

HUSCH BLACKWELL

—

© 2021 Husch Blackwell LLP. All Rights Reserved.





© 2021 Husch Blackwell LLP



- Title IX applies to sexual harassment in the “education program or activity”

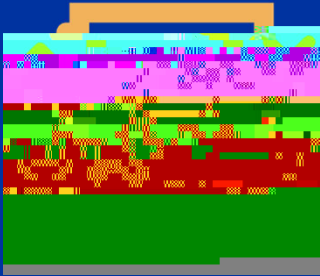

© 2021 Husch Blackwell LLP



—
One student in an online College course conducted by Zoom repeatedly sends vulgar and propositioning messages to another student using the Zoom private chat feature. The two students are physically in

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP





Two students in the nursing program are in clinical rotations at a local hospital supervised by a preceptor who receives compensation from the College. One student sexually assaults the other in a breakroom commonly used by students in the program.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

11



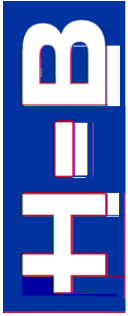
On a Saturday night, two students meet at a local bar and eventually go to a local hotel to “hook up.” One student exceeds the bounds of consent by attempting to choke the other student during the sexual encounter, despite having never discussed it.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

12



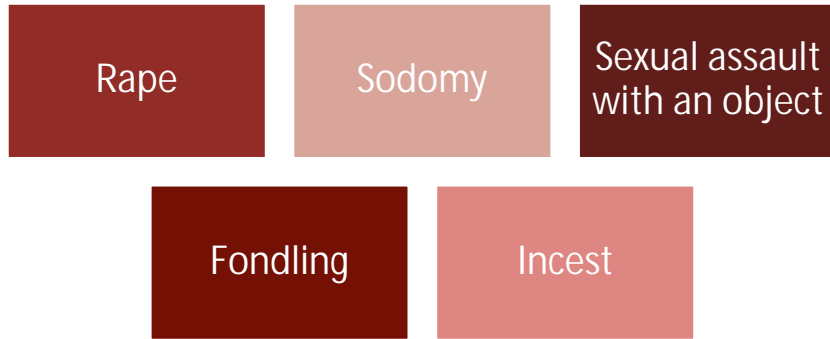


- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
Often arises in the employment

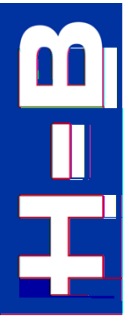
© 2021 Husch Blackwell LLP



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



© 2021 Husch Blackwell LLP



Having carnal knowledge of a person, without the consent of the victim, including instances the

CA

© 2021 Husch Blackwell LLP



- Words or actions that a reasonable person in the

Title



© 2021 Husch Blackwell LLP

H-B

—

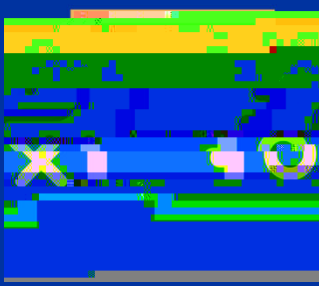
Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

© 2021 Husch Blackwell LLP

37

H-B

—



Medical Student and Nursing Student discuss and agree to vaginal intercourse. The room is dark. After making out, and without discussion, Medical Student inserts Medical Student's penis into Nursing Student's mouth. Nursing Student reacts negatively and says: "No, I don't do that. Get out." Medical Student has always had oral sex prior to vaginal sex in previous sexual encounters and expected the same in this case.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

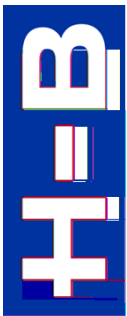
38



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.



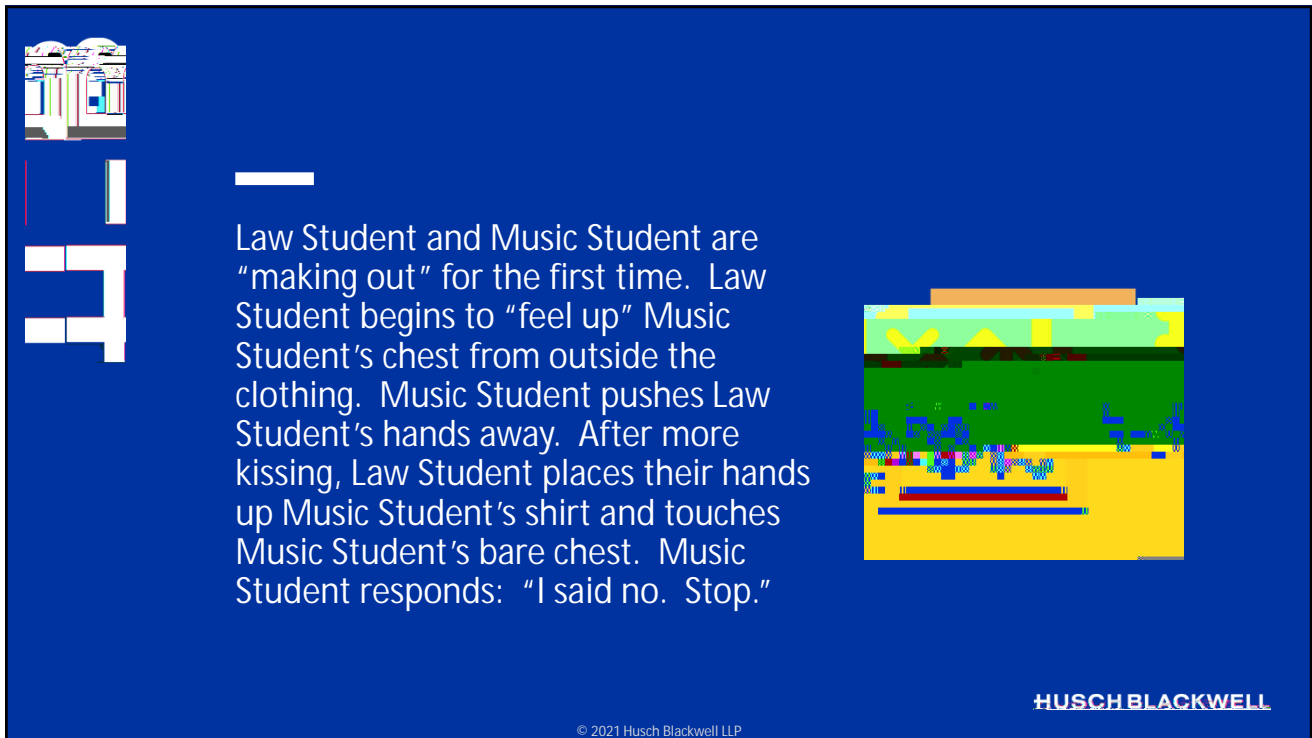
© 2021 Husch Blackwell LLP



Touching of the private body parts of another person for the purpose of sexual gratification, without DC 4'37 of the of 0 unlaw9815(ion,)]TJ -r other



© 2021 Husch Blackwell LLP



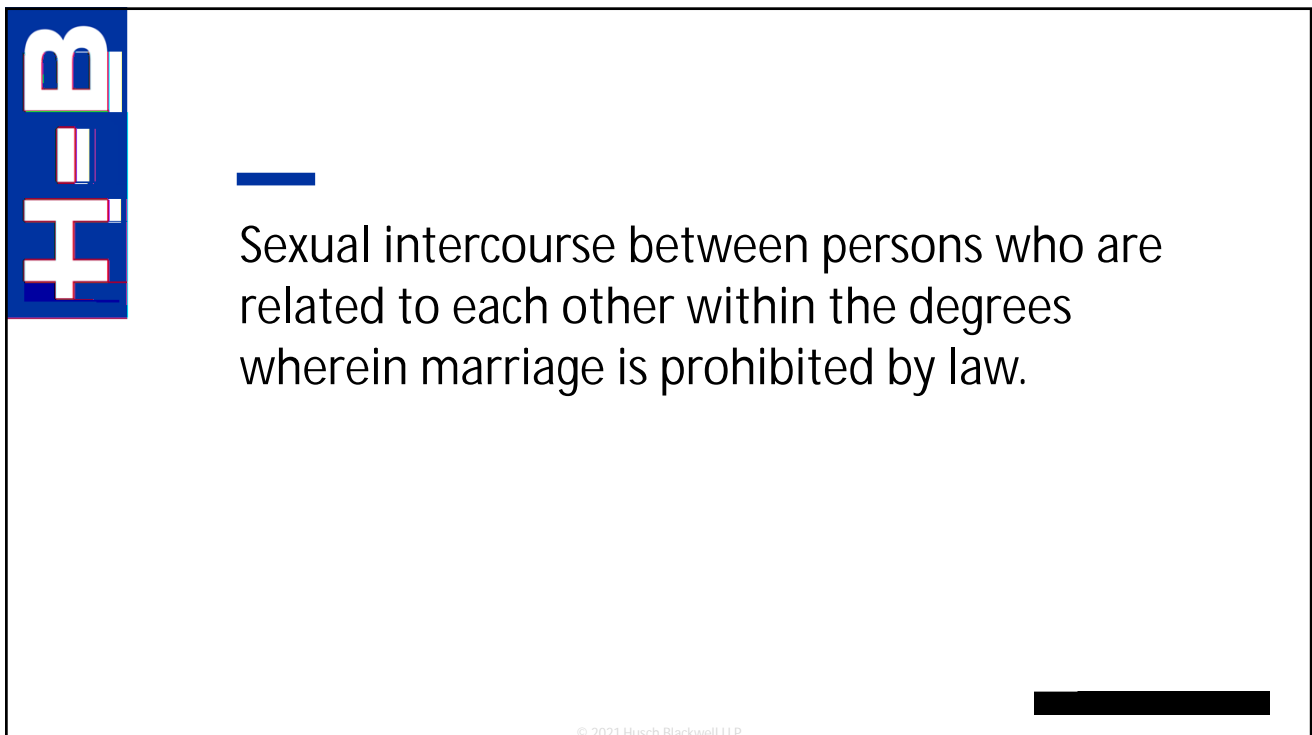
—

Law Student and Music Student are “making out” for the first time. Law Student begins to “feel up” Music Student’s chest from outside the clothing. Music Student pushes Law Student’s hands away. After more kissing, Law Student places their hands up Music Student’s shirt and touches Music Student’s bare chest. Music Student responds: “I said no. Stop.”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

41

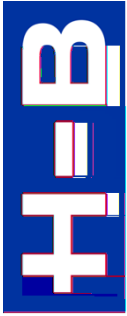


—

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

© 2021 Husch Blackwell LLP

42



—
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

© 2021 Husch Blackwell LLP



Housing employee breaks up with Facilities employee. Facilities employee repeatedly shows up at the Housing office crying and asking for Housing employee. Facilities employee repeatedly instant messages Housing employee during work to talk about their relationship. Housing employee rebu emp

HUSCH BLACKWELL

© 2021 Husch



© 2021 Husch Blackwell

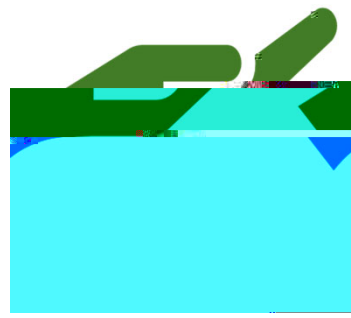



On Campus Student and Online Student connect on Tinder. They meet in a campus parking lot where they take several shots of hard alcohol and anti depressants that On Campus brought. The two students kiss in the car for 30 minutes before driving to a local hotel where they have oral sex and intercourse without incident. The two students connect again a week later and meet in On c.1



© 2021 Husch Blackwell LLP





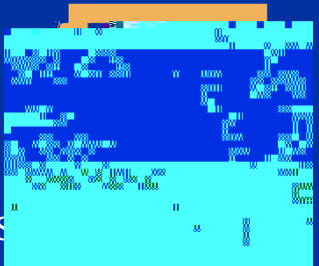


- Non disciplinary, non punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party

© 2021 Husch Blackwell LLP



-  Counseling
-  Academic accommodations
-  Housing accommodations
-  Security escorts
-  Leave of absence
-  Increased security or monitoring
-  Modified work schedules

work






—

Grad Student reports that Undergrad Student sexually harassed Grad by repeatedly propositioning Grad until Grad's brother intervened. Grad would like to receive counseling but does not wish to file a formal complaint. Grad does not believe Undergrad poses a physical threat.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

61




—

History student in History 101 reports that another student, also in History 101, sexually assaulted History student two weeks ago. History student is uncertain whether to file a formal complaint but wants assistance transferring to a different section of History 101.

HUSCH BLACKWELL

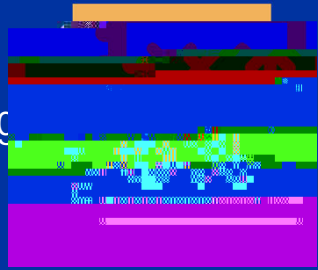
© 2021 Husch Blackwell LLP

62



—

Graduate student reports that supervising faculty member has propositioned the graduate student for sex, multiple times. Graduate student wants assistance finding a different supervising faculty member. The department is large and has several faculty members with the competence to oversee graduate student.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

63



—


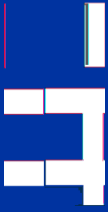

One student reports another student committed sexual assault three years ago when they were first years. The reporter has received strong academic marks since then. The reporter requests a refund of all tuition and housing charges for the last three years and a waiver of tuition and charges until the reporter completes graduate school.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

64





—

Employee in maintenance department accuses supervisor of sexual harassment by way of making sexualized jokes and remarks. Employee requests to be on indefinite paid leave for the remaining six months of the academic year. Employee could easily be reassigned to work under a different supervisor in a different part of campus.


HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

65




- Yes—other laws may trigger accommodations when a medical condition or disability is present
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act




© 2021 Husch Blackwell LLP



66



- Yes, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process



© 2021 Husch Blackwell LLP



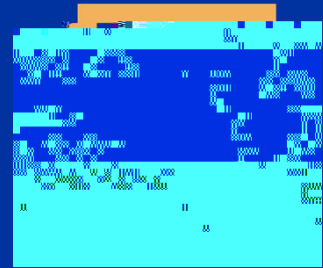
Student Worker accuses Colleague of

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

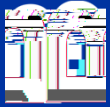


—
In State Student accuses Out of State Student of sexual assault. In State requests as a support measure that Out of State be removed from all shared classes, removed from shared dormitory and made to live off campus, and prohibited from being on campus after 5:00 pm.



HUSCH BLACKWELL

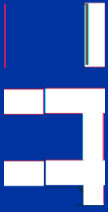

© 2021 Husch Blackwell LLP




—
Sophomore accuses Freshman of sexual harassment. Sophomore requests as a support measure that sexual

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP




Two students are admitted to institution as first years. Prior to arriving on campus, one reports that the other sexually harassed the reporting student when the two were sophomores in high school. The reporter wants counseling; safety escorts; and access to the respondent's schedule so the reporter can avoid the respondent.



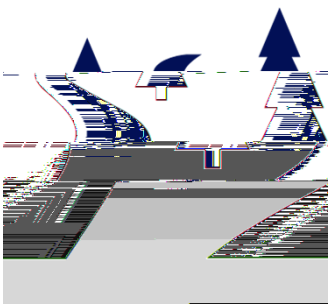
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

71



- Title IX requires supportive measures for reported sexual harassment covered by Title IX
- Institute may provide supportive measures for reported conduct that falls outside Title IX's scope



© 2021 Husch Blackwell LLP

72



- Generally, yes
- Only shared to the extent necessary

© 2021 Husch Blackwell LLP



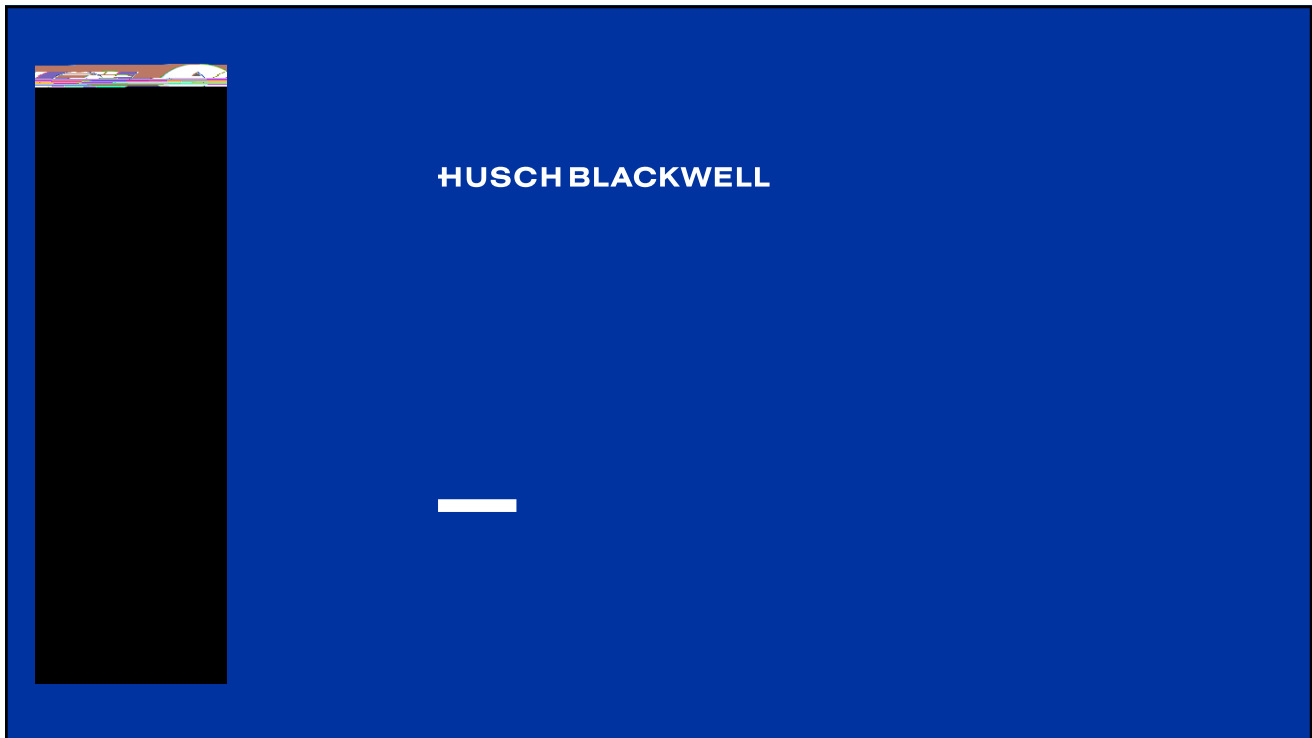
Title



Future Oncologist and Future Psychiatrist are both in their third year of medical school. Oncologist reports that Psychiatrist sexually harassed Oncologist by repeatedly propositioning Oncologist at a school sponsored happy hour. Oncologist has not decided whether to file a formal complaint. Oncologist requests several supportive measures, including free counseling; the ability to complete the semester remotely; never to be



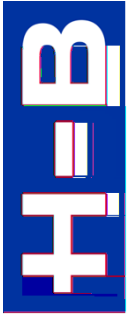
© 2021 Husch Blackwell LLP



- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision maker to determine through a live hearing
- Whether or not the reported



© 2021 Husch Blackwell LLP



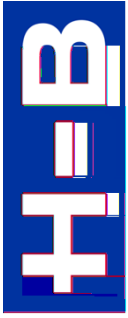
- Parties must have sufficient notice to prepare and meaningfully participate
-



Student submits formal complaint via email with a single sentence reading, "Named Student sexually assaulted me." Prior to sending a written notice, investigator meets with the complainant and asks for more specific information about

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



© 2021 Husch Blackwell LLP



“Please tell me what happened that night.”

“Can you walk me through what happened?”

“In your own words, tell me what occurred.”

“Can you tell me everything that happened after you got to the party?”

© 2021 Husch Blackwell LLP

99



“Ok”

“Yes”

“Go on . . .”

“I follow you . . .”


“Okay . . .”

“Uh huh”

Facilitators

© 2021 Husch Blackwell LLP

100





“You mentioned that Can you tell me more?”


“You said that Can you elaborate?”


“You said they ‘coerced’ you. Can you tell me what they did?”


“If I understood you right, you said that after Can you tell me what happened in between?”

© 2021 Husch Blackwell LLP




 “What did she say?” (directive)

 “What day did that happen?” (directive)

 “Did

© 2021 Husch Blackwell LLP





© 2021 Husch Blackwell LLP






—

Student who makes report of sexual assault executes release allowing disclosure of counseling records demonstrating student sought an emergency counseling session the morning after the alleged sexual assault

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

107



—

Employee accuses Student of sexual assault and reports that Student transmitted an STD. Student denies sexual encounter occurred. Investigator unilaterally contacts student health center seeking records to determine whether Student has been treated for STD.

HUSCH BLACKWELL

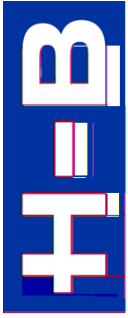
© 2021 Husch Blackwell LLP

108



- 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?— 'Due' evidence •be

© 2021 Husch Blackwell LLP



© 2021 Husch Blackwell LLP



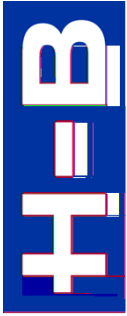


After completing all interviews,
investigator prints the evidence and
tells parties they can schedule a
time to review it in a conference

1(v))

HUSCH BLACKWELL

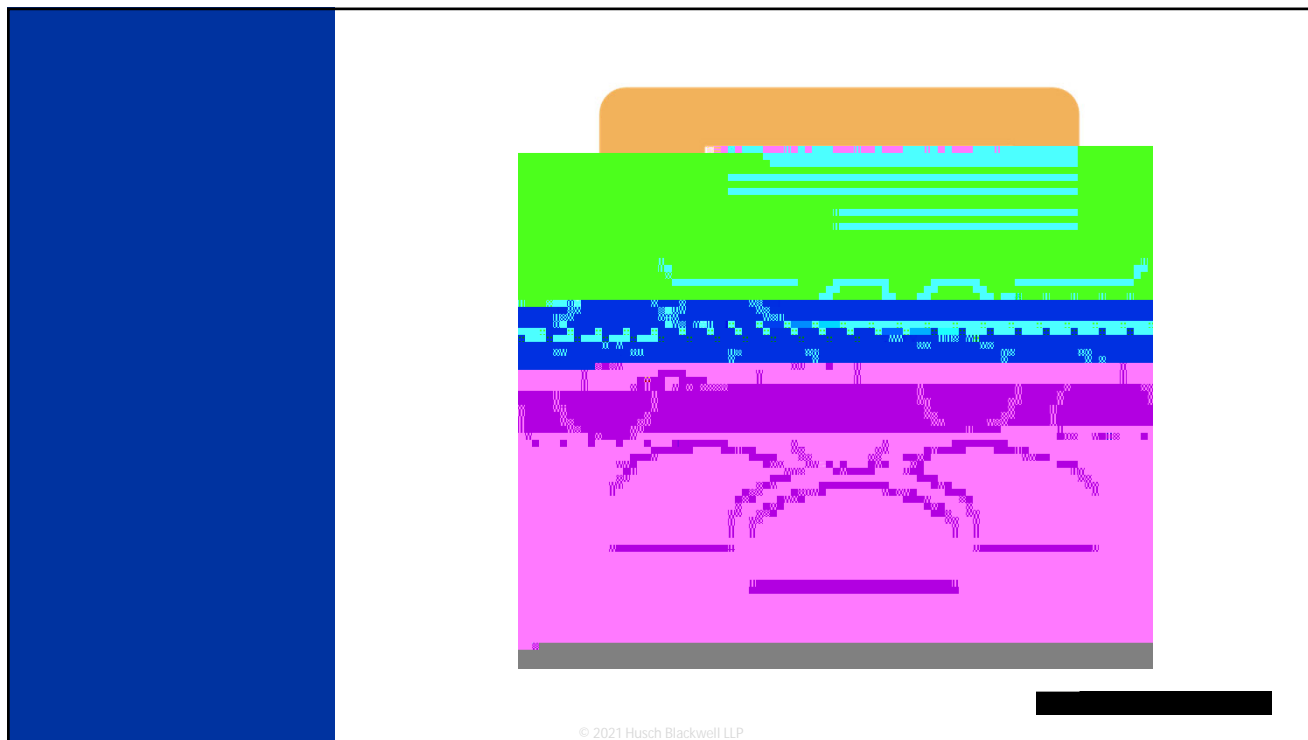
© 2021 Husch Blackwell LLP




- No – the investigation report fairly summarizes the relevant




© 2021 Husch Blackwell LLP






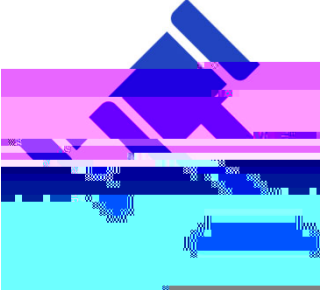
- To hear testimony and receive non testimonial evidence so that
- The decision maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary




© 2021 Husch Blackwell LLP

125






- A single hearing officer; or
- A hearing panel led by a chair



© 2021 Husch Blackwell LLP


126



- Either


Preponderance of the evidence or
Clear and convincing evidence

- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent




© 2021 Husch Blackwell LLP

127




- Parties are provided the final investigation report at least 10 days prior to the hearing
- “Decision maker” must be identified and clear conflicts of interest assessment
- Hearing must be scheduled and logistics arranged
- Witnesses must be notified
- Pre hearing conference should be held




© 2021 Husch Blackwell LLP

128



- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position



© 2021 Husch Blackwell LLP

129



The University hires an outside attorney to serve as a hearing officer. The outside attorney currently represents the respondent's father in a personal injury lawsuit.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

130



—

The College assigns a faculty member to serve on a hearing panel. The faculty member previously wrote a glowing letter of recommendation for the complainant and has recently advised the complainant on graduate school applications.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



-
- Set aside sufficient time considering the nature and complexity of the case
 - Consider class and work schedules of parties and key witnesses to avoid conflicts
 - Consider pre scheduling a backup or “spill over” date in the event the hearing runs long or must be continued
 - Provide letters excusing parties and witnesses from other

© 2021 Husch Blackwell LLP



- Institution must provide written notice to the parties of time and place of hearing
- Institution should provide written notice to witnesses requesting their presence
- Notice may be issued by the decision maker or another institutional official in coordination with decision maker

© 2021 Husch Blackwell LLP



Based on investigation report and in consultation with the parties, hearing officer issued letters to 8 witnesses advising them of the hearing date and coordination

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



- 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 <u>may</u> have their testimony excluded (depends on policy)	Questioning of sexual history generally not permitted

© 2021 Husch Blackwell LLP

Statement and
expenses & Oct 6

© 2021 Husch Blackwell LLP



Title



- Not unless the institution chooses to allow it
- The Title IX regulation requires cross examination, but not “direct” examination

© 2021 Husch Blackwell LLP

143



- Decision maker(s) must screen questions for relevance and resolve relevance objections
- Decision maker(s) must explain any decision to exclude a question as not relevant

© 2021 Husch Blackwell LLP

144

What is relevance?

Evidences relevantif:

f It is a

© 2021HuschBlackwellLLP





Faculty member is accused of engaging in quid pro quo harassment by rounding up a student's final grade in exchange for a sexual favor. Complainant's advisor asks faculty member whether he rounded up any other student's grade.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

147

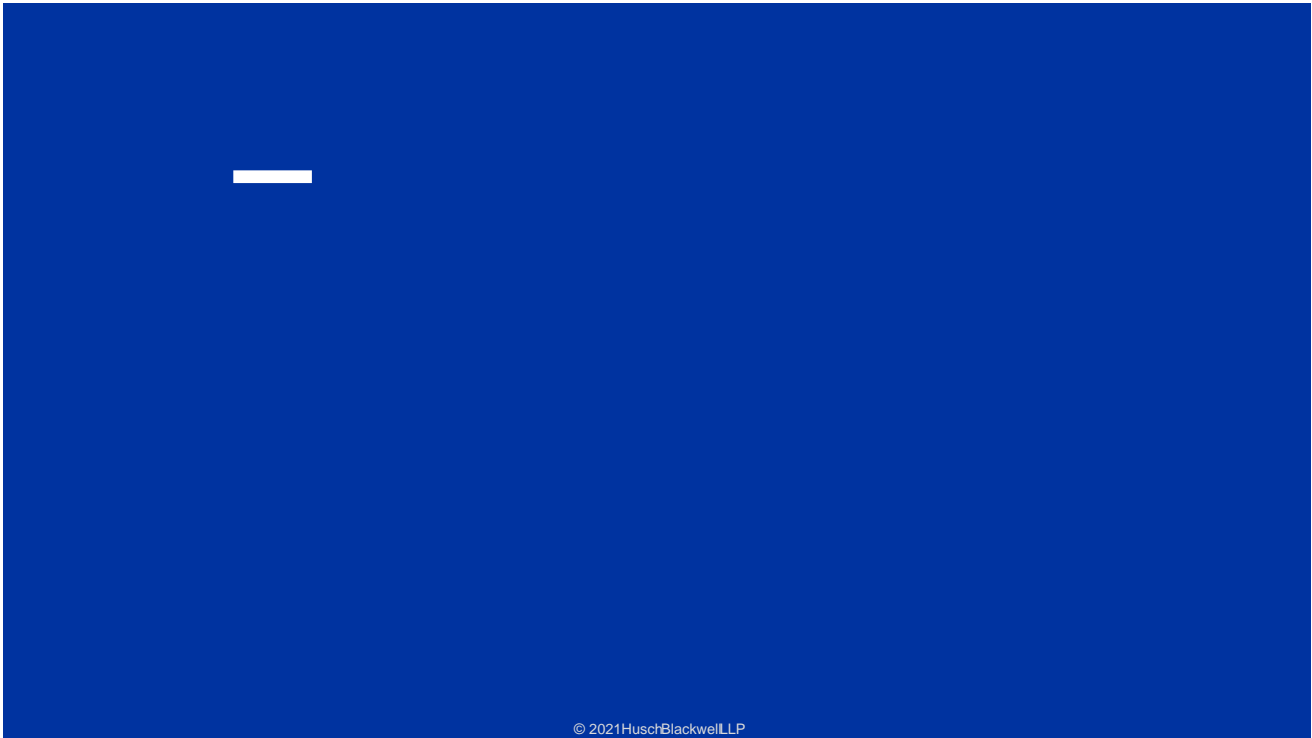


Employee accuses another employee of sexual harassment by telling sexual jokes in the workplace. Advisor for complainant asks respondent whether respondent had an affair with a co worker three years prior.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

148





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



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.

HUSCH BLACKWELL


© 2021 Husch Blackwell LLP



During hearing, complainant identifies a text message from the respondent, sent to the complainant, calling the complainant a sexual epithet. The respondent


HUSCH BLACKWELL

© 2021 Husch Blackwell LLP




—

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




© 2021 Husch Blackwell LLP

157



—



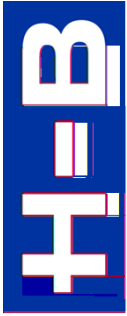
Institution's hearing procedures require all participants to remain seated during the hearing and to remain silent when another party is testifying or engaging in cross examination except to succinctly raise an objection.

HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

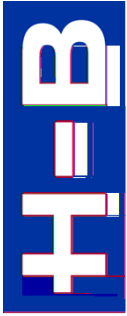
158

Title



- Yes, but only if a delay is not clearly unreasonable
- Consider pre scheduling an alternative date
- Inconvenience alone should not be the determinative factor; every date will inconvenience (not) plaintiffs

Blackwell (ng) P.L.L.C. & 166 N. D. 29th St. a BYU A F 18 2021 Husch



- In a written document, provided contemporaneously to the parties that:

Identifies the allegations of sexual harassment

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 complainant or respondent generally or the individual complainant or respondent that affected the outcome of the matter

© 2021 HuschBlackwell LLP



Respondents

© 2021 HuschBlackwell LLP



—
Parties agree to engage in informal

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



—
Student files a formal complaint
accusing a faculty member of groping
the student during a clinical experience.
As the hearing approaches, the hearing

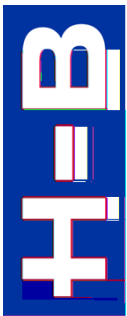
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



- 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

© 2021 Husch Blackwell LLP



- Informal resolution should be reasonably prompt
- Typically has the effect

© 2021 Husch Blackwell LLP




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





© 2021 Husch Blackwell LLP

183


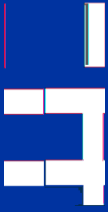



- Yes
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Other policy violations may be apparent prior to Title IX



© 2021 Husch Blackwell LLP

184



—

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.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

185




—

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.

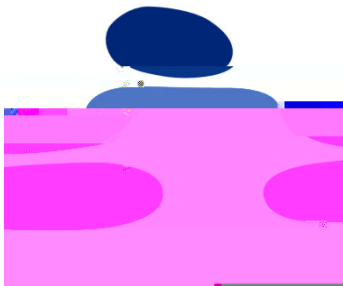
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

186




- 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




© 2021 Husch Blackwell LLP

187




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.




HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

188




—
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.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

189



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

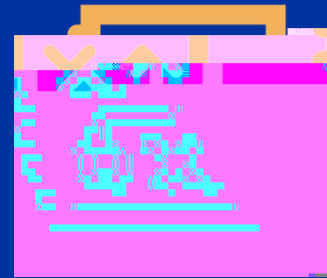
© 2021 Husch Blackwell LLP

190



—

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

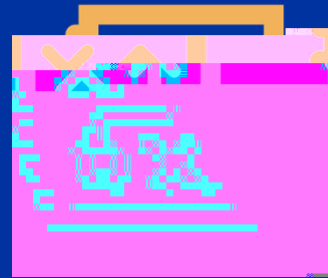


-
- Yes
 - But any "joint" investigation

© 2021 Husch Blackwell LLP



—
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


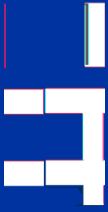
© 2021 Husch Blackwell LLP




—
Male respondent at private religious college is accused of sexually

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

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.





HUSCH BLACKWELL

© 2021 Husch Blackwell LLP





- Complainant's wishes
- Desire to avoid "passing the harasser" scenario
- Community expectation
- Large investment of time and





- 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

© 2021 Husch Blackwell LLP



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, smot

HUSCHBLACKWELL

© 2021 Husch Blackwell LLP



© 2021 Husch Blackwell LLP



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

© 2021 Husch Blackwell LLP

203



- 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

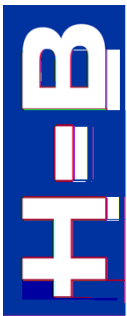
© 2021 Husch Blackwell LLP

204



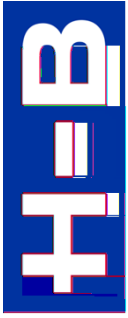
- Yes
- July 2021 ED Q&A document on Title IX sexual harassment guidance
- Q&A articulates ED's interpretation of existing regulations and does not have the force and effect of law
- Includes sample language for key policy provisions

© 2021 Husch Blackwell LLP



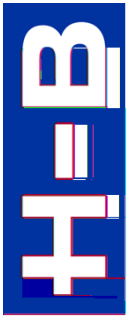
- Regulatory application
 - Regulations apply to sexual harassment occurring on or after August 14, 2020
 - Sexual harassment in online/virtual

© 2021 Husch Blackwell LLP



© 2021 Husch Blackwell LLP





- Process

A school may use a



© 2021 Husch Blackwell LLP

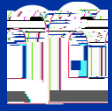


© 2021



© 2021 Husch Blackwell LLP






- Institution's

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



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



© 2021 Husch Blackwell LLP

