



Title IX Training
August 7 and 14, 2020

For the
Universidad de
Sagrado Corazón

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Disclaimers

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

U.S. Department of Education Title IX Training Requirements

Who must be trained:

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

Recordkeeping

- Training materials must be posted on website for 7 years.

U.S. Department of Education Title IX Training Requirements -- Content

The Title IX training

- Must not rely on sex stereotypes
- Must promote impartial investigations and adjudications of formal complaints of sexual harassment.
 - Must address: the definition of sexual harassment
 - the scope of the school's education program or activity
 - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - technology to be used at a live hearing
 - issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant,
 - issues of relevance to create an investigative report that fairly summarizes relevant evidence

Training Agenda – Day One

- Title IX Legal Landscape
- The definition of sexual harassment
- The scope of Sagrado's education programs and activities
- How to conduct an investigation and grievance process
 - Grievance Process Requirements and Principles
 - Evaluation
 - Investigations
 - Informal Resolution Processes
 - Hearings
 - Written Determinations
 - Appeals
 - Recordkeeping

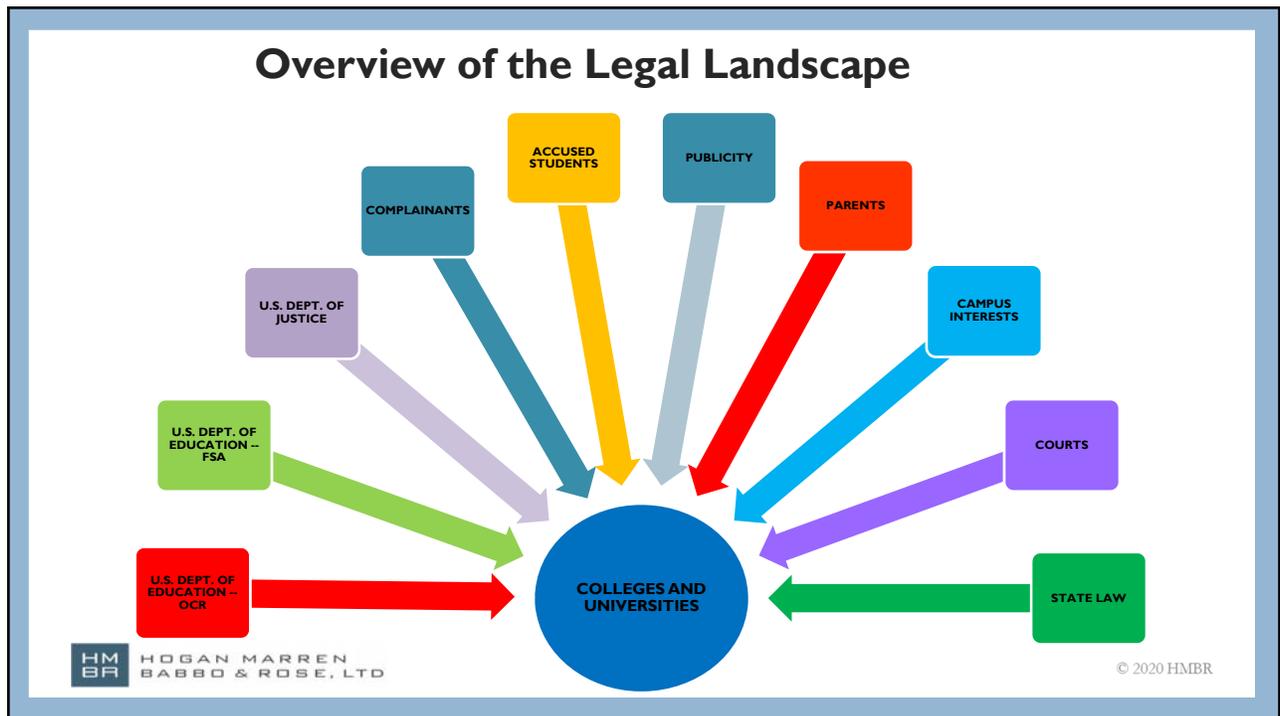
Training Agenda – Day Two

- How to create an investigative report that fairly summarizes relevant evidence
- How to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias
- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Technology to be used at a live hearing

Title IX Legal Landscape

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7



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



Supreme Court Title VII Decision



Photo by New York Times

- June 15, 2020 decision
- Title VII protects against discrimination on the basis of sexual orientation or transgender status
- Supreme Court specifically declined to address bathroom and facilities issues

Title IX of the Education Amendments of 1972

20 U.S.C. § 1681(a)

“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.”

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

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

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

Court Challenges by Complainants



- Title IX: Deliberate indifference
- Tort Law: Negligence/duty of care
- Other Claims: Breach of contract, intentional infliction of emotional distress, and more

Court Challenges by Respondents

- Title IX (gender bias)
Do the alleged facts, if true, raise a plausible inference that the university discriminated against the respondent “on the basis of sex”?
 - Erroneous outcome: flawed due to sex of a party
 - Selective enforcement: similarly situated individuals of different sexes treated differently
- Due Process
- Other Claims: Breach of contract, intentional infliction of emotional distress, defamation and more

Announcement of Final Title IX Regulations By Secretary Betsy DeVos May 6, 2020

<https://www.youtube.com/watch?v=hTb3yfMNGuA&t=782s>



Implementation Date

- August 14, 2020
- Litigation filed
- Deadline for Clery Act Reports extended to end of the year
- Regulations are not retroactive



<p>Liability Standard: Deliberate Indifference 34 C.F.R. § 106.44(a) and 106.44(b)(2)</p>	<p>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 promptly in a manner that is not deliberately indifferent. A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.</p>
<p>Updated Procedural Requirements 34 C.F.R. § 106.8 and 106.71</p>	<ul style="list-style-type: none"> • Title IX Coordinator • Notice of Nondiscrimination • Grievance Procedures • Retaliation
<p>New Requirements for “Sexual Harassment” 34 C.F.R. § 106.45</p>	<ul style="list-style-type: none"> • Specific new requirements for sexual harassment as defined by regulations: • Grievance process • Investigation and Adjudication
<p>Outside the Scope of Title IX</p>	<ul style="list-style-type: none"> • Title IX regulations and requirements do not apply • Schools have discretion as to how they handle these matters

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NEW TITLE IX REGULATIONS – KEY CONCEPTS

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school's Response to Sexual Harassment
34 C.F.R. §§ 106.44(a), 106.30

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 promptly in a manner that is not deliberately indifferent.

A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. This section further states that a school's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

In response to a formal complaint, a school must follow a grievance process that complies with § 106.45. With or without a formal complaint, a school must comply with § 106.44(a).

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NEW TITLE IX REGULATIONS – SCHOOL'S RESPONSE AND THE DELIBERATE INDIFFERENCE STANDARD

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<p>Actual Knowledge 34 C.F.R. § 106.30(a)</p>	<p>“Actual knowledge” defined as notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the school with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the school.</p> <p>“Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).</p>	<p>NEW TITLE IX REGULATIONS – SCHOOL’S RESPONSE AND THE DELIBERATE INDIFFERENCE STANDARD</p> <p>HMBR HOGAN MARREN BABBO & ROSE, LTD</p>
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<p>Nondiscrimination Notice 34 C.F.R. § 106.8(b)</p>	<p>Each school must notify persons entitled to a notification under Section 106.8(a) that:</p> <ol style="list-style-type: none"> 1. The school does not discriminate on the basis of sex in the education program or activity that it operates; 2. The school is required by Title IX and this part not to discriminate in such a manner; 3. The requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment; and 4. Inquiries about the application of Title IX and this part to such school may be referred to the school’s Title IX Coordinator, to the OCR Assistant Secretary, or both. <p>Each school must prominently display the contact information required to be listed for the Title IX Coordinator under Section 106.8(a) and the nondiscrimination policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under Section 106.8(a). The section further states that a school must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX or this part of the Title IX regulations.</p>	<p>NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS</p> <p>HMBR HOGAN MARREN BABBO & ROSE, LTD</p>
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<p>Title IX Coordinator 34 C.F.R. §§ 106.8(a)</p>	<p>Each school must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part of the Title IX regulations, and that the employee must be referred to as the “Title IX Coordinator.” The school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), 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. Such 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.</p> <p>The Title IX Coordinator(s) cannot be the same as the decision-maker(s) in formal complaints of sexual harassment. This section also states that the Title IX Coordinator(s) are responsible for effective implementation of any remedies.</p> <p>The Title IX Coordinator(s) cannot be the same as the decision-maker(s) in appeals of a determination regarding responsibility or from a school’s dismissal of a formal complaint or any allegations therein.</p>	<div style="border: 1px solid #ccc; width: 100px; height: 100px; margin: 0 auto; background-color: #add8e6;"></div> <p>NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS</p> <div style="text-align: left; margin-top: 20px;">  HOGAN MARREN BABBO & ROSE, LTD </div>
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Retaliation
34 C.F.R. §
106.71

No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

The school must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

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 prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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NEW TITLE IX
REGULATIONS –
UPDATED GENERAL
PROCEDURAL
REQUIREMENTS

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The Definition of Sexual Harassment

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Section 106.30 -- Sexual Harassment

Means conduct on the basis of sex that satisfies one or more of the following:

- 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 or
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity or
- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

Sexual Assault	“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 uniform crime reporting system of the Federal Bureau of Investigation (FBI). The FBI uniform crime reporting system 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 uniform crime reporting system 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	“Domestic 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.
Domestic Violence	“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— A. fear for his or her safety or the safety of others; or B. suffer substantial emotional distress.

**NEW TITLE IX
REGULATIONS – KEY
DEFINITIONS**

Related requirements

- Actual notice (knowledge) – allegation made to Title IX Coordinator or person with authority to take corrective measures
- Must be against a person in the U.S.
- In an education program or activity

The Scope of Sagrado's Education Program and Activities

Education Program or Activity includes:

- 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 postsecondary institution.

How to Conduct a Title IX Investigation and Grievance Process

The Players

- “Complainant” -- an individual who is alleged to be the victim of conduct that could constitute sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
- “Respondent” -- an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. School may dismiss a formal complaint if the respondent is no longer enrolled or employed by the school.
- Employees – Title IX requirements apply (even to at-will employees)
- Title IX Coordinator
 - Cannot be decision-maker
 - Responsible for coordinating overall Title IX compliance
 - Responsible for implementing “effective” supportive measures and remedies
- “Official with authority to take corrective action” and “responsible employees”
- Investigator(s)
- Decision-maker(s) – determinations of responsibility; appeals
- Hearing officers or hearing panels – must make determinations of relevancy and keep order over hearing
- Advisors for cross-examination at hearings



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Sagrado Policy – Title IX Coordinator

- Initiates and ensures that all the complaints are investigated, adjudicated and resolved.
- Evaluates requests for confidentiality.
- Receives claims and formal complaints.
- Requests an investigation upon receipt of a formal complaint.
- May request an investigation without a formal complaint if and when she/he believes that an investigation is appropriate to address the allegations.
- Communicates with the Complainant and/or the Respondent to discuss the availability of supportive measures.
- Serves as the point of contact for the affected student (Complainant and/or Respondent) to ensure that the supportive measures are effectively implemented.
- Explains to the Victim and/or Complainant the process for filing a formal complaint.
- Determines if there is an imminent threat that warrants an emergency action.
- Determines if the complaint should be dismissed.
- Sends the necessary notifications to the Complainant, the Respondent and other interested parties.
- Provides Advisors for the hearing if the Complainant or the Respondent does not have one.
- Offers the Complainant and the Respondent the possibility of an informal resolution process.
- Retains all the records.

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Sagrado Policy - Investigator

- The Investigator is the person that conducts the investigation once a formal complaint is filed.
- Conducts interviews of the complainant, respondent, witnesses and other interested parties.
- Collects evidence such as, but not limited to, statements, documents, text messages, chats, video, audio and photographs.
- Prior to completion of the investigative report, sends to the Complainant, the Respondents and the Advisors the evidence collected so that they can inspect, review and provide comments; the parties must have at least 10 days to submit a written response.
- Prepares a written investigative report fairly summarizing the relevant evidence.
- Sends the investigative report to the Complainant, Respondent and the Advisors prior to the hearing.

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Sagrado Policy: Hearing Officer

- The Hearing Officer is the person that conducts the hearing once the investigation is completed and the Investigator has delivered his/her investigative report and after the parties have had an opportunity to respond.
- Determines if the complaint should be dismissed.
- Presides over the hearing (in person or using synchronous virtual methods).
- Determines if the evidence is relevant, including 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.
- Sends the written determination simultaneously to the Complainant and the Respondent.

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Sagrado Policy: Advisor

- The Advisor is the person that assists the Complainant and the Respondent during the hearing.
- The Advisor must be an adult capable of understanding the purpose and scope of cross-examination.
- The Complainant and the Respondent may use the Advisor of their choice or Sagrado will provide a trained Advisor who may or not be an attorney.
- The Advisor can ask questions to the opposing party and witnesses.

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Sagrado Policy: Appeal Officer

The Appeal Officer is the person that conducts the appeal if either party files an appeal from the Hearing Officer's resolution and adjudication report. The Complainant or Respondent has 7 calendar days from the date in the resolution and adjudication report to file an appeal from the Hearing Officer's written determination.

- If an appeal is filed, notifies in writing to the appealed party.
- Explains the appeal process to the Complainant and the Respondent.
- Provides a reasonable time not to exceed 10 calendar days 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 resolution and adjudication report.
- Prepares a written appeal resolution and adjudication.
- Sends the appeal resolution and adjudication to the Complainant and the Respondent.

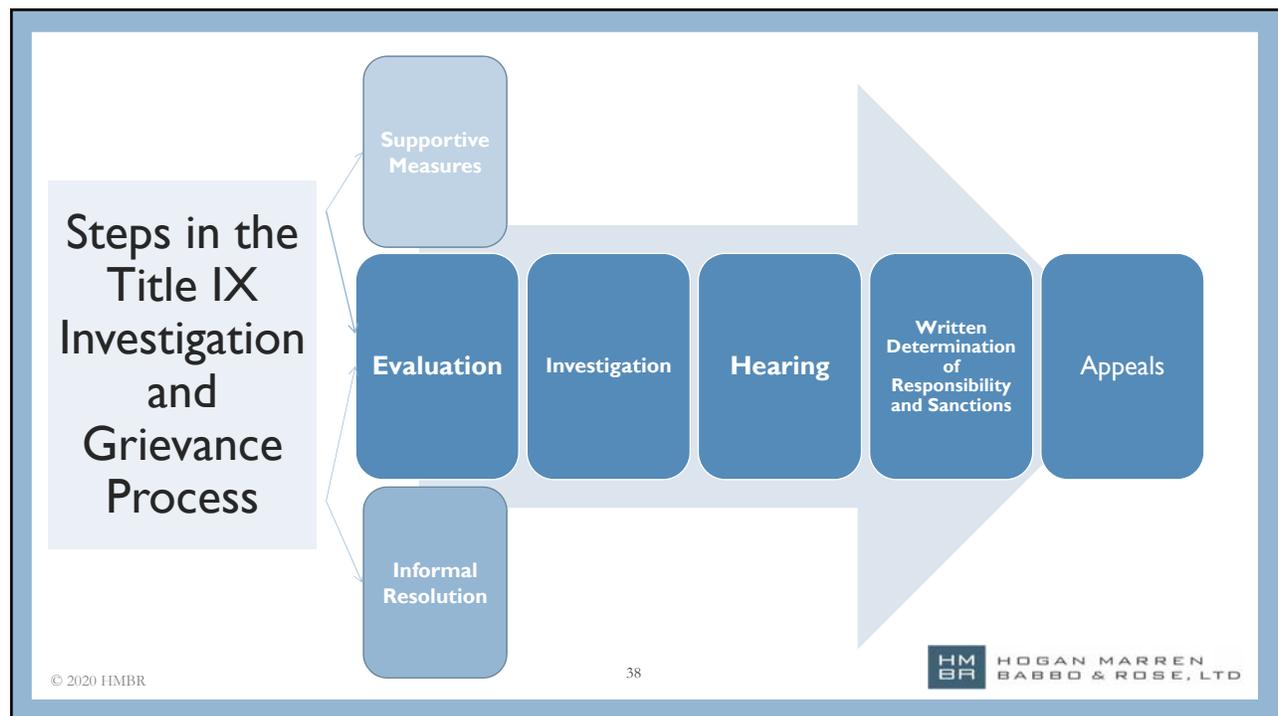
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Sagrado Policy: Facilitator

The Facilitator is the person that conducts the informal resolution process if and when the Complainant and the Respondent voluntarily consent to participate.

- Receives from the Coordinator notice that the Complainant and the Respondent voluntarily agree to the informal resolution process.
- 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.
- Conducts the informal resolution process with the Complainant and the Respondent.
- Prepares a written informal resolution agreement.

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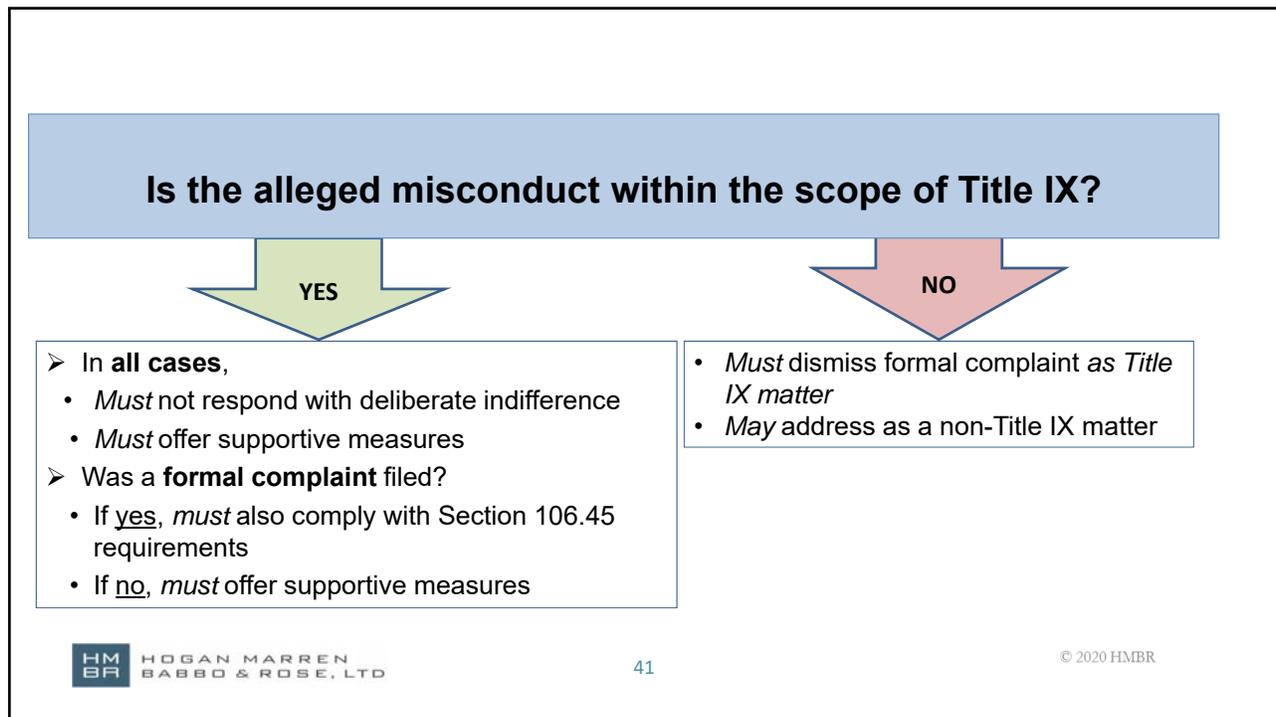


Evaluation

Evaluation

1. Is the conduct within the scope of Title IX?
 - If no, Title IX regulations do not apply.
 - If yes, must not respond in a manner that is deliberately indifferent – by providing supportive measures.

2. For conduct within the scope of Title IX, was a formal complaint filed?
 - If no, must still provide supportive measures.
 - If yes, must also follow specific requirements for the sexual harassment grievance process.



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*

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42

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Dismissals

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

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

Permissive – may dismiss at any time during the investigation or hearing 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.

Upon a dismissal, must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

Formal Complaint

- Formal complaints must be signed and filed by a complainant who is participating (or attempting to participate) in the educational or employment program or activity
- May also be filed by Title IX Coordinator
- school may dismiss complaint against a respondent who is no enrolled or employed
- Make clear if and how sexual misconduct that occurs outside the scope of Title IX will be addressed (e.g., codes of conduct)

Supportive Measures

Must provide supportive measures – without or without a formal complaint of sexual harassment

- Required when the sexual harassment is within the scope of Title IX
- Non-disciplinary, non-punitive individualized services
- Designed to restore or preserve equal access without unreasonably burdening the other party
- To be provided to both parties
- Use interactive process to determine supportive measures – consider “wishes” of the complainant
- Document decisions relating to supportive measures
- Offer internal grievance process for challenging adequacy or burden of supportive measures

Complaint Evaluation

- Is it a formal complaint?
- Getting preliminary information – how much is enough to go forward to investigation?
- What are the allegations?
 - Is this a Title IX Matter?
 - Does the complaint state a violation of University policy?
- How to handle confidentiality requests?
- How to handle anonymous reporting issues?



Hypothetical Scenario Discussion of Complaint Evaluation



Does this complaint trigger any obligation for the school to respond?

1. Under the 2020 Title IX regulations?
2. If it is not a complaint, what elements are missing?
3. What should the school do in response to the report?
4. How should the school respond if the report is anonymous?

Investigation

“Basic Requirements” in the Grievance Process

- Treat complainants and respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Training for Title IX Coordinator(s), investigator(s), and decision-maker(s), and informal resolution facilitator(s)
- Presumption that the respondent is not responsible
- Reasonably prompt timeframes, 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 (newly mandatory)
- Supportive measures available to both parties
- Restrictions relating to privilege

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49

Specific Requirements Relating to the Investigation

- Initial and continuing written notice to parties
- Burdens of proof and of gathering evidence rest on school
- Equal opportunity for parties to present witnesses, including fact and expert witnesses
- No gag orders
- No single-investigator model
- Advisor of choice
- Written notice of hearings, interviews and other meetings
- Opportunity to inspect and review evidence
- Draft investigation report given to the parties for review and response

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Informal Resolution

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Informal Resolution, 34 C.F.R. § 106.45(b)(9)

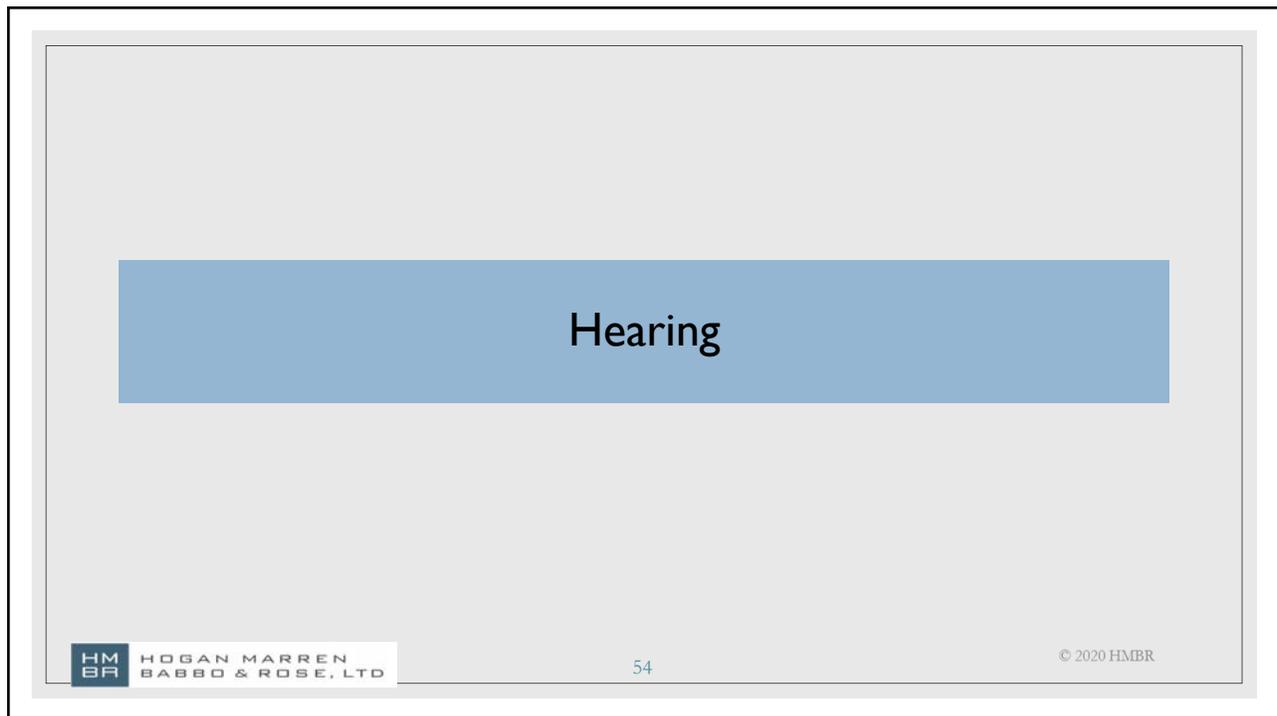
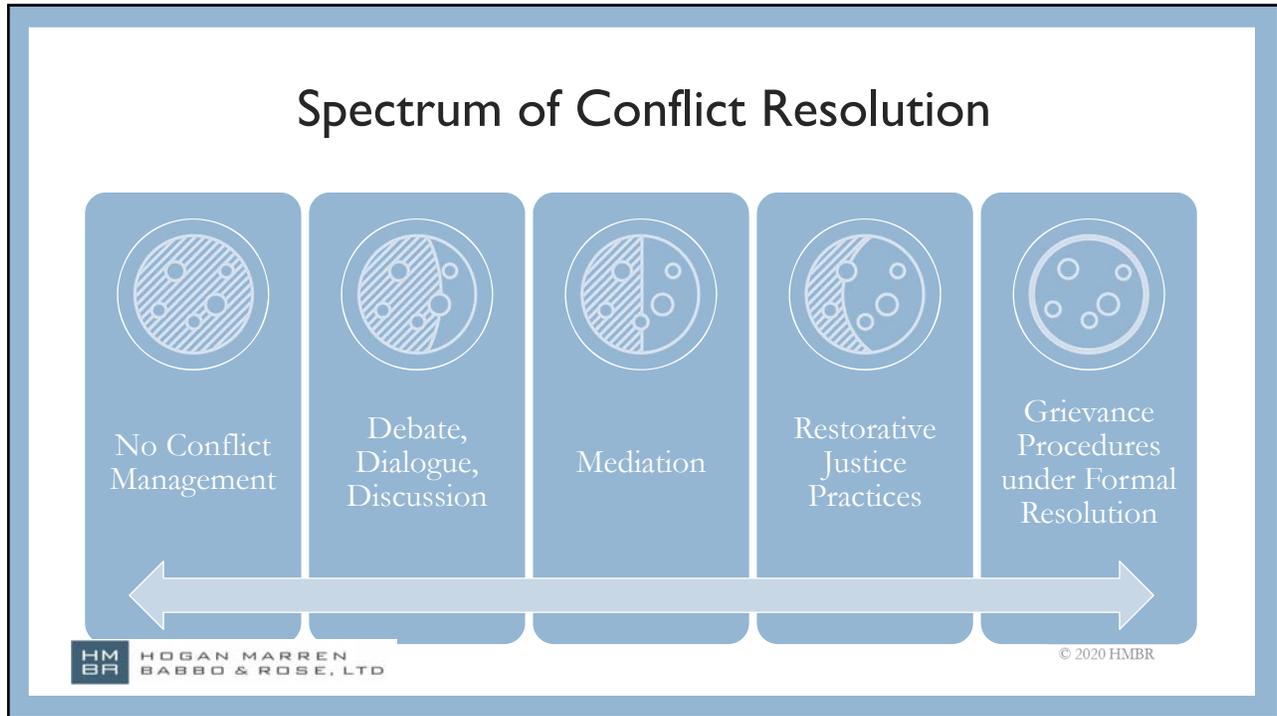
- Not available for allegations that an employee sexually harassed a student
- May not require the parties to participate in an informal resolution process.
- May not offer an informal resolution process unless a formal complaint is filed.
- May facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, provided that the school –
 - Provides to the parties a written notice disclosing: (1) the allegations, (2) 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, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and (3) any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
 - Obtains the parties' voluntary, written consent to the informal resolution process

NEW TITLE IX REGULATIONS – INFORMAL RESOLUTION

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Hearing Requirements

- Live hearing with opportunity for cross-examination required
- To be conducted by the Decision-maker, who is either the hearing officer or multiple hearing officers (a hearing panel)
- Decision-maker cannot be the same as the Title IX Coordinator(s) or investigator(s)
- Must provide access to evidence during hearing
- May be held in the same geographic location or virtually
- Location to be determined by school
- Technology must allow the parties (and their advisors) to see and hear one another and any witnesses
- Recording or transcript of hearing required

Hearing Requirements (cont.)

Live hearing with opportunity for cross-examination required

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

Written Determination

Written Determination

- Determination must include:
 - Allegations potentially constituting sexual harassment
 - Procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - 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 school imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant; and
 - Appeal procedures and permissible bases for the complainant and respondent to appeal.
- 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.

Appeals

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Appeals

Mandatory appeals from a determination regarding responsibility and from a school's dismissal of a formal complaint or any allegations

Three bases:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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Appeals

Requirements:

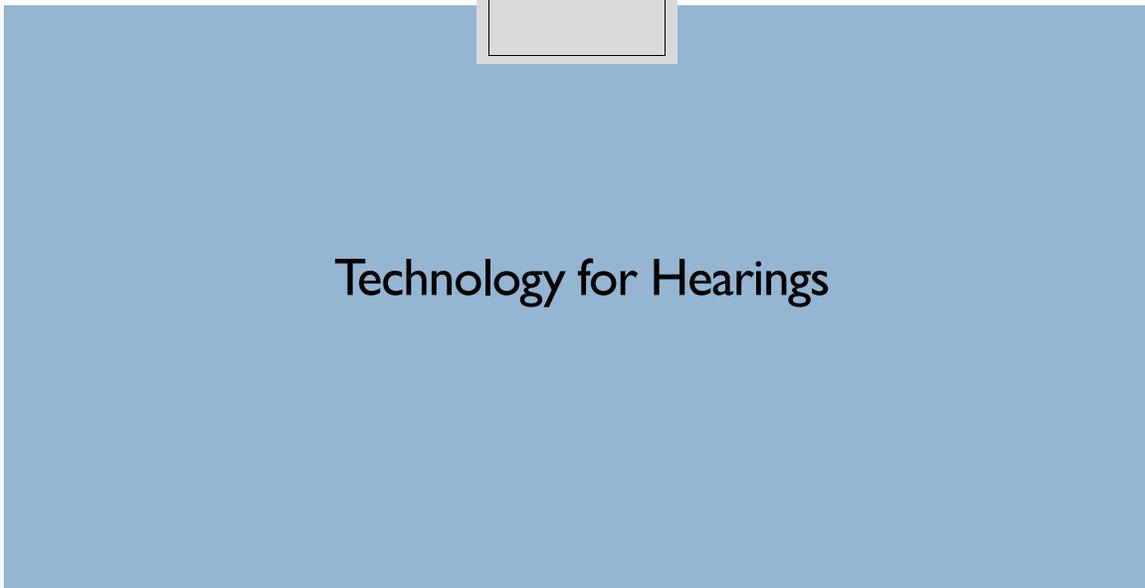
- Notify the other party in writing when an appeal is filed
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
- Give both parties a reasonable, 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

Recordkeeping

<p>Recordkeeping 34 C.F.R. § 106.45(b)(10)</p>	<p>A school must maintain for a period of seven years records of –</p> <ul style="list-style-type: none"> (A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity; (B) Any appeal and the result therefrom; (C) Any informal resolution and the result therefrom; and (D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A school must make these training materials publicly available on its website, or if the school does not maintain a website the school must make these materials available upon request for inspection by members of the public. <p>For each response required under § 106.44, a school must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the school must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school's education program or activity. If a school does not provide a complainant with supportive measures, then the school must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the school in the future from providing additional explanations or detailing additional measures taken.</p>	<h2 style="text-align: center;">RECORDKEEPING</h2> <p style="text-align: right;">© 2020 HMBR</p>
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Training Agenda – Day Two

- How to create an investigative report that fairly summarizes relevant evidence
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of relevance of questions and evidence
 - including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Technology to be used at a live hearing



Technology for Hearings

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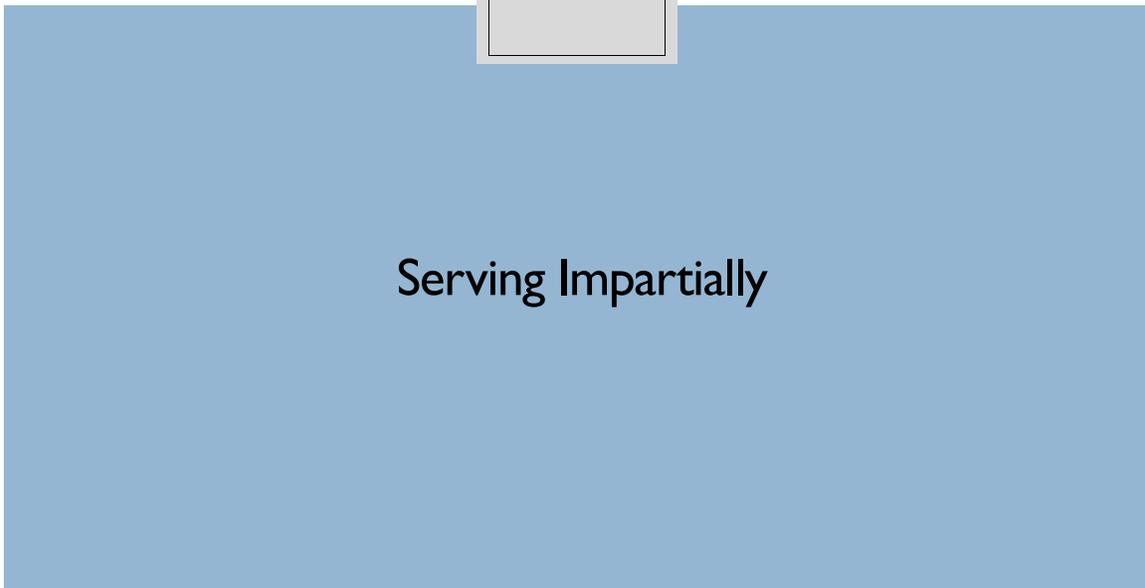
Technology for Hearings

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

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Serving Impartially

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What's My Role?

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



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How to Serve Impartially

- Avoid any 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

Relevancy of the Evidence

<p>Burden of Proof and Burden of Gathering Evidence 34 C.F.R. § 106.45(b)(5)(i)</p>	<p>The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties.</p>	<p style="text-align: center;">EVIDENTIARY CONCEPTS</p> <p style="text-align: center;">© 2020 HMBR</p> <p style="text-align: center;">HMBR HOGAN MARREN BABBO & ROSE, LTD</p>
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71

<p>Standard of Evidence 34 C.F.R. § 106.45(b)(1)(vii)</p>	<p>Grievance processes must:</p> <ul style="list-style-type: none"> • List the standard of evidence to be used to determine responsibility (preponderance of the evidence or the clear and convincing) • Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty • Apply the same standard of evidence to all formal complaints of sexual harassment 	<p style="text-align: center;">EVIDENTIARY CONCEPTS</p> <p style="text-align: center;">© 2020 HMBR</p> <p style="text-align: center;">HMBR HOGAN MARREN BABBO & ROSE, LTD</p>
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72

Preponderance of the Evidence



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Access to
Evidence
Section
§
106.45(b)
(5)(vi)

- Throughout the process, must provide both parties an equal opportunity to inspect and review any evidence that is directly related to the allegations, including:
 - The evidence upon which the school does not intend to rely in reaching a determination and
 - Inculpatory or exculpatory evidence
- Prior to completion of the investigative report, must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and give the parties at least 10 days to submit a written response
- During hearing, must make all such evidence subject to the parties' inspection and review available

74

EVIDENTIARY CONCEPTS

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<p>Presumption for Respondent 34 C.F.R. § 106.45(b) (1)(iv)</p>	<ul style="list-style-type: none"> • Grievance processes for formal complaints must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. • Statement must be included in the notice of the allegation(s). 	<div data-bbox="1096 514 1372 598" style="text-align: center;"> <h2>EVIDENTIARY CONCEPTS</h2> </div> <div data-bbox="1079 871 1404 934" style="text-align: center;"> <small>© 2020 HMBR</small>  HOGAN MARREN BABBO & ROSE, LTD </div>
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75

<p>Privilege 34 C.F.R. § 106.45(b)(1) (x)</p>	<ul style="list-style-type: none"> • Grievance processes must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. • Examples include the attorney-client and the doctor-patient relationships 	<div data-bbox="1096 1428 1372 1512" style="text-align: center;"> <h2>EVIDENTIARY CONCEPTS</h2> </div> <div data-bbox="1079 1774 1404 1837" style="text-align: center;"> <small>© 2020 HMBR</small>  HOGAN MARREN BABBO & ROSE, LTD </div>
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76

Issues of Relevancy

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

Sexual Predisposition and Prior Sexual Behavior

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

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

Investigation and Investigation Report

Reminder!

Upon receipt of actual notice of alleged sexual harassment, the Title IX Coordinator must – with or without the filing of a formal complaint -- promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures and explain to the complainant the process for filing a formal complaint.

Deciding Whether to Investigate

Mandatory Dismissals: the school must dismiss the complaint if the alleged conduct:

- Would not constitute “sexual harassment” as defined even if proved,
- Did not occur in the school’s education program or activity, or
- Did not occur against a person in the United States
- The complainant was not employed or enrolled or an applicant for employment or enrollment at the time the complaint was filed

Note: All dismissals can be appealed.

Deciding Whether to Investigate

Permissive Dismissals: the school may dismiss the complaint at any time during the investigation and hearing process if:

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

Note: All dismissals can be appealed.

Hypothetical Scenario

Discussion of Interviews and Documentation



1. What information should be included in the introduction to the interview?
2. Was the format of the questions appropriate?
3. Was it appropriate to ask about the complainant's prior sexual history?

Investigation Plan and Strategy

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



Confidentiality Requests



Assess!

- Risk to the student and broader community
- Provide a safe and non-discriminatory environment for all students

Factors:

- Seriousness of the alleged actions
- Age of the complainant
- Other complaints against same person
- Rights of the accused to receive information

Collecting and Evaluating Evidence



Role of Investigator

- Conduct comprehensive and appropriate interview(s) of the complainant and respondent
- Identify witnesses, and then conduct appropriate interviews with relevant witnesses
- Gather any available relevant physical or documentary evidence
- Prepare draft investigation report that “fairly summarizes” the evidence collected
- Receive, review and potentially conduct additional investigation into feedback received from the parties on a draft investigation report

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Investigation Plan and Strategy

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



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Collecting Evidence - Testimonial Evidence

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

Collecting Evidence - Physical Evidence

- 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

Documentation

Maintain Detailed Records

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

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?

Interview 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
Examples	<ul style="list-style-type: none"> • Tell me about ... • Can you explain ... • 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 ...

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ASSESSING CREDIBILITY

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94



How to determine if a person is credible?

EEOC says
to consider:



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

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Investigative Report – For Discussion



- a. Does the report fairly summarize the evidence?
- b. List the inculpatory evidence
- c. List the inculpatory evidence
- d. Rank the evidence in terms of reliability (from most reliable to least reliable)

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Evaluating the Evidence - Bulls Eye

Physical Evidence of Sexual Assault

Testimony of the Parties

Texts between the Parties

Text from friend of complainant to another friend about the incident

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

Statements regarding Either Party's Good Character

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Evaluating the Evidence

Evidence supporting the complainant

Evidence supporting the respondent

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

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Hearing – For Discussion



- What are the **relevant** questions?
 - To the Investigator?
 - To the complainant?
 - To the respondent?
 - To each of the witnesses?
- Is there any information missing from the report?
- Is the tone of the investigation report appropriate?
- Is the report clearly organized?

Hypothetical Scenario Discussion of Written Determination



- What is your conclusion as to whether the preponderance of the evidence supports that the respondent violated the University policy?
- What is your conclusion based upon?

Questions and Answers



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Presenter's Contact Information



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- Title IX Compliance Services
 - External Investigator
 - Hearing Officer
 - Appeal Decision-maker
 - Policies and procedures review
 - Compliance assessments and recommendations
 - Training
 - General Title IX advice and consultation
- 25 years at OCR, National Enforcement Director

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102

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