



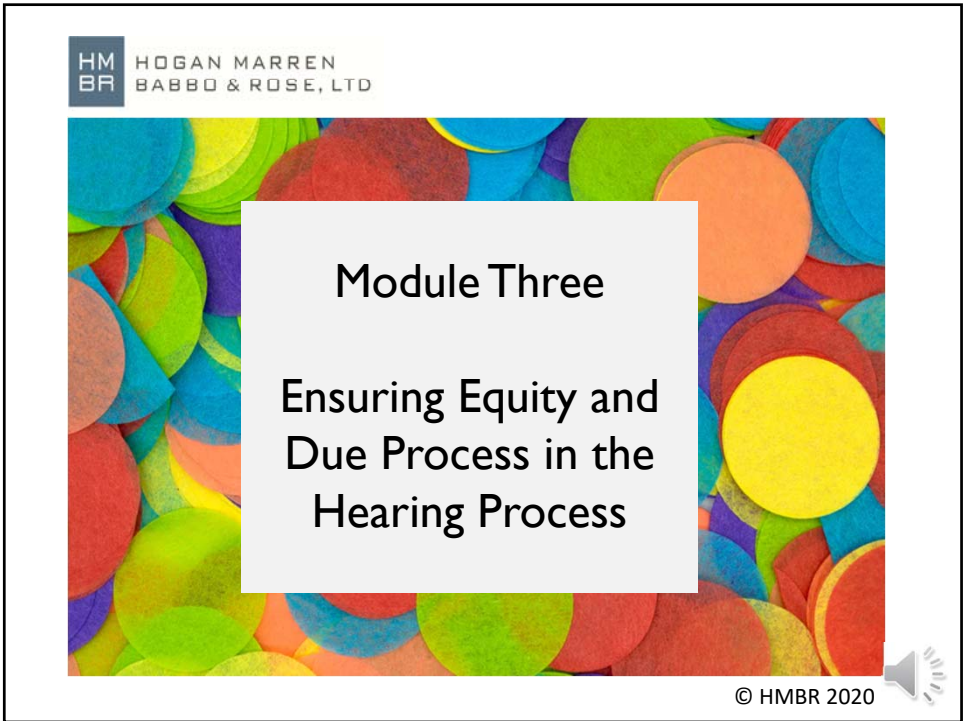
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**Title IX Sexual Harassment  
Training  
August 2020**

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**Module Three**

**Ensuring Equity and  
Due Process in the  
Hearing 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

## 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.



## New Title IX Training Requirements

- Goal: To promote impartial investigations and resolutions of formal sexual harassment 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 university'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 Hearings

1. Hearing structures and roles
2. Preparing for and presiding over the hearing
3. Relevancy determinations
4. Making the decision about responsibility
5. Sanctions
6. The written determination



## To keep in mind ...

Grievance Process 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



## To keep in mind (cont.) ...

### Grievance Process Requirements

6. Include a standard of evidence:  
*Preponderance or Clear and Convincing*
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



## To keep in mind (cont.) ...

- Appeals may be filed of the dismissal decision or written determination
- Three possible bases:
  - 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



# HYPOTHETICAL SCENARIO

Creative College  
9021 Hamilton Lane, Shoreview, CA 90210

## INVESTIGATION REPORT

**TO:** Holly Sanders, Associate Vice President and Provost  
**FROM:** Marissa Gettleman, Title IX Investigator  
**DATE:** March 2, 2019  
**SUBJECT:** Complainant of Sexual Misconduct by Susan Specter (Complainant) against Peter Janson (Respondent)

### I. Background

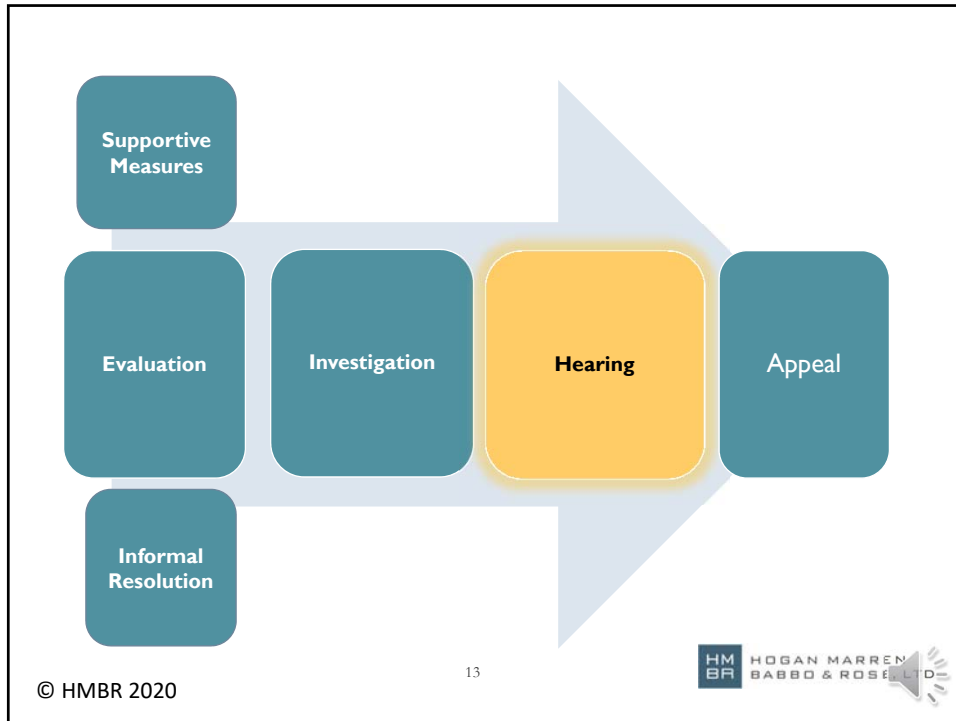
On January 3, 2019, Creative College (the "College") learned of possible sexual misconduct involving the Complainant, Susan Specter, and the Respondent, Peter Janson. On that date, the College's Title IX Coordinator, Jessie Fanta, met with the Complainant in the Title IX Office at Frisbee Hall. The Complainant requested that the College conduct a formal investigation of the alleged violation by the Respondent of the College's Sexual Misconduct Policy.<sup>1</sup> Specifically, the Complainant reported that in



## Part One

# Hearing Structures and Roles





## Hearing Requirement

- Previously, universities had a choice as to how to conduct investigation and resolution process – single investigator model, hearing model, or hybrid of two
- With the new regulations, the universities must provide live hearing with opportunity for cross-examination

A yellow sticky note with a red pushpin at the top center, featuring the word "Change" written in a bold, black, handwritten-style font.

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## What is a Title IX Hearing?

- After the final investigation report, a live hearing must be held for PSE institutions
- Advisor for each party allowed to conduct cross-examination of other party and witnesses
- Hearing Officer/Hearing Panel issues written determination of responsibility and, if applicable, sanctions



## Title IX – Hearing Requirement

DOE reasoned that:

- “[P]art of a meaningful opportunity to be heard includes the ability to challenge the testimony of parties and witnesses”
- “[C]ross-examination is a valuable tool for resolving the truth of serious allegations”





## Federal Court – Hearing Requirement

### Sixth Circuit Court of Appeals

“Due process requires that public institutions provide a hearing with an opportunity for cross-examination where credibility is at issue.”



*Doe v. Baum* Sept. 2018



## Hearing – Individuals Involved



- Hearing officer or member of a hearing panel
- The Complainant
- The Respondent
- Witnesses
- Title IX Coordinator (in an administrative, not substantive role)
- The Investigator (as a possible witness)



## Hearing – Location and Logistics



- May be held in the same geographic location or virtually
- Either party may request separate rooms
- Virtual hearing may be held at university's discretion
- Technology must allow the parties, their advisors and the Hearing Office/Panel to see and hear one another and any witnesses



## Qualifications of the Hearing Officer

- Must receive mandated Title IX training
- May not be the same person as the Title IX Coordinator, the Investigator(s), or the Appeal Decision-maker
- Must be impartial and unbiased
- Must be free from conflicts of interest



## Hearing Officer – Responsibilities

- Makes an impartial determination as to whether a university policy or procedure was violated
- Presides over the hearing
- Determines relevancy of questions
- Enforces the rules of order and decorum in the hearings
- Issues written determination of responsibility and sanctions




## Hearing Officer – Ethical Considerations

- Neutrality -- not an advocate for the Complainant or the Respondent
- Must be unbiased
- Must not have conflicts of interest
  - A conflict of interest is any direct or indirect financial or personal interest in the outcome or any existing or past relationships with any of the parties, representatives, or witnesses.
- Must maintain confidentiality – before, during and after hearing



## Potential Roles



- Hearing Officer (Administrative)
- Hearing Officer (Sole decision maker)
- Hearing Panel Member

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## Administrative Hearing Officer

- Sets tone for the hearing
- Deals with advisors
- Maintains order and decorum of hearings
- Ensures that the hearing follows university's written procedures
- Makes relevancy determinations before each question is answered



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## Hearing Officer – Sole Decision-Maker

Everything the administrative officer does, plus:

- Weighs the evidence
- Makes credibility determination
- Writes report of hearing results with rationale



## Hearing Panel Member

Everything the  
other two do,

Plus:

- Confers with fellow panelists to
  - Weigh the evidence
  - Make credibility determinations
  - Write the report of the hearing results with rationale(s)



## For all kinds of hearing processes, the role of the Hearing Officer is:

- Limited
- NOT to collect information in the first instance
- To oversee the hearing, including cross-examination
- To make relevancy determinations



## Part Two

### Preparing for and Presiding over the Hearing



## What the hearing officer needs to know

1. Applicable laws and regulations (Title IX, VAWA, state)
2. Applicable university policies and procedures
3. How to run an orderly hearing
4. Rights of the Complainant and Respondent
5. Questioning and deliberation techniques
6. How to make relevancy determinations
7. How to evaluate types of evidence
8. How to assess credibility
9. Analytical approach in determining if a policy was violated



## Pre-Hearing Preparation



Hearing Officer should:

- Review Final Investigation Report
- Consider submissions by the parties in advance of hearing
- Know the university's policy and procedures, including any specific hearing procedures
- Identify areas needing clarification or where you have additional questions
- Prepare opening and closing comments



## Orderly Hearings: Setting ground rules

- Hearing officer has complete authority
- Participation of advisors – cross-examination
- No ex parte communications
- Interact respectfully
- No interruptions
- Limitations on evidence (timing, etc.)
- Direct procedural questions to hearing officer

# RULES



## Orderly Hearings: Logistics to think about beforehand

- Information parties should have before the hearing
- Inform yourself of any accommodations required by the parties
- Physical space and use of remote technology—before, during and after hearing
- Plan for order of hearing
- Plan for recording hearing
- Plan for handling/keeping evidence
- Have contact information for Title IX Coordinator/counsel





## 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



QUIZ TIME



## Learning Exercise #1

Test your knowledge!



1. Go to:

<http://www.quiz-maker.com/Q8Z9PNKPP>

2. Answer Questions


# 1 - 3


## Part Three

### Relevancy Determinations


## Asking Questions

- First and foremost, always remember your role
- Rapport-building stage—what does this look like in a hearing? And why is this important?
- Connect your questions to the elements of the prohibited conduct—stay focused
- If asking a sensitive question, explain why




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## Asking Questions (cont'd)

- Use hearing to get clarification of any aspects of investigation report
- Use the hearing to ask about inconsistencies you noted in the evidence
- Ask why just learning new information now
- Ask the challenging party how/what the investigator got wrong



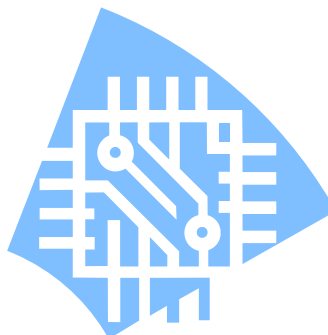
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## Access to the Evidence

Parties must be allowed with access to the evidence during the hearing



## 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 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 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



## Relevancy – Character Evidence

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



<https://lawshelf.com/shortvideoscontentview/evidence-law-the-rule-of-relevance-and-admissibility-of-character-evidence/>

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## 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



## Hearing – Provision of an Advisor

If a party does not have an advisor present at the live hearing, the university must provide without fee or charge to that party, an advisor of the university's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

**ADVISOR**



## Hearing – Exclusion of Statements

- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- The hearing officer cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.




## Hearing – Recording or Transcript

An audio or audiovisual recording, or transcript, must:

- Be created of any live hearing
- Made available to the parties for inspection and review
- Maintained with university records for seven years







A large teal starburst shape is centered on a light blue rectangular background. The words "QUIZ TIME" are written in white, bold, uppercase letters across the center of the starburst.

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## Learning Exercise # 2

Test your knowledge!




A photograph showing a person's hands typing on a laptop. The laptop screen displays a website with the word "UNIVERSITY" visible. A white coffee cup is on the table next to the laptop.

1. Go to:  
<http://www.quiz-maker.com/Q8Z9PNKPP>


2. Answer Questions  
# 4 - 12

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## Part Four

# Making the Decision about Responsibility



## Making the Decision

- Understanding the evidence
- Determining credibility
- Weighing and analyzing the evidence



## Preponderance of the Evidence

**Levels of Proof**

- Beyond a Reasonable Doubt
- Reasonable Doubt
- Clear & Convincing
- Preponderance
- Substantial
- Probable Cause
- Reasonable Suspicion
- Scintilla
- No Evidence

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## Evaluating the Evidence - Bulls Eye

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

Text from friend of Complainant to another friend about the incident

Texts between the Parties

Testimony of the Parties

Physical Evidence of Sexual Assault


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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## Assessing Credibility

EEOC says to consider:

1. Inherent plausibility: Is the testimony believable on its face? Does it make sense?
2. 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)



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## Assessing Credibility (cont.)

EEOC says  
to  
consider:



3. Demeanor: Did the person seem to be lying or telling the truth?
4. Motive to falsify: Did the person have a reason to lie?
3. Past record: Did the alleged harasser have a history of similar behavior in the past?

# QUIZ TIME

## Learning Exercise #3

Test your knowledge!



1. Go to:  
<http://www.quiz-maker.com/Q8Z9PNKPP>

2. Answer Questions  
# 13 – 16

## Part Five

### Sanctions

## Considerations for the Imposition of Sanctions

- The nature of the conduct at issue
- The impact of the conduct on the Complainant
- The impact of the conduct on the community or the university, including protection of the university community
- Prior misconduct by the Respondent, including the Respondent's relevant prior discipline history, both at the university or elsewhere, including criminal convictions
- Maintenance of a safe and respectful environment conducive to learning



## Other things to consider



- Consistency: Sanctions that have been imposed for the same category of prohibited conduct, and how this matter is similar and different to those matters
- Proportionality: Sanctions should ultimately be proportional to the behavior
- Explanation: Sanctions must be objectively explained in the written determination



## Part Six

### The Written Determination



## Written Determination

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



## Written Determination

Determination must include:

- Allegations potentially constituting sexual harassment
- Procedural steps
- Findings of fact
- Conclusions regarding the application of the policy to the facts 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 university imposes on the Respondent, and whether remedies will be provided by the university to the Complainant
- Appeal procedures available to both parties and the permissible bases for an appeal



## Format of Final Letter

1. Allegation(s)
2. Procedural history
3. Applicable policies and procedures
4. Information considered during investigation (witnesses questioned, documents and other evidence)
5. Findings of fact
6. Analysis and conclusion – whether the alleged conduct violated the policy
7. Evidentiary standard -- preponderance of the evidence
8. Sanctions and/or remedies, if any
9. Rationale for the decision and sanction(s)
10. Appeal procedures





## More important points for the final letter

- Use standard format and language
- Start by stating your scope of review and evidence standard  
Identify the materials you reviewed and considered
- State material findings of fact
- Identify inculpatory and exculpatory evidence
- Address significant pieces of evidence that are contrary to your finding(s) and why you do not find them persuasive
- Summarize your reasoning and process of applying the policy to the facts found
- State that you considered the totality of the circumstances



## 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/or remedies provided to the Complainant



## Recap – Dos and Don'ts

- Be knowledgeable about your university's policies and procedures
- Carefully review and consider all the investigative materials (report and documentation) and relevant evidence
- Remain impartial, calm and patient
- Allow parties to tell their stories
- Make findings decisions based on the evidence and policy
- Write clear and thorough final determination letters



## Recap – Do's and Don'ts

- Prejudge either party
- Allow the introduction of
  - Evidence of prior sexual activity (except in limited circumstances)
  - Character evidence
  - Information protected by privilege
- Make public (or private) statements suggesting gender bias
- Be afraid to ask the questions you need to ask
- Breach a confidence



## Presenter's Contact Information



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

