

Title IX & Sexual Harassment Response

Participants in Sexual Harassment policy process
Fall 2020

© 2020 Husch Blackwell LLP. All Rights Reserved

1

Agenda

- Title IX Scope & Jurisdiction
- Title IX & Other Policies
- Institutional Response to Sexual Harassment
- Investigations
- Hearings
- Appeals
- Informal Resolution
- Confidentiality

© 2020 Husch Blackwell LLP

2



Who does Title IX apply to?

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding

Not individual persons

- But institutions are required to adopt policies and procedures to implement Title IX that apply to individual persons



© 2020 Husch Blackwell LLP

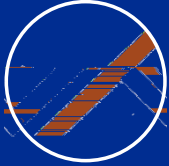


What are examples of education programs and activities?

Admissions	Hiring	Workplace
Academic instruction	Residence life	Amenities on campus
Sports teams	Work-study	Games, concerts, and speeches on-campus
Off-campus trips or experiences organized by the institution	Sponsored organization activities	Anything else that happens on-campus

© 2020 Husch Blackwell LLP

7

Does Title IX apply to off-campus sexual harassment?

 <p>Yes, if the conduct at issue occurs in the context of an education program or activity</p>	 <p>Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization</p>	 <p>No, if it occurs in a private location and is not part of an institution's education program or activity</p>
---	--	---

© 2020 Husch Blackwell LLP

8

Example (included in EP&A)

Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The amp9s9x T-9.

Example (excluded from EP&A)

During spring break, two students travel to another state and stay at an all-inclusive resort owned by a prominent hotel chain. The students booked the trip on their own for leisure purposes. While staying at the resort, one student sexually assaults the other student.

© 2020 Husch Blackwell LLP

11

Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment

© 2020 Husch Blackwell LLP

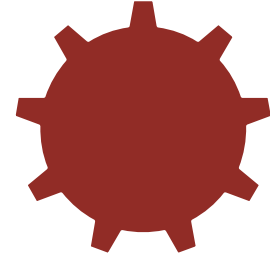
12



© 2020 Husch Blackwell LLP

What is quid pro quo?

- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
Often arises in the employment context or where an employee holds a position of authority over a student



© 2020 Husch Blackwell LLP

Another example of quid pro quo

A faculty member tells a student that the student can increase the student's grade from a "B" to an "A" if the student wears revealing clothing that is "more pleasing" to the faculty member's eye.

© 2020 Husch Blackwell LLP

17

What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

© 2020 Husch Blackwell LLP

18

How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person

© 2020 Husch Blackwell LLP

Example of hostile environment

Student A repeatedly gropes Student

© 2020 Husch Blackwell LLP

Does the First Amendment matter?

- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



© 2020 Husch Blackwell LLP

23

Example (not-hostile environment)

Student A actively supports a prominent political candidate who has been accused of sexually harassing campaign staffers. Student B files a complaint that Student A's political support of the candidate has caused a sexually hostile environment on campus.

© 2020 Husch Blackwell LLP

24

What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:

Rape

Sodomy

Sexual assau
with an object

Fondling

Incest

© 2020 Husch Blackwell LLP

What is rape?

© 2020 Husch Blackwell LLP

What is sodomy?

Oral or anal sexual intercourse with another person without the consent of the victim,

© 2020 Husch Blackwell LLP

What is fondling?

Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



© 2020 Husch Blackwell LLP

Example of fondling

© 2020 Husch Blackwell LLP

What is incest?

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

© 2020 Husch Blackwell LLP

35

What is statutory rape?

Sexual intercourse with a person who is under the statutory age of consent as defined by law.

© 2020 Husch Blackwell LLP

36

What is domestic violence?

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 state, 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 state.

© 2020 Husch Blackwell LLP

37

What is dating violence?

“Dating Violence” is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

© 2020 Husch Blackwell LLP

38



Example of retaliation

Employee A testifies at hearing in support of Employee B's complaint of sexual harassment against manager. After institution finds that manager sexually harassed Employee B, manager demotes Employee A to punish Employee A for testifying against manager.

© 2020 Husch Blackwell LLP

43

What about state laws governing sexual harassment on campus?

- Institutions must still comply with state laws unless
- They conflict with some element of the new Title IX regulation in which case
- State law is preempted

© 2020 Husch Blackwell LLP

44

Group Scenario

Student A reports that Student B sexually harassed Student A on two occasions. The first incident consisted of Student B groping Student A's genitals without permission while the two were dancing during a formal hosted by a Greek organization at a local party venue the Greek organization rented. The second incident consisted of Student B attempting to have sexual intercourse with Student A a week later, when Student A was heavily intoxicated at a tailgate party held in the parking lot of a rival institution's football stadium.



© 2020 Husch Blackwell LLP

45

Questions



© 2020 Husch Blackwell LLP

46



How do Title IX and Title VII standards compare?

“Neither Federal non-sex discrimination civil rights law represents a ‘zero-tolerance’ policy banning all sexual harassment.”
Preamble to 2020 Title IX Regulations

Title VII Sexual Harassment

Title IX Sexual Harassment

Quid pro quo

Sufficiently severe or pervasive

Any quid pro quo by employee

Unwelcome and Sufficiently severe and pervasive and objectively offensive

Any sexual assault/DV /stalking

© 2020 Husch Blackwell LLP

How should we treat alleged conduct that may violate Title IX and Title VII policies?

“The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations

© 2020 Husch Blackwell LLP

Example of typical "Title VII" process

Complaint to manager, HR, ethics line, etc.

HR/manager collaborate to provide information to parties, investigate, and resolve

HR/manager take any appropriate corrective and preventive action, and protect against retaliation

© 2020 Husch Blackwell LLP

What triggers an employer's liability for sexual harassment under Title VII?

An employer, its agent, or its supervisor
Knew or should have known
About severe or pervasive sexual harassment
That a reasonable person would consider intimidating, hostile, or abusive
By an employee or non-employee over which it has control and

© 2020 Husch Blackwell LLP

Group Scenario

Employee A reports that Employee B sexually harassed Employee A by installing a program on Employee A's computer that caused pornography to play when Employee A logged on. This occurred only once, after which Employee A had the program removed from Employee A's computer. Employee A makes a formal complaint under the institution's Title IX sexual harassment policy.



© 2020 Husch Blackwell LLP

53

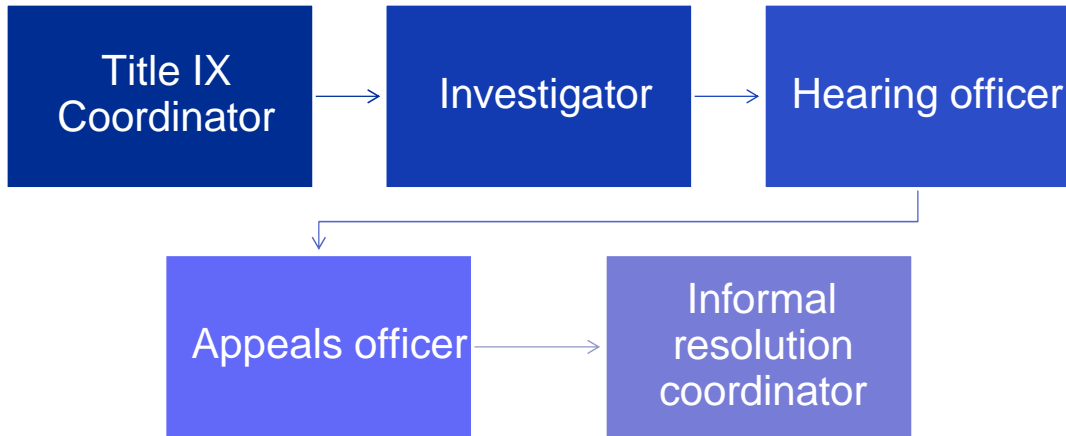
Questions



© 2020 Husch Blackwell LLP

54

Who are the key institutional actors in the grievance process?



© 2020 Husch Blackwell LLP

57

How does an institution get notice of sexual harassment?

Sexual harassment response is triggered when institution has “actual knowledge” of potential sexual harassment.

© 2020 Husch Blackwell LLP

58

What is “actual knowledge”?

- “Actual knowledge” occurs when
 - An institutional official, with authority to take corrective action
 - Observes or receives a report
 - Of sexual harassment occurring in the institution’s education programs and activities

© 2020 Husch Blackwell LLP

Is an “institutional official” the same as a “responsible employee”?

With authority to take corrective action

With authority to take action to redress the harassment or
Who has the duty to report to appropriate school officials sexual harassment or any other misconduct or
Individual who a student

© 2020 Husch Blackwell LLP

When do we reach out to the alleged victim?

- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes

© 2020 Husch Blackwell LLP

61

What if we can't identify the alleged victim from a report?

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are utilized

© 2020 Husch Blackwell LLP


62

What are supportive measures?


- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party



© 2020 Husch Blackwell LLP



Counseling



Academic accommodations

Housing accommodations

Security escorts



© 2020 Husch Blackwell LLP

Example of reasonable supportive measure

Student A and Student B used to be in a romantic relationship. Since the relationship ended, Student B has gossiped about Student

© 2020 Husch Blackwell LLP

Can we utilize interim removals or suspensions for students?

- Students may be removed on a temporary basis only if:
 - Individualized safety and risk analysis
 - Determines that an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
 - Student is given immediate notice and opportunity to contest the removal

© 2020 Husch Blackwell LLP

67

Example of immediate threat to physical health or safety

Student A is reported to have raped Student B at gunpoint. Police engage in hot pursuit and apprehend Student A attempting to flee campus. When apprehended, Student A is found in possession of a loaded and unregistered firearm.

© 2020 Husch Blackwell LLP

68

What is a formal complaint?

What	Who	How
<ul style="list-style-type: none"> • Document • Alleging sexual harassment • Requesting an investigation / resolution under grievance procedures 	<ul style="list-style-type: none"> • <u>Signed by</u> <ul style="list-style-type: none"> • Alleged victim or • The Title IX Coordinator • If filed by alleged victim, alleged victim must be current or attempted participant in education programs and activities • Third-parties may not file formal complaints on behalf of an alleged victim 	<ul style="list-style-type: none"> • Either physical or electronic submission

© 2020 Husch Blackwell LLP

When may the Title IX Coordinator file a formal complaint?

- Typically when there is an important interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint

© 2020 Husch Blackwell LLP

Example of T9 Coordinator formal complaint

Student A and Student B each separately report they were sexually assaulted by Student C. Student A and Student B each suspect they were

Example of dismissal

Student A reports that Student B sexually assaulted Student A in their hometown during summer break. The alleged assault occurred in Student B's house after the two attended a co-ed softball game hosted by a local recreation league. Student A and Student B have had no contact since the alleged sexual assault.

© 2020 Husch Blackwell LLP

75

Example of dismissal

Student A makes a sexual harassment complaint against a faculty member because the faculty member requires students in English class to read a "Confederacy of Dunces" which contains sexual content that Student A finds immoral and obscene. Student A has no other basis for the complaint but the required reading of the book.

© 2020 Husch Blackwell LLP

76

When may we dismiss a formal complaint?

- Alleged victim indicates in writing a desire to

Example of impermissible consolidation

Student A files a formal complaint that Student B sexually assaulted Student A two years ago after Student A was incapacitated by drinking. Student C, Student B's present romantic partner, files a formal complaint that Student B committed dating violence. 12.1(4.6(i)-2.7(o)-1.

What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- Conflict and bias-free institutional participants



© 2020 Husch Blackwell LLP

Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Greeks can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape.”



© 2020 Husch Blackwell LLP

What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



© 2020 Husch Blackwell LLP

85

Example of conflict of interest

Student A files a formal complaint of sexual harassment against Student B. One of the hearing panel members selected is Student B's faculty advisor who has previously written letters of recommendation for Student B's application to law school in which faculty advisor wrote that Student B is "honest to a fault."

© 2020 Husch Blackwell LLP

86

Example of conflict of interest

Employee A accuses an employee of a food service vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the food service vendor and who directly supervises the accused employee.

© 2020 Husch Blackwell LLP

Example of bias

Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” He tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”

© 2020 Husch Blackwell LLP

89

Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should self-police conflicts of interest and self-identify bias

© 2020 Husch Blackwell LLP

90

Group Scenario

Student A reports that Student B stalked Student A by peeping through Student A's changing room door at the hospital where both are doing rotations, and by stealing Student A's underwear from the laundry at the dormitory. Student A seeks supportive measures but does not wish to file a formal complaint and is concerned Student B may retaliate if Student B learns of the report. Student A graduates in two months, while Student B will not graduate for another year. It is unclear whether Student A will testify at a hearing.



© 2020 Husch Blackwell LLP

93

Questions



© 2020 Husch Blackwell LLP

94

HUSCH BLACKWELL

Investigations



What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding

© 2020 Husch Blackwell LLP

99

How do we tell the parties about an investigation?

- Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how”

© 2020 Husch Blackwell LLP

100

What else does the notice need to say?

- Written notice must also include:
 - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
 - That parties have the right to an advisor of their choice
 - That parties have the right to inspect and review evidence
 - Any prohibition on providing knowingly false statements or information



© 2020 Husch Blackwell LLP

101

How do we collect evidence in an investigation?

Interviews of parties and witnesses

Collection of non-testimonial evidence

© 2020 Husch Blackwell LLP

102



“Tell me what happened that night.”

“Will you walk me through what you remember?”



“Tell me more about that.”



© 2020 Husch Blackwell LLP

Examples of cued invitations

“You mentioned that . . . Can you tell me more?”

“You said that What did you mean?”


“You used the word ‘pressured’ to describe Can you be specific about what they did?”


“If I understood you right, you said that after Did anything happen in between?”

© 2020 Husch Blackwell LLP

113

Examples of recognition prompts

 “What did she say?” (directive)

 “What day did that happen?” (directive)

“Did it hurt?” (option choosing)

“Was he slurring words?” (option choosing)

© 2020 Husch Blackwell LLP

114



"I'm sure
it's difficult

© 2020 Husch Blackwell LLP



May an investigation collect evidence on sexual history?

- Generally, no – Evidence of a complainant's prior sexual behavior is relevant only if offered to prove that someone other than the respondent committed the conduct, or if evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

© 2020 Husch Blackwell LLP

Example of permissible use

Student who makes report of sexual assault executes a HIPAA-compliant release requesting and authorizing the hospital to provide a copy of her SANE/SART examination to the investigator.

© 2020 Husch Blackwell LLP

121

Example of impermissible use

Respondent tells investigator he met with an attorney the day after the alleged sexual assault. The investigator demands that the respondent reveal what he told his attorney. When the respondent declines, the investigator states he will note that in the report and advise the hearing panel to draw an adverse inference against the respondent for “failing to cooperate.”

© 2020 Husch Blackwell LLP

122

Do the parties have access to the evidence?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally

© 2020 Husch Blackwell LLP

123

Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report

© 2020 Husch Blackwell LLP

124

How is the investigation concluded?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing

© 2020 Husch Blackwell LLP

125

Does the investigation report make findings?

- No – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulation, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing

© 2020 Husch Blackwell LLP

126

May parties have an advisor during the investigation?

- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during the investigation phase

© 2020 Husch Blackwell LLP

127

What if the advisor breaks the rules?

- Institution may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institution may exclude advisor who violates rules, but must pause the relevant interview, meeting, or interaction until the party has a new advisor

© 2020 Husch Blackwell LLP

128



Example of impermissible conduct

Respondent tells roommate that respondent has been accused of sexual assault and “it’s important that we get our

© 2020 Husch Blackwell LLP

What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

© 2020 Husch Blackwell LLP

137

What standard of evidence can be used?

- Either
 - Preponderance of the evidence or
 - Clear and convincing evidence
- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent

© 2020 Husch Blackwell LLP

138

Who runs the hearing?

- Regulation requires hearing to be administered by a “decision-maker(s)”
- Means institution can use a single hearing officer or a hearing panel (presumably, with a chairperson)

© 2020 Husch Blackwell LLP

139

What are the logistics of a hearing?

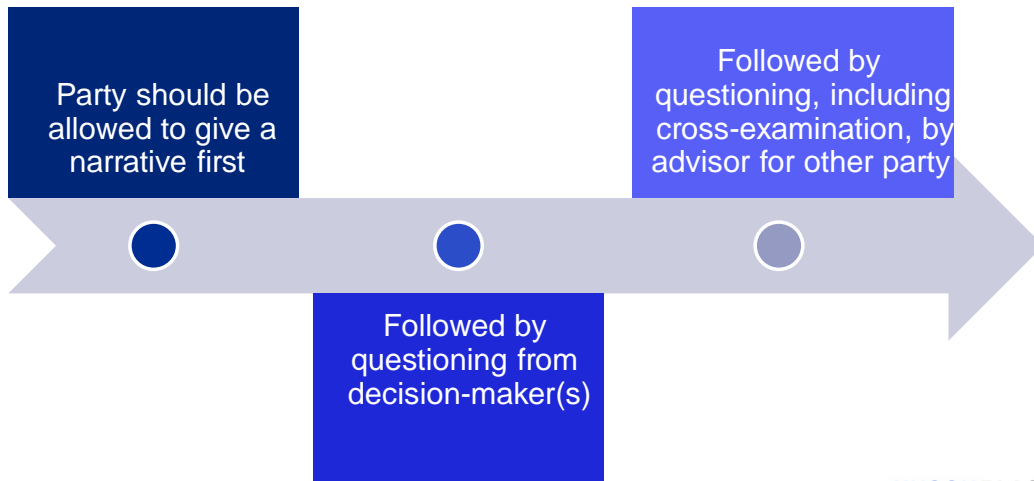
- Hearing must be recorded (audio or video) or transcribed
- Hearing must have “live” – i.e., contemporaneous participation by parties and their advisors
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software

© 2020 Husch Blackwell LLP

140

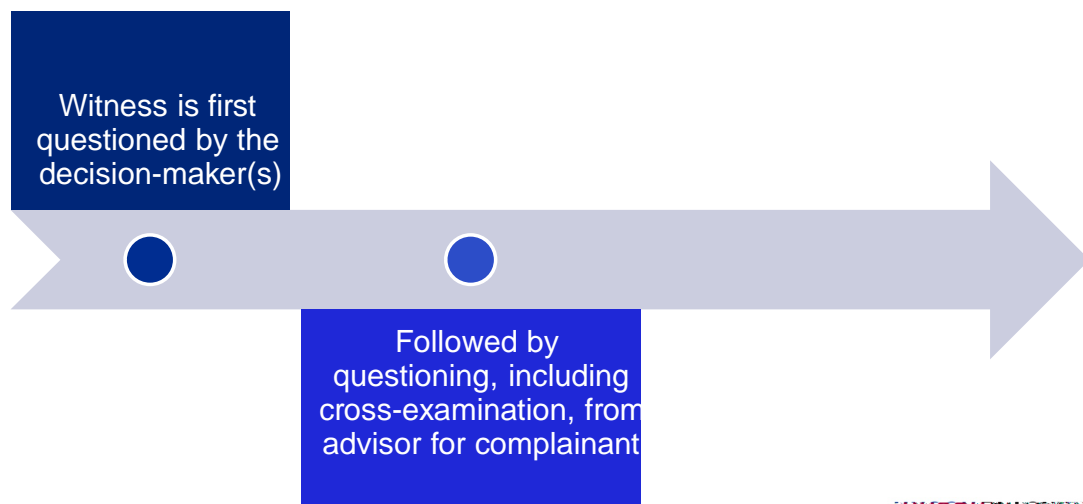
© 2020 Husch Blackwell LLP

How might questioning of parties take place?



© 2020 Husch Blackwell LLP

How might questioning of witnesses take place?



© 2020 Husch Blackwell LLP

Example (relevant)

Student A has accused Student B of sexual assault by having sex with Student A while Student A was incapacitated by alcohol consumption after a party. Advisor for Student B asks Student A: “Did you send any text messages or make any phone calls during the party?”

© 2020 Husch Blackwell LLP

149

Example (relevant)

Coach is accused of sexually propositioning Student B in exchange for more playing time. Advisor for complainant asks the Coach: “Didn’t you tell one of the trainers that Student B is a ‘very attractive young woman?’”

© 2020 Husch Blackwell LLP

150



Example (excluded)

Complainant gives emotional account of sexual assault and answers questions from hearing panel chair. Complainant then answers only one question from respondent's advisor before breaking down and refusing to answer any more. After a break is taken, complainant tells hearing panel chair complainant cannot endure cross-examination. Complainant leaves the hearing.

© 2020 Husch Blackwell LLP

157

Example (excluded)

Witness gives statement to investigator that witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Investigator is prepared to relay what witness told investigator.

© 2020 Husch Blackwell LLP

158

Example (not-excluded)

Witness answers questions from hearing officer. After consulting with complainant, advisor for complainant says that the advisor heouestion()-14.6(f)1823(o)-2.3(r)3.3()-1.9(w)1.7(to)-2.



© 2020 Husch Blackwell LLP

How long does a hearing last?

- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- Parties must have a reasonable opportunity to conduct questioning/cross-examination, but do not have the right to question/cross-examine witnesses as long as they want
- Decision-maker(s) should set an overall length to the hearing in advance and keep parties on schedule

© 2020 Husch Blackwell LLP

How do(es) the decision-maker(s) decide a case?



© 2020 Husch Blackwell LLP

What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.



© 2020 Husch Blackwell LLP

165

Example of considerable weight

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.

© 2020 Husch Blackwell LLP

166

Example of less weight

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”

© 2020 Husch Blackwell LLP

167

How do(es) the decision-maker(s) issue a decision?

- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding application of relevant policy definitions to the facts
 - Includes a rationale for each finding for each allegation
 - States the disciplinary sanctions and remedies, if implicated by the determination made, and
 - Explains the procedures and grounds for appeal

© 2020 Husch Blackwell LLP

168

Who determines discipline and remediation?

- This is a question of institutional choice
- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued



© 2020 Husch Blackwell LLP

What principles do we use to determine discipline?

-



© 2020 Husch Blackwell LLP

What principles do we use to determine remediation?

1.9(sar)4lny-2.8()-293(lu)58clab.arsas-930(n)-235(a)580abR1(n)A31a(38(5).371)c-23(4(

© 2020 Husch Blackwell LLP

What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review

© 2020 Husch Blackwell LLP

175

Who can appeal?

- Title IX regulation requires that either party be allowed to appeal
- Third-party persons cannot file appeals on behalf of a party

© 2020 Husch Blackwell LLP

176

Can an institution set a time limit to appeal?

- Yes – an institution can and should require an appeal to be filed within a reasonable number of days after a dismissal or determination
- Institution may set a secondary deadline for the non-appealing party to elect to file a cross-appeal the first party has appealed

© 2020 Husch Blackwell LLP

What are the grounds for appeal?

Title IX regulation requires the following permitted grounds



Procedural irregularity that affected the outcome of the matter



New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or



© 2020 Husch Blackwell LLP

Example (procedural irregularity)

During a hearing, the hearing officer denies the respondent's advisor the right to question witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing officer must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.

© 2020 Husch Blackwell LLP

Example (harmless error)

Policy required hearing to be held within 60 days of submission of Formal Complaint. Hearing was held 61 days after submission of Formal Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.

© 2020 Husch Blackwell LLP

181

Example (new evidence)

After determination is made that respondent did not commit sexual harassment, complainant secures a previously unknown video made by a bystander at the party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The student who took the video has been away studying abroad and only learned of the hearing after returning a few days ago.

© 2020 Husch Blackwell LLP

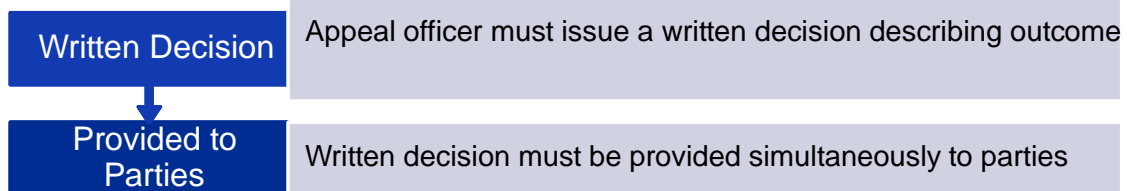
182

Example (conflict of interest/bias)

After determination is made that respondent committed sexual harassment, respondent sees social media post by hearing officer stating: “All victims of sexual harassment must be believed. False reports of harassment are exceedingly rare. A person accused of sexual harassment is a guilty person in my book.” Respondent argues bias resulted in a sham hearing with the outcome predetermined.

© 2020 Husch Blackwell LLP

What is the appeal process?



© 2020 Husch Blackwell LLP

Should we ever dismiss an appeal?

- Yes – dismissal is appropriate if:
 - Appeal is filed after the reasonable deadline set in the policy
 - Appealing party does not articulate one of the three grounds for appeal

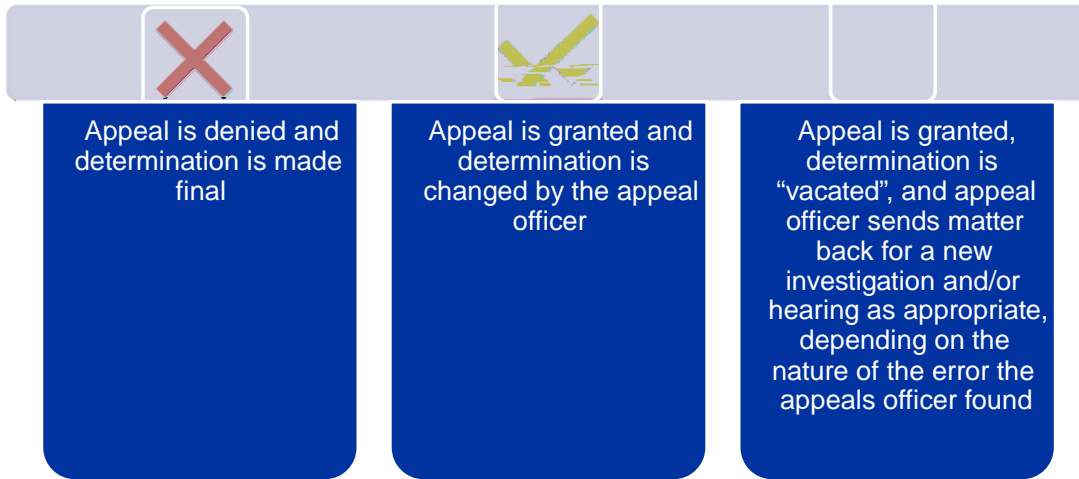
© 2020 Husch Blackwell LLP

May the institution appeal if the parties don't?

- No – the institution sBlm5.9(ion)2.5TJ ET Q q BT 0 .2 .6 16.32

© 2020 Husch Blackwell LLP

What are the potential outcomes of an appeal?



© 2020 Husch Blackwell LLP

189

Example

Appeals officer finds there was a prejudicial procedural error because the hearing officer failed to send notices requesting several of the respondent's key witnesses appear. Appeals officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.

© 2020 Husch Blackwell LLP

190

Is there further review after appeal?

Unless policy expressly provides for second level appeals (not recommended), President and Board should not entertain pleas for additional review.



© 2020 Husch Blackwell LLP

After a hearing, a faculty member—who is also a principal investigator in externally funded research—is determined to have sexually harassed a student lab assistant by repeatedly making sexualized comments about the student's physique and manner of dress when the student was performing research duties in the lab. Faculty member appeals on



© 2020 Husch Blackwell LLP



© 2020 Husch Blackwell LLP



What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.

© 2020 Husch Blackwell LLP

What are the key concepts of informal resolution?



A fWhat are re ret 14830 1 17g e 122.28BT 0 g ((281 cm /4k.64 104.1 cmj 0 ()5.21(f921 2

© 2020 Husch Blackwell LLP

Example

Parties agree to engage in informal resolution in the form of mediation. Parties meet with third-party mediator three times over the course of two weeks and are very near to reaching a complete agreement. The morning of the last session, the complainant indicates a desire to stop mediation and resume the formal investigation/hearing process.

© 2020 Husch Blackwell LLP

197

What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment

© 2020 Husch Blackwell LLP

198

Example (impermissible)

Student files a formal complaint accusing a faculty member of offering to give student better grades in exchange for sexual favors. Faculty member proposes to informally resolve the complaint by apologizing for a “bad joke” and having a colleague grade student’s work product. Student indicates they are amenable to the faculty member’s proposal.

© 2020 Husch Blackwell LLP

© 2020 Husch Blackwell LLP

What are some examples of informal resolution?

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorney

© 2020 Husch Blackwell LLP



© 2020 Husch Blackwell LLP



How long can an informal resolution take?

© 2020 Husch Blackwell LLP

Example

Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent's misconduct and attend counseling, but should respondent sexually harass complainant again, complainant will be free to file a formal complaint encompassing the entire range of sexual harassment.

© 2020 Husch Blackwell LLP

207

How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted

© 2020 Husch Blackwell LLP

208



Are parties allowed to talk about a case?

- Title IX regulation prohibits an institution from restricting the ability of a party to discuss the allegations under investigation or to gather or present evidence
- First Amendment additionally limits public institutions' ability to restrict speech about a case
- Witness manipulation and intimidation can still be addressed by institution



© 2020 Husch Blackwell LLP

Example (permitted communication)

Res6ab007 35.274.9(3(s6a)1 Tm /369.)-6.9(02 Tt)-3.(d)2.e3.

© 2020 Husch Blackwell LLP

Example (institution may restrict)


Complainant contacts witness who complainant knows will testify to witness' belief, based on observation, that complainant was not incapacitated and desired to have sex with respondent. Complainant tells witness to ignore investigator's request for an interview, to lie if witness is asked what witness observed, and not to show up at a hearing under any circumstances.

© 2020 Husch Blackwell LLP

Are interviews and hearings confidential?

- Institution should restrict access to investigations and hearings to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors of choice and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access to interviews

© 2020 Husch Blackwell LLP



Student A is being investigated for sexually assaulting Student B. Student A contacts various individuals who were present at a party immediately before the sexual assault and asks the individuals to sign a declaration attesting that Student B was sober and fondling Student A in front of others. One such individual is a friend of Student B's and complains to the Title IX Coordinator. Later, when Student A is given access to the investigation evidence before the conclusion of the investigation, Student A posts -4.6(e)2(s)6.4(ti)-Ten4.9(u)7.



© 2020 Husch Blackwell LLP



© 2020 Husch Blackwell LLP