

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

## Title IX – Appeal Requirements (cont.)

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

**APPEALS**

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## Title IX – Appeal Requirements (cont.)



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

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## Appeals

Either the Respondent and/or the Complainant may appeal:



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

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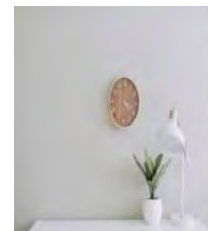
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## Appeals

Appeals may be filed based on the following:

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



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## Example -- Appeal of a Dismissal

A complainant appeals a dismissal by asserting that:

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

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

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



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## Information to be Considered



The Appeal-decision maker will consider:

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

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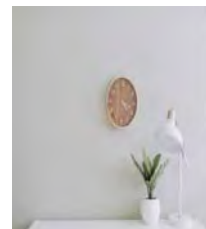
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## Appeals

Appeals may be filed based on the following:

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



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## Appeals – Procedural Irregularity

1. Procedural irregularity - examples:

- Institution's failure to evaluate all relevant evidence
- Erroneous relevancy determinations by hearing officer

2. Must affect the outcome of the matter



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## Appeals – New Evidence



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

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## Appeals – Bias or Conflict of Interest

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



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## Written Appeal Decision

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



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### Possible Appeal Outcomes

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



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### Presenter's Contact Information



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

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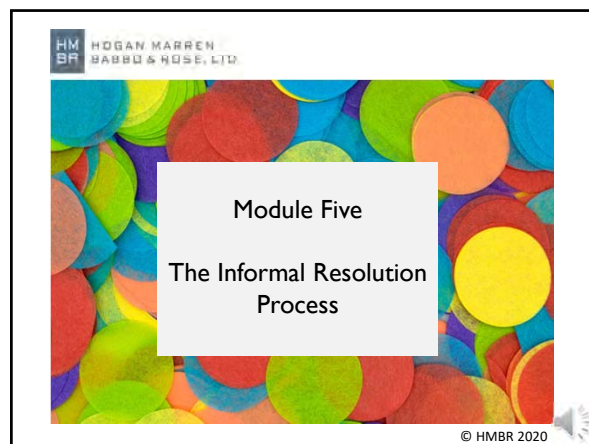
## 2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES



**Title IX Sexual Harassment Training  
August 2020**

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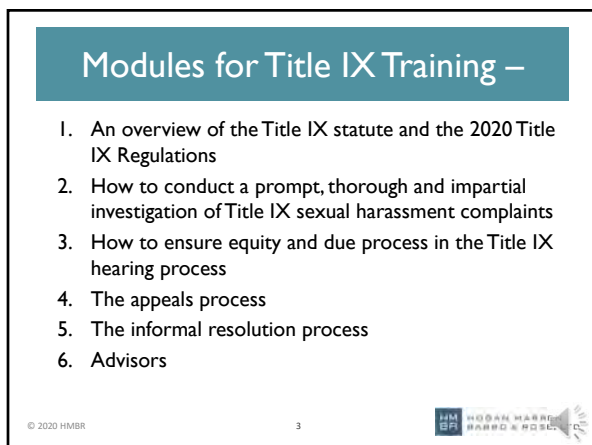
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**Module Five**

**The Informal Resolution Process**

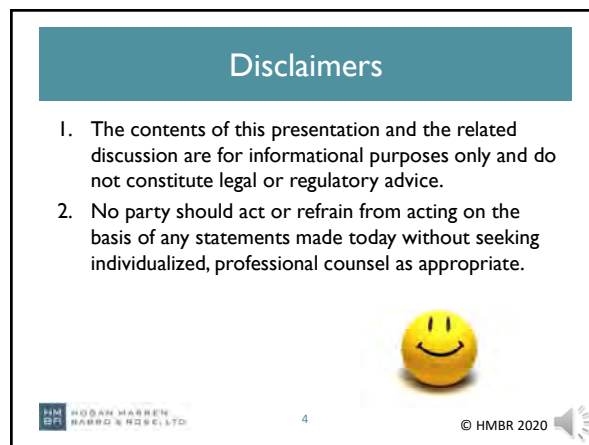
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**Modules for Title IX Training –**

1. An overview of the Title IX statute and the 2020 Title IX Regulations
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

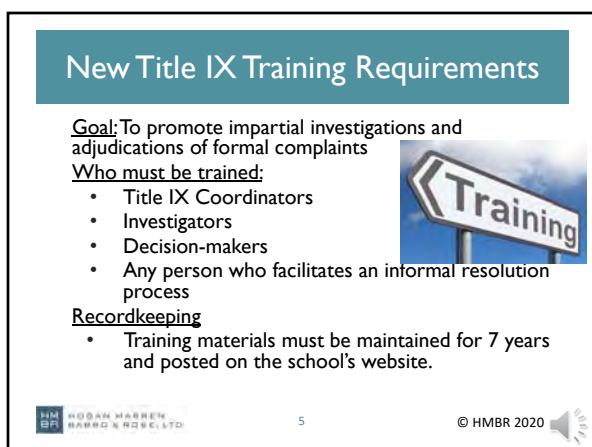
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**New Title IX Training Requirements**

Goal: To promote impartial investigations and adjudications of formal complaints

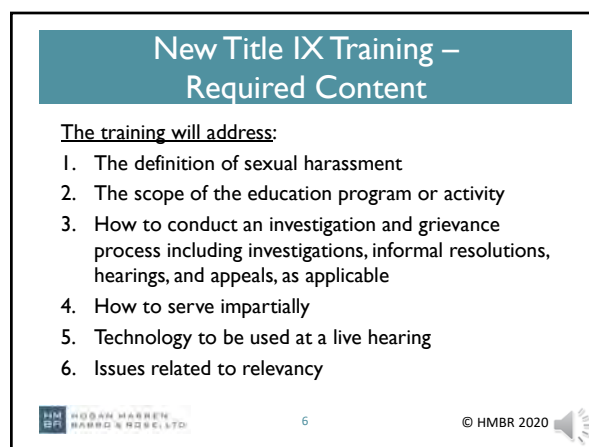
Who must be trained:

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

Recordkeeping

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

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**New Title IX Training – Required Content**

The training will address:

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

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

## Agenda

### The Informal Resolution Facilitator

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

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## Why Informal Resolution ?

From the perspective of the parties:

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

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## Why Informal Resolution ?


From the institution's perspective:

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

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## Why Informal Resolution? A Recap



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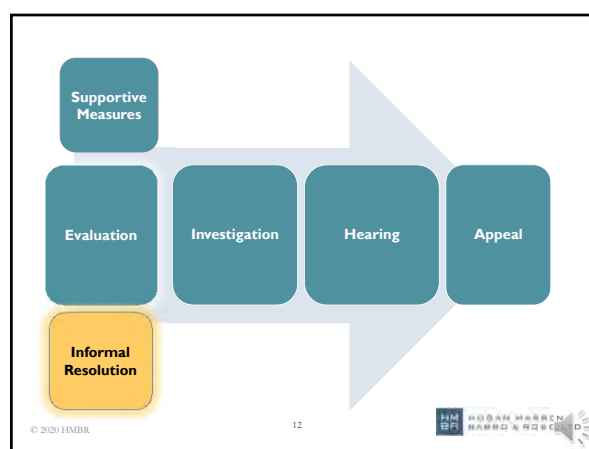
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## Part One

### Title IX Provisions relating to Informal Resolutions

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### Informal Resolution - Timing

Informal resolution is available at any time:

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



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### Informal Resolution – Voluntary

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



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### Informal Resolution

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



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### Informal Resolution – Written Notice

Written notice to the parties must describe:

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



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### Informal Resolution – Recordkeeping



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

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### Part Two

### Using Informal Resolution as an Effective Resolution Tool

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## Informal Resolution – Players

- Title IX Coordinator
- Informal Resolution Facilitator
- The Parties

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## Informal Resolution Facilitator

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

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## Structural

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

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## Promoting Informal Resolution

It is important to promote the informal resolution option:

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

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## Success Stories

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

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## Possible Results

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

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## Part Three

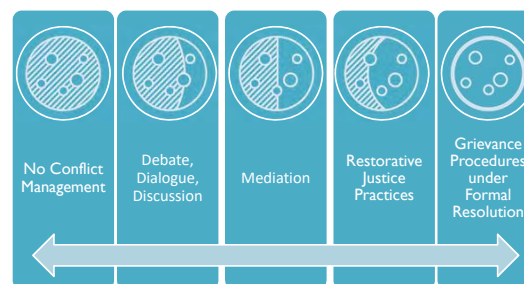
## Types of Informal Resolution

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## Spectrum of Conflict Resolution

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## Principles of Mediation

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

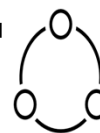
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## The Mediation Process

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

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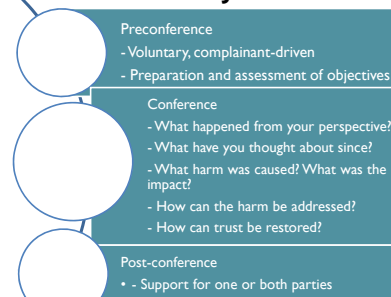
## Principles of Restorative Justice

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

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## The Restorative Justice Process

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

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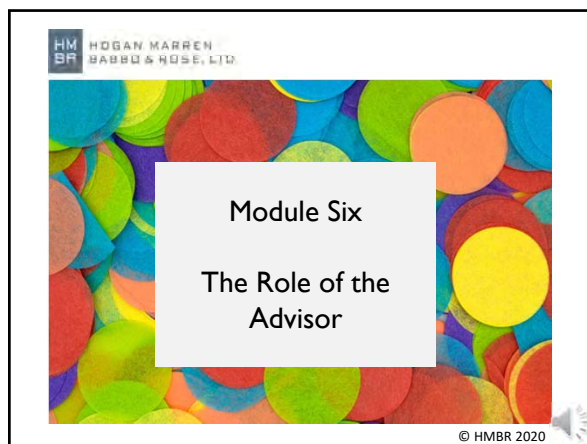


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**Title IX Sexual Harassment  
Training  
August 2020**

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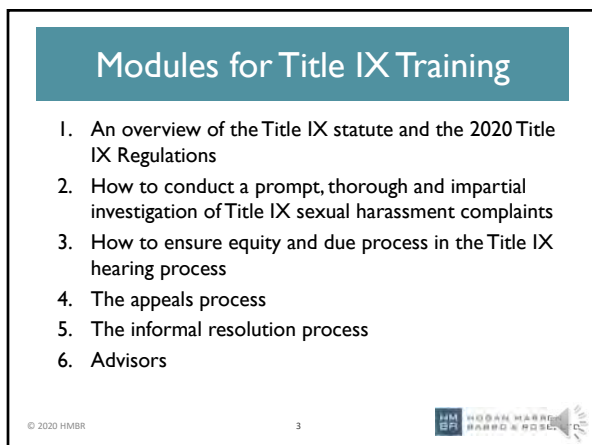


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**Module Six**

**The Role of the  
Advisor**

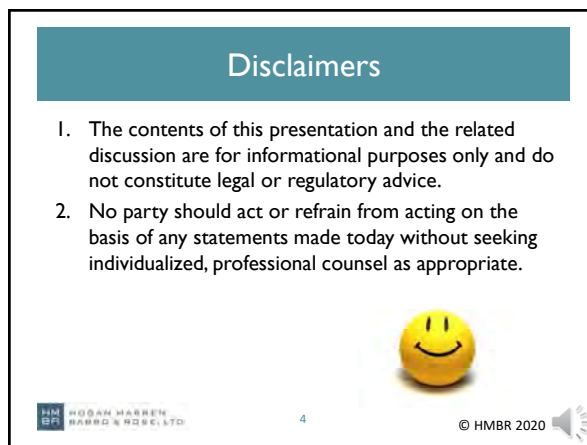
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**Modules for Title IX Training**


1. An overview of the Title IX statute and the 2020 Title IX Regulations
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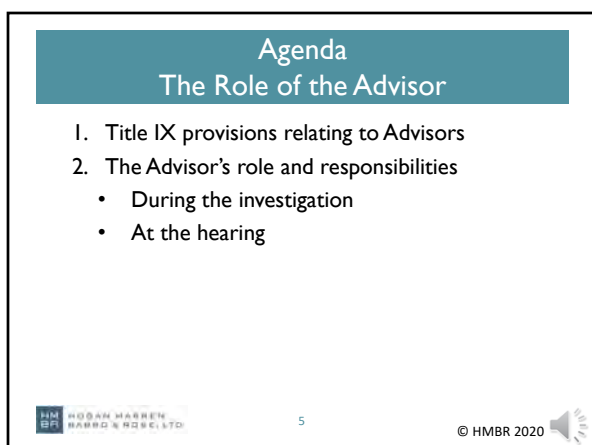


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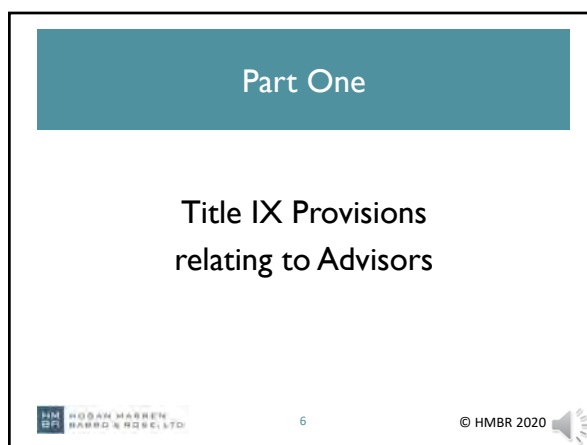


**Agenda**

**The Role of the Advisor**

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

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**Part One**

**Title IX Provisions  
relating to Advisors**

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

## Key Title IX Provisions related to Advisors

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



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## Key Title IX Provisions related to Advisors

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



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## Title IX Regulations related to Advisors

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



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## Part Two

## The Advisor's Role and Responsibilities

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## The role of the Advisor

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



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## Advisor Qualifications

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



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

### Advisor Qualifications

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



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### Who cannot be an Advisor



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

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### Limitations on Advisor's Participation

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



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### Limitations on Advisor's Participation

According to OCR, institutions may:

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



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

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



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### Confidentiality

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



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## During the Investigation



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

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## During the Investigation

The Advisor advises and assists the party with:

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



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## At the Hearing – Cross Examination



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

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## Free Advisor?



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

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## Relevant Cross-Examination

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

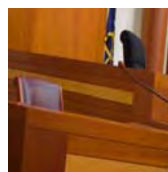


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## Exclusion of Statements



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

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