without consent/incapacitation

108

Investigative Plan – Identifying the elements of a policy violation

Sexual Assault – domestic violence

Policy Definition: 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 laws of the jurisdiction.

Elements (elements)

1. Violence
2. On the basis of sex
3. By a current or former spouse or intimate partner or
4. By a person who is or has cohabited with the complainant

109

Investigative Plan – Identifying the elements of a policy violation

Sexual Assault – dating violence

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

- A. Who has been in a social relationship of an intimate nature with the victim; and
- B. Where the existing of such a relationship shall be determined by the length and type of the relationship and the frequency of the interactions of the persons involved.

Elements (example)

1. Violence
2. On the basis of sex
3. By a person in a romantic or intimate relationship with the complainant

110

Investigative Plan – Identifying the elements of a policy violation

Sexual Assault – stalking

Policy Definition:

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.

Elements (example)

1. Engaging in a course of conduct
2. On the basis of sex
3. That would cause a reasonable person to fear for their safety or the safety of others or suffer emotional distress

111

Investigative Plan – Identifying the elements of a policy violation

Sexual Assault – sexual harassment

Policy Definition: Unwelcome conduct of a sexual nature determined by a reasonable person to be so severe and pervasive and objectively offensive that it effectively denies or limits a person's access to the education program or activity.

Elements (example)

1. Unwelcome conduct
2. Of a sexual nature
3. Determined by a reasonable person to be so severe and pervasive and objectively offensive
4. That it creates a sexually hostile environment (where person is effectively denied or limited in access to education program or activity)

112

Investigative Plan – Identifying the elements of a policy violation

Retaliation

Policy Definition: Intimidation, threats, coercion or discrimination against an individual for the person of interfering with rights protected under Title IX

Elements (example)

- I. Protected activity
 - Made complaint or report
 - Participated or refused to participate in investigation or hearing
2. Adverse action
3. Causal connection
4. Legitimate justification?
5. Pretextual justification?

113

Investigative Plan

- a. *Identify elements of policy violation*
- b. *Identify evidence* – documents and testimony -- needed to complete the investigation and *identify the best sources and means* of obtaining each type of evidence.
- c. *Identify what you are looking for* – who, what, where, how, when – to put together a chronological timeline of the events.

114

Types of Evidence: Testimonial

Interview all relevant witnesses and, to extent practicable, all witnesses identified by the parties.

1. Parties and all other individuals with “first-hand” knowledge
2. Individuals with “second-hand” knowledge
3. All of witnesses identified by parties?

115

Types of Evidence: Physical

- Closely review complaint or report from complainant
- Obtain relevant physical evidence
 - Medical evidence
 - Swipe cards
 - Emails
 - Phone records (text/voice-mail messages, photos videos)
 - Snapchat, Instagram, Facebook, and other forms of social media
 - Videos from security cameras or residence hall cameras
 - Security or police reports, if any
- Preserve physical evidence
 - University policy: “It is important to preserve evidence related to any of these prohibited behaviors, including physical evidence, text messages, etc. as the evidence may assist in proving that the alleged offense occurred or may be helpful in obtaining a protection order.”

116

Interviewing Techniques – Do's and Don'ts

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

117

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?

118

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 proof:

- 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

119

Affirmative Consent – example of a university policy

Definition of Affirmative Consent: "Affirmative consent is a **knowing, voluntary** and **mutual decision** among all participants to engage in sexual activity."

"Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent."

"The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression."

"Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act."

"Consent may be initially given but withdrawn at any time."

"Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm. When consent is withdrawn or can no longer be given, sexual activity must stop."

120

Evaluating Affirmative Consent and Incapacitation Due to Alcohol/Drugs

Assess **whether the respondent knew or should have known** that the complainant was incapacitated and unable to give affirmative consent.

Signs of possible incapacitation:

- Slurred or incomprehensible speech
- Unsteady Gait
- Combativeness
- Emotional Volatility
- Vomiting
- Incontinence

121

Analyzing Consent: General Factors

The following factors can aid in the determination:

- How drunk was the victim? The more intoxicated the victim was, the less likely it is that the person was capable of consenting.
- Was the person conscious or unconscious? Did the person regain consciousness during the sexual assault? Did the person pass out? If so, what did the accused do?
- Did the person black out? Did the person vomit?
- Could the person speak? Was the person slurring? Was the person able to communicate coherently?
- Was the person able to walk or did someone (in particular, the defendant) have to carry the person? Did the person have to lean on someone?

From Missoula County Attorney's Office, *Sexual Assault Policy and Procedure Manual* (2014), at <https://dojmt.gov/wp-content/uploads/SEXUAL-ASSAULT-POLICY-AND-PROCEDURE-MANUAL.pdf>

122

Analyzing Consent: General Factors (cont.)

- Was the person able to dress/undress herself? Were the person's clothes disheveled?
- Was the person responsive or in a nonresponsive state?
- Was the person able to perform physical tasks or was the person's coordination impacted? For example, did the person light the wrong end of a cigarette or spill things?
- Did the person urinate or defecate on herself?
- What was the person's level of mental alertness?
- Did the person do anything else to indicate whether the person was capable of cognitive functioning? For example, did the person use a credit card? Did she use a cell phone or e-mail?

From Missoula County Attorney's Office, *Sexual Assault Policy and Procedure Manual* (2014), at <https://dojmt.gov/wp-content/uploads/SEXUAL-ASSAULT-POLICY-AND-PROCEDURE-MANUAL.pdf>

123

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

124

Investigation Report

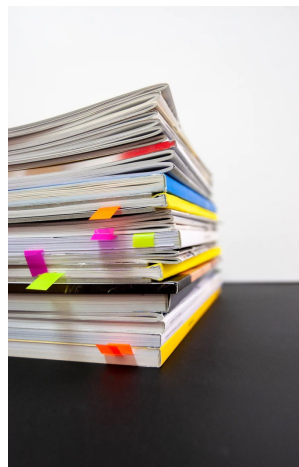
1. Allegations potentially constituting sexual harassment
2. Applicable policy
3. Procedural steps (taken from complaint receipt through final investigation report, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence)
4. Findings of fact
 - Accounts provided by parties and witnesses
 - Description of relevant evidence obtained
5. Preliminary recommendations regarding conclusions supporting the application of the policy to the facts (permissible but not required)

125

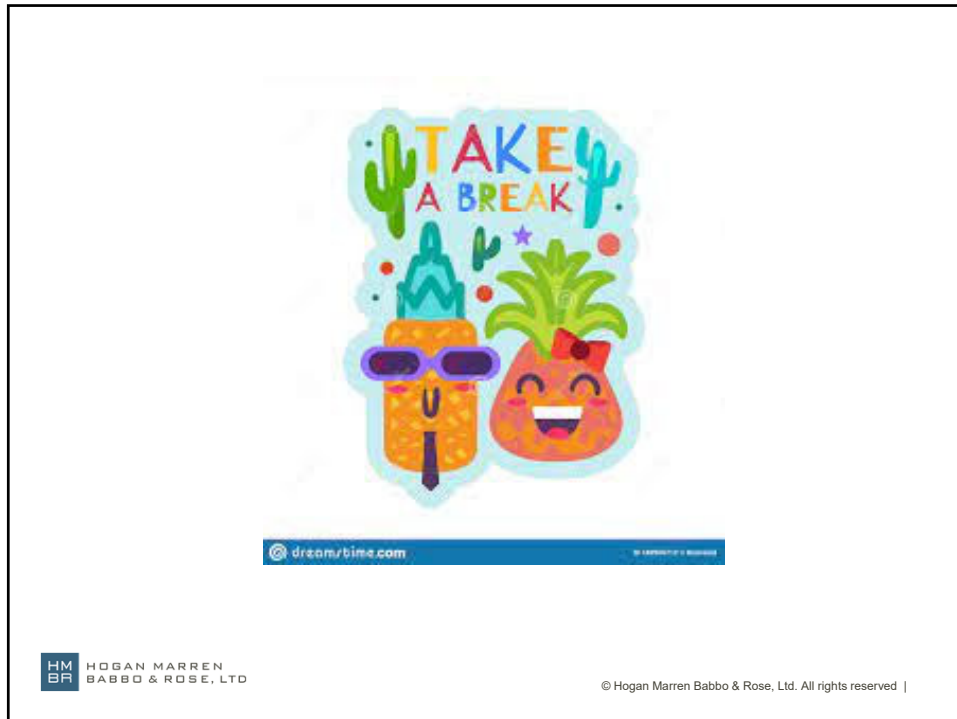
Investigation - Recordkeeping

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



126



127

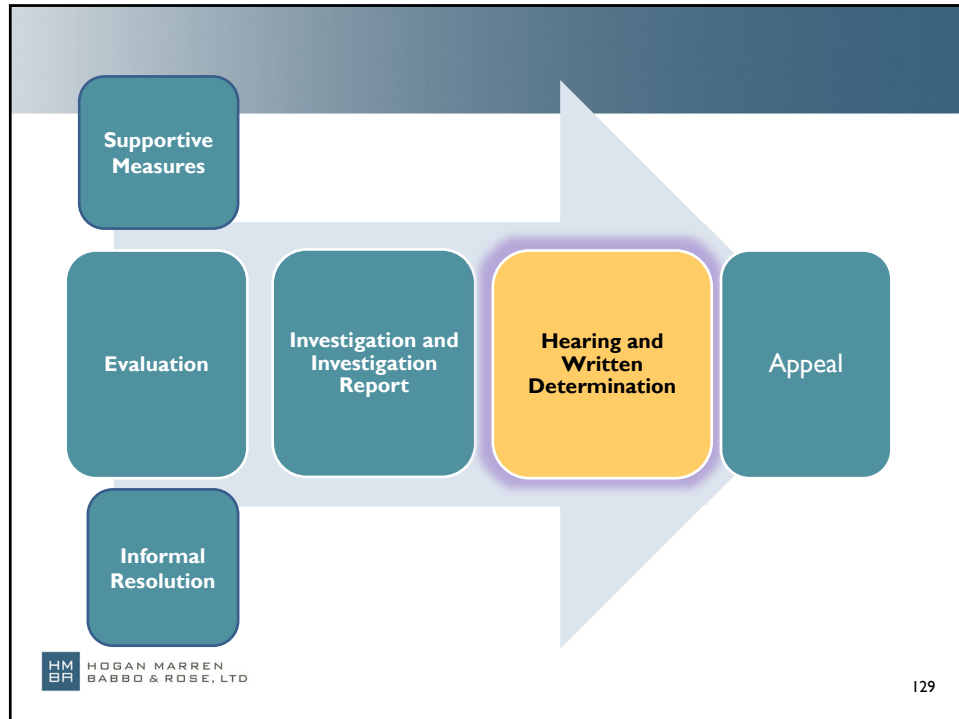
Session 4

The Hearing Process and the Written Determination

HOGAN MARREN BABBO & ROSE, LTD.

128


128



129

Grievance Process Requirements

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



HM BR HOGAN MARREN BABBO & ROSE, LTD.

130

130

Grievance Process Requirements (cont.)

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



131

Keep in mind...

Appeals may be filed by either party about the dismissal decision or written determination.

There are three possible bases for an appeal:

1. Procedural irregularity that affects the outcome
2. New evidence that was not reasonably available at the time of the determination that affects the outcome
3. Bias or conflict of interest that affects the outcome



132

What is a Title IX Hearing?

- After the final investigation report, a live hearing is held.
- The advisor for each party is allowed to conduct cross-examination of other party and witnesses.
- The Hearing Officer/Hearing Panel issues a written determination of responsibility and, if applicable, sanctions and/or remedies.



133

Hearing – Players



- Hearing officer or panel -- not the same person(s) as the Investigator(s), the Title IX Coordinator or the Appeal Decision-maker
- The parties
- Witnesses
- Title IX Coordinator (in administrative, not substantive role)
- The Investigator (as possible witness)

134

Hearing Requirement

- Previously, colleges and universities had a choice as to how to conduct investigation and resolution process – single investigator model, hearing model, or hybrid of two
- With the 2020 Title IX regulations, schools must provide live hearing with opportunity for cross-examination



135

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”



136

Hearing Officer – Responsibilities

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



137

Hearing Officer – Ethical Considerations

- Neutrality -- not an advocate for the Complainant or the Respondent
- Must be unbiased
- Must not have any conflict 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

138

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 additional questions
- Prepare opening and closing comments

139

Hearing – Location and Logistics



- May be held in the same geographic location or virtually
- Specific location to be determined by the school
- Technology must allow the parties, their advisors and the Hearing Office/Panel to see and hear one another and any witnesses

140

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

141

Orderly Hearings: Logistics to think about

- 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



142

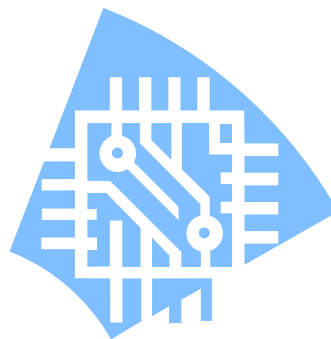
Technology for Hearing

- 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

143

Access to the Evidence

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



144

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



145

Possible Questions (cont'd)

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



146

Issues of Relevancy



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

147

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

148

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

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.



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

151

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.



152

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



153

Making the Decision

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



154

Evaluating the Evidence

Text from friend of Complainant to another friend about the incident

Texts between the Parties

Testimony of the Parties

Physical Evidence of Sexual Assault

Statements regarding Either Party's Good Character?

The most reliable evidence is in the center – the evidence gets less reliable the further it is from the center.

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

155

155

Evaluating the Evidence

Evidence supporting the Complainant

Evidence supporting the Respondent

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

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

156

156

Assessing Credibility

EEOC factors: 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)

157

Written Determination

1. Allegations potentially constituting sexual harassment
2. Applicable policy (and evidentiary standard)
3. 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)
4. Findings of fact
 - Accounts provided by parties and witnesses
 - Description of relevant evidence obtained

Note: These four parts are the parts required for the Investigation Report.

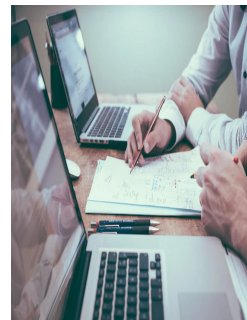
158

Written Determination (cont.)

5. Description of parties' written responses to the investigation report
6. Conclusions supporting the application of the policy to the facts
7. Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions for the respondent, and any remedies for the complainant
8. Appeal procedures available to both parties and the permissible bases for an appeal

Written Determination

- Must provide the written determination to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the school 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



Additional suggestions for the Written Determination

- Use standard format and language
- 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
- State that you considered the totality of the circumstances

161

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

162

Other things to consider



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

163

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 any remedies provided to the Complainant

164

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



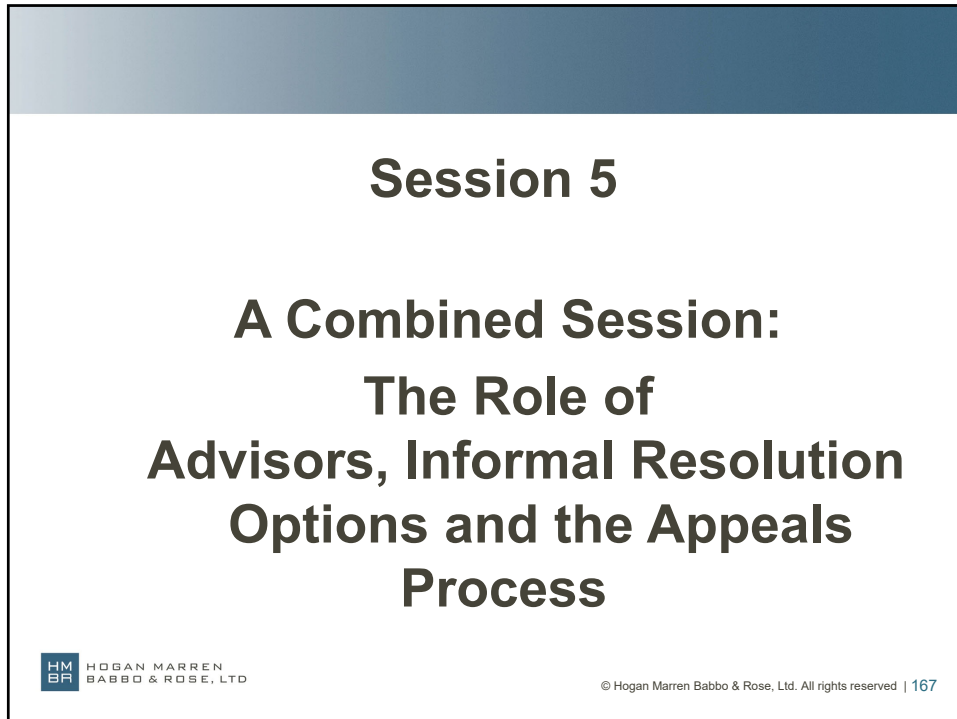
165

Recap – Do's and Don'ts

- Prejudge either party
- Allow the introduction of
 - Evidence of prior sexual activity (except in limited circumstances)
 - 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




166



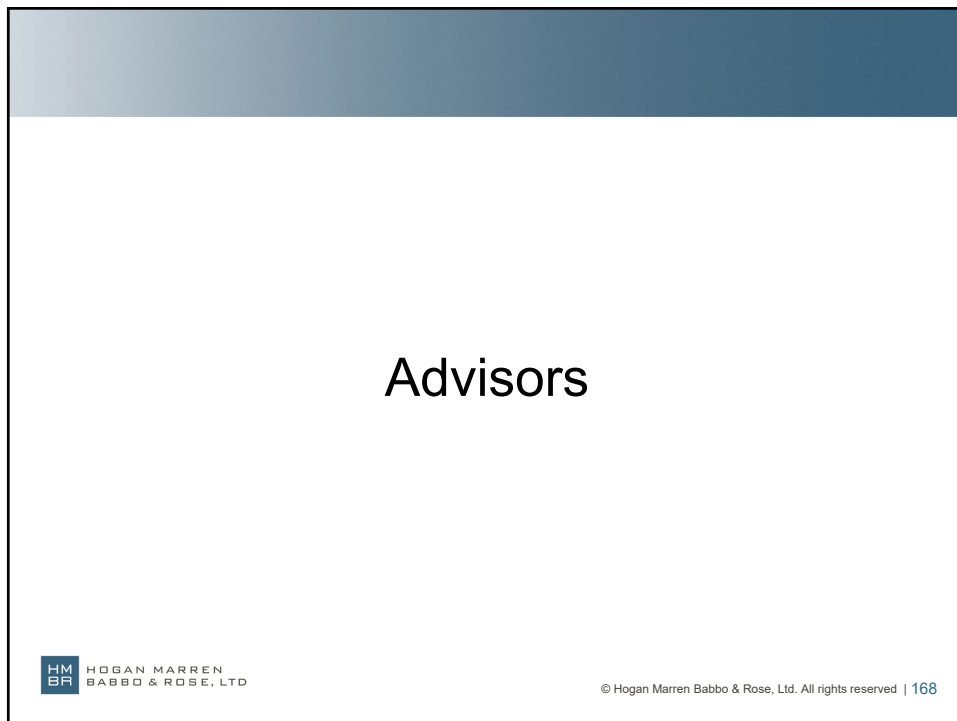
Session 5

**A Combined Session:
The Role of
Advisors, Informal Resolution
Options and the Appeals
Process**


 HOGAN MARREN
BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 167

167



Advisors

 HOGAN MARREN
BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 168

168

Key State Law Provisions related to “Confidential Advisors”

- 110 ILCS 155/20. Confidential advisor.
- Each college or university must provide students with access to confidential advisors to provide emergency and ongoing support to survivors of sexual violence.
- Confidential advisors may not be individuals on campus who are designated as responsible employees under Title IX. Schools can partner with a community-based sexual assault crisis center to provide confidential advisors.
- Confidential advisors must receive 40 hours of training on sexual violence and must attend a minimum of 6 hours of ongoing education training annually on issues related to sexual violence. Confidential advisors must also receive periodic training on the campus administrative processes, interim protective measures and accommodations, and complaint resolution procedures.

169

Key State Law Provisions related to “Confidential Advisors”

- Each confidential advisor must, at a minimum, do all of the following:
 - Inform the individual of their choice of possible next steps regarding reporting options and possible outcomes, including reporting under the college or university's comprehensive policy, and notifying local law enforcement.
 - Notify the individual of resources and services for survivors of sexual violence, including, but not limited to, student services available on campus and through community-based resources, such as sexual assault crisis centers, medical treatment facilities, counseling services, legal resources, medical forensic services, and mental health services.
 - Inform the individual of their rights and the college or university's responsibilities regarding orders of protection, no contact orders, or similar lawful orders issued by the college or university or a criminal or civil court.
 - Provide confidential services to and have privileged, confidential communications with the individual in accordance with the Code of Civil Procedure.
 - Upon the individual's request, liaise with campus officials, community-based sexual assault crisis centers, or local law enforcement and, if requested, assist the individual with contacting and reporting to campus officials, campus law enforcement, or local law enforcement.
 - Upon the individual's request, liaise with the necessary campus authorities to secure interim protective measures and accommodation.

170

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.)



171

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.”



172

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.”



173

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



174

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

175

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



176

Who Cannot Be An Advisor



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

177

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.



178

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.



179

Confidentiality

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



180

During the Investigation



- The parties are told in the initial written notice of the investigation that they may have an advisor 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

181

During the Investigation

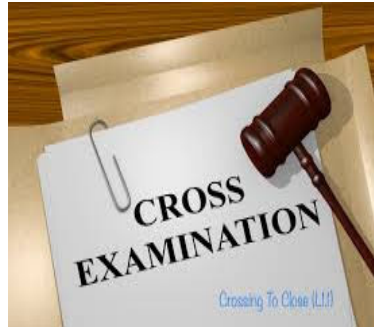
The Advisor advises and assists the party with:

- 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



182

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

183

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

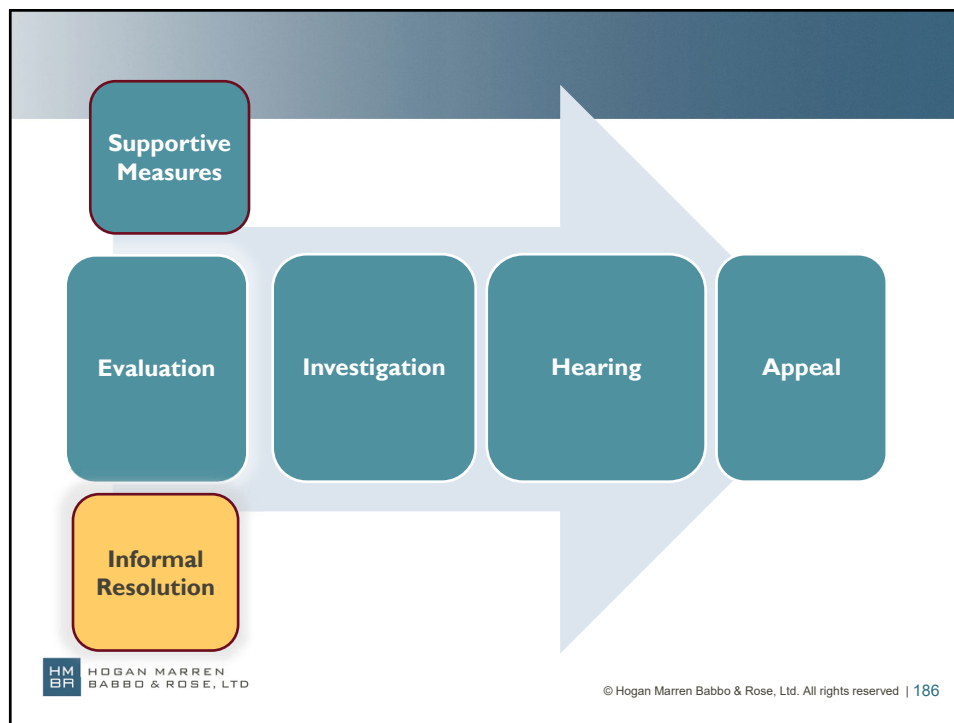
184

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.



185



186

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)

187

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?

188

Informal Resolution – Players

- Title IX Coordinator
- The Parties
- Informal Resolution Facilitator



189

Informal Resolution Facilitator

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

190

Informal Resolution - Timing

Informal resolution is available at any time:

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



191

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



192

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.



193

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



194

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

195

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

196

Promoting Informal Resolution

IF YOU
BUILD
IT ...

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

197

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



198

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



199

Why Informal Resolution? A Recap



200

Types of Informal Resolution

HM HOGAN MARREN
BR BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 201

201

Spectrum of Conflict Resolution

No Conflict Management

Debate, Dialogue, Discussion

Mediation

Restorative Justice Practices

Grievance Procedures under Formal Resolution

HM HOGAN MARREN
BR BABBO & ROSE, LTD

© Hogan Marren Babbo & Rose, Ltd. All rights reserved | 202

202

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



203

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



204

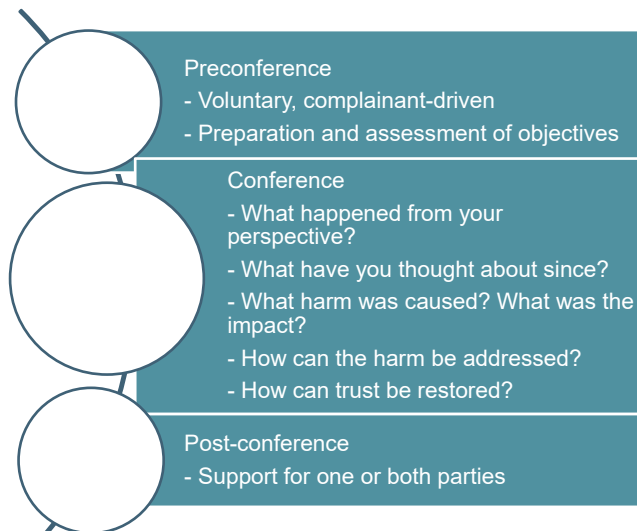
Principles of Restorative Justice

- 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



205

The Restorative Justice Process



206

Appeals

207

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)

208

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)

209

Individuals Involved in the Appeal Process

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



210

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



211

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

212

Title IX –

- 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

APPEALS

213

Title IX –



- 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

214

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

215

Appeals

Appeals may be filed based on the following:

1. Procedural irregularity
2. New evidence
3. Bias or conflict of interest



216

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

217

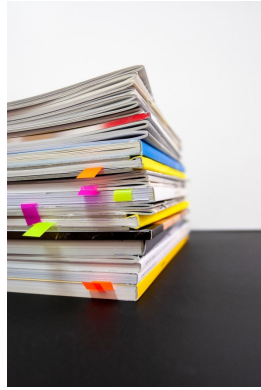
After an appeal is filed by one party. . .

- 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



218

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

219

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



220

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



221

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

222

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.



223

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



224

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




225


Session 6

Questions and Answers and Looking Forward

226




Questions and Answers on the
Title IX Regulations on Sexual
Harassment (July 2021)



UNITED STATES
DEPARTMENT
OF EDUCATION
Office for Civil Rights
July 20, 2021

- Stopgap measure
- Guidance not regulations
- Two parts:
 - 67 questions and answers
 - Appendix with example policies


 HOGAN MARREN
BABBO & ROSE, LTD

227

OCR Guidance

Questions and Answers

- I. General obligations
- II. Definition of sexual harassment
- III. Where sexual harassment occurs
- IV. When harassed occurred
- V. Notice of sexual harassment
- VI. Response to sexual harassment
- VII. Formal complaints
- VIII. Handling situations in which a party or witness may be unable to participate in the Title IX grievance process in person

 HOGAN MARREN
BABBO & ROSE, LTD

228

OCR Guidance

Questions and Answers (cont.)

- VIII. Supportive measures and temporary removal of respondents from campus
- IX. Presumption of no responsibility
- X. Time frames
- XI. Live Hearings and cross-examination
- XII. Standard of Proof
- XIII. Informal Resolution
- XIV. Retaliation and amnesty
- XV. Forms of sex discrimination other than sexual harassment as defined by the 2020 Amendments
- XVI. Religious exemptions

OCR Guidance

Appendix

- I. Receiving and responding to reports of sexual harassment
- II. Supportive Measures
- III. Investigations
- IV. The role of the advisor
- V. The live hearing process
- VI. Behavior during the live hearing/rules of decorum
- VII. Protecting the well-being of the parties during the live hearing/investigation
- VIII. The cross-examination process
- IX. Restrictions on considering a complainant's or respondent's sexual history

OCR Guidance

Appendix (cont.)

- XI. Presumptions about Complainants, Respondents and Witnesses
- XII. Determination regarding responsibility
- XIII. Sanctions and remedies
- XIV. Appeals
- XV. Informal resolution
- XVI. Addressing conduct that the school deems to be sexual harassment but does not meet the definition of sexual harassment under the Title IX regulations
- XVII. Parent and guardian rights

Key Points

1. Institutions may address misconduct outside the scope of Title IX under non-Title IX policies and procedures. (Q&A 2, 7)
2. Off-campus misconduct – Institutions have jurisdiction over conduct that occurs in an education program or activity – defined as having substantial control over the context and the accused. (Q&A 9, 10, 11, 12)
3. Schools may designate professors and other employees as “officials with authority” to respond to sexual misconduct. (Q&A 14, 19)

--7/21/21 *Chronicle of Higher Education*

Key Points

4. Schools may remove students or employees from campus if alleged to have engaged in sexual assault – while the investigation is pending.
5. Timeframes – No specific requirement, but okay to have a 60-day timeframe. (Q&A 37)
6. If students or employees do not participate in the hearing, the decision-maker cannot rely on any of their previous statements to make a decision, even if they confessed. (Q&A 42, 51, 52, 53, 54, 55)

--7/21/21 *Chronicle of Higher Education*

233

Required Title IX Response

Question 20: How must a school respond to allegations of sexual harassment?

Answer 20: When a school has actual knowledge of sexual harassment in any of its programs or activities that take place in the United States, it must “respond promptly in a manner that is not deliberately indifferent.”⁶³ This includes schools that serve any age, grade, or level of students, from pre-K through postsecondary.

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process for filing a formal complaint.⁶⁴ For more on supportive measures, see Questions 32-34.

In addition, if a formal complaint is filed, either by the complainant or the Title IX Coordinator, a school must:

- offer supportive measures to the respondent, and
- follow the Title IX grievance process specified by the 2020 amendments.⁶⁵ For more on this process, including the requirement to offer supportive measures to the respondent, see Question 26 and Section IX.

In addition to setting out these requirements, the regulations provide that a school is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”⁶⁶

234

Evaluation -- OCR Q&A

VII. Formal Complaints

Question 22: What is a “formal complaint” under the 2020 amendments?

Answer 22: A “formal complaint” is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.⁷⁴ It may be a hard copy document or an electronic document submitted via email or an online portal.⁷⁵ Whether it is a hard copy document or an electronic document, it must contain the complainant’s physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.⁷⁶ For example, an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice.

A formal complaint may be filed with the school’s Title IX Coordinator in person, by mail, or by email using the contact information provided by the school. A formal complaint may also be filed by any additional method designated by the school.⁷⁷ A parent or guardian who has a legal right to act on behalf of an individual may also file a formal complaint on that individual’s behalf.⁷⁸ In addition, a Title IX Coordinator may initiate a formal complaint as described in Question 24.⁷⁹

Evaluation -- OCR Q&A

Question 2: Is a school permitted to take steps in response to reports of sexual harassment that go beyond those set out in the 2020 amendments?

Answer 2: Yes. The 2020 amendments set out the minimum steps that a school must take in response to notice of alleged sexual harassment. A school may take additional actions so long as those actions do not conflict with Title IX or the 2020 amendments. The preamble provides this additional guidance:

A school “remain[s] free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations imposed under the [2020 amendments].”²

Evaluation -- OCR Q&A

Question 7: May a school respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments?

Answer 7: Yes. The preamble makes clear that "Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students."¹³ A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.¹⁴ This may include, for example, reported sexual misconduct that a) occurs outside of a school's education program or activity; b) occurs outside of the United States; or c) causes harm in the school environment that does not fit within the definition set out above in Question 5.¹⁵

The preamble also says that "nothing in the final regulations precludes [a school] from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma."¹⁶

Put simply, Title IX's sexual harassment regulation need not replace a school's more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that does not constitute sexual harassment under the 2020 amendments. OCR encourages schools to develop and enforce their codes as an additional tool for ensuring safe and supportive educational environments for all students. OCR does not enforce school codes of conduct but may investigate complaints that a school's code of conduct treated students differently based on sex, including sexual orientation or gender identity.¹⁷

237

Evaluation -- OCR Q&A

Question 16: May a school accept reports of sexual harassment from individuals who are not associated with the school in any way?

Answer 16: Yes. A school may receive actual knowledge of sexual harassment from any person.⁴⁹ There is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.⁵⁰

238

Evaluation -- OCR Q&A

Question 18: Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but is not certain whether the harassment has occurred?

Answer 18: Yes. At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that *could* constitute sexual harassment.⁵³ A complainant is “an individual who is alleged to be the victim of conduct that could constitute sexual harassment” and the definition of actual knowledge refers to “allegations of sexual harassment.”⁵⁴ Thus, the preamble explains that a school must respond promptly and appropriately when it receives notice of alleged facts that, if true, could be considered sexual harassment under the 2020 amendments.⁵⁵

Questions

Sometimes it may not immediately be apparent if the incident meets the definition of sexual harassment under Title IX.

1. When do the provisions of Title IX begin?
 - Immediately upon receipt of complaint?
 - After enough information is gathered (e.g., through interviews, etc.) to determine the incident would meet the definition?
2. Is there guidance about the actual determination of whether the incident meets the definition?

Questions

3. Does the TIX Coordinator make the determination (about whether or not the incident must be dismissed under TIX but can continue investigation under the school's misconduct policy) decision alone?
4. Must individual(s) charged with making that initial determination (about whether or not the incident must be dismissed under TIX but continue under school's misconduct) have received 8 hours of training?
5. Do the other TIX requirements (e.g., notice to the parties, etc.) begin AFTER the university makes the determination? Or does the university treat it as if it does meet the definition until such time as the university makes a determination that it must be dismissed under TIX because it does not meet the definition?



241

Investigation – OCR Q&A

Question 28: May a school use trauma-informed approaches when responding to a formal complaint?

Answer 28: Yes. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment. The preamble clarifies that the 2020 amendments do not preclude a school “from applying trauma-informed techniques, practices, or approaches,” but notes that the use of such approaches must be consistent with the requirements of [34 C.F.R. § 106.45](#), particularly [34 C.F.R. § 106.45\(b\)\(1\)\(iii\)](#).⁹³



242

Hearing Process - OCR Q&A

Question 43: May a school create its own rules for conducting a live hearing?

Answer 43: Yes. The preamble states that a school may implement rules regarding how the live hearing is conducted as long as those rules are applied equally to both parties.¹⁴¹ For

example, a school “may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing.”¹⁴²

The preamble also explains that a school may adopt rules on “whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, [and] place reasonable time limitations on a hearing.”¹⁴³ The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant.¹⁴⁴

In addition, the preamble says that an advisor’s cross-examination role “is satisfied where the advisor poses questions on a party’s behalf, which means that an assigned advisor could relay a party’s own questions to the other party or witness.”¹⁴⁵ Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.



243

Hearing Process - OCR Q&A

Question 44: May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow during a live hearing?

Answer 44: Yes. The preamble says that a school may “adopt rules of decorum” and notes that a school is “in a better position than the Department to craft rules of decorum best suited to [its] educational environment.”¹⁴⁶

For example, a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.¹⁴⁷

A school also may require a party to use a different advisor if the party’s advisor refuses to comply with the school’s rules of decorum. For example, the preamble explains that if a party’s advisor of choice yells at others in violation of a school’s rules of decorum, the school may remove the advisor and require a replacement.¹⁴⁸ The school has this authority even when the advisor is asking a question that is relevant to the hearing. If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.¹⁴⁹



244

Hearing Process - OCR Q&A

Question 46: Is a school permitted to limit the questions that may be asked by each party of the other party or witnesses?

Answer 46: Yes, and in fact the 2020 amendments require certain limitations, whether in a hearing or as part of an exchange of written questions at the elementary and secondary school level. Note that the 2020 amendments do not require a hearing at the elementary and secondary school level.¹⁵⁴

Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant's prior sexual behavior are not relevant, subject to certain limitations.¹⁵⁵ The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive.¹⁵⁶ For more information regarding other limitations on questioning, see Question 48.

Further, the 2020 amendments state that during cross-examination at the postsecondary school level, "only relevant cross-examination questions and other questions may be asked of a party or witness" and the decision-maker must determine the relevance of a question before a party or a witness answers.¹⁵⁷



245

Hearing Process - OCR Q&A

Question 48: Can cross-examination include questions about an individual's medical or mental-health records?

Answer 48: Questions that seek information about any party's medical, psychological, and similar records are not permitted unless the party has given written consent.¹⁶³ Questions about other records protected by a legally recognized privilege are also not permitted unless waived by the party.¹⁶⁴ The preamble also explains that "[schools] (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process."¹⁶⁵

These protections apply throughout the investigation as well as the hearing.



246

Hearing Process - OCR Q&A

Question 49: May a school put measures in place to protect the well-being of the parties during the cross-examination?

Answer 49: Yes. For example, the preamble notes that a school is permitted to grant breaks to the parties during a live hearing.¹⁶⁶ Also, as discussed in Question 46, the 2020 amendments require a pause in the cross-examination process each time before a party or witness answers a cross-examination question in order for the decision-maker to determine if the question is relevant.¹⁶⁷ The preamble explains that this is to help ensure that the cross-examination includes only relevant questions and that the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.¹⁶⁸

Hearing Process - OCR Q&A

Question 50: How do the 2020 amendments address the manner in which a decision-maker should evaluate answers to cross-examination questions?

Answer 50: The 2020 amendments do not require that answers to cross-examination questions “be in linear or sequential formats” or that any party “must recall details with certain levels of specificity.”¹⁶⁹ The preamble adds that the 2020 amendments “protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence” because “decision-makers must be trained to serve impartially without prejudging the facts.”¹⁷⁰

For examples of language related to this issue, please see Q&A Appendix Section VIII.

Hearing Process - OCR Q&A

Question 42: Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the postsecondary school level?

Answer 42: No. Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process.¹³⁹ For information on the consequences of not submitting to cross-examination, see Question 51.

Hearing Process - OCR Q&A

Question 51: What are the consequences if a party or witness does not participate in a live hearing or submit to cross-examination?

Answer 51: Postsecondary schools, which are required to provide for cross-examination at a live hearing, should keep in mind that, under the 2020 amendments, if a party or a witness does not submit to cross-examination, that individual's statements cannot be relied on by the decision-maker in determining whether the respondent engaged in the alleged sexual harassment.¹⁷¹

The preamble explains that even if a party is unable to participate at a hearing "due to death or post-investigation disability," the school's decision-makers may not rely on any statements from that individual in their decision-making about whether the respondent has committed sexual harassment in violation of school policy.¹⁷² As discussed in Question 37, a school has "discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability."¹⁷³

The decision-maker also may not draw any inference from a decision of a party or witness not to participate at the hearing, including not to submit to cross-examination.¹⁷⁴ This means, for example, that the decision-maker may not make any decisions about a party's credibility based on their decision not to participate in a hearing or submit to cross-examination.

Note that "police reports, medical reports and other documents and records may not be relied on to the extent they contain the statements of a party or witness who has not submitted to cross-examination."¹⁷⁵

Hearing Process - OCR Q&A

Question 52: May a decision-maker at a postsecondary school rely on non-statement evidence, such as photographs or video images, if a party or witness does not submit to cross-examination?

Answer 52: Yes. Although a decision-maker may not rely on any statement of a party or witness who does not submit to cross-examination, other relevant evidence can still be considered to determine whether the respondent is responsible for the alleged sexual harassment.¹⁷⁶ The preamble explains that the term “statements” should be interpreted using its ordinary meaning, but does not include evidence, such as a videos of the incident itself, where the party or witness has no intent to make an assertion regarding whether or not the alleged harassment occurred or discuss factual details related to the alleged harassment, or where the evidence does not contain such factual assertions by the party or witness.¹⁷⁷ Thus, the decision-maker may rely on non-statement evidence related to the alleged prohibited conduct that is in the record, such as photographs or video images showing the underlying incident.¹⁷⁸

Hearing Process - OCR Q&A

Question 53: May a decision-maker at a postsecondary school rely on statements of a party, such as texts or emails, even if the party does not submit to cross-examination?

Answer 53: It depends. The decision-maker may consider certain types of statements by a party where the statement itself is the alleged harassment, even if the party does not submit to cross-examination. For example, the decision-maker may consider a text message, email, or audio or video recording created and sent by a respondent as a form of alleged sexual harassment even if the respondent does not submit to cross-examination.¹⁷⁹ Similarly, if a complainant alleges that the respondent said, “I’ll give you a higher grade in my class if you go on a date with me,” the decision-maker may rely on the complainant’s testimony that the respondent said those words even if the respondent does not submit to cross-examination.¹⁸⁰

In these types of situations, the decision-maker is evaluating whether the statement was made or sent. In second example above, the complainant’s testimony was about the fact that the respondent made the offer, and not about what the respondent intended or whether the respondent took an additional action based on the statement, such as changing the student’s grade after a date.¹⁸¹

In contrast, evidence in which a party or witness comments on the interaction between the parties without engaging in harassment (e.g., email or text exchanges leading up to the alleged harassment or an admission, an apology, or other comment about the alleged harassment), would be considered statements that could not be considered unless the party or witness is cross-examined.¹⁸²

Hearing Process - OCR Q&A

Question 54: May a decision-maker rely on a video, text message, or other piece of evidence that includes statements by multiple parties or witnesses if some of them do not submit to cross-examination?

Answer 54: Yes. The preamble explains that in such cases, even if a party or witness in a text message, email, or video does not submit to cross-examination, the decision-maker may still rely on the statements by other people in that text message, email, or video who do submit to cross-examination.¹⁸³

Hearing Process - OCR Q&A

Question 55: May a decision-maker rely on the statements of a party or witness who submits to cross-examination, but does not answer questions posed by the decision-maker?

Answer 55: Yes. The preamble explains that cross-examination differs from questions posed by a neutral fact-finder and that if a party or witness submits to cross-examination by a party's advisor, but does not answer a question posed by the decision-maker, the decision-maker may still rely on all of that person's statements.¹⁸⁴ The preamble also explains that "the decision-maker still may not draw any inference about the party's credibility in making the responsibility determination based solely on a party's refusal to answer questions posed by the decision-maker" because [34 C.F.R. § 106.45\(b\)\(6\)\(i\)](#) states that no inference may be drawn based on the refusal to answer cross-examination or other questions.¹⁸⁵

Contact Information



Linh T. Nguyen
Associate, HMBR
ltn@hmbbr.com
312-540-4440



Debbie Osgood
Partner, HMBR
dlo@hmbbr.com
312-540-4427