

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

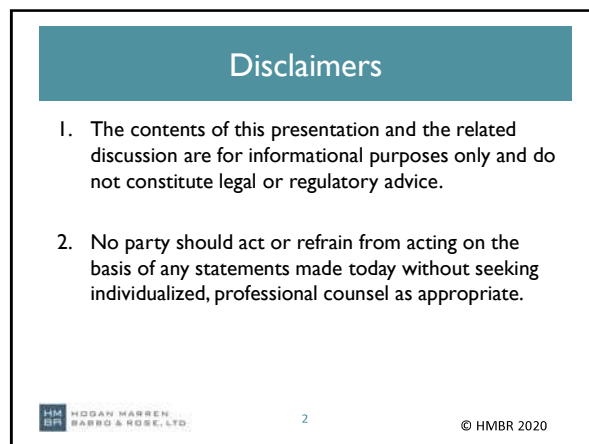


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**Title IX Sexual Harassment
Training
August 2020**

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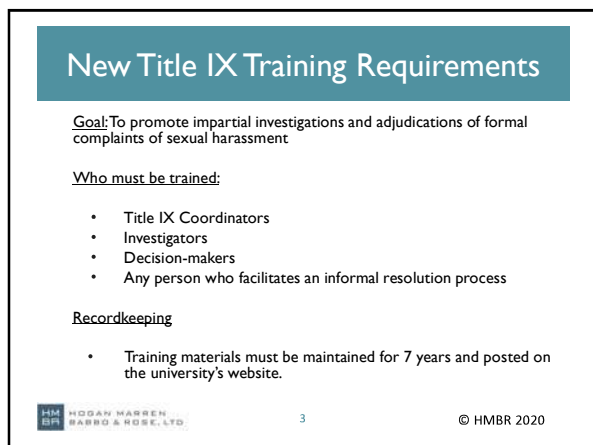
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New Title IX Training Requirements

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

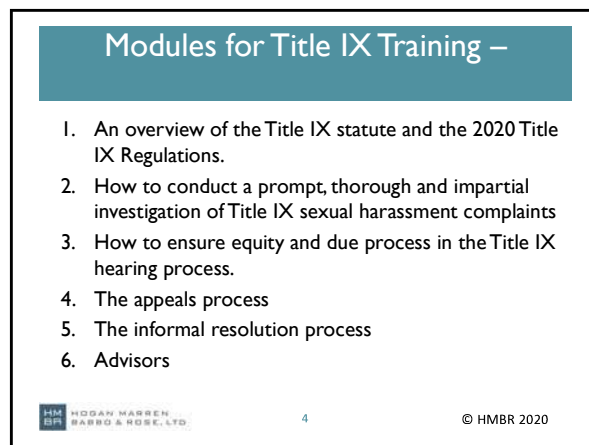
Who must be trained:

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

Recordkeeping

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

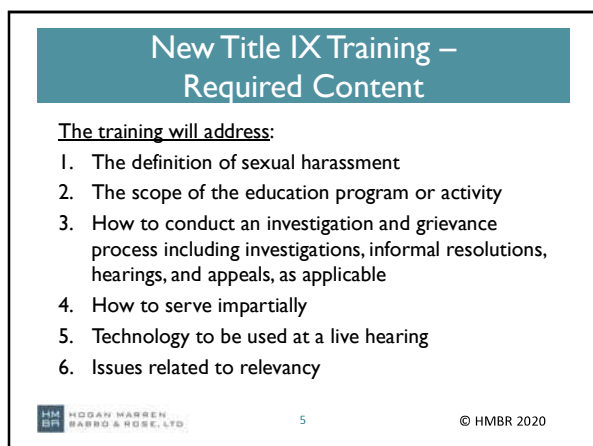
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Modules for Title IX Training –

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

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**New Title IX Training –
Required Content**

The training will address:

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

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Module One

**An Overview of Title IX and
the Final Title IX Regulations**

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Module One - Agenda

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

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Part One


The Scope of the 2020 Title IX Regulations

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What is Title IX?

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

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."



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

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2020 Title IX Regulations



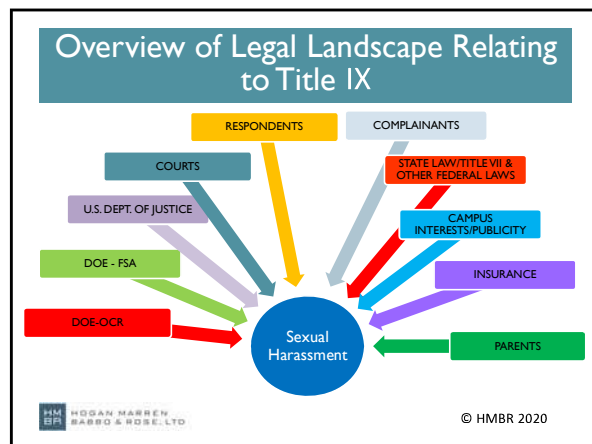
- Announced May 6, 2020
- Effective August 14, 2020
- Ongoing federal litigation
- First Title IX sexual harassment regulations; considered more legally binding than policy guidance
- Regulations are not retroactive

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Key Concepts

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

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Civil Litigation Claims

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

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Part Two

Applicable State Law Requirements

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Tennessee State Law

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

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

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Tennessee State Law

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

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Part Three

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

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Title IX Liability Standard

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

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Actual Knowledge

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

Sexual Harassment

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

Sexual Harassment – Quid Pro Quo

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

Sexual Harassment – VAWA Categories

- Sexual Assault
- Domestic Violence
- Dating 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."

Dating Violence

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

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

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Domestic Violence

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

Stalking

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

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

Sexual Harassment – Hostile Environment

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

An Educational Program or Activity

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

Against a Person in the United States

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

Deliberate Indifference

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

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Formal Complaint

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

Part Four

Roles and Responsibilities

The Players in a Title IX Investigation and Grievance Process

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

Obligation to Serve Impartially

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

The Parties

Complainant

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

Respondent

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

The Title IX Coordinator

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

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Official with Authority (OWA)

Official with Authority (OWA):

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

Not the same as a Responsible Employee:

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

Investigator

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

Informal Resolution Facilitator

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

Hearing Officer

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

Advisor

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

Appeal Officer

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

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Part Five

Supportive Measures

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Supportive Measures

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

Non-disciplinary, non-punitive individualized services

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

Offered to the Complainant and the Respondent

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Supportive Measures

Title IX Coordinator must:

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

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

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Examples of Supportive Measures

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

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Part Six

Title IX Policies and Grievance Processes

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Written Title IX Grievance Process – Basic Requirements

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

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Written Title IX Grievance Process – Basic Requirements

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

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Evaluation

Is the conduct within the scope of Title IX?

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

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Evaluation

Is the alleged misconduct within the scope of Title IX?

YES

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

NO

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

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Dismissals – Mandatory

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

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

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

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Dismissals – Permissive

Permissive – may dismiss at any time if:

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

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

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Informal Resolution

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

Informal Resolution

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

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

Specific Requirements for the Investigation

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

Specific Requirements for the Investigation

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

Hearing

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

Cross-Examination

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

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Written Determination

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

Written Determination

Determination must include:

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

Appeals

The Respondent or the Complainant may appeal:

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

Appeals

Appeals may be filed based on the following:

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

Appeal Requirements

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

Part Seven

Title IX Procedural Requirements

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Nondiscrimination Notice - Content

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

Nondiscrimination Notice – Distribution

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

Title IX Coordinator

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

Title IX Coordinator

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

Grievance Procedures

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

Retaliation

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

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Retaliation

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

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

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

Retaliation

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

Recordkeeping

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

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

Recordkeeping

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

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

Presenter's Contact Information



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