

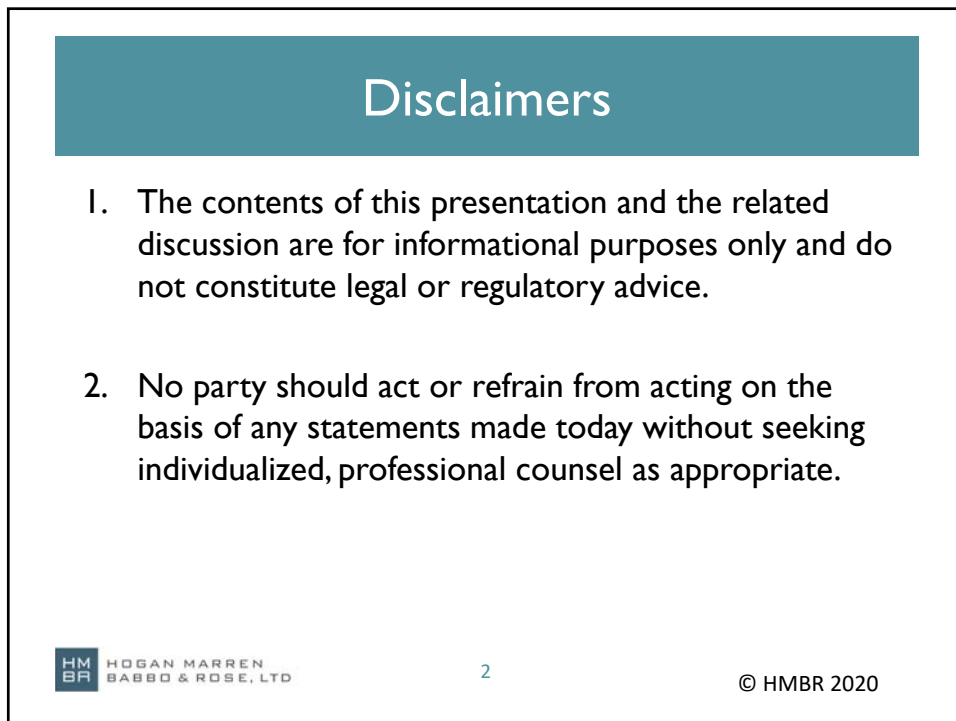
A presentation slide with a background of overlapping colorful circles in shades of blue, green, yellow, orange, and red. In the top left corner, there is a logo consisting of the letters 'HM' above 'BR' in a dark square, followed by the text 'HOGAN MARREN BABBO & ROSE, LTD'. The main text is centered in a white box with a thin black border. At the bottom right of the slide, there is a small copyright notice '© HMBR 2020'.

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

**Title IX Sexual Harassment
Training
August 20, 2020**

Presenter:
Debbie Osgood
Partner
Hogan Marren Babbo & Rose, Ltd.
dlo@hmb.com
312-540-4427

© HMBR 2020

A presentation slide with a white background. At the top, there is a teal-colored horizontal bar with the word 'Disclaimers' in white, sans-serif font. Below this bar, there are two numbered list items. At the bottom left, there is a logo with 'HM' above 'BR' in a dark square, followed by 'HOGAN MARREN BABBO & ROSE, LTD'. In the bottom center, there is a small number '2'. At the bottom right, there is a copyright notice '© HMBR 2020'.

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.

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

2

© HMBR 2020

New Title IX Training Requirements

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

Who must be trained:

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



Recordkeeping

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


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

Agenda


- I. The Title IX legal landscape
- II. Title IX procedural requirements
- III. Obligation to respond to sexual harassment
 - A. Roles and responsibilities
 - B. Responding to misconduct within the scope of Title IX
 - C. The Key Six Steps (from the beginning to the end of the grievance process)
 - 1. Evaluation
 - 2. Supportive measures
 - 3. Informal resolution
 - 4. Investigation
 - 5. Hearing
 - 6. Appeal

 HOGAN MARREN
BABCO & ROSE, LTD

5

© HMBR 2020

I. The Title IX Legal Landscape

 HOGAN MARREN
BABCO & ROSE, LTD

6

© HMBR 2020

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)




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

Key Concepts

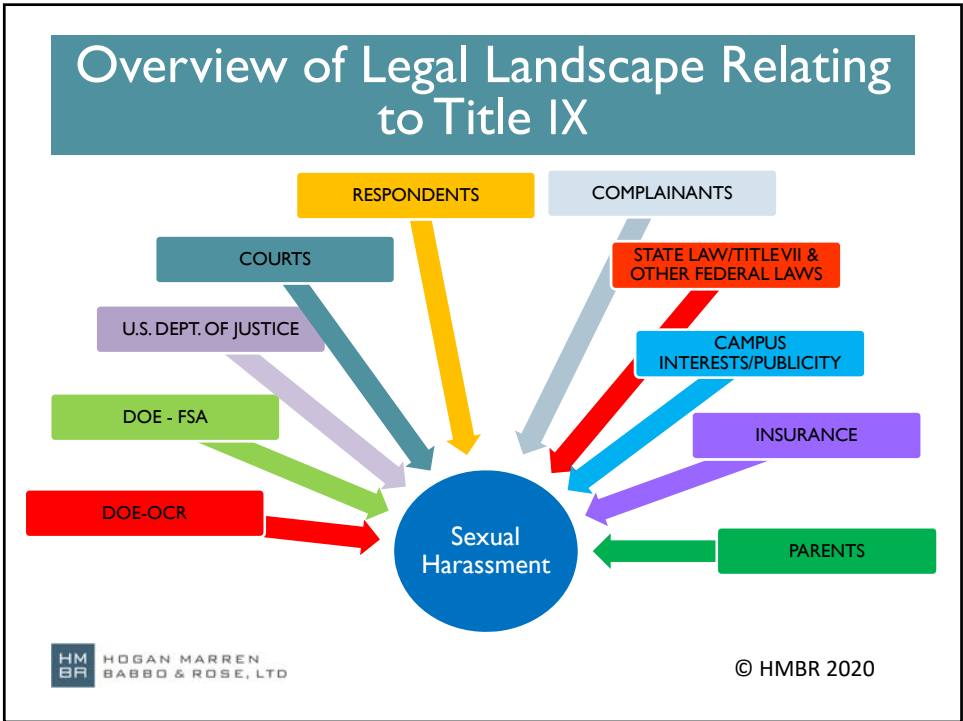
- Deliberate indifference
- Updated procedural requirements – generally for sex discrimination, and specifically for sexual harassment
- Revised scope of Title IX sexual harassment
- Explicit discretion to address sexual misconduct outside the scope of Title IX sexual harassment



HM BR HOGAN MARREN
BABBO & ROSE, LTD


9

© HMBR 2020



Civil Litigation Claims


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

 HOGAN MARREN
BABCO & ROSE, LTD

11

© HMBR 2020

II. Title IX Procedural Requirements

 HOGAN MARREN
BABCO & ROSE, LTD

12

© HMBR 2020

Title IX Procedural Requirements

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



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

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

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

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.

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



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



Standards of Evidence



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.



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

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



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



g, or judicial proceeding.

© HMBR 2020

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



24

© HMBR 2020


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

III. Obligation to Respond to Sexual Harassment

A. Roles and Responsibilities


 HOGAN MARREN
BABCO & ROSE, LTD


27

© HMBR 2020

The Players in a Title IX 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



 HOGAN MARREN
BABCO & ROSE, LTD

28

© HMBR 2020

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.

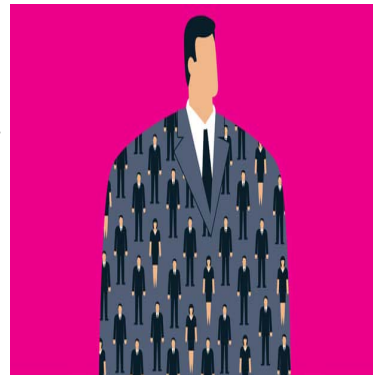
Official with Authority (OWA)

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.



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

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

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

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

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 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

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



B. Responding to Misconduct within the Scope of Title IX

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**.



HM BR HOGAN MARREN
BABBO & ROSE, LTD

39

© HMBR 2020

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


HM BR HOGAN MARREN
BABBO & ROSE, LTD

40

© HMBR 2020

Sexual Harassment

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




HM HOGAN MARREN
BR BABCO & ROSE, LTD

41

© HMBR 2020

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




HM HOGAN MARREN
BR BABCO & ROSE, LTD

42

© HMBR 2020

Sexual Harassment – VAWA Categories

Sexual Assault	Dating Violence
Domestic Violence	Stalking




HOGAN MARREN
BABBO & ROSE, LTD

43

© HMBR 2020

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.”



HOGAN MARREN
BABBO & ROSE, LTD

44

© HMBR 2020

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.

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

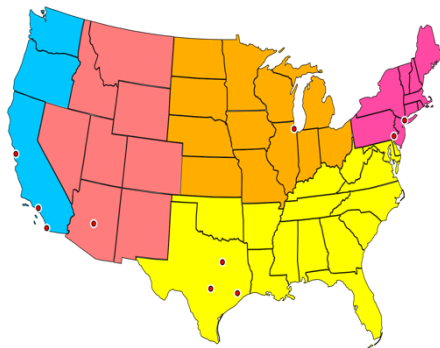


An Educational Program or Activity

- Locations, events, or circumstances over which the 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



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

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

Formal Complaint

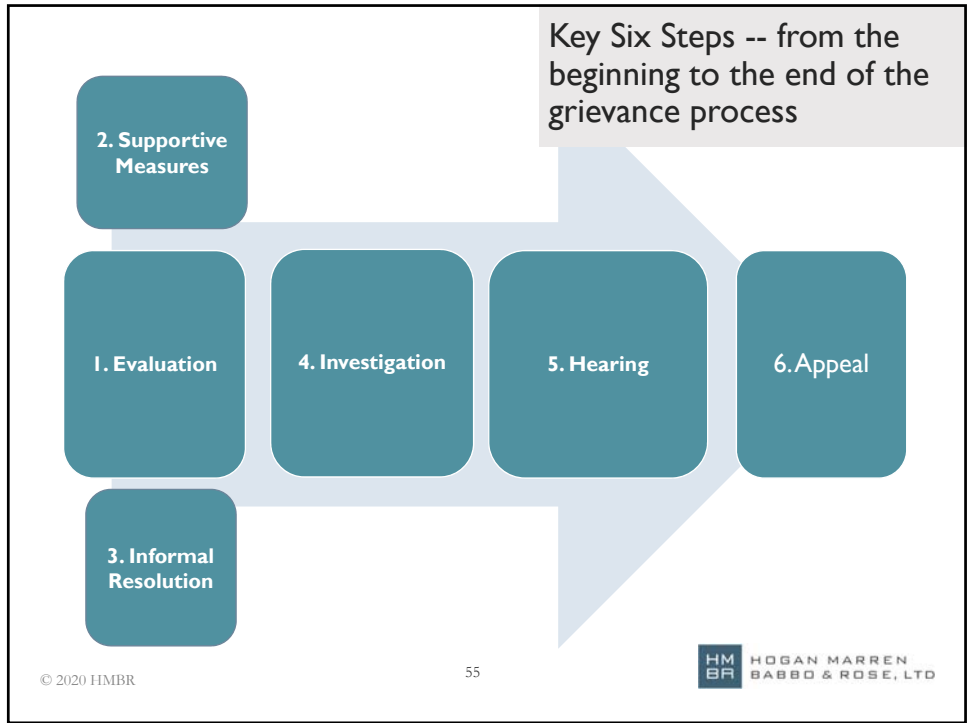


- Formal complaints must be signed and filed by a Complainant who is enrolled or employed (or an applicant)
- May also be filed by Title IX Coordinator
- A school may dismiss complaint against a Respondent who is no enrolled or employed

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.

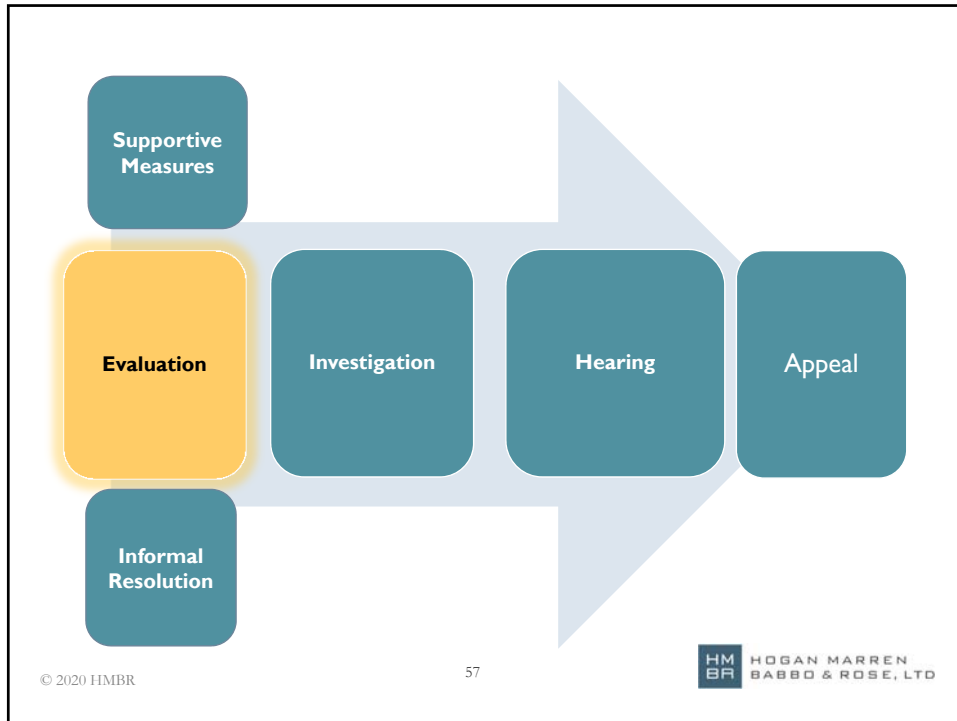
C. The Key Six Steps (from the beginning to the end in the grievance process)



Step 1

Evaluation

HMBR HOGAN MARREN BABBO & ROSE, LTD 56 © HMBR 2020



Evaluation – Players

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

HMBR HOGAN MARREN BABBO & ROSE, LTD 58 © HMBR 2020

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.

HM
BR

HOGAN MARREN
BABCO & ROSE, LTD

59

© HMBR 2020

Evaluation

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 Title IX grievance requirements

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

HM
BR

HOGAN MARREN
BABCO & ROSE, LTD

60

© HMBR 2020

30

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

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.

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


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

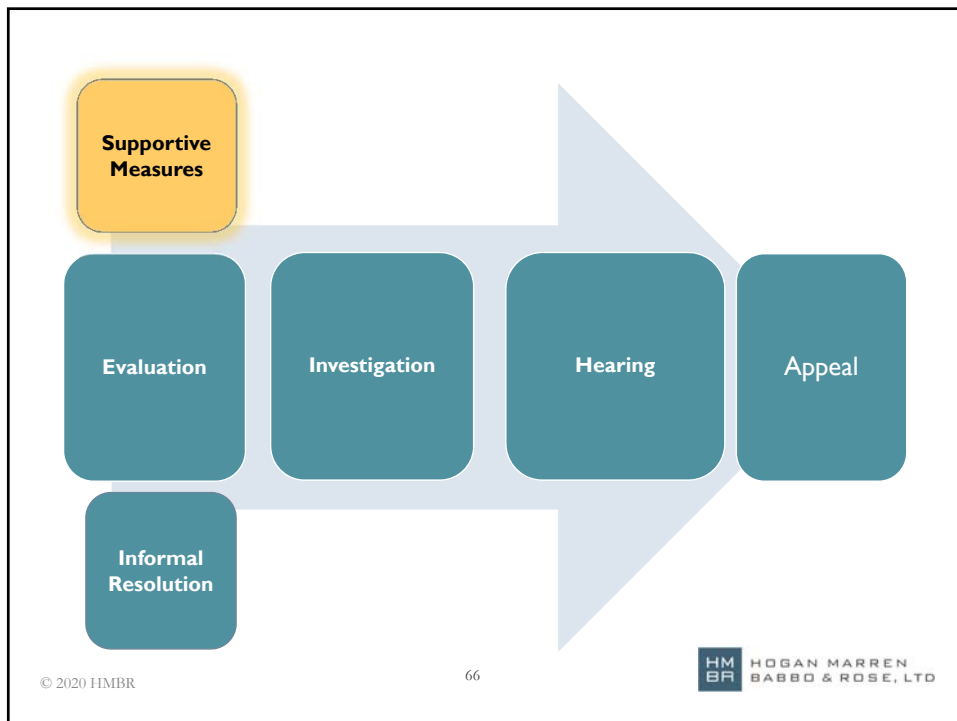
Step 3

Supportive Measures

 HOGAN MARREN
BABBO & ROSE, LTD

65

© HMBR 2020



Supportive Measures -- Players



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

 HOGAN MARREN
BABCO & ROSE, LTD

67


© HMBR 2020

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

 HOGAN MARREN
BABCO & ROSE, LTD

68

© HMBR 2020

Supportive Measures

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.

The school 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.

BR BABBO & ROSE, LTD 69 © HMBR 2020

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

HM HOGAN MARREN
BR BABBO & ROSE, LTD 70 © HMBR 2020

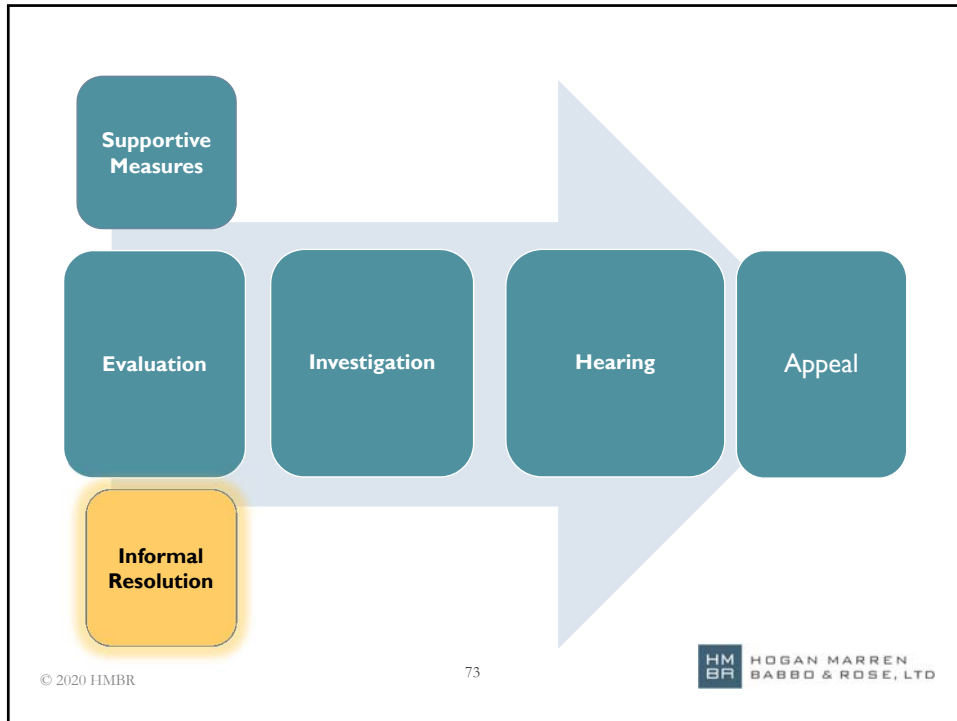
Supportive Measures -- Recordkeeping

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

Step 3

Informal Resolution



Informal Resolution – Players

- Title IX Coordinator
- Informal Resolution Facilitator
- The Parties

A photograph showing two men sitting at a table. The man on the left is looking at a laptop screen. The man on the right is gesturing with his hand while talking to the other man. They appear to be in a meeting or discussion.

HMBR HOGAN MARREN BABBO & ROSE, LTD 74 © HMBR 2020

Informal Resolution


- Not available for allegations that an employee sexually harassed a student
- Available at any time after filing of a formal complaint and before reaching determination of responsibility
- May not be required by the school
- 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 – 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

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


 HOGAN MARREN
BABCO & ROSE, LTD

77

© HMBR 2020

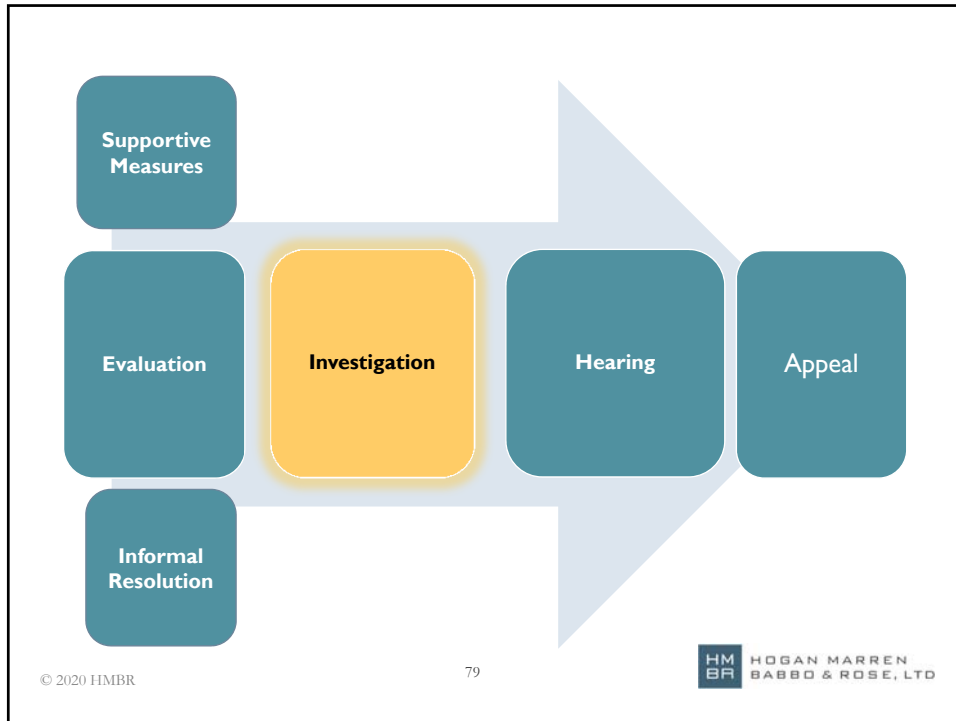
Step 4

Investigation

 HOGAN MARREN
BABCO & ROSE, LTD

78

© HMBR 2020



Investigation -- Players

- Title IX Coordinator
- Investigator
- The parties
- Witnesses

HMBR HOGAN MARREN
BABB & ROSE, LTD

80

© HMBR 2020

Specific Requirements for Investigation

In any investigation, the school must:

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

Specific Requirements for the Investigation

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

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

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



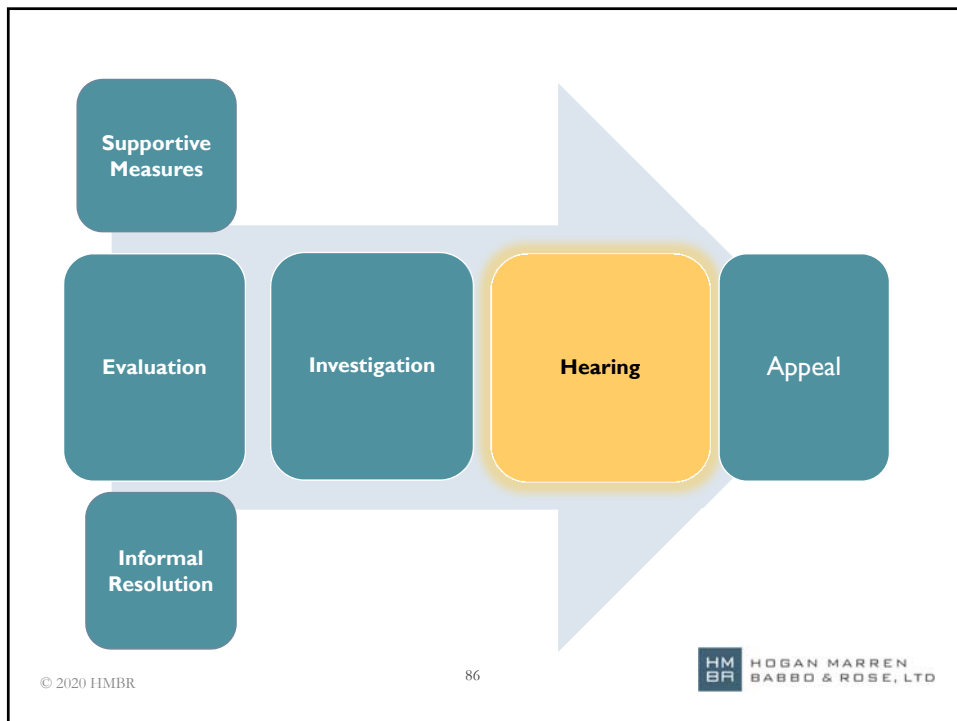
Step 5

Hearing


 HOGAN MARREN
BABBO & ROSE, LTD

85


© HMBR 2020



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)

 HOGAN MARREN
BABBO & ROSE, LTD


87

© HMBR 2020

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


 HOGAN MARREN
BABBO & ROSE, LTD

88

© HMBR 2020

Role of Hearing Officer

- Presides over hearing
- Makes relevancy determinations
- Provides parties with access to the evidence during hearing
- Issues written determination of responsibility and, if applicable, sanctions
- Ensures hearing is recorded



HM HOGAN MARREN
BR BABCO & ROSE, LTD

89

© HMBR 2020

Issues of Relevancy at the Hearing

- Only relevant cross-examination and other questions may be asked of a party or witness.
- The Hearing Officer or Hearing Panel must decide if question is relevant before it is answered at the hearing and explain any decision to exclude a question.
- Questions and evidence about the complainant's sexual predisposition and prior sexual behavior are generally not relevant, except in two specific circumstances (described above)

HM HOGAN MARREN
BR BABCO & ROSE, LTD

90

© 2020 HMBR

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
- 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

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

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




Written Determination

Determination must include:

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

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

HM
BR HOGAN MARREN
BABCO & ROSE, LTD

95

© HMBR 2020

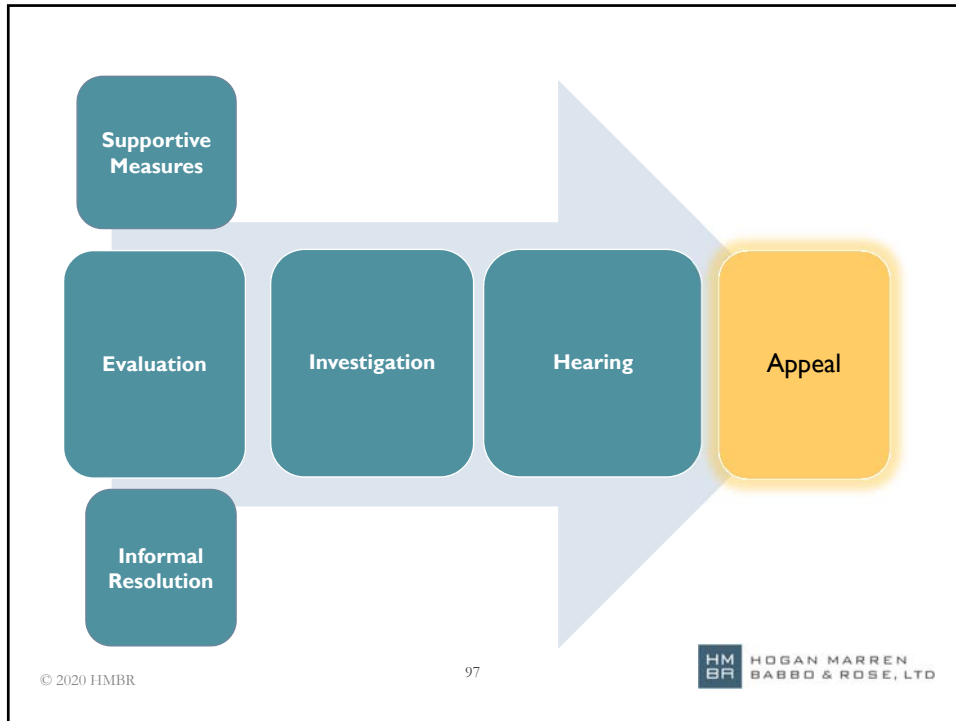
Step 6

Appeal

HM
BR HOGAN MARREN
BABCO & ROSE, LTD


96

© HMBR 2020



Appeal – Players

- Appeal Decision-maker --
- not the same person as the Hearing Officer, the Investigator(s), or the Title IX Coordinator
- The parties

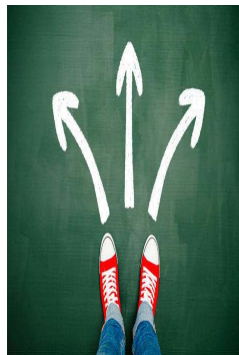


HMBR HOGAN MARREN BABCO & ROSE, LTD 98 © HMBR 2020

Appeal Requirements

- Other party is provided written notice when an appeal is filed
- Both parties are given a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Written decision by Appeal Decision-maker issued simultaneously to both parties, describing the result of the appeal and the rationale for the result

Appeal



The Respondent or the Complainant may appeal:

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

Appeal

Appeals may be filed based on the following:

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



Appeal -- Recordkeeping

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



Presenter's Contact Information



Debbie Osgood

dlo@hmb.com

312-540-4427



HOGAN MARREN
BABBO & ROSE, LTD

- 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)

103

© HMBR 2020