



HUSCHBLACKWELL

Training for Discrimination Issues/Processes

Fall 2023

© 2022 Husch Blackwell LLP. All Rights Reserved.

1

Group Scenario




Breakout Groups

- 4 Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today's training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Add your institution to your displayed name


HUSCHBLACKWELL

2



Agenda


- Parallel Processes
- Investigations
- ADA Issues
- Gender Identity and Sexual Orientation
- Religious Discrimination/Accommodations




HUSCHBLACKWELL

3

H-B



Join at vevox.app
Or search **Vevox** in the app store



ID: 171-079-147

HUSCH BLACKWELL

4

H-B

HUSCH BLACKWELL


Parallel Processes

—

5

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

HUSCH BLACKWELL

6

H-B**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

HUSCH BLACKWELL

7

H-B**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



HUSCH BLACKWELL

8

H-B**Example**

Student makes a verbal report that resident director had sex with student. Before student signs a formal complaint, resident director confesses that he had sex with student, but says it was consensual. Resident director's contract strictly prohibits all manner of sexual contact between resident director and students, consensual or otherwise.



HUSCH BLACKWELL

9

H-B

Example

Student A files a formal Title IX complaint, accusing Student B of recording the two having sex without Student A's permission. Student A discloses that she is 17. Student B admits to making the videos but claims Student A consented.



© 2022 Husch Blackwell LLP

HUSCH BLACKWELL

10

H-B

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



© 2022 Husch Blackwell LLP

HUSCH BLACKWELL

11

H-B

Example

Respondent is accused of sexually assaulting a peer at a department social gathering. During Title IX hearing, Complainant admits the sexual encounter occurred at a private residence not owned by the University. Title IX hearing results in a "no violation" finding because of the location of the incident. Institution then initiates code of conduct charges against respondent.



© 2022 Husch Blackwell LLP

HUSCH BLACKWELL

12

H-B

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.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

13

H-B

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

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

14

H-B

Example

Faculty member at institution with prohibition on faculty/student romantic relationships is accused of serving alcohol to underage student and performing non-consensual oral sex on student. Faculty member contends sex was consensual. Institution initiates Title IX investigation and parallel investigation of whether faculty member violated professionalism obligations by having sexual encounter with a student.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

15

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

16

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

17

H-B**Can the resolution of one process “moot” a Title IX process?**

- Yes
- Title IX permits dismissal of Title IX complaint if respondent is separated from the institution
- Earlier process that results in dismissal (student) or termination (employee) may support dismissal of Title IX complaint


HUSCH BLACKWELL

18

H-B

Example

Respondent is accused of sexually assaulting peer at a party at Respondent's house that violates COVID protocols. Respondent has two prior COVID protocol violations. Institution promptly dismisses student for COVID protocol violation using student code of conduct. Institution may dismiss Title IX complaint.




HUSCH BLACKWELL

19

H-B

Example

Student complains that adjunct faculty member coerced student into sexual encounter. Faculty member admits sexual encounter but denies it was coerced. Institution promptly terminates faculty member's contract based on institution's prohibition of any sexual relationship between faculty and student and bans faculty member from reemployment. Institution may dismiss Title IX complaint.



HUSCH BLACKWELL

20

H-B

Must an institution dismiss Title IX complaint if employee is terminated?


- No
- Dismissal is permissive
- Reasons not to dismiss include:
 - Concern about reemployment
 - Public relations concerns
 - Desire of complainant(s) to continue
 - Desire to document sexual misconduct (if supported by evidence) in personnel record.

HUSCH BLACKWELL

21

H-B

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” that occurs in institution’s programs and activities

HUSCH BLACKWELL

22

H-B

Example (impermissible)

Employee A files formal Title IX complaint against Employee B alleging that Employee B stalked Employee A by following every night for two weeks. When Employee A expresses concern about cross-examination, institution dismisses Title IX complaint and simply charges respondent with “stalking” under non-Title IX policy. Those procedures do not include a live hearing or cross-examination.



HUSCH BLACKWELL

23

Questions



HUSCH BLACKWELL

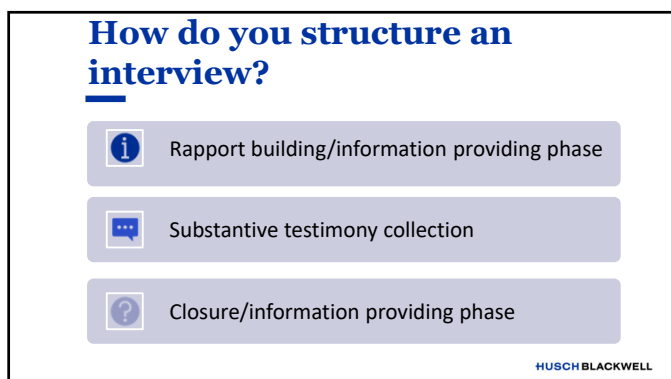
24



25



26



27

H-B

How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions ("recognition prompts") as long as possible
- Avoid suggestive or leading questions



HUSCH BLACKWELL

28

Examples of open invitations



"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?"

HUSCH BLACKWELL

29

Examples of facilitators



HUSCH BLACKWELL

30

**Examples of
cued
invitations**

"You mentioned that . . . Can you tell me more?"

"You said that Can you elaborate?"


"You said they 'coerced' you. Can you tell me specifically what they did?"


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


HUSCH BLACKWELL


31

**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)

HUSCH BLACKWELL

32

H-B

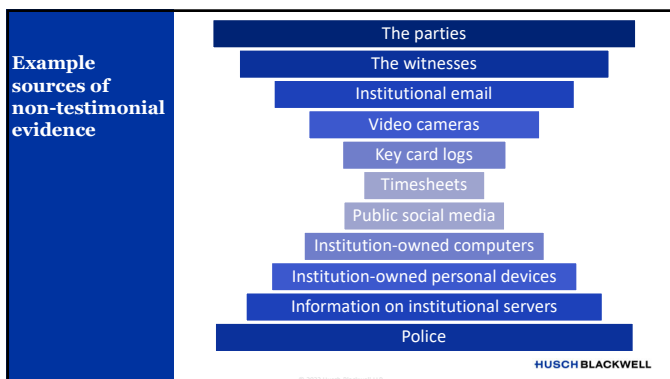
Proposed Change



- If not using a live hearing
- Must allow parties to propose relevant and not otherwise impermissible questions and follow up questions for any party or witness

HUSCH BLACKWELL

33



34

H-B

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

35

H-B

Proposed Change

- Expanded to prohibit consideration of evidence that
 - "Relates to the complainant's sexual interests or prior sexual conduct" unless
 - Showing someone other than respondent committed the act or
 - To prove consent with specific incidents between the complainant and respondent

HUSCH BLACKWELL

36

H-B

Example

Student A complains that Student B forced Student A to have oral sex. Student B says it was Student A's idea and Student A consented. Student A says they had never performed oral sex before and wouldn't ever do it because it's "gross." Student B has two witnesses who will say Student A performed oral sex on them.



HUSCH BLACKWELL

37

H-B

May an investigation collect and rely on privileged records?



- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

HUSCH BLACKWELL

38

H-B

Proposed Change



- Confidentiality of health and medical records must be waived in writing
- Confidentiality of other privileged documents and communications can be waived in a manner permitted in the institution's "jurisdiction"

HUSCH BLACKWELL


39

Complainant provides to the investigator a redacted version of Complainant's gynecological exam, conducted two days after alleged assault and including pregnancy and STD test results.

HUSCH BLACKWELL

© 2023 Husch Blackwell LLP

**Example:
Permissible
collection**




40

Institution accessed information from Complainant's campus counseling records without Complainant's consent and included them among investigation records shared with Respondent.

HUSCH BLACKWELL

© 2023 Husch Blackwell LLP

**Example:
Impermissible
collection**




41

H-B

Proposed Change

- Institutions have discretion to allow or not allow expert witnesses, as long as the rule applies equally to the parties.



HUSCH BLACKWELL

42

H-B

Do the parties have access to the evidence?

- 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

43

H-B

What exactly has to be shared?

- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared

HUSCH BLACKWELL

44

After completing all interviews, investigator uploads interview transcripts and other evidence to a secure file sharing program and sends individual links and passwords to each party and their advisor, placing party-specific watermarks on the evidence.

HUSCH BLACKWELL

© 2023 Husch Blackwell LLP

Example: Permissible provision of evidence



45

H-B

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

46

H-B

Proposed Change



- Institution must provide equitable access to the relevant evidence
- Or to a written investigation report that accurately summarizes the evidence and access to relevant evidence upon request; and
- Must provide a reasonable period of time to respond before determination

HUSCH BLACKWELL

47

H-B

Non-Title IX investigation

- University provides equitable access to relevant evidence
- Preliminary Report shares what investigator deems relevant evidence as exhibits
- After parties respond, ask questions, provide more evidence, Investigator decides

HUSCH BLACKWELL

48

H-B

Is the evidence “confidential?”

- Institution may require parties and advisors to agree not to disclose investigation evidence to third-parties
- But cannot prohibit parties from speaking about the allegations themselves



HUSCH BLACKWELL

49

H-B

Proposed Change



- Institution “must” take reasonable steps to prevent and address “unauthorized disclosure of information and evidence obtained solely through . . . grievance procedures.”

HUSCH BLACKWELL

50

H-B

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

51

H-B

Proposed Change



- Investigation report becomes optional
- But minimally parties must have access to the relevant evidence itself
- If adopting single investigator/decision-maker model, investigation report is effectively supplanted by a written decision document

HUSCH BLACKWELL

52

H-B

Does the investigation report make findings?

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

HUSCH BLACKWELL

53

H-B

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

54

H-B

Example

The institution sends a written notice of investigation to respondent requesting an interview. The advisor, an attorney, demands answers to various procedural questions before he will "allow" his client to be interviewed. Institution's policy states that advisors play a passive role during the investigation phase and may not obstruct communication with the institution's students.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

55

H-B

Example

A complainant identifies their father as an advisor. During the interview, complainant's father becomes emotional and berates investigator for "how the school could let this happen." As complainant is interviewed, father cries periodically and pounds his fist. Investigator must take several breaks for father to compose himself. Institution's policy prohibits advisors from "disrupting" investigative interviews or hearings.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

56

Group Scenario



- Professor is up for tenure review. Before resigning, Fellow worked in Professor's research lab. When asked about Professor during the tenure review process, Fellow informed the tenure review committee that Professor had once thrown items at Fellow in the lab and that Professor expects unreasonably long hours of fellows because of Professor's cultural background. The committee nevertheless recommended promotion.
- Two days later, Fellow reported to the Title IX coordinator that Professor "raped" Fellow, and that the two later engaged in a secret consensual sexual relationship. More specifically, Fellow said that Professor invited Fellow to the lab one night and began kissing and groping Fellow; and that, after forcefully trying to push Professor away, Fellow agreed to engage in further sexual relations that night and they had a secret affair thereafter.
- After receiving notice of a rape allegation, Professor denies sexual contact with Fellow, consensual or otherwise. Professor alleges that, before Fellow filed the complaint, a colleague heard Fellow threaten to interfere with Professor's tenure process. Professor claims to have not been on campus on the day/night Fellow alleges rape. Professor alleges that another student told Professor that Fellow had lobbied to keep peers out of Professor's lab during the time Fellow claims the two were in a consensual relationship. When asked to provide a list of all days when he was present on campus, Professor asks for counsel.

57



58

 A white rectangular slide with a blue vertical bar on the left containing the "H-B" logo. The title "ADA" is in blue at the top left. Below it is a small image of a hand with a red 'X' over the word "DISABILITY". To the right of the image are four bullet points. The Husch Blackwell logo is in the bottom right corner.

- Prohibit discrimination and retaliation based on disability
- Require reasonable accommodation of disabled employees
- Three primary requirements relate to discrimination, accommodation, non-retaliation
- Embedded requirement of "interactive process"

59

 A white rectangular slide with a blue vertical bar on the left containing the "H-B" logo. The title "Critical to Understand:" is in blue at the top left. Below it are three bullet points. The Husch Blackwell logo is in the bottom right corner.

- What's a "disability?" Who's protected?
- What are University's obligations?
- What is proper procedure for assessing and granting accommodations, or for investigating complaints about such issues?

60

H-B

What's a disability?

- Medical or mental condition that "substantially interferes" with a major life activity
 - This includes working, living, etc.
 - So it's almost everything that is not temporary
- And it can also encompass side effects of temporary conditions
 - E.g., meningitis is not a disability – but the deafness or balance impairment that may result IS
 - War wound is not a disability – but permanent medical or mental effects are

HUSCH BLACKWELL

61

H-B

What's a disability?

- "Regarded as" standard of discrimination
 - If employee does not actually have a disability, but is "regarded as" being disabled by the employer, that is also disability discrimination
 - Often comes up if employee has some indication of limitation on their ability to function in some way, but it does not substantially limit a major life activity
 - If supervisor believes the employee's condition limits their ability to do their work, and takes some type of adverse employment action based on that belief, that is discriminatory.
- Example:
 - Manager told employee he either did not know what he was doing at work or had dyslexia, employee then requested accommodations for dyslexia, was fired soon thereafter
 - NO actual dyslexia, but "regarded as" having it,

HUSCH BLACKWELL

62

H-B

The Obligation Not to Discriminate Means...

- DO NOT make assumptions
- DO NOT make diagnoses and conclusions about appropriate accommodations without documentation
- DO respect disabled person's privacy and right to ask for accommodations or NOT
- DO treat employee equally (no better, no worse), except in context of request for reasonable accommodation . . .

HUSCH BLACKWELL

63

H-B

Providing Reasonable Accommodations

- Opposite of nondiscrimination
 - Obligation to treat people differently because of their disability
 - To help them achieve desired results at work or in academic setting
- Only when person requests
 - Never assume someone wants an accommodation
 - "Dignity" interest in self-determination important
- Exception for "obvious" impediment

HUSCH BLACKWELL

64

H-B

Providing Reasonable Accommodations

- Goal of accommodations
 - Allow person to perform essential duties of their job with some adjustments
- May result in perceived unfairness from others
 - Co-workers who do not receive same adjustments
 - Questions about whether changes really necessary
 - Confidentiality requirements often reduce communication in ways that may create tension

HUSCH BLACKWELL

65

H-B

Providing Reasonable Accommodations

- What's reasonable?
 - To modify the way employees perform their role without causing an "undue burden"
- What's not reasonable?
 - To fundamentally alter the essential requirements of a job or change role drastically; OR
 - To place undue hardship or burden upon company
- But these concepts require careful consideration of multiple factors
- And we can't make assumptions about what is essential or burdensome

HUSCH BLACKWELL

66

H-B

Use Interactive Process

- A structured exchange with employee with a disability to explore
 - Medical condition and impact on ability to work
 - Particular aspects of job
 - Previous experiences
 - Past use of accommodations, current needs
- Balance what employee reports with other sources
 - Observations
 - External documentation (medical records, etc.)

HUSCH BLACKWELL

67

H-B

Use Interactive Process

- Can require medical documentation
- Uniquely fact specific for each situation, even for each request from the same employee
- Best managed by someone other than supervisor/manager
 - Staff with expertise relating to balancing work needs, employee's limitations, and options available to consider as accommodations
 - Consult with managers about whether particular accommodation could or would work
 - Not always necessary to be employee's "chosen" accommodation
 - Centralizing accommodation decisions helps avoid inconsistent decisions across different work units

HUSCH BLACKWELL

68

H-B

Investigating Disability or Accommodation Complaints

- University policy (*Non-Discrimination Policy*)

Definitions

Discrimination

To be subject to different treatment based on membership in a protected classification and to thereby experience an adverse employment or academic action or to be excluded from participation in or denied the benefits of a University program.

HUSCH BLACKWELL

69

H-B

Investigating Disability or Accommodation Complaints

- "Different treatment"
 - This would include adverse treatment based on having a disability or being perceived as having a disability
- What about complaints about accommodations, or whether the "interactive process" related to them was appropriate?
 - "excluded from participation in or denied benefits of a University program"
 - Not receiving an accommodation could fit that portion of the definition

HUSCH BLACKWELL

70

H-B

Investigating Disability or Accommodation Complaints

- Unique aspects of investigations of accommodation-related complaints:
 - Not just investigating facts relating to the medical condition, work duties, and accommodations offered
 - Need to review the "process" as well
 - Expect some back and forth, either in writing or oral discussions, that help demonstrate an "interactive process" of weighing different options and factors occurred
 - Confidentiality factors:
 - Not all witnesses may know all information at issue
 - Managers often shielded from medical details
 - Avoid inadvertent disclosures of confidential information when interviewing people

HUSCH BLACKWELL

71

H-B

Another key factor - Retaliation

- In accommodation cases – be alert for retaliation facts
- Retaliation means:
 - Protected Activity
 - Reasonable Belief
 - Opposition or Participation
 - Adverse Action
 - "Reasonably dissuade"
 - Causal Link
 - Often easier to prove than discrimination

HUSCH BLACKWELL

72

H-B**Retaliation (continued)**

- Payback for "protected activity"
 - Seeking an accommodation qualifies
 - Can create tension within work units because not everyone is being treated the same
- Common "human" reaction
 - Managers lose degree of authority over work environment
 - Co-workers lack information about why employee treated differently
- Can transform perfectly legal initial decision into actionable claim (e.g., if accommodation process and decision were done well)

HUSCH BLACKWELL

73

H-B**Key Issues**

- Comparators
 - Not just "was it fair"
 - Applied the same to similarly-situated people?
- Multiple substantive factors
 - Accommodation decisions themselves
 - Process applied to get to decisions
- Retaliation
 - Timing really matters

HUSCH BLACKWELL

74

Group Scenario

Admissions officer, Jane, has medical condition that hinders energy level. She enjoyed remote work during the pandemic and has resented being required to work in the office or to travel the past year. She initially asked her manager, without any medical issue reference, to allow everyone in her role to work from home Mondays and Fridays but was denied. On eve of busiest period for admissions, Jane submits doctor's note indicating that she needs more rest and to avoid exposure to poor air quality from wildfire haze, and recommends that she work from home 2 days per week and never travel out of state. Manager emphasizes importance of in-person collaboration to University mission, but says Jane can avoid traveling for a year to help her recover. Jane reluctantly agrees until, a few weeks later, she learns that other admissions officers who travel are allowed to work from home ½ days on days they have flights. She restates her work-from-home request (with another doctor's note) to include ½ days as often as those who travel "to be fair". Manager responds asking to connect Jane with doctor Manager knows for second opinion. Jane refuses. Manager then emails Jane with long list of mistakes Jane has made the last year, hinting that she must avoid more. Jane requests reassignment to alumni relations office because their staff are allowed to work from home twice a week, but there is no open position so this is summarily denied.

HUSCH BLACKWELL

75

Questions

?



HUSCH BLACKWELL

76

H-B

HUSCH BLACKWELL


Gender Identity and Sexual Orientation

77

H-B

Topics

- Gender identity and sexual orientation discrimination and harassment
- Preferred names and pronouns



HUSCH BLACKWELL

78

H-B

A word on terminology . . .

Vocabulary concerning gender identity and sexual orientation continues to evolve. There is not universal agreement on the meaning of all terms or the best terms to use to refer to certain concepts. We strive to utilize language and examples that are respectful and appropriate. But we welcome your feedback on how we can improve. Please be patient with your colleagues today and assume their good faith even if they use language or terms that you would not.

HUSCH BLACKWELL

79

H-B

Gender Identity and Sexual-Orientation Discrimination and Harassment

80

H-B

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

81

What sex discrimination does Title IX apply to?

- Title IX applies to sex discrimination 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

82

What are the two types of sex discrimination?

- Adverse treatment discrimination
- Sexual harassment



HUSCH BLACKWELL

83

Is all adverse treatment and all harassment discrimination?

- Civil rights laws like Title IX and Title VII prohibit material adverse action based on sex
 - That which has a material effect on a person's participation in programs and activities
- “Harassment” must rise to the level of quid pro quo; hostile environment; sexual assault; or a VAWA crime

HUSCH BLACKWELL

84

H-B**What constitutes “sex” for purposes of Title IX?**

- Biological sex (a/k/a “assigned sex”)
- Gender identity
- Sexual orientation

Department of Education Interpretive Guidance
June 2021
Applying *Bostock v. Clayton County* (U.S. 2020)

HUSCH BLACKWELL

85

Poll questionJoin: [vevox.app](#) ID: 171-079-147**POLL OPEN**

Do these distinctions between biological sex/gender identity and sexual orientation matter for both adverse treatment discrimination and sexual harassment?

1. Yes
2. No
3. It depends

86

H-B**Example**

Engineering faculty member systematically grades female students more harshly than male students because faculty member believes women simply aren't “wired” to be engineers.

HUSCH BLACKWELL

87

H-B

Example




Faculty member refuses to serve as advisor for any transgender student because faculty member believes gender identity is “made up” and anyone who believes in it is “delusional.”

HUSCHBLACKWELL

88

H-B

Example



Faculty member intentionally writes an overly harsh and factually inaccurate letter to undermine openly gay student’s scholarship application because faculty member believes sex should only be between a “biological male” and “biological female” who are married.


HUSCHBLACKWELL

89

H-B

What is hostile environment?

Unwelcome conduct based on sex, 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.




HUSCHBLACKWELL

90

H-B

Example




Student A is straight and Student B is straight. Student A frequently makes comments about how Student B is promiscuous and “sleeps around.” Student A also comments publicly about Student B’s breasts and how Student A would love to “get it on” with Student B.

© 2022 Husch Blackwell LLP HUSCHBLACKWELL

91

H-B

Example




Student A is straight and Student B is gay. Student A repeatedly refers to Student B as a “queer” in front of others.

© 2022 Husch Blackwell LLP HUSCHBLACKWELL

92

H-B

Example



Student A is a trans woman who frequently wears dresses. Student B publicly berates Student A for dressing “like a woman” and comments persistently on Student A’s makeup and jewelry.

© 2022 Husch Blackwell LLP HUSCHBLACKWELL

93

What is gender stereotyping?

- Adverse treatment discrimination against a person because they do not conform to stereotypes about a person of a given sex/gender.
- Harassment of a person that targets their failure to conform to stereotypes about a given sex/gender.
- Gender stereotyping can occur against any person—even cisgender persons.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

94

H-B

Example



Jane is a cis woman and straight. Jane has short hair and doesn't wear makeup. Jane's male supervisor tells Jane if she wants to get promoted, she'll have to stop looking like a "tom boy" and "wear a dress every now and then."

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

95

Poll question

Join: [vevox.app](#) ID: 171-079-147

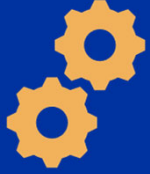
POLL OPEN

Does Title IX's concept of gender identity extend to non-binary gender identities?

1. Yes
2. No

96

Group Scenario



Casey is cis male and straight. But Casey does not discuss his gender identity or sexual orientation with others. Casey is shy, speaks quietly, and wears sleek clothing. One of Casey's classmates, Jeb, tells other students in the class that Jeb perceives sexual orientation of others amazingly well and that he's certain Casey is "one of them." Over several weeks before, during, and after class, Jeb tells explicit gay jokes in Casey's presence; comments on Casey's "nice highlights;" and repeatedly asks Casey whether Casey likes certain movies with prominent gay characters. Casey frequently observes Jeb snickering to others about Casey. One day while leaving class Jeb squeezes Casey's rear-end and says "I'll bet you liked that!" The faculty member for the class has observed all this conduct. The institution has a mandatory reporting policy. But the faculty member chooses not to report because she dislikes when men are "weak" and believes Casey has "brought this on himself" by not "standing up" to Jeb.

HUSCH BLACKWELL

97

Questions



HUSCH BLACKWELL

98

H-B

Preferred Names and Pronouns

99

H-B**Does the law require the use of preferred names and pronouns?**

- The law does not (presently) mandate the use of preferred names or pronouns for any student (cisgender, transgender, or otherwise)
- But the refusal to use preferred names and pronouns based on protected status and/or the use of non-preferred names and pronouns based on protected status may constitute discrimination or harassment based on the facts

HUSCH BLACKWELL

100

H-B**Example**

Faculty member is concerned they will not be able to remember every student's preferred pronouns. Faculty member chooses never to use pronouns for any student and refers to all students by their preferred first name.

HUSCH BLACKWELL

101

Poll questionJoin: **vevox.app** ID: **171-079-147** **POLL OPEN**


Does this faculty member's practice treat any student differently based on a protected status?

1. Yes
2. No

102

H-B

Example



Faculty member is concerned they will not be able to remember every student's preferred pronouns and elects to refer to every student by either their preferred first name or by the gender-neutral "they/them/their."

HUSCHBLACKWELL

103

Poll question

Join: [vevox.app](#) ID: 171-079-147
POLL OPEN


Does this faculty member's practice treat any student differently based on a protected status?

1. Yes
2. No

104

H-B

Example



Faculty member dislikes transgender students. Faculty member's default practice is to refer to students by first name but when addressing transgender students, faculty member intentionally uses a misgendered honorific and always uses the transgender student's legal name instead of their preferred name.

HUSCHBLACKWELL

105

Poll questionJoin: [vevox.app](#) ID: 171-079-147 **POLL OPEN**

Does the faculty member's misgendering and use of non-preferred first name constitute discrimination?

- 1 Yes
- 2 No

106

H-B

Remember, there are two types of discrimination under Title IX . . .

- Adverse treatment discrimination
- Sexual harassment



HUSCH BLACKWELL

107

H-B

***Meriwether v. Hartop* (6th Cir. 2021) (1 of 2)**

- Institution adopts mandatory preferred pronouns policy
- Faculty member wishes to refer to transgender students by last name instead of preferred honorific or pronouns
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination

HUSCH BLACKWELL

108

H-B***Meriwether v. Hartop (6th Cir. 2021) (2 of 2)***

- Faculty member files lawsuit asserting free speech, freedom of religion, and due process claims
- Faculty member's claims survive a motion to dismiss
- Court says: "there is no suggestion [faculty] member's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits."
- "[Faculty member's] decision not to refer to Doe using feminine pronouns did not have a [systematic effect of denying the victim equal access to an education program or activity]."

HUSCH BLACKWELL

109

H-B**What factors could suggest systematic discrimination?**

- Repeated and pervasive conduct
- Reduction in academic performance
- Need to transfer class
- Conduct prompts others to harass/discriminate
- Disruption in class
- Need for counseling
- Others????

HUSCH BLACKWELL

110

H-B***Meriwether takeaways***

- Misgendering or failure to use preferred names is not inherently discrimination as defined by law (but may be)
- Faculty members have First Amendment academic freedom rights that limit institutional ability to compel language
- Faculty members with religious beliefs may be entitled to an accommodation (more on that later)

HUSCH BLACKWELL

111

Poll questionJoin: [vevox.app](#) ID: 171-079-147 **POLL OPEN****Does your institution have a preferred name/pronoun policy?**

1. Yes
2. No

112

H-B**Preferred name/pronoun policy**

- Not required nationally
- Distinction between advisory policies ("should") and mandatory policies ("must")
- Consider distinctions between employees and non-employees
- Think about practicality



HUSCH BLACKWELL

113

H-B**What are potential challenges?**

- How will employees know?
- How will the institution track?
- Will the institution itself abide by the policy? (i.e., transcripts; official communications)
- How frequently are changes allowed?
- What about non-binary pronouns?
- What if the preferred name is vulgar or disruptive?
- Are there exceptions?

HUSCH BLACKWELL

114

H-B

Example



Institution's policy states: "A student's preferred first name will be used when it is unnecessary for the legal name to be used, it is technically feasible to use the preferred name, and the preferred name is not being used for an improper purpose.*"

HUSCH BLACKWELL

115

H-B

Are there alternatives to a policy?

- Rely on general non-discrimination and harassment policies and address complaints as made
- Prepare and publish guidance/educational documents

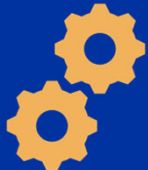


HUSCH BLACKWELL

116

H-B

Group Scenario



Xander is a second-year student who is a trans man. During first year, Xander presented as female and used "she/her/hers" pronouns but now wishes to use "he/him/his." Professor Johnson taught Xander during Xander's first year and is now teaching Xander in an American history class. It is mid-semester. Professor Johnson's syllabus for the class states: "I will refer to students by whatever name and pronouns they identify to me at the start of class." Professor Johnson's reason for the rule is that he does not want confusion and disruption by changing names and references mid-semester. After Xander notifies Professor Johnson of Xander's desire to use "he/him/his" pronouns, Professor Johnson tells Xander it is "too late" to change because the course is "half over." Professor Johnson offers to refer to Xander simply by preferred name, but without pronouns, for the remainder of the class.

HUSCH BLACKWELL

117

Questions

?



HUSCH BLACKWELL

118

H-B

HUSCH BLACKWELL

Religious Discrimination/ Accommodations

119

H-B

Do civil rights laws protect religious liberty?


- Title VII prohibits employment discrimination based on "religion"
 - But there is an exemption for religious institutions
- State non-discrimination statutes typically mirror Title VII and may also extend to non-employee students
- Prohibit classic discrimination by adverse treatment as well as failure to accommodate religion
- Apply to both public and private institutions

HUSCH BLACKWELL

120

H-B

What must an employer do to accommodate religious belief?



- Employer must accommodate employee's sincerely held religious beliefs or practices unless
- The accommodation would impose an "undue hardship"

HUSCH BLACKWELL

121

H-B

What does it mean to have a sincerely held religious belief?

- Whether the employee has a personal, genuinely held belief
- Belief does not have to be part of organized religion
- Belief does not have to be orthodox to the employee's claimed faith
- Religious belief can still be sincere even if recently adopted or occasionally violated
- Religious belief does not have to be validated by a religious leader (priest, pastor, rabbi, imam, etc.) to be genuine

HUSCH BLACKWELL

122

H-B

What does it mean to create an undue hardship?


- The burden must be genuine and not speculative
- The burden must be more than *de minimus*. E.g.,
 - Costly
 - Compromises safety
 - Infringes rights of other employees
 - Violates CBA or seniority rights
 - Would place the institution in legal jeopardy
 - Requires other employees to do more than their share of hazardous or burdensome work

HUSCH BLACKWELL

123

H-B

Example



Teacher at K-12 school seeks a Title VII religious exemption from generally applicable rule that requires all teachers and staff to refer to students by preferred pronouns, including pronouns that are not traditionally associated with a given biological sex. Teacher wishes to use student's last names in lieu of pronouns.

HUSCH BLACKWELL

124

Poll question

Join: [vevox.app](#) ID: 171-079-147 POLL OPEN

Must the institution grant the accommodation?

1. Yes
2. No

125

H-B

Kluge v. Brownsburg Community School Corporation (S.D. Indiana)

- Holds that granting teacher's request to use last names only would create an undue burden
- Would still make transgender students "feel targeted and uncomfortable"
- Evidence that one transgender student dreaded coming to class and had transferred out of the class taught by teacher to avoid environment

HUSCH BLACKWELL

126

H-B

Where does the Constitution protect religious liberty?

- First Amendment, Clause 1
- "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"
- Applies to the federal government and state governments (through "incorporation" by the Fourteenth Amendment)

HUSCH BLACKWELL

127

H-B

What does the free exercise clause protect?

- Government can enforce generally applicable rules that incidentally burden religion as long as there is a rational basis for the action.
- Government cannot take actions specifically targeting free exercise without satisfying "strict scrutiny."
 - Compelling government interest
 - Narrowly tailored policy that furthers interest
- If the government makes exceptions for non-religious actions, the rule is not generally applicable and subject to strict scrutiny.

HUSCH BLACKWELL

128

H-B

Example



K-12 school has a policy that prohibits faculty or staff from using names or pronouns that are offensive to a student based on gender when the use of such terms is motivated by religious animus.

HUSCH BLACKWELL

129

Poll question

Join: [vevox.app](#) ID: 171-079-147 **POLL OPEN**

Does this policy survive under the free exercise clause?

1. Yes
2. No

130

H-B

Example



Education department at public university directs all full-time faculty members to post a sign on their door advertising the department's pride month activities in support of LGBTQ students. Part-time faculty are not required to post signs on the offices they share. Nor are the department chair and staff required to post signs. One faculty member objects on religious grounds.

HUSCHBLACKWELL

131

Poll question

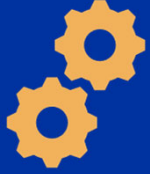
Join: [vevox.app](#) ID: 171-079-147 **POLL OPEN**

Does this policy survive under the free exercise clause?

1. Yes
2. No

132

Group Scenario



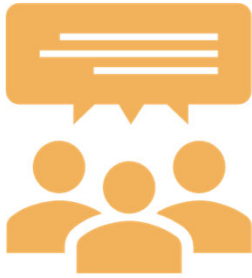
Marcus is a tutor at a public university's writing center. The writing center assigns students with tutors based on availability and sign-up times, and walk-in support is provided when available. There are typically 1-3 tutors staffed at the writing center at a time. Students may seek support on writing assignments for any course offered by the university and, when availability allows, are also able to request writing support for personal statements and cover letters for graduate school and job applications.

Marcus is a devout Mormon with traditionally conservative religious and political beliefs. Marcus believes that it would violate his religious beliefs to engage in conduct which directly or indirectly supports premarital sex, gay marriage, abortion rights, and related issues. Marcus requests that he not be paired with any students seeking tutoring support on topics which might violate his religious beliefs, such as creative writing assignments discussing premarital sex or LGBTQ relationships, or policy papers arguing in support of gay marriage or abortion rights. Marcus proposes that these students be assigned to another available tutor, or if he is the only available tutor at the time, be asked to sign-up for a different time slot or come back to the center at a later time.

HUSCH BLACKWELL

133

Questions



HUSCH BLACKWELL

134

HUSCH
BLACKWELL

135
