HUSCH BLACKWELL

Title IX Obligations and Requirements: Lessons Learned since August 2020

November 2021

© 2021 Husch Blackwell LLP. All Rights Reserved.

1

Presenter

Hayley Hanson

Husch Blackwell

816-983-8377

hayley.hanson@huschblackwell.com

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

2

Agenda

- Title IX Overview: Obligations and Requirements
- Supportive Measures
- Investigations
- Hearings
- Confidentiality and Expectations
- Appeals
- Informal Resolution
- July 20, 2021 Title IX Guidance

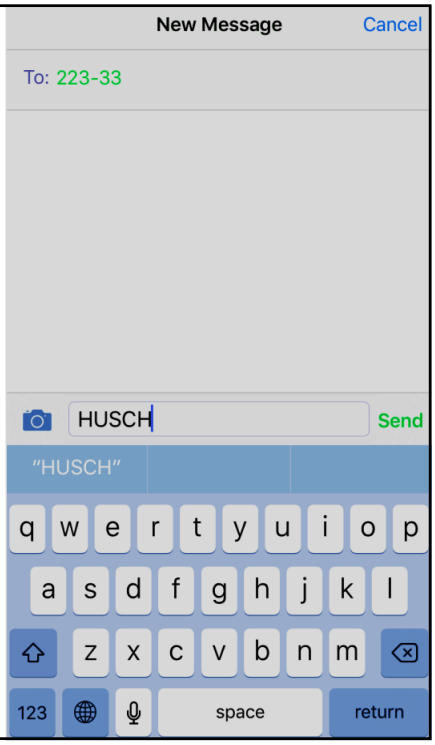
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

3

Polling Login

- Text huschedu1 to 22333
- Text in answers to participate in polls



© 2021 Husch Blackwell LLP

4

HUSCH BLACKWELL

Title IX Overview: *Obligations and Requirements*

5

When poll is active, respond at **pollev.com/huschedu1**
Text **HUSCHEDU1** to **22333** once to join

Does Title IX apply only to traditional educational entities (schools, colleges, universities, graduate schools)?

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

6

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

© 2021 Husch Blackwell LLP

7

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 a private location that is not part of education program/activity

HUSCH BLACKWELL

© Husch Blackwell LLP

8

What is 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

© Husch Blackwell LLP

9

How do Title IX and Title VII standards compare?

"Neither Federal non-sex discrimination civil rights law represents a 'zero-tolerance' policy banning all sexual harassment." – Preamble to 2020 Title IX Regulations

Title VII Sexual Harassment		Title IX Sexual Harassment		
Quid pro quo	Sufficiently severe or pervasive	Any quid pro quo by employee	Unwelcome and Sufficiently severe and pervasive and objectively offensive	Any sexual assault/DV /stalking

HUSCH BLACKWELL

© Husch Blackwell LLP

10

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

© 2021 Husch Blackwell LLP

11

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

© 2021 Husch Blackwell LLP

12

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

© 2021 Husch Blackwell LLP

13

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

© 2021 Husch Blackwell LLP

14

HUSCH BLACKWELL

Lessons Learned: *Supportive Measures*

15

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

© 2021 Husch Blackwell LLP

16

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

© 2021 Husch Blackwell LLP

17

Example of reasonable supportive measure

Student A and Student B used to be in a romantic relationship. Since the relationship ended, Student B has gossiped about Student A's sexual proclivities with Student A's friend group. Student A does not wish to file a formal complaint, but wants access to counseling and to be allowed to change sections of a course that Student A currently shares with Student B.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

18

Example of unreasonable supportive measure

Employee A alleges Employee B engaged in sexual harassment by pervasively telling unwelcome sexual jokes in the workplace. Employee A asks the institution to retain the services of a specific psychologist in a different state to provide Employee A counseling at a cost of $1,000 per hour and to pay for Employee A's travel expenses. The institution has access to local counselors of suitable qualification who are under a fixed contract to provide counseling to employees.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

19

What are the compliance points to consider?

- Creation of a supportive measures document
- Remember Clery obligation for VAWA crimes
- Consider overlap in documentation
- Consider who will provide and implement requests
- Determine how long supportive measure will be provided (with or without the filing of a formal complaint)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

20

HUSCH BLACKWELL

Lessons Learned: *Investigations*

21

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

© 2021 Husch Blackwell LLP

22

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

© 2021 Husch Blackwell LLP

23

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

© 2021 Husch Blackwell LLP

24

What are the general principles of an investigation?

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

25

When poll is active, respond at **pollev.com/huschedu1**
Text **HUSCHEDU1** to **22333** once to join

Which of these does not need to be provided in a notice of investigation to the parties?

- The who, what, when, where, and how of the allegations
- Confirmation of the parties' involvement in the institution's programs or activities
- A statement that the respondent is presumed not responsible until resolution of the Title IX process
- Information on the right to an advisor

Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

26

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

© 2021 Husch Blackwell LLP

27

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

© 2021 Husch Blackwell LLP

28

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

© 2021 Husch Blackwell LLP

29

Does the investigation report make findings?

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

30

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 the institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

31

What are the compliance points to consider?

- Clearly identify the role of the investigator in report-writing
- Outline for the parties the procedures regarding sharing information from the investigation
- Determine how the investigator will present the report to the decision-maker(s)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

32

HUSCH BLACKWELL

Lessons Learned: *Hearings*

33

What is the purpose of the hearing?

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

34

Who runs the hearing?

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

35

What are the logistics of a hearing?

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

36

Do we provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- Advisor can be, but does not have to be, an attorney
- If a party does not have an advisor, institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

37

How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- Required elements include:

Decision-maker(s) 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 may have their testimony excluded (depends on policy)	Questioning of sexual history generally not permitted

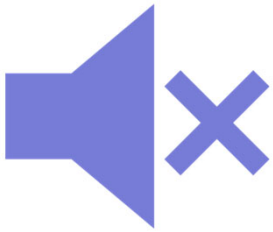
HUSCH BLACKWELL

© Husch Blackwell LLP

38

Does any testimony get excluded?

- This depends on institutional policy
- So-called "exclusionary rule" was vacated by D. Mass. court decision
- Institutions now have a policy choice whether to keep, eliminate, or modify the exclusionary rule



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

39

Example (excluded)

Witness gives testimony in support of complainant's account that respondent sexually assaulted complainant. When advisor for respondent seeks to cross-examine witness about a long-standing grudge witness holds against respondent, witness refuses to answer questions. School has maintained exclusionary rule.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

40

Example (included)

During hearing, respondent seeks to "introduce into evidence" an email respondent obtained from witness stating that "respondent could not have committed sexual assault because they were with me at that time in a different town." Witness is not present at the hearing due to an unavoidable scheduling conflict. Institution has modified exclusionary rule to allow statements from absent witnesses.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

41

Example (not excluded)

During hearing, complainant identifies a text message from the respondent, sent to the complainant, calling the complainant a sexual epithet. The respondent refuses to submit to cross-examination. The respondent's text message is still considered.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

42

Is an advisor required to ask questions a party wants asked?

- Advisors should consult with their party and consider their preferences for what questions to ask
- But an advisor must exercise their own reasonable judgment and is never required to ask questions that the advisor knows are improper (e.g., invade sexual history)
- An advisor may consult the decision-maker if a party demands the advisor ask a question that advisor is uncertain is appropriate

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

43

Can we set standards of behavior for hearings?

Yes, provided they are applied equally and do not violate explicit guarantees from the Title IX regulation.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

44

What are the compliance points to consider?

- Create hearing procedures
- Include a pre-hearing meeting in your process
- Identify multiple dates all parties are available for the hearing
- Determine how advisors will function within the hearing process

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

45

HUSCH BLACKWELL

Lessons Learned: *Confidentiality and Expectations*

46

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

47

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

48

HUSCH BLACKWELL

Lessons Learned: *Appeals*

49

What is the purpose of the appeal?

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

50

51

Who can appeal?

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

52

What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
- Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

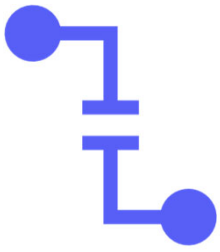
HUSCH BLACKWELL

© Husch Blackwell LLP

53

Are all procedural errors appealable?

- No – the procedural irregularity must be one that "affected the outcome of the matter"
- Errors that affect the outcome may be referred to as "prejudicial" errors
- Errors that do not affect the outcome may be called "non-prejudicial" or "harmless" errors



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

54

What are the potential outcomes of an appeal?

Appeal is denied and determination is made final

Appeal is granted and determination is changed by the appeal officer

Appeal is granted, determination is "vacated", and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found

HUSCH BLACKWELL

© Husch Blackwell LLP

55

What are the compliance points to consider?

- Determine the scope of the appeal within the policy
- Identify trained appeal officer
- Provide information to the parties regarding the appeal

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

56

HUSCH BLACKWELL

Lessons Learned: July 20, 2021 Title IX Guidance

57

Status of 2020 Amendments

- 2020 Amendments (regulations effective 8.14.2020) remain in effect pending ED further review
- 2020 Amendments (including definitions) are legally binding
- Nothing in the 2020 Amendments prohibits schools from addressing sexual misconduct that does not meet the 2020 definition of sexual harassment in their codes of conduct
  - But (as expressly stated in the Q&A) OCR does not enforce school codes of conduct
    - Except to the extent they may be discriminatory

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

58

Guidance status

- Guidance documents and the preamble to the 2020 Amendments do not have the force/effect of law
- "Although the guidance documents issued in 2011 and 2014 were rescinded in 2017, and the 2001 and 2017 guidance documents were rescinded in 2020, these documents remain accessible on OCR's website for historical purposes to the extent they are helpful to schools when responding to earlier allegations of sexual harassment."

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

59

Sexual orientation & gender identity

- It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.

March 8, 2021 Executive Order

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

60

Complaints

- Encourages schools to publish a list of "officials with authority" to implement corrective measures, such that a report to them will constitute "actual knowledge"
- Notes that formal complaints—electronic or hardcopy—must have physical or digital complainant signature or otherwise indicate complainant is the person filing
- Clarifies that schools need only accept formal complaints from complainants not currently enrolled/attending *if* the complainant is attempting to participate in education programs/activities
- States that a Title IX Coordinator may file a formal complaint "even if the complainant is not associated with the school in any way"
  - If there is opportunity for repetition or respondent in position of authority, may be a violation *not* to do so

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

61

Respondent departure – "may dismiss"

- Although schools may dismiss a formal complaint if the respondent leaves, "Proceeding with the grievance process could potentially allow a school to determine
  - the scope of the harassment,
  - whether school employees knew about it but failed to respond,
  - whether there is a pattern of harassment in particular programs or activities,
  - whether multiple complainants experienced harassment by the same respondent, and
  - what appropriate remedial actions are necessary."

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

62

Medical/mental-health records

- Questions that seek information about a party's medical/mental-health records not permitted unless party has given written consent
- Protection applies throughout investigation and at hearing

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

63

Prior sexual behavior

- Per the 2020 Amendments, complainant's prior sexual history only relevant if
  - Offered to prove someone other than respondent or
  - Concerns incidents with respect to respondent offered to prove consent
- "Prior sexual behavior" refers to conduct unrelated to allegations
- Preamble to 2020 Amendments state they "do not imply" that sexual behavior after alleged incident is relevant
- Whether sexual behavior between the parties is relevant to prove consent depends on school's definition of consent
  - Verbal vs.
  - Circumstances

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

64

Informal resolution

- Discretion to offer informal resolution process is limited by a school's obligation to ensure that facilitators are free of conflicts and trained to serve impartially
  - E.g., restorative justice facilitators should be "well-trained in effective process"
- May use trauma-informed techniques during informal resolution

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

65

Additional nuggets beyond the 2020 Amendments

- Schools may not place grievance process on hold due to COVID-19
- Schools may not impose discipline for violating COVID-19 or other policies during reported incidents unless school has a policy of "always imposing the same punishment for violating the COVID-19 or other policy regardless of circumstances"
- Policy language examples from various schools

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

66

Questions?

Contact:

Hayley E. Hanson
hayley.hanson@huschblackwell.com

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

67

Upcoming Clery Compliance Toolset Demo

Wednesday, December 8 –
12:00-12:30 PM CDT

For more information, contact

Mary Jones

Mary.Jones@huschblackwell.com
816-983-8314

CLERY Compliance Toolset

HUSCH BLACKWELL

68

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

69