

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, 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

HUSCHBLACKWELL

Group Scenario



Respondent is accused of sexually harassing a minor at a sports camp. Institution utilizes a single hearing officer. In advance of the hearing, institution provides the hearing officer a copy of the investigation report and all evidence disclosed to the parties, including witness statements. At the hearing, the investigator testifies briefly about the nature of the formal complaint and the timing of various stages of the investigation. Advisor for the respondent then seeks to cross-examine the investigator about specific questions investigator asked or did not ask in interviews. The hearing officer rules the questioning irrelevant. When complainant is cross-examined by respondent's advisor, complainant takes long pauses and asks for several breaks before answering questions. The hearing officer permits this. Later, advisor for the complainant seeks to cross-examine respondent about whether respondent has been diagnosed with pedophilia. The respondent refuses to answer. Three witnesses who gave statements in the investigation do not appear at the hearing.

HUSCHBLACKWELL

Questions



HUSCHBLACKWELL



HUSCHBLACKWELL

Alternative and Parallel Processes

What is informal resolution?

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

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

Example

Parties agree to engage in informal resolution in the form of separate meetings with the College's ombudsperson in an attempt to reach an agreement regarding their future interaction. A written agreement is eventually reached and signed by both parties.



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



Example (impermissible)

Student files a formal complaint accusing a faculty member of groping the student during a clinical experience. As the hearing approaches, the student decides not to participate in the hearing and requests that the matter be resolved by the faculty member apologizing. Faculty member apologizes and matter is closed "by agreement."



HUSCHBLACKWELL

When may a case be dismissed?

- Complainant withdraws allegations in writing
- Respondent is no longer employed or is no longer a student
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

HUSCHBLACKWELL

Who facilitates an informal resolution?

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

HUSCHBLACKWELL

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

HUSCHBLACKWELL

H-B

Can a case that is resolved informally be “reopened”?

- It depends upon the terms of the informal resolution
- Title IX Coordinator should ensure that any informal resolution clearly resolves this question



HUGSBBLACKWELL

H-B

Example

Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent’s conduct and avoid future communication with complainant. Agreement states that, if respondent violates informal resolution, respondent will be subject to discipline under Student Code of Conduct but formal Title IX complaint is resolved and closed.



© 2011 HUGSBBLACKWELL LLP

HUGSBBLACKWELL

H-B

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

HUGSBBLACKWELL

H-B

Is Title IX the exclusive process for resolving sexual misconduct?



- No
- Title IX does not preclude the use of other policies and processes that may be implicated by a report of sexual misconduct

HUGSBBLACKWELL

What other policies/processes may apply?

- Title VII policy
- Consensual relationships policy
- Professionalism policies
- Student code of conduct
- Threat assessment
- Employee handbook provisions
- Faculty handbook provisions
- Contractual provisions

HUSCHBLACKWELL

May we use another process before Title IX?

- Yes
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Other policy violations may be apparent prior to Title IX



HUSCHBLACKWELL

Example

Student makes a verbal report that resident director provided alcohol to underage Student and then attempted to grope Student before Student fled the room. Resident director admits to providing alcohol but denies any attempted groping.



HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

Example

Volleyball Player files a formal Title IX complaint accusing Student Team Manager of punching and kicking Player to the point of leaving bruises. Manager admits to punching and kicking Player but denies there is a dating relationship.



HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

May we use another process after Title IX?

- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy



Example

Medical Student accuses Physical Therapy Student of sexual assault after Physical Therapy Student rendered Medical Student incapacitated by providing Medical Student with illegal drugs. Title IX hearing officer concludes Physical Therapy Student provided Medical Student illegal drugs but that Medical Student was not incapacitated.



Example

Employee is accused of hostile environment sexual harassment. Title IX process results in a "no violation" finding because harassment is not pervasive. Institution then initiates process under Title VII policy contending that harassment is severe.



May we use two processes at the same time?



- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ

H-B

Example

Math faculty member at religious institution is accused of sexually harassing students by requiring them to read sexualized and satirical accounts of Biblical events. Institution initiates a Title IX process as well as discipline process under faculty handbook for actions seriously undermining religious mission of institution.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

H-B

May we conduct a “joint” investigation?

- Yes
- But any “joint” investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence



HUSCH BLACKWELL

H-B

Example

Employee is accused of sexually harassing a co-worker. Institution initiates a Title VII investigation and a Title IX investigation. Title IX investigator and Title VII investigator conduct joint interviews of parties and witnesses.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

H-B

Example

Male respondent at private religious college is accused of sexually assaulting female complainant in a female-only dorm. Respondent has two previous conduct charges for entering female-only dorms after hours. Based on respondent's admission that he entered female dorm after hours, even though he denies sexual contact, institution dismisses respondent under its “three strikes your out” conduct provision.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

Example

Student complains that Graduate Assistant harassed Student by sending Student an email with a pornographic video attached from GA's University laptop. GA claims the video was sent to Student by accident; Student's email account was close to the intended recipient's email account, which was mistyped. Institution terminates GA for violating institutional prohibition on accessing pornography from institutional computers.



© 2021 Husch Blackwell LLP

HUSCHBLACKWELL

Why would an institution continue with a Title IX process after respondent departure?

- Complainant's wishes
- Desire to avoid "passing the harasser" scenario
- Community expectation
- Large investment of time and resources to date
- Potential for respondent's return in the future
- Other factors possible

HUSCHBLACKWELL

Can we use another process to make the same finding we would otherwise make under Title IX policy?



- No
- Title IX regulation requires the use of specific Title IX process for any "sexual harassment" as defined by Title IX that occurs in institution's programs and activities

HUSCHBLACKWELL

Example (impermissible)

Alpha Alpha Student files formal Title IX complaint against Mu Mu Student alleging that Mu raped Alpha in a Greek house by having non-consensual vaginal sex. Alpha does not want to participate in a hearing, so institution dismisses Title IX case and re-charges Mu with rape by way of non-consensual vaginal sex under student code of conduct.



© 2021 Husch Blackwell LLP

HUSCHBLACKWELL

H-B

Example

Dorm Resident files formal Title IX complaint against Student Security Officer alleging that Officer engaged in sexual harassment by masturbating in the hallway outside Resident's room. Resident withdraws Title IX complaint to avoid being cross-examined at hearing. Institution then charges Officer with lewd conduct under student code of conduct, which does not use a hearing process.



HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

Group Scenario



Junior Student files sexual harassment complaint alleging that Senior Student broke down the door to Junior's dorm room while high on drugs, took off Senior's own clothes, and attempted to get in bed with Junior while naked. As Title IX investigation proceeds, Junior indicates a desire for informal resolution of the sexual harassment complaint if Senior will apologize and agree to treatment. Senior agrees, and the Title IX complaint is closed. Unbeknownst to Junior, Senior has one prior conduct charge for illegal drug use and was previously reported to have sexually harassed another student while drunk. Concerned about the continuing risk Senior may pose, and after the Title IX complaint is closed, institution charges Senior under its conduct code for illegal drug use; damaging institutional property; lewd conduct; and invasion of privacy. The institution's conduct code does not use a hearing model. The institution finds Senior in violation of its code based on Junior's statement and the statements of other witnesses that were made in the Title IX case before it was resolved. Senior accuses the institution of a "bait and switch."

HUSCHBLACKWELL

Questions



HUSCHBLACKWELL

H-B

HUSCHBLACKWELL

Regulatory and Caselaw Update



Have the Title IX regulations been rescinded?

- No
- The 2020 Title IX Regulations remain in effect and institutions must continue to abide by them
- Court challenges to the regulations have been unsuccessful (to date)
- Current administration cannot rescind or alter regulations without rulemaking process

HUSCHBLACKWELL



Will the Title IX regulations be rescinded?

- Changes are likely but wholesale rescission is not
- ED is currently engaged in a “comprehensive review” of Title IX regulations
 - Internal review of regulations and guidance
 - Public hearings with comments and feedback from stakeholders
- Any changes likely will not take effect until 2022-2023 academic year at the earliest

HUSCHBLACKWELL



Is there guidance in the interim?

- Yes
- July 2021 ED Q&A document on Title IX sexual harassment guidance
- Q&A articulates ED’s interpretation of existing regulations and does not have the force and effect of law
- Includes sample language for key policy provisions

HUSCHBLACKWELL



Are there key points from the Q&A? (1 of 5)

- Regulatory application
 - Regulations apply to sexual harassment occurring on or after August 14, 2020
 - Sexual harassment in online/virtual operations of an institution is covered by Title IX
 - A school’s Title IX obligations continued despite COVID-19

HUSCHBLACKWELL



Are there key points from the Q&A? (2 of 5)

- Combatting sexual harassment
 - Schools should take steps to affirmatively prevent sexual harassment in addition to the grievance process
 - Schools can take additional steps to combat sexual harassment as long as those steps don't conflict with regulations

HUSCHBLACKWELL



Are there key points from the Q&A? (3 of 5)

- Other policies
 - Schools may address conduct that falls outside the scope of the regulations through other policies
 - A school may use its code of conduct to address sexual harassment where the complainant is not a participant at the time the complaint is filed
 - Forms of sex discrimination other than sexual harassment are not covered by the sexual harassment regulations and may be resolved through a different process that is prompt and equitable

HUSCHBLACKWELL



Are there key points from the Q&A? (4 of 5)

- Process
 - A school may use a "trauma-informed" approach as long as it does not adopt improper presumptions or stereotypes
 - Presumption of no responsibility does not mean a presumption that the complainant is lying or that alleged harassment did not occur

HUSCHBLACKWELL



Are there key points from the Q&A? (5 of 5)

- Hearings
 - An advisor may fulfill their cross-examination duty simply by restating questions their party wants asked
 - The cross-examination exclusionary rule does not apply to statements that are themselves alleged to be harassment; otherwise, no exceptions

HUSCHBLACKWELL

Is there an update on Title IX and gender identity?

- Recent Supreme Court decision in Title VII context
- *Bostock v. Clayton County Georgia*, 140 S. Ct. 1731 (2020)
- "Sex" for purposes of Title VII's definition of sex discrimination includes discrimination based on gender identity and sexual orientation
- Title VII caselaw often borrowed by courts to inform construction of Title IX

HUSCHBLACKWELL

What is ED's current position on gender identity and Title IX?

- June 2021 Notice of Interpretation
 - Title IX prohibits discrimination based on gender identity and sexual orientation
 - Makes clear that harassment based on gender identity and/or sexual orientation is sexual harassment covered by August 2020 regulation
- Religious exemption still applies and is still viable

HUSCHBLACKWELL

Example

Student experiences repeated jokes and taunts from peers in a dormitory regarding Student's transgender status and manner of gender expression. Student files formal complaint of sexual harassment. Complaint is covered by 2020 sexual harassment regulations.



HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

Are there other administration initiatives concerning LGBTQ+?

- Biden-administration wide-directive to apply civil rights laws and regulations to ensure equal access for LGBTQ+ in USA and abroad
- Dear Colleague Letter on Transgender Students
- Executive Order on Preventing and Combatting Discrimination Based on Gender Identity or Sexual Orientation
- Anticipate more robust OCR enforcement of LGBTQ+ implicated complaints of discrimination/harassment

HUSCHBLACKWELL

H-B

What are trends in caselaw?

- Continued growth in number of respondent-initiated lawsuits alleging:
 - Title IX sex discrimination based on status as male
 - Due process violations for failure to provide fundamental fairness (public schools)
 - Breach of contract for failure to follow policies and procedures in handbooks
 - Negligent administration of Title IX policies

HUSCHBLACKWELL

H-B



Example: Doe v. University of Denver

- Respondent can prevail if demonstrates sex (male) was a motivating factor in disciplinary decision
- Can be shown by:
 - Significant (and largely unexplainable) procedural irregularities that all work to the benefit of a party of the opposite sex
 - Statistical evidence demonstrating harshness to males or leniency to women

HUSCHBLACKWELL

H-B



Example: Does 1-2 v. University of Minnesota

- Public attention, media pressure, and threat of loss of public funding can support circumstantial case of intentional bias against male student athletes accused of sexually assaulting women
- Institution's history of legal claims brought by female victims, and desire to avoid future claims of a similar nature, can be circumstantial evidence of anti-male bias

HUSCHBLACKWELL

H-B

Are there other trends?

- Rising number of cases presenting a conflict between First Amendment rights and anti-harassment policies
- Preferred name policies; social media policies; application of conduct expectations to off-campus social media

HUSCHBLACKWELL

H-B



Example: Meriwether v. Hartop

- Institution's policy required all faculty members to refer to students by their preferred pronouns
- Religious faculty member refuses and Title IX complaint is made; hostile environment harassment is found before being revised to finding a disparate treatment
- Faculty member sues and wins; First Amendment's academic freedom principles protect faculty when teaching, including protection from certain compelled speech

© 2021 Husch Blackwell LLP

HUSCHBLACKWELL

H-B



Example: Mahanoy Area Sch. Dist. v. B.L.

- Cheerleader disciplined for vulgar social media posts about team
- School's ability to discipline for off-campus speech is significantly less than on-campus speech
- School has a duty to protect the expression of unpopular views
- Vulgar speech on private time with no evidence of disruption is insufficient to overcome First Amendment's protections

© 2021 Husch Blackwell LLP

HUSCHBLACKWELL

Group Scenario



Two years ago, institution settled lawsuit brought by student raped at the house of a Greek organization. As part of settlement, institution issued public statement promising "robust" measures to prevent sexual assault in the Greek community. Recently, institution received Title IX sexual harassment complaint alleging members of the same Greek organization are creating a hostile environment through public Facebook posts that refer to members of the opposite sex using vulgar terms and that discuss the members' sexual conquests with members of other Greek organizations (without using names). The complaint specifically states: "It's clear the institution isn't keeping its promise to prevent sexual assault when it's allowing students to post garbage like this where everyone can see it." The institution is a private college whose freedom of expression policy states: "although private, college supports and will abide by freedom of speech principles as embodied in the First Amendment."

HUSCHBLACKWELL

Questions



HUSCHBLACKWELL