


HUSCH BLACKWELL

# Title IX and VAWA Training

University of Maryland Participants in Sexual Harassment Policy Process  
Fall 2020

© 2020 Husch Blackwell LLP. All Rights Reserved.


1



## Agenda

.....

- Key Legal Principles and Considerations
- Applicable Policy Requirements
- Resolution Options and Case Processing
- Investigation and Key Issues
- Conflicts of Interest, Bias, and Stereotyping
- Investigative Issues
- Informal Resolutions & Confidentiality



HUSCH BLACKWELL


© 2020 Husch Blackwell LLP

2

**H-B**

## Goals

---



- Understand
  - Title IX
  - New regulations
  - University policies
  - Mapping relevant policies
  - Identify issues for consideration

**HUSCH BLACKWELL**

© 2020 Husch Blackwell LLP

3

# Key Legal Principles & Considerations

---

Module 1: Including scope, jurisdiction, and reporting

© 2020 Husch Blackwell LLP


4

U-M

# What is Title IX?

“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

32 C.F.R. § 106.31

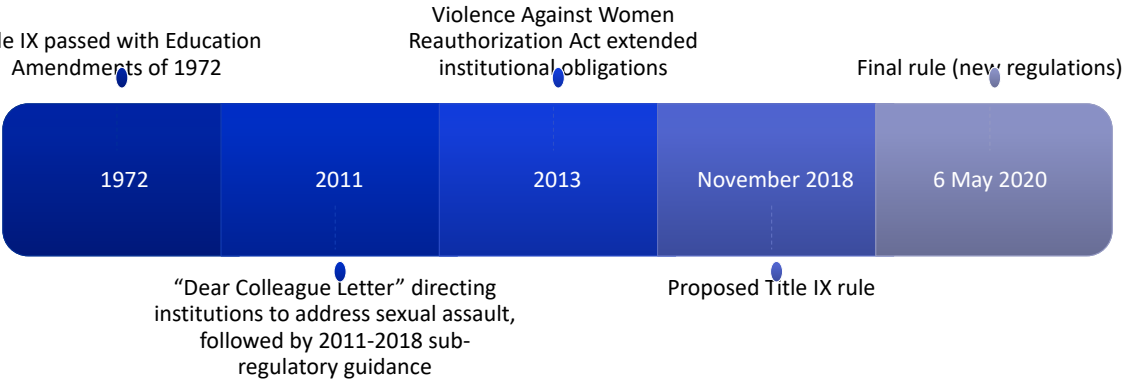


HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

5

# Why are we talking about this now?



The timeline consists of a horizontal bar divided into five segments, each representing a key event in Title IX history. Above the bar, text labels describe the events. Below the bar, specific dates are listed. The segments are: 1972 (Title IX passed), 2011 (Dear Colleague Letter), 2013 (VAWA Act extended obligations), November 2018 (Proposed Title IX rule), and 6 May 2020 (Final rule).

Year	Event
1972	Title IX passed with Education Amendments of 1972
2011	"Dear Colleague Letter" directing institutions to address sexual assault, followed by 2011-2018 sub-regulatory guidance
2013	Violence Against Women Reauthorization Act extended institutional obligations
November 2018	Proposed Title IX rule
6 May 2020	Final rule (new regulations)


HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

6

H-B

# When are the new regs effective?



- August 14, 2020
- Do not apply to Sexual Harassment that allegedly occurred prior to effective date
  - Assessed according to guidance and regulations in place at time alleged conduct occurred

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

7

## Examples of notable provisions

Revised definition of the types of sexual misconduct covered by ED's Title IX rules

Added emphasis on equal rights of parties

Presumption respondent did not violate policy unless and until a determination is made after hearing

Revised procedural parameters including

- Triggers for institutional responsibility
- Notice requirements
- Proceeding with investigations
- Appeals
- Informal resolution

Live hearing including

- Cross-examination by party advisors
- Relevance rulings by decision maker
- Allowable expert witnesses

8

© 2020 Husch Blackwell LLP. All Rights Reserved.

4

# B-H

## 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 *do* apply to individual persons



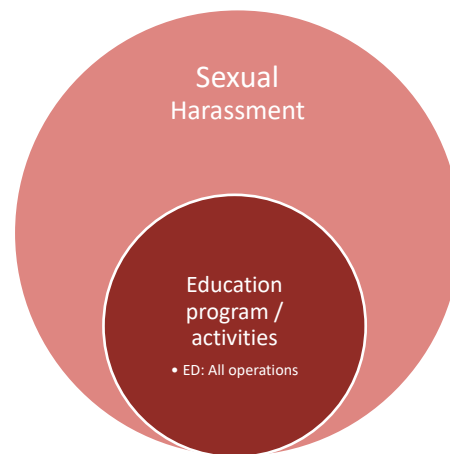
HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

9

## What sexual harassment does Title IX apply to?

- 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

© 2020 Husch Blackwell LLP

10

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

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

11

Does Title IX apply to off-campus sexual harassment?

✓

Yes, if the conduct at issue occurs in the context of an education program or activity

✓

Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization

✗

No, if it occurs in a private location and is not part of an institution's education program or activity

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

12

© 2020 Husch Blackwell LLP. All Rights Reserved.


6

B

-

H

# Example (included in EP&A)



Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

13


B

-

H

# Example (included in EP&A)

The tennis team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the coach sexually harasses the team’s manager.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

14

**B  
-  
H**

## 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.

**HUSCH BLACKWELL**

© 2020 Husch Blackwell LLP

15

**B  
-  
H**

## 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**

© 2020 Husch Blackwell LLP

16





## Additional Legal Considerations

© 2020 Husch Blackwell LLP

17



## The Clery Act

- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. section 1092(f)), a federal law that requires institutions such as University of Maryland to collect and publish statistics for certain crimes reported to have occurred on the university's "Clery Geography" (i.e., occurring on campus, on public property within or immediately adjacent to campus, and on other non-campus university property), for the purpose of informing current and prospective students, faculty or staff.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

18

**H-B**

## **Additional Legal Considerations: Violence Against Women Reauthorization Act of 2013**

- Codification of Title IX principles
- Sexual misconduct policy
- Statements of rights and options
- Support persons
- Training

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

19

**H-B**

## **Applicable disabilities statutes**



- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

20



## Section 504 of the Rehabilitation Act

- The first statute to require disability accommodation (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . .”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

21



## ADA—Title II

- Title II: Prohibits disability discrimination by public entities
- “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity”
- A public entity’s programs, activities, and services, viewed in their entirety, must be readily accessible to, and usable by, persons with disabilities

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

22



## ADA—Title III

- Title III: Prohibits “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . .”
- Colleges and universities are places of public accommodation
- Must make reasonable accommodations in policies, practices, and procedures

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

23



## FERPA

- *Addressed in Confidentiality Section*

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

24



## Standard of Evidence

© 2020 Husch Blackwell LLP

25



## Legal Standard

Preponderance of the evidence

=

“more likely than not”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

26



## Maryland Language:

*UMD Updated Policy*

- “The standard of proof for a determination of responsibility...is Preponderance of the Evidence”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

27



## Reporting Requirements

© 2020 Husch Blackwell LLP

28

*UMD Updated Policy*

## Reporting of prohibited conduct

- A **Responsible University Employee** must promptly notify the Title IX Officer of any report of Prohibited Conduct brought to their attention
- All persons are encouraged to report Prohibited Conduct promptly in order to maximize the University's ability to obtain evidence, identify potential witnesses, and conduct a thorough, prompt and impartial investigation

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

29

*UMD Updated Policy*

## Confidential Resources

### *On campus:*

- Campus Advocates Respond & Educate (CARE) to Stop Violence
- Faculty Staff Assistance Program (FSAP)
- University Counseling Center
- University Health Center (UHC)
- Campus Chaplains

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

30

# Applicable Policy Requirements

Module 2: Including key terms, definitions & retaliation

© 2020 Husch Blackwell LLP

31

H-B

+

UMD Updated Policy

## Purpose of Policy

**The University is committed to:**

- Creating and maintaining a working and learning environment *free* from all forms of Sexual Harassment, Other Sexual Misconduct and Retaliation.

**The University accomplishes this through training, education, prevention programs, policies and procedures that promote:**

- Prompt reporting and response;
- Providing support to persons alleged to be victimized;
- Prohibiting Retaliation; and
- The implementation of timely, fair and impartial investigations and resolutions that ensure due process and remedy policy violations.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

32





UMD Updated Policy

## Scope of Policy

- The University of Maryland is committed to taking the appropriate steps to **eliminate** Prohibited Conduct, **prevent** its recurrence and **address** its effects.
- The policy applies to all members of the University community, including
  - Students, faculty and University of Maryland staff;
  - Contractors and other third parties who are engaged in any University Education Program or Activity; or
  - Who are otherwise interacting with the University including, but not limited to volunteers, vendors, guests and visitors.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

33



UMD Updated Policy


## Reach of Policy

- Acts of **Prohibited Conduct** committed by or against students, employees, and third parties when:
  - The conduct occurs **on** University premises, in any University facility, or on property owned or controlled by the university;
  - The conduct occurs **in the context** of a University Education Program or Activity, including, but not limited to, University-sponsored academic, athletic, extracurricular, study abroad, research, online or internship programs or activities;
  - The conduct occurs outside the context of a University Education Program or Activity, but has **continuing adverse effects** on or creates a hostile environment for students, employees or third parties while on University premise or other property owned or controlled by the University or in any University Education Program or Activity; or
  - Conduct otherwise **threatens** the health and/or safety of University members.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

34



## Maryland’s Designated Title IX & Non-Title IX Conduct

UMD Updated Policy

- This Policy also addresses allegations of Other Sexual Misconduct, which includes:
  - Sexual Harassment that occurred against a person outside of the United States or not within an Education Program or Activity;
  - Sexual Coercion;
  - Sexual Exploitation;
  - Sexual Intimidation;
  - Attempted Sexual Assault;
  - Retaliation; and
  - Other Sex-based Offenses.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

35

## What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

Relationship violence

Stalking

HUSCH BLACKWELL

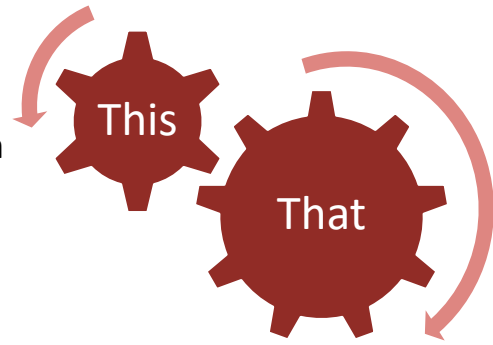
© 2020 Husch Blackwell LLP

36

# B-H

## What is quid pro quo?

- **Title IX-Designated**
- 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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

37

# B-H

## Example of quid pro quo

Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager. Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.



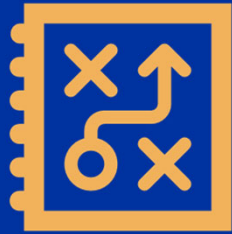
HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

38

**H-B**

## Another example of quid pro quo



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

**HUSCH BLACKWELL**

© 2020 Husch Blackwell LLP

39

**H-B**

## 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.

**HUSCH BLACKWELL**

© 2020 Husch Blackwell LLP

40



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

41



## Example of hostile environment

Bookworm student repeatedly gropes Social Butterfly student's buttocks when the two are in the elevator of their shared dormitory. Butterfly has no romantic interest in Bookworm and has told Bookworm to stop. But Bookworm persists, causing Butterfly to use the stairs instead of the elevator and to avoid Bookworm in other areas of the dormitory.



HUSCH BLACKWELL


© 2020 Husch Blackwell LLP

42

B

H

## Another example of hostile environment



Resident Assistant asks Student to go on a date, and Student says “no.” RA then repeatedly sends Student text messages using various vulgar terms that suggest Student is promiscuous. When RA and Student attend a shared biology class, RA mutters these vulgar terms toward Student, loud enough for others to hear. Student blocks RA’s phone number and drops the biology class to avoid RA.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

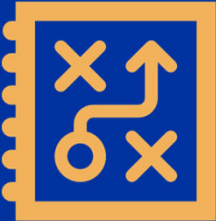
43

B

H

## Another example of hostile environment

Senior obtains a nude picture of Soccer Player from Player’s former romantic partner. Senior threatens to post the nude picture on social media unless Player poses nude for Senior in Senior’s residence hall. Player poses for Senior to avoid the nude picture being circulated. Senior is not an employee.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

44



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

45



## Example (not-hostile environment)

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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

46

B

H

I

B

## What is sexual assault?

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

Rape

Sodomy

Sexual assault with an object

Fondling

Incest

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

47

B

H

I

B

## What is rape?

Having carnal knowledge of a person, 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. There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

48





## What is consent?

- Policy definition – read it carefully
- Words or actions that a reasonable person in the respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

49



## What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

50

B

-

H

+

## Example (incapacitated)

Short student has had ten cocktails over the course of two hours. Sober student takes Short student to Sober’s apartment. Short student cannot walk without support, forgets Sober’s name, and passes into a stupor when Sober places Short student on Sober’s bed. Sober then engages in sexual activity with Short student.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

51

B


-

H

+

## Example (not-incapacitated)

Tall student has had four beers over the course of two hours with dinner. Tall student calls Friend to see if Friend is home. Tall student then drives from campus to Friend’s off-campus apartment. Upon arriving, Tall student initiates sexual contact with Friend, and then insists that Friend uses contraception before the two have intercourse. Tall student is an active participant in the intercourse.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

52



## What is sodomy?

Oral or anal sexual intercourse with another person 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.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

53



## What is sexual assault with an object?

Using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, 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. An “object” or “instrument” is anything used by the perpetrator other than the perpetrator’s genitalia.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

54



# 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.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

55



# Example of fondling

Clumsy student and Dance student attend a dance held in the student union. While on the dance floor, Clumsy gropes Dancer’s groin without permission. Dancer does not welcome the groping and views it as unwelcome.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

56



## What is incest?

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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

57



## What is statutory rape?



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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

58



## 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.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

59



## What is dating violence?

"Dating Violence" is :

- Actual, attempted or threatened violence by one individual against another individual with whom they are, or have been, in a social relationship of a romantic or intimate nature; or
- Conduct that would constitute a felony or misdemeanor crime of violence by an individual against:
  - A current or former spouse or intimately partner
  - An individual with whom they share a child
  - An individual similarly situated to a spouse under Maryland state domestic or family violence laws
  - Any adult or youth who is protected from the individual's acts under the Maryland state domestic or family violence laws

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

60



## Example of dating violence

President's Chief of Staff and Statistics Department Chair are engaged to be married but live separately and have no children in common. Chief of Staff and Department Chair get into an argument over sex in Chief of Staff's car in the institution's parking lot. During the argument, Chief of Staff slaps Department Chair's face and tells chair to "shut your mouth."



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

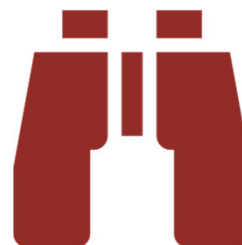
61



## What is stalking?

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

62

B

-

+

# Example of stalking



Freshman is infatuated with Sophomore who has rebuffed Freshman’s romantic advances. Thereafter, Freshman dresses in black and sneaks up to the window of Sophomore’s house (owned by sponsored Student Organization) at night in an attempt to see Sophomore. Freshman does this twice before being caught in the act during Freshman’s third attempt.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

63

B

-

+

HUSCH BLACKWELL

# Retaliation

64





## Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy (34 C.F.R. § 106.71)

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

65



UMD Updated Policy

## What is Retaliation?

- Retaliation means intimidating, threatening, coercing or discriminating against, or otherwise taking an **adverse action** against an individual:
  - To interfere with any right or privilege secured by law or University policy relating to Prohibited Conduct, or
  - Because an individual has made a report, filed a complaint, testified, assisted, participated or refused to participate in any manner in an investigation, proceeding or hearing related to Prohibited Conduct.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

66

*UMD Updated Policy*

## Adverse Actions are defined as...

- **Adverse actions** include but are not limited to:
  - Impeding an individual's academic advancement;
  - Terminating, refusing to hire or refusing to promote an individual;
  - Transferring or assigning an individual to a lessor position in terms of wages, hours, job classification or job security;
  - Retaliatory harassment;
  - Charges against an individual for violations of other University policies that do not involve sex discrimination or Prohibited Conduct but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or complaint of Prohibited Conduct, for the purpose interfering with any right or privilege secured by law.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

67

*UMD Updated Policy*

## University Response

- “The University has a compelling interest in protecting the integrity of the resolution process, protecting the privacy of Parties and witnesses, and protecting Parties and witnesses from harassment, intimidation or Retaliation during the resolution process.”
- Concerns about potential retaliation in connection with a report of sexual misconduct should be reported to the designated officials under this policy.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

68

B

-

H

## Example of retaliation

Groundskeeper testifies at hearing in support of Office Worker’s complaint of sexual harassment against Manager. After institution finds that Manager sexually harassed Office Worker, Manager demotes Groundskeeper to punish Groundskeeper for testifying against Manager.




HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

69

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.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

70

Questions


?



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

71



HUSCH BLACKWELL

# Resolution Options & Case Processing

Module 3: Including Title VII; Response; Supportive Measures; Interim Removals; Bias, Stereotyping & Conflicts

72

## Examples of Policies with Related Concepts

### Discrimination

- Sexual Harassment
- Other non-discrimination statement & policies

### Relationships

- Workplace
- Employee - student

### Conduct

- Student
- Faculty/Employee

### Discipline

- Student
- Faculty
- Employee

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

73

# B - I T

## Understand Title IX and Title VII Procedures

- New Title IX Regulations -- Employees
  - Impose additional procedural requirements
  - Only for allegations meeting new sexual harassment definition
  - Expressly contemplate “dual” compliance approach with Title IX and Title VII

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

74

## 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	Any quid pro quo by employee
Sufficiently severe <u>or</u> pervasive	Unwelcome <u>and</u> Sufficiently severe <u>and</u> pervasive <u>and</u> objectively offensive
	Any sexual assault/DV /stalking

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

75

## Title VII Sexual Harassment Standard

- Sexual Harassment under Title VII includes:
  - Hostile environment
    - Unwelcome subjectively and objectively
    - “severe OR pervasive”
  - Similar conduct as at issue under Title IX
    - Quid Pro Quo
    - Sexual Violence (e.g. assault)

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

76



## 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 in a manner to avoid an actual conflict between an employer’s obligations under Title VII and Title IX.”

— Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

77



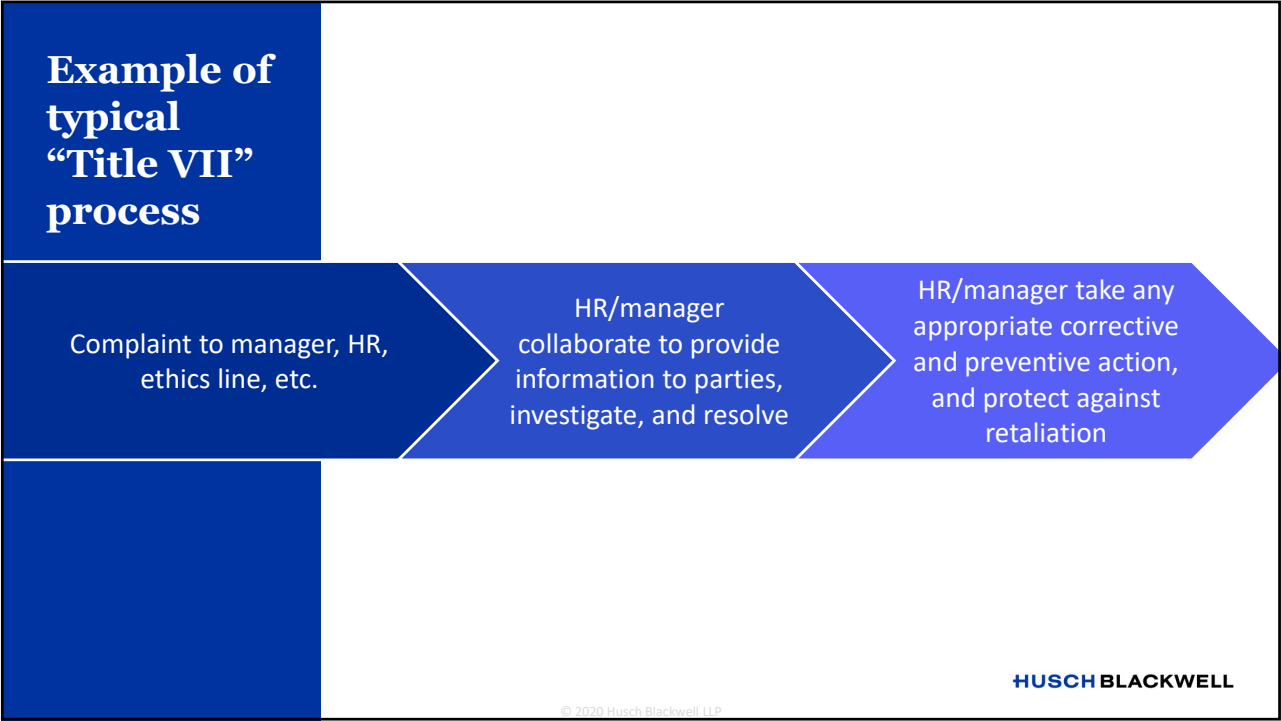
## More From Preamble

- “These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient’s own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30.”
- “These final regulations do not preclude a recipients’ obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations.”

- Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))

-

78



79

Comparison	
Common Title VII Response	Title IX Regs Requirements
Resolution by internal investigation	Discipline requires regimented investigation & hearing process
Formal or informal complaint	Formal complaint only
Advisor silent supporter	Advisor entitled to participate
Resolution does not require active complainant	Need participating complainant
May or may not result in formal report	Requires formal report & other documentation
<div>HUSCH BLACKWELL</div> <div>© 2019 Husch Blackwell LLP</div>	

80



B

-

H

## 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
- ✓ Failed to take appropriate corrective action

- U.S. Equal Employment Opportunity Commission, *Harassment* (<https://www.eeoc.gov/harassment>)

HUSCH BLACKWELL

81

## What Triggers Obligations for VII vs. IX?

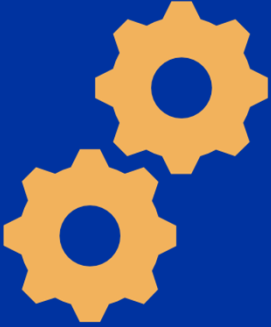
“Knew or Should Have Known” – No Formal Complaint Required  
Title IX Reg Definition + Brought by Current & Former employees

“Formal Complaint” + “Sex Harassment” as defined by regs

HUSCH BLACKWELL

82

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.

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

83

Questions





HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

84

H-B

# Institutional Response to Sexual Harassment

© 2020 Husch Blackwell LLP

85

## What are the institution's overall duties?

Respond to known acts of sexual harassment in a manner that is not clearly unreasonable

Treat complainants and respondents equitably

Utilize a grievance procedure in response to formal complaints and before imposing discipline

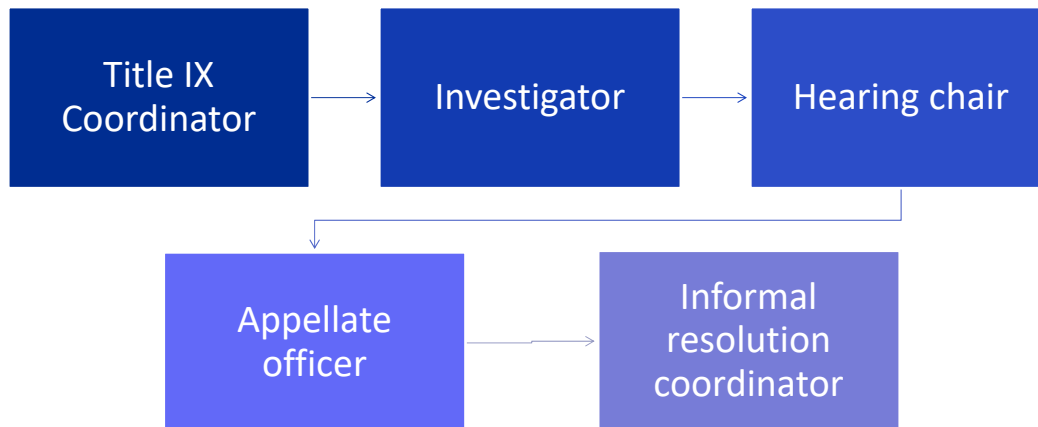
Offer supportive measures

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

86

## Who are the key institutional actors in the grievance process?



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

87



## Defining what is adequate, reliable, and impartial process

- 34 CFR 106.8(b) requires recipients to “adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints” of sex discrimination under Title IX.
- “Prompt and equitable grievance procedures” in the regulation means investigations of sexual harassment allegations that provide for “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”

HUSCH BLACKWELL

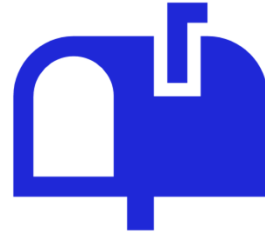
© 2020 Husch Blackwell LLP

88



## How does an institution get notice of sexual harassment?

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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

89



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

90



## **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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

91



## **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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP


92

B

-

H

# 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


HUSCH BLACKWELL


© 2020 Husch Blackwell LLP


93


## Examples of supportive measures


 Counseling


 Academic accommodations


 Housing accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

94



## Examples of Supportive Measures under Maryland's Policy

*UMD Updated Policy*

- Supportive measures may include:
  - Academic Accommodations
  - Housing Accommodations
  - Employment Accommodations
  - Care and Support (e.g. Referral to FSAP, facilitating assistance for an individual to obtain medical, healthcare, advocacy and therapy services)
  - Community Education
  - Safety (e.g. Providing campus safety escorts, transportation accommodations, assistance in making a report to law enforcement)
  - University Referrals
  - Other (e.g. No Contact Order, Denial of access to campus grounds and/or buildings)

**HUSCH BLACKWELL**

© 2020 Husch Blackwell LLP

95



## Notice of Supportive Measures

*UMD Updated Policy*

- Upon receipt of a report alleging Prohibited Conduct, OCRSM will inform Complainant of Supportive Measures.

**HUSCH BLACKWELL**

© 2020 Husch Blackwell LLP

96





## Interim Removals

© 2020 Husch Blackwell LLP

97



## Interim Removal Considerations for Students

*UMD Updated Policy*

- Under the Maryland Policy, the University may undertake emergency removal of a student Respondent for reasons arising from the alleged prohibited Conduct when the University:
  - 1) undertakes an ***individualized safety and risk analysis***;
  - 2) concludes that there is an ***immediate threat*** to the physical health or safety of any student or other individual arising from the alleged prohibited conduct; and
  - 3) provides the Respondent with ***notice and an opportunity to challenge*** the decision immediately following the removal.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

98

B

-

H

Interim Removal Considerations  
for Employees

UMD Updated Policy

• An employee's responsibilities or work location may change, or the employee may be placed on leave if without such action:

▪ 1) the Respondent **will engage** in prohibited conduct while the grievance process is ongoing, or

▪ 2) the Respondent would be **unduly disruptive** to University members or University activities or programs.

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

99


B

-

H

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.



HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

100

© 2020 Husch Blackwell LLP. All Rights Reserved.

50

**B**  
**-**  
**H**

## Example of no immediate threat to physical health or safety



Student A reports that Student B committed sexual harassment by repeatedly posting pornographic images on Student B's door in a Greek house. Student A does not allege that Student B has engaged in any physical conduct. When notified of formal complaint, Student B agrees to voluntarily remove images and cooperate with investigation.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

101

**B**  
**-**  
**H**

## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

102



## Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (i.e., Faculty Handbook)

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

103



## Processing Complaints

© 2020 Husch Blackwell LLP

104

# What is a formal complaint?

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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

105



## When may the Title IX Coordinator file a formal complaint?

- Typically when there is an important institutional interest in adjudicating a report irrespective of the alleged victim’s wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator’s decision to do so must not be clearly unreasonable

HUSCH BLACKWELL

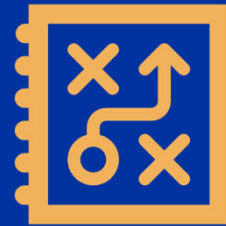
© 2020 Husch Blackwell LLP

106



## Example of T9 Coordinator formal complaint

Two student members of separate Greek organizations (GGG and PPP) each separately report they were sexually assaulted by a member of Tau Tau Tau. GGG and PPP each suspect they were drugged by TTT. Neither GGG nor PPP wishes to file a formal complaint, but each has indicated they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

107



## When must we dismiss a formal complaint?

- If filed by the alleged victim, and the alleged victim is not a current or attempted participant in education programs and activities
- Complaint does not allege sexual harassment in the institution's education programs or activities
- Complaint alleges sexual harassment abroad
- Conduct alleged would not amount to sexual harassment even if it occurred as reported
- *Practice point – duty*

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

108

B

H

I

B

Example of dismissal

Music student reports that Neuroscience student sexually assaulted Musician in their hometown during summer break. The alleged assault occurred in Neuroscientist’s house after the two attended a co-ed softball game hosted by a local recreation league. Musician and Neuroscientist have had no contact since the alleged sexual assault.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

109


B

H

I

B

Example of dismissal



Literature student makes a sexual harassment complaint against a faculty member because the faculty member requires students to analyze a “Confederacy of Dunces” which contains sexual content that Literature student finds immoral and obscene. Literature student has no other basis for the complaint but the required reading of the book.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

110



## When may we dismiss a formal complaint?

- Alleged victim indicates in writing a desire to withdraw the complaint (or particular allegations)
- Respondent is no longer enrolled in or employed by the institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

111



## Example of permissive dismissal

Prior to investigation being completed, respondent graduates institution and Complainant indicates Complainant will not testify at a hearing because any discipline would be meaningless in light of respondent's graduation. There are no witnesses to the alleged sexual harassment and no non-testimonial evidence, such as video footage.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

112



## Can we consolidate the complaints?

Yes – complaints can be consolidated if they arise out of the same facts and circumstances.

Multiple respondents

Multiple complainants

Multiple allegations against a single respondent

Multiple allegations from a single complainant

© 2020 Husch Blackwell LLP

113

## Example of permissible consolidation

Students A and Student B, who are roommates, allege that Student C barged into their dormitory room drunk and propositioned them for sex. Student A and Student B each file their own formal complaint of sexual harassment from the same incident.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP


114

B

H

I

## Example of impermissible consolidation



Medical Resident files a formal complaint that Research Fellow sexually assaulted Resident two years ago when Resident was incapacitated by drugs taken to treat a back injury. Undergraduate, Fellow’s present romantic partner, files a formal complaint that Fellow committed dating violence by slapping Undergraduate during an argument a month ago.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

115

## What is the grievance process?

Investigation to collect relevant inculpatory and exculpatory evidence

Live hearing before a decision-maker who finds facts under an evidentiary standard and determines the existence (or not) of a policy violation and any resulting sanctions/remediation

Appeal

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

116



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

117



## How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

118



## What do we do if we find sexual harassment occurred?

- If grievance process results in a finding of sexual harassment:
  - Discipline for the respondent as determined by those with authority over the respondent
  - For complainant, grant remedies reasonably necessary to restore or preserve access to education programs and activities

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

119

### 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 student lounge at the hospital. 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.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

120

Questions

?



HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

121

H-B

Bias, Stereotype and  
Conflicts

© 2020 Husch Blackwell LLP

122



## Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator or designee 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

123

### Examples of impermissible stereotypes

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

“Students 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. Therefore, every complainant must be believed.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

124



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

125



## Example of conflict of interest

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



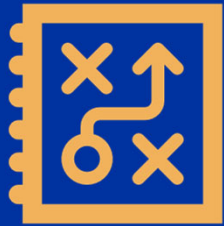
HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

126



## Example of conflict of interest



An administrator accuses an employee of an office supply vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

127



## Example of bias

An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."



HUSCH BLACKWELL

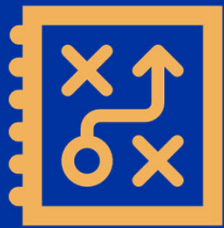
© 2020 Husch Blackwell LLP

128





## 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.” Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

129



## Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator or designee 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

130

## Resource for consideration: Harvard implicit bias test

<https://implicit.harvard.edu/implicit/takeatest.html>



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

131



HUSCH BLACKWELL

## Investigations & Key Issues

Module 4: Including Questioning, Role of Advisors and  
Trauma

132



## What is the purpose of an investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sexual harassment occurred

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

133



## Investigator

*UMD Updated Policy*

- The Title IX Officer or designee will designate an Investigator(s) from OCRSM and/or an external investigator to conduct a prompt thorough, fair and impartial investigation.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

134

**H-B**

## What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged
- Example: A text message sent the day after an incident from the respondent stating: “I never should have forced you to have sex with me after you said ‘no.’ I’m so sorry for what I did.”



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

135

**H-B**

## What is exculpatory evidence?



- Evidence tending to support that the respondent did not commit sexual harassment as alleged
- Example: A text message sent the day after an incident from the complainant stating: “I know that I said ‘yes’ at the time. And I knew what I was doing. But now I feel like you just used me as a one-night-stand.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

136



## 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 **final** fact-finding

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

137



## What is relevance?

Evidence is relevant if:

- It has a tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action

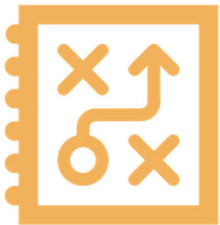
HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

138

H-B

### Example (relevant)



Coach is accused of sexually propositioning Player in exchange for more playing time. Witness states that: “One of the trainers heard Coach say that Player is ‘extremely attractive.’”

HUSCHBLACKWELL

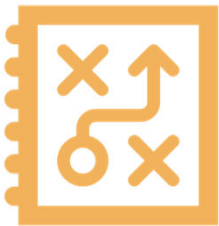
© 2020 Husch Blackwell LLP

139

H-B

### Example (not relevant)

Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Witness asserts: “Complainant is only dating Significant Other because of the Other family’s money?”



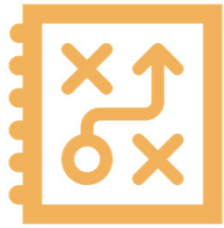
HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

140

**H-B**

## Example (not relevant)



Journalism student has accused Professor of sexual harassment. Witness says: "Student was convicted for driving under the influence when they were a sophomore in high school."

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

141

**H-B**

## Is sexual history considered?

- 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

HUSCH BLACKWELL

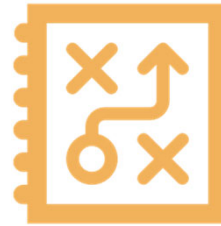
© 2020 Husch Blackwell LLP

142

**H-B**

## Example (impermissible)

Law student has accused a faculty member of sexual harassment. Witness asserts: “Law student slept with a number of individuals in the month before the claim.”



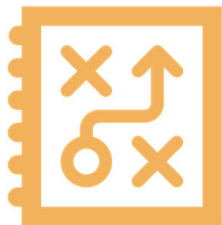
HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

143

**H-B**

## Example (permissible)



Engineering student has accused Fine Arts student of sexual assault. Engineer states that Artist had intercourse with Engineer without using a condom without Engineer’s agreement--Engineer always requires protection. Witness provides “Engineer had unprotected sex with Artist a week prior?”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

144





## 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”



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

145



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

146

## How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

147

## What are some general principles about interviewing?

Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain role as fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

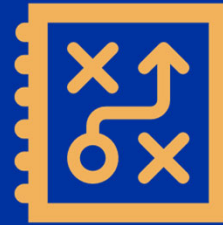
148



## Example question

From student witness: “Will I be disciplined if I don’t show up for the hearing?”

Answer: “It’s very important for you to attend so we have accurate and complete information. And I’m personally asking you to attend if your presence is requested. But no, you won’t be disciplined for failing to attend.”



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

149



## Another example question



- From a party: “I want to tell you something ‘off-the-record.’ Is that okay?”
- Answer: “The nature of the interview is that everything is ‘on-the-record.’ So no, I can’t have an ‘off-the-record’ conversation with you. But you can have a confidential conversation with one of the University counselors.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

150

## How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

151



## How do you build rapport?

- Take the time to learn basic information about the interview subject before conducting the interview
- Learn something about the subject and share something about yourself; find commonality
- Explain the nature of the investigation, your role, and the rules of the interview
- Explain why you need accurate and detailed information
- Acknowledge the stresses the subject is likely feeling

HUSCH BLACKWELL

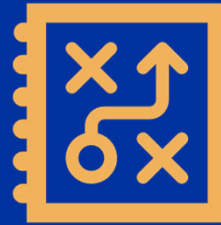
© 2020 Husch Blackwell LLP

152



## Example of rapport building

“I saw in the directory that you are from Colorado. My family likes to visit the state. Are there any places you’d recommend we visit?”



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

153



## Things helpful to say in every interview . . .

- “If I ask a question you don’t understand, please tell me.”
- “If I ask a question and you don’t know the answer, it’s okay to say you don’t know.”
- “If you think I’ve misunderstood anything you say today, please tell me.”
- “I want to get as much information as possible, so please be detailed in what you share. And if I don’t ask about something you think is important, please tell me.”
- “To do my job, I need accurate information. So I always remind every witness that it’s important to tell the truth.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

154



78

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?”


HUSCHBLACKWELL


© 2020 Husch Blackwell LLP


157

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)

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

158

© 2020 Husch Blackwell LLP. All Rights Reserved.

79

## Examples of suggestive questions (avoid)

"I'm sure it's difficult when you see them on campus. Do you agree?"

"You probably thought that was an invitation to have sex, right?"

"If I were in your position, I would probably feel threatened. Did you?"

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

159



## How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

160



© 2020 Husch Blackwell LLP

81



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

163



## 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 a SANE/SART examination to the investigator.



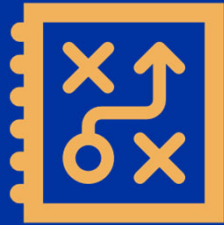
HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

164



## Example of impermissible use



Respondent tells investigator  
Respondent met with an attorney the day after the alleged sexual assault. The investigator demands that the respondent reveal what was said to the attorney. When the respondent declines, the investigator notes that in the report and advises the hearing panel to draw an adverse inference against the respondent for “failing to cooperate.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

165



## 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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

166



## 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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

167



## 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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

168



## Does the investigation report make findings?

- No – not final findings. 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.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

169



## 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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

170

**B-I-T**

## 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

HUSCH BLACKWELL

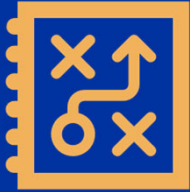
© 2020 Husch Blackwell LLP

171

**B-I-T**

## Example of advisor breaking the rules

A dining service employee brings an aggressive union representative as an advisor to an interview. The institution's policy states that advisors are to remain passive and not argue on behalf of the parties they are advising. During the interview, the union representative repeatedly interrupts the investigator, objects to questions, argues that the investigator should ask different questions, and attempts to present legal arguments citing caselaw.



HUSCH BLACKWELL

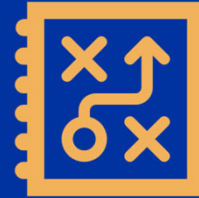
© 2020 Husch Blackwell LLP

172

**B  
-  
H  
-  
B**

## Example of advisor breaking the rules

Psychology student names the student's mother as advisor. The institution's policy states that advisors may not obstruct communications between the institution and a party. The mother tells the investigator the investigator is to communicate solely through the mother and not send any emails directly to the student. When the investigator emails the student directly to schedule an interview, the mother calls and verbally attacks the investigator.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

173

**B  
-  
H  
-  
B**

## Are parties subject to a “gag” order during the investigation?

- No – the institution may not restrict the ability of parties to discuss the allegations or to gather and present relevant evidence, which includes talking to witnesses
- But institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

174

B

H

## Example of impermissible conduct




Respondent tells roommate that respondent has been accused of sexual assault and “it’s important that we get our stories lined up.” Roommate states a belief that respondent arrived home at 2:00 a.m. Respondent says: “No. You’re going to say you saw me here in bed at 11:00 p.m. That’s what you need to say or I’m screwed. I’ll owe you for this . . .”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

175

Group Scenario



Political Science student accuses Graduate Teaching Assistant of using a power differential to coerce student into performing oral sex. Student has received counseling since the incident and tells the investigator the counselor has diagnosed PTSD. GTA denies the oral sex was coerced. GTA claims that student consented and previously performed oral sex on another GTA. GTA tells investigator GTA has procured an expert witness who will opine student was not coerced and was not influenced by the power differential. Student identifies several witnesses who will testify GTA was a “creep.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

176





## May parties present expert witnesses?

- Parties must have equal opportunity to present witnesses, including fact *and* expert witnesses

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

177

## Questions



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

178



## Evidentiary Concepts

© 2020 Husch Blackwell LLP

179



## Key Legal Principles

- Direct vs. circumstantial
  - Hearsay
- Weight of evidence
- Assessment of credibility

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

180



## Direct v. Circumstantial

- **Direct** — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
  - e.g.: testimony of a witness who actually observed and perceived event in question (see, hear, touch)

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

181



## Direct v. Circumstantial

- **Circumstantial (indirect)** — Series of facts which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred.
  - e.g.: witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

182

**H-B**

## Hearsay

- **Hearsay** — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
  - Statement contemporaneous with the event in question
  - Excitable statement uttered in the moment being perceived

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

183

**H-B**

## Credibility

- To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony
- Common factors:
  - Consistency
  - Corroboration
  - Plausibility
  - Motive
  - Demeanor

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

184



## 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.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

185



## 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.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

186

H-B  
H-B

## 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.”



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

187

H-B  
H-B

## Trauma Issues

© 2020 Husch Blackwell LLP

188



## Balance

- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”  
- Candace Jackson, Acting Asst. Secretary of Ed (2017)

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

189



## Trauma might affect a party

- Not in every case
- Not just one party
- Never assume anyone interviewed or questioned suffered any trauma

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

190

## Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

191



## Trauma & credibility

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies
- Ascertain fair and impartial assessment of the facts and give appropriate weight to party and witness statements


HUSCH BLACKWELL

© 2020 Husch Blackwell LLP


192




# What is the definition of trauma?



**Merriam-Webster:** a very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



**English Oxford:** Deeply distressing or disturbing experience




**Wikipedia:** is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

193

H-B



## Physical reaction

- Brain—Trauma triggers chemical reaction which impacts
  - Perception
  - Ability to React
  - Memory
- Each individual reacts differently

HUSCHBLACKWELL

© 2020 Husch Blackwell LLP

194



## Investigating trauma

- Avoid judgment, impatience, disrespect, misuse of power
- Emphasize
  - Safety/comfort
  - Choices
  - Support for person
    - Personal support
    - Available services
    - Remain objective on facts
  - Trustworthiness/transparency



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

195



## Trauma-informed interview

- Provide information to the party
- Acknowledge the difficult situation
- Provide as many options as possible
- The process
  - Your role
  - Policy
  - Communication

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

196



## Trauma-informed interview (cont.)

- Important to focus on two concepts:
- What are you **able** to tell me about your **experience**?
  - Allow complainant to begin where he/she wants
  - Allow an uninterrupted statement
  - Use follow-up questions (non-leading)

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

197



## Trauma-informed interview (cont.)



- Instead of asking “why,” ask about what witness was thinking during the experience
- Ask about memories associated with the senses:
  - Sights
  - Smells
  - Feelings

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

198



## Awareness of respondent trauma

- Own experience
- Around event
- Around accusations
- Thoughts in the respondent's mind:
  - Will this be a criminal investigation?
  - Could I go to jail?
  - Could I get kicked out of school?
  - Should I have a lawyer?
  - Should I tell my parents?
  - You can't answer these questions but must give time and options
- Always offer interim measures and counseling

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

199



HUSCH BLACKWELL

## Informal Resolution & Confidentiality

Module 5

200



## What is informal resolution?

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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

201



## Does every case with disputed facts have to proceed to hearing?

- No – As long as the procedural requirements to enter informal resolution are met, Title IX regulations permit a wide range of alternative models, including a decision by a single individual (i.e., “arbitration”)
- It is especially important to advise the parties of the nature of this type of resolution and how it differs from the default investigation and hearing

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

202



UMD Updated Policy

## Informal Resolution

- Either party may request an Informal Resolution, including their preferred approach of reaching a resolution, such as mediation.
- Both Parties and the Title IX Officer or designee must agree to the process in writing.
- Either party may terminate an ongoing Informal Resolution at any time prior to reaching an agreement.
- Informal Resolution is voluntary and is not a requirement or condition of continued enrollment or employment at the University.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

203



UMD Updated Policy

## Informal Resolution Process Elements

- Each party will receive a *Notice of Informal Resolution* stating:
  - Summary of the allegations;
  - That neither Party is required to accept responsibility for the alleged Prohibited Conduct
  - There is no finding of a Policy violation or Sanction unless agreed to by the Respondent;
  - That Informal Resolution is not a waiver of right to proceed with an investigation and Hearing;
  - That until an Informal Resolution agreement is finalized, the Parties may, at any time, opt out of Informal Resolution
  - That the results of an Informal Resolution are not eligible for appeal.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

204

H

T

B

## Informal Resolution

UMD Updated Policy


- When an informal Resolution agreement is reached and the terms of the agreement are implemented, the matter is resolved and closed.
- In the case where an agreement is not reached and the Title IX Officer or designee determines that further action is necessary, or if either Party fails to comply with the terms of the Informal Resolution, the matter may be referred for an investigation and adjudication.

HUSCHBLACKWELL


© 2020 Husch Blackwell LLP

205


## What are the key concepts of informal resolution?




A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



The parties must be allowed to withdraw from informal resolution up until the point it is final

HUSCHBLACKWELL

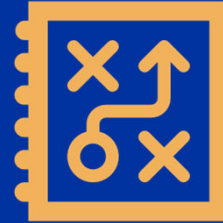
© 2020 Husch Blackwell LLP

206



## Example (informal resolution)

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.



HUSCH BLACKWELL

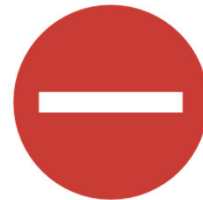
© 2020 Husch Blackwell LLP

207



## 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



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

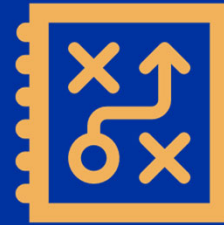
208



# B-H

## Example (cont.) - resolution

- Investigation and hearing process would resume
- If complainant withdraws complaint, or refuses to participate, institution might elect to dismiss complaint
- But Title IX Coordinator might also elect to file formal complaint and cause the issue to be adjudicated fully



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

209

# B-H

## 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.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

210

**B  
-  
H  
+**

## Example (impermissible)



Enrollment agreement for students contains a clause stating: “Student hereby waives their right to a formal investigation and hearing as contemplated by Title IX and instead agrees that all reports of sexual harassment will be summarily resolved by a decision issued by the Dean of Students after an investigation.”

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

211

**B  
-  
H  
+**

## Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator or designee
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

212

## What are some examples of informal resolution?

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

213



## How long can an informal resolution take?

- Informal resolution should be reasonably prompt
- Typically has the effect of suspending any default investigation and hearing process
- If informal resolution fails or appears futile, institution should promptly resume default investigation and hearing process



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

214

**H-B**

## Is an informal resolution final?

- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

215

**H-B**

## Example of Informal Resolution

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.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

216



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

217

### Group Scenario



Tech Employee makes a report that Faculty Member slapped, punched, and shoved Techie while the two were dating. Techie and Faculty Member verbally agree to engage in informal resolution.

Title IX Coordinator meets separately with each party and mediates a resolution that involves Faculty Member apologizing and attending anger management classes. Each signs a term sheet. Faculty Member attends two weeks of anger management classes and then stops going. Techie then files a formal complaint based on the allegations in the previous report.

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

218

Questions

?



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

219

H-B

Confidentiality

© 2020 Husch Blackwell LLP

220



## Are sexual harassment cases confidential?

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used as required by Title IX itself



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

221



## 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

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

222



## Example (permitted communication)

Respondent in sexual harassment case affirmatively calls several other students who know complainant. Respondent tells such persons he has been accused of sexual harassment and is attempting to determine whether the complainant discussed the effect of respondent's actions with any of them.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

223



## 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.



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

224





## 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 and hearings

HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

225

## Questions



HUSCH BLACKWELL

© 2020 Husch Blackwell LLP

226

