HUSCH BLACKWELL

2020 Title IX Regulations

Core Issues and Lessons Learned

© 2021 Husch Blackwell LLP

1

Our Topics Today

- Title IX Jurisdiction: is it Title IX or not?
- Advisors: understanding their unique role
- Live hearings: some practical tips
- Title IX case law update

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

2

© 2021 Husch Blackwell LLP. All Rights Reserved.

But First: What Might the Biden Administration Do?

- Issue sub-regulatory guidance
- Modify enforcement stance
- Repeal regulations and adopt new regulations at the same time
- Repeal only and adopt new regulations at a later time
- Bottom line: for now, institutions must comply with current regulations

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

3

HUSCH BLACKWELL

Title IX Jurisdiction: Is it Title IX or not?

© 2021 Husch Blackwell LLP

4

© 2021 Husch Blackwell LLP. All Rights Reserved.

Important Threshold Issue

- What policies/procedures potentially apply: Title IX, student conduct code, others?
- What is being alleged – by whom and against whom?
- When and where did alleged conduct occur?
- Do you need more information to make an assessment?
- Who is involved in making an assessment?
- How and when will the results of assessment be communicated?
- Then what happens?

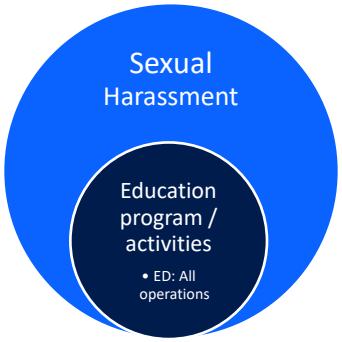
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

5

Did the alleged conduct occur in an education program or activity?

- Title IX applies to sexual harassment in the "education **program or activity**" of a **federal funding recipient**
  - Title IX defines "education program or activity" to include the "operations" of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



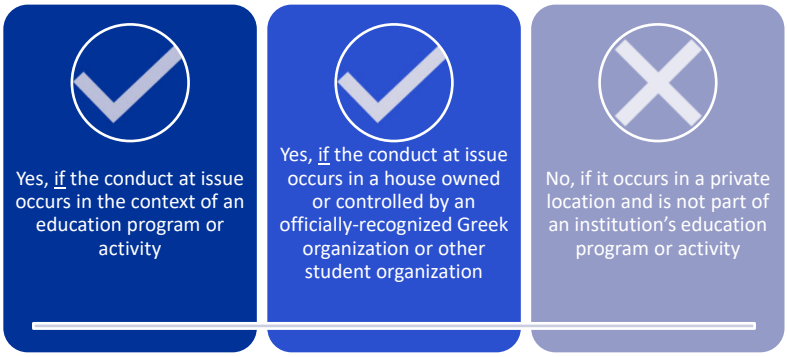
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

6

© 2021 Husch Blackwell LLP. All Rights Reserved.

Does Title IX apply to off-campus sexual harassment?



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

7

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

8

© 2021 Husch Blackwell LLP. All Rights Reserved.

Example (included in EP&A)

Student claims they were sexually assaulted at third-party clinical site owned and operated by a hospital that is not owned by the university.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

9

Example (excluded from EP&A)

Student reports being sexually assaulted by multiple other students in a private off-campus apartment.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

10

© 2021 Husch Blackwell LLP. All Rights Reserved.

Example (included or excluded?)

Student reports some acts of sexual misconduct occurring in on-campus residence hall, others occurring in the parking lot of nearby restaurants, and others occurring at private off-campus apartment.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

11

Does the alleged conduct meet the Title IX definition of sexual harassment?

Conduct on the basis of sex that is:

- Quid pro quo harass-ment
- Hostile environment harassment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

12

© 2021 Husch Blackwell LLP. All Rights Reserved.

What is a 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.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

13

Does your institution have other policies that might apply?

- Institutions are free to use
  - Student code of conduct
  - Faculty/employee handbooks
  - Other policies

  to address sexual harassment that does not occur in an education program or activity

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

14

© 2021 Husch Blackwell LLP. All Rights Reserved.

HUSCH BLACKWELL

Assignment and Role of Advisors

© 2021 Husch Blackwell LLP

15

Advisors: Key Issues

- Assignment of advisors
- Role of advisors during investigation and hearing
- Questioning by advisors
- Confidentiality and other expectations

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

16

© 2021 Husch Blackwell LLP. All Rights Reserved.

Do parties get assistance in the grievance process?

- Yes
- The parties have the right to be accompanied by an advisor of their choice during the investigation and hearing
- The institution must provide the party an advisor **for purposes of conducting questioning at the hearing** if the party does not have an advisor
- Can be an employee, a retained attorney, or a third party
- Equal competency not required

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

17

Does the institution provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing and any other interviews or investigation meetings
- If a party does not have an advisor, the institution must supply one **for the purpose of questioning the other party and witnesses at the hearing** on behalf of the student in question

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

18

© 2021 Husch Blackwell LLP. All Rights Reserved.

What is the role of an advisor during the investigation?

Support	Provide personal support to the party throughout
Preparation	Support the party in preparing for meetings and interviews
Presence	Be present with the party during meetings and interviews
Review	Assist the party in reviewing the evidence prior to the close of the investigation

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

19

What must an advisor not do during the investigation?

Inhibit	Advisor should not inhibit communication between investigator and party
Disrupt	Advisor should not disrupt meetings and interviews
Argue	Advisor should not argue with the investigator
Evidence	Advisor does not present evidence or “make a case”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

20

© 2021 Husch Blackwell LLP. All Rights Reserved.

What if the advisor breaks the rules?

- An advisor who violates the rules may be excluded from further participation
- Institution may pause the relevant interaction to allow the party to select a new advisor

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

21

What is the role of an advisor during the hearing process?

Support	Provide personal support to the party throughout
Preparation	Help the party prepare for pre-hearing conference and live hearing
Presence	Be present with the party during pre-hearing conference and live hearing
Questioning	Conduct live questioning of other party and witnesses at the live hearing

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

22

© 2021 Husch Blackwell LLP. All Rights Reserved.

Is there a standard of behavior in hearings?

- Yes
- All parties (including advisors) must:
  - Act professionally
  - Maintain decorum
  - Not disrupt proceedings

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

23

HUSCH BLACKWELL

Questioning

© 2021 Husch Blackwell LLP

24

© 2021 Husch Blackwell LLP. All Rights Reserved.

What is a "live" hearing?

- A proceeding held by the hearing officer or panel, either in-person or virtually where:
  - Parties are present with their advisors at the same time
  - Parties and witnesses testify with contemporaneous participation (i.e., no "pre-recording")
  - Parties' advisors ask live questions of the other party and witnesses
  - If virtual hearing, make sure everyone has adequate internet connection and leaves cameras on

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

25

Who attends a live hearing?

- The hearing officer or panel
- Other necessary institutional personnel or institutional advisors (i.e., attorneys)
- The parties and each party's advisor
- Witnesses as they are called to testify (consider confirming in advance which witnesses each party intends to question)
- Other support persons for parties, if permitted by institution
- Consider asking if others not permitted are present

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

26

© 2021 Husch Blackwell LLP. All Rights Reserved.

How does the hearing actually work?

- Required elements include:

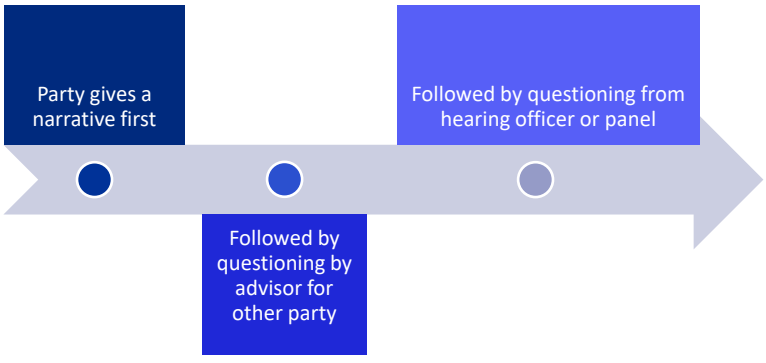
Hearing officer or panel must independently evaluate questions for relevance and resolve relevancy objections	Party's advisors must be allowed to conduct live questioning of other party and witnesses
Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded	Questioning of sexual history generally not permitted

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

27

How might questioning of parties take place?



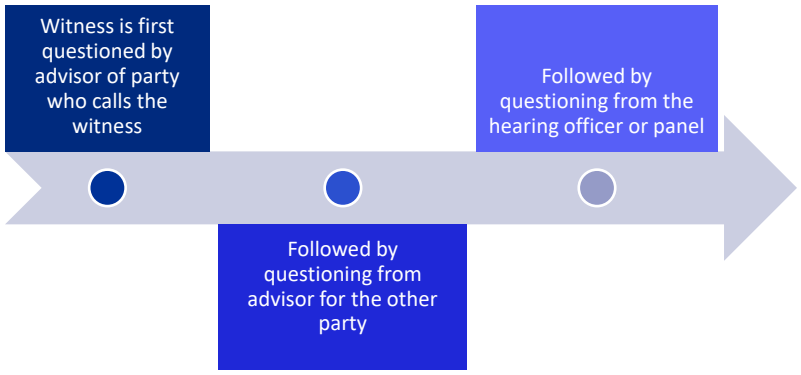
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

28

© 2021 Husch Blackwell LLP. All Rights Reserved.

How might questioning of witnesses take place?



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

29

What is the advisor's role in questioning?

- Ask relevant questions, including those characterized as "cross-examination" of the other party and witnesses
- The questions asked are reasonably intended to support the position of the party who the advisor is supporting

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

30

© 2021 Husch Blackwell LLP. All Rights Reserved.

What questions should advisors ask?

- Review the nature of the allegations
- Review the definition of the particular type of sexual harassment alleged
- Consider facts that would support the party's position that a given element of the sexual harassment is either met or not met
- Prioritize questioning to focus on the most compelling points
- Consider questions that will bear on credibility

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

31

What are the hallmarks of effective questioning?

- Questions should be clear and precise
- Questions should advance a party's position with respect to one or more elements of the sexual harassment alleged
- Questions should be asked in a purposeful order
- Questions should be prioritized and edited for greatest effect

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

32

© 2021 Husch Blackwell LLP. All Rights Reserved.

What should an advisor do if a question is deemed irrelevant?

- The hearing officer or panel will be making these decisions during the questioning
- Advisors are generally not permitted to argue with the hearing officer or panel like a lawyer, but they might ask clarifying questions

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

33

Is an advisor required to make objections?

- If a party believes the other party's advisor is asking an inappropriate question, the party may object
- At most institutions, advisors are not permitted to speak for their advisee, make objections, present arguments, or engage in any other active role except questioning (including cross-examination) of the other party and witnesses

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

34

© 2021 Husch Blackwell LLP. All Rights Reserved.

Is an advisor required to "act like a lawyer"?

- Advisor role is a non-legal role
- Advisors are not providing legal advice (unless retained as counsel)
- Advisors are not a prosecutor or a defense attorney
- Advisors are not required to engage in "zealous advocacy" like a private attorney (unless retained as counsel)
- Advisors are to ask relevant and appropriate questions to reasonably support the case of the party they are supporting

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

35

HUSCH BLACKWELL

Confidentiality and Other Expectations

© 2021 Husch Blackwell LLP

36

© 2021 Husch Blackwell LLP. All Rights Reserved.

Must an advisor maintain confidentiality?

- Yes
- If an advisor is an institutional employee, the advisor must abide by the same confidentiality rules as the institution itself, including FERPA
- Advisors should maintain the confidentiality of the process and not disclose information to any third-party except as the process itself permits

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

37

Are an advisor's communications with a party "privileged"?

- No, if the advisor is an employee of the institution
- Communications are not protected from discovery in normal criminal and civil legal processes
- Advisors should not disclose communications with an advisee to a third-party unless FERPA allows it
- An institution may require advisors to disclose communications to another institutional official in certain circumstances (i.e., witness tampering; suicidal ideation; disclosure of other sexual harassment; other legitimate educational purposes)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

38

© 2021 Husch Blackwell LLP. All Rights Reserved.

HUSCH BLACKWELL

Hearings: Some Lessons Learned

© 2021 Husch Blackwell LLP

39

Additional Practical Tips

- Review and confirm Title IX jurisdiction before conducting hearing
- Remain open to informal resolution
- Make good use of one or more pre-hearing conferences – **confirm witness attendance**, access to evidence, discuss attendance and sequencing, answer questions, address concerns, etc.
- Virtual hearings: internet connection, how evidence will be accessed, keep cameras on, maintain role of advisor as "silent advisor"
- Ensure the hearing officer or panel has been trained and is prepared to maintain order, display impartiality, and address relevancy and other issues during the hearing

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

40

© 2021 Husch Blackwell LLP. All Rights Reserved.

HUSCH BLACKWELL

Case Law Update

© 2021 Husch Blackwell LLP

41

Adams v. Sch. Bd. of St. John's County, Fla. (11th Cir. 2020)

- Applied *Bostock* to Title IX
- *Bostock* determined that Title VII prohibits discrimination because of sexual orientation or gender identity
- Discrimination based on sex includes discrimination based on gender identity
- Determined that policy restricting restroom use to restroom corresponding with sex at birth violated Title IX

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

42

© 2021 Husch Blackwell LLP. All Rights Reserved.

Foster v. Univ. of Mich. (6th Cir. 2020) (en banc)

- Reaffirming "deliberate indifference" standard in affirming summary judgment for university
- Arose out of alleged student-on-student sexual harassment during MBA program in L.A. via emails, texts, social media posts, and physical contact
- No contact order (which respondent violated), placed respondent in different hotel, arranged separate meal times, precluded attendance at commencement
- Made no contact order permanent after investigation as sanction for policy violation

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

Doe v. Marian Univ. (7th Cir. 2020)

- Affirming summary judgment in Title IX respondent case
- Pressure from Obama-era OCR not enough when no other evidence of gender bias because the parties were treated equally
- Contrasted case with *Doe v. Purdue Univ.,* in which the university allegedly credited the female complainant's account without ever hearing from her and the complainant was supported by an organization that had posted article titled, "Alcohol isn't the cause of campus sexual assault. Men are."

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

© 2021 Husch Blackwell LLP. All Rights Reserved.

Doe v. Univ. of the Sciences (3rd Cir. 2020)

- Reversed dismissal of Title IX claim brought by male respondent
- Rejected often used framework set forth by 2nd Circuit in *Yusuf v. Vassar College* that used erroneous outcome and selective enforcement categories
- Issue is whether the alleged facts, if true, support a plausible inference of gender bias/discrimination based on sex
- Extended live hearing requirement with cross examination to all private institutions in the 3rd Circuit

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

45

Karasek v. Regents of the Univ. of Cal. (9th Cir. 2020)

- Institutions can be liable for "pre-assault" deliberate indifference claims
- Based on theory that Title IX policies are inadequate, create heightened risk of sexual misconduct, and lead a complainant to be sexually harassed or assaulted
- Relied on 2014 California State Auditor report that said from 2009-2013 the university did not notify or regularly update parties, complete investigations in timely fashion, or provide proper training

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

46

© 2021 Husch Blackwell LLP. All Rights Reserved.