

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

HM
BR HOGAN MARREN
BABBO & ROSE, LTD.

**Title IX Sexual Harassment
Training
August 2020**

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

© HMBR 2020

HM
BR HOGAN MARREN
BABBO & ROSE, LTD.

**Module Six
The Role of the
Advisor**

© HMBR 2020

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

© 2020 HMBR 3

HM
BR HOGAN MARREN
BABBO & ROSE, LTD.

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.



© HMBR 2020 4

HM
BR HOGAN MARREN
BABBO & ROSE, LTD.

**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

© 2020 HMBR 5

HM
BR HOGAN MARREN
BABBO & ROSE, LTD.

Part One

**Title IX Provisions
relating to Advisors**


© HMBR 2020 6

HM
BR HOGAN MARREN
BABBO & ROSE, LTD.

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.)



HM BR HOGAN HARREN RABBO & ROSE, LTD. 7 © HMBR 2020

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.”



HM BR HOGAN HARREN RABBO & ROSE, LTD. 8 © HMBR 2020

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.”



HM BR HOGAN HARREN RABBO & ROSE, LTD. 9 © HMBR 2020


Part Two

The Advisor’s Role and Responsibilities

HM BR HOGAN HARREN RABBO & ROSE, LTD. 10 © HMBR 2020

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



HM BR HOGAN HARREN RABBO & ROSE, LTD. 11 © HMBR 2020

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





HM BR HOGAN HARREN RABBO & ROSE, LTD. 12 © HMBR 2020

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






HOGAN HARREN
RABBO & ROSE, LTD.


13

© HMBR 2020 

Who cannot be an Advisor




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




HOGAN HARREN
RABBO & ROSE, LTD.


14

© HMBR 2020 

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.





HOGAN HARREN
RABBO & ROSE, LTD.


15


© HMBR 2020 

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.






HOGAN HARREN
RABBO & ROSE, LTD.


16

© HMBR 2020 

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.






HOGAN HARREN
RABBO & ROSE, LTD.


17

© HMBR 2020 

Confidentiality


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






HOGAN HARREN
RABBO & ROSE, LTD.

18

© HMBR 2020 

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

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

HM BR HOGAN HARREN RABBO & ROSE, LTD. 19 © HMBR 2020

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



HM BR HOGAN HARREN RABBO & ROSE, LTD. 20 © HMBR 2020


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

HM BR HOGAN HARREN RABBO & ROSE, LTD. 21 © HMBR 2020

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

HM BR HOGAN HARREN RABBO & ROSE, LTD. 22 © HMBR 2020


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.



HM BR HOGAN HARREN RABBO & ROSE, LTD. 23 © HMBR 2020

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.



HM BR HOGAN HARREN RABBO & ROSE, LTD. 24 © HMBR 2020

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Complainant's Sexual Predisposition and Prior Sexual History

Generally, the Complainant's sexual predisposition and prior sexual history are not relevant, except where offered to prove:


- Someone other than the Respondent committed the misconduct at issue
- The parties have a prior sexual relationship and the information is provided to show consent


25
© HMBR 2020 



Relevancy and Character Evidence

Evidence Law: The Rule of Relevance and Admissibility of Character Evidence

Exceptions to the Rule Against Character Evidence






<https://lawshelf.com/shortvideoscontentview/evidence-law-the-rule-of-relevance-and-admissibility-of-character-evidence/>
 Used with permission of LawShelf Educational Media


26
© HMBR 2020 

Adequacy of Cross-Examination



Question to OCR:
 Suppose the respondent's advisor isn't well-prepared and forgets to cross-examine the complainant during the hearing on a key statement related to credibility. What is the effect of this on the statement made by the complainant – may or may not the decision-maker consider it, and please explain why or why not?





27
© HMBR 2020 

Adequacy of Cross-Examination

OCR's Answer: The new Title IX Rule requires that postsecondary institutions hold a live hearing at which each party has the opportunity to cross-examine other parties and witnesses, where such cross-examination is conducted by a party's advisor and never by a party personally. [citation omitted]. If a party [through their advisor] does not pose a cross-examination question to the other party, then the answering party cannot be said to have "not submitted" to cross-examination, and the provision of [the Title IX provision] prohibiting the decision-maker from relying on the statements of a party who has not submitted to cross-examination would not apply to the regulations are necessary.



28
© HMBR 2020 

Presenter's Contact Information



- 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.hmbr.com/news-insight/title-ix-compliance/>
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

Debbie Osgood
dlo@hmbr.com
 312-540-4427


29
© HMBR 2020 