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2020 Title IX Regulations

Core Issues and Lessons Learned

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Our Topics Today

- Title IX Jurisdiction is it Title IX or

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Important Threshold Issue

- What policies/procedures potentially

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Assignment and Role of Advisors

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Advisors: Key Issues

- Assignment of advisors
- Role of advisors during investigation and hearing
- Questioning by advisors
- Confidentiality and other expectations

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Do parties get assistance in the grievance process?

- Yes
- The parties have the right to be accompanied by an advisor of their choice during the investigation and hearing
- The institution must provide the party an advisor for purposes of conducting questioning at the hearing if the party does not have an advisor
- Can be an employee, a retained attorney, or a third party
- Equal competency not required

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Does the institution provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing and any other interviews or investigation meetings
- If a party does not have an advisor, the institution must supply one for the purpose of questioning the other party and witnesses at the hearing on

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What is the role of an advisor during the investigation?

| | |
|-------------|--|
| Support | Provide personal support to the party throughout |
| Preparation | Support the party in preparing for meetings and interviews |
| Presence | Be present with the party during meetings and interviews |
| Review | Assist the party in reviewing the evidence prior to the close of the investigation |

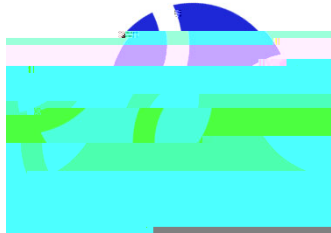
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What must an advisor not do during the investigation?

| | |
|---------|---|
| Inhibit | Advisor should not inhibit communication between investigator and party |
| | Advisor should not |

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What if the advisor breaks the rules?



- An advisor who violates the rules may be excluded from further participation
- Institution may pause the relevant interaction to allow the party to select a new advisor

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What is the role of an advisor during the hearing process?

| | |
|-------------|---|
| Support | Provide personal support to the party throughout |
| Preparation | Help the party prepare for pre hearing conference and live hearing |
| Presence | Be present with the party during pre hearing conference and live hearing |
| Questioning | Conduct live questioning of other party and witnesses at the live hearing |

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Is there a standard of behavior in hearings?

- Yes
- All parties (including advisors) must:
 - Act professionally
 - Maintain decorum
 - Not disrupt proceedings

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Questioning

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What is a “live” hearing?

- A proceeding held by the hearing officer or

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How does the hearing actually work?

- Required elements include:

Hearing officer or panel 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 must have their testimony excluded

Questioning of sexual history generally not permitted

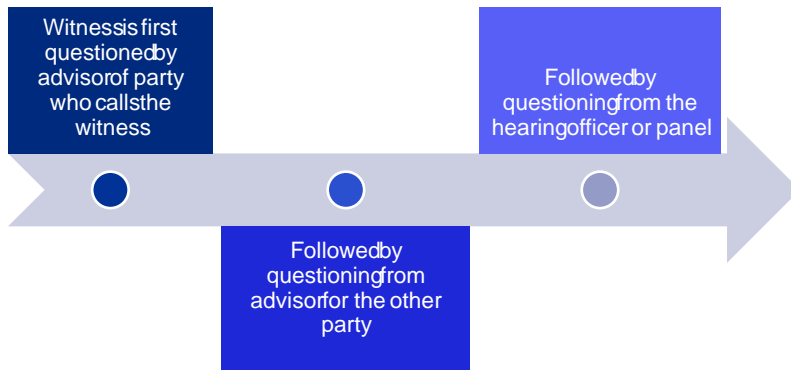
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How might questioning of parties take place?



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How might questioning of witnesses take place?



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What is the advisor's role in questioning?

- Ask relevant questions, including those

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What questions should advisors ask?


- Review the nature of the allegations
- Review the definition of a particular type of sexual harassment alleged
- Consider facts that would support a party's position that a given element of the sexual harassment is either met or not met
- Prioritize questioning to focus on the most compelling points
- Consider questions that will bear on credibility

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What are the hallmarks of effective questioning?

- Questions should be clear and precise
- Questions should advance a party's position with respect to one or more elements of the sexual harassment alleged
- Questions should be asked in a purposeful order
- Questions should be prioritized and edited for greatest effect

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What should an advisor do if a question is deemed irrelevant?

- The hearing officer or panel

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Must an advisor maintain confidentiality?

- Yes
- If an advisor is an institutional employee, the advisor must abide by the same confidentiality rules as the institution itself, including FERPA
- Advisors should maintain the confidentiality of the

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Hearings: Some Lessons Learned

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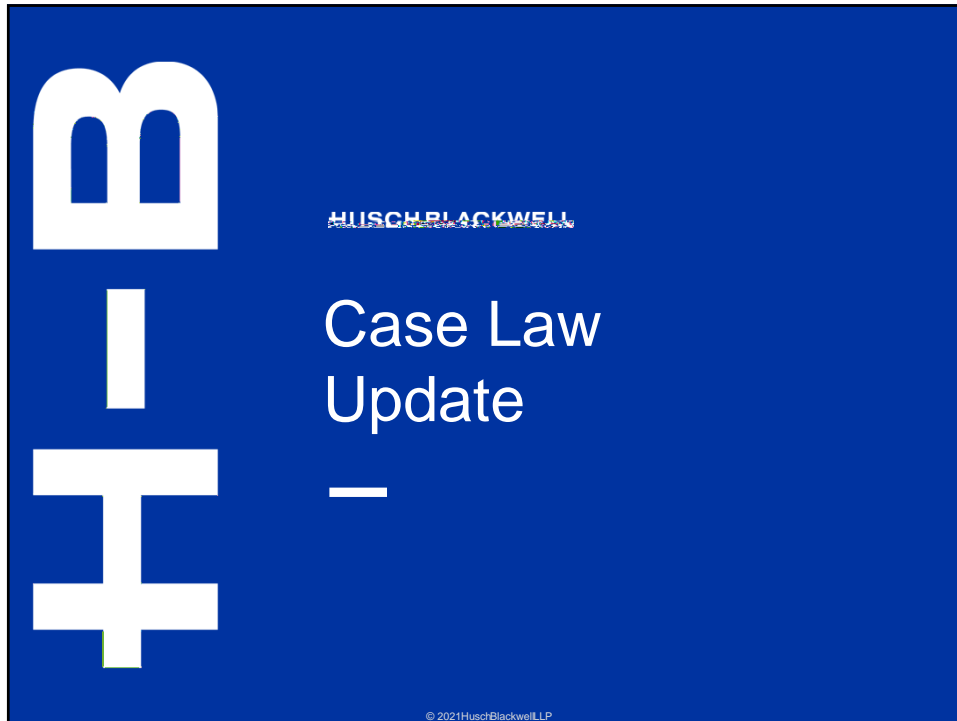
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Additional Practical Tips

- Review and confirm Title IX jurisdiction before conducting hearing
- Remain open to informal resolution
- Make good use of one or more pre hearing conferences – confirm witness attendance, access to evidence, discuss attendance and sequencing answer questions, address concerns etc.
- Virtual hearings: internet connection, how evidence will be accessed, keep camera on, maintain role of advisor as “silent advisor”
- Ensure the hearing officer or panel has been trained and is prepared to maintain order, display impartiality, and address relevancy and other issues during the hearing

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Adams v. Sch. Bd. of St. John's County, Fla. (11th Cir. 2020)

- Applied *Bostock* to Title IX
- *Bostock* determined that Title VII prohibits discrimination because of sexual orientation or gender identity
- Discrimination based on sex includes discrimination based on gender identity
- Determined that policy restricting restroom use to restroom corresponding with sex at birth violated Title IX

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Foster v. Univ. of Mich. (6th Cir. 2020) (en banc)

- Reaffirming “deliberate indifference” standard in affirming summary judgment for university
- Arose out of alleged student on student sexual harassment during MBA program in L.A. via emails, texts, social media posts, and physical contact
- No contact order (which respondent violated), placed respondent in different hotel, arranged separate meal times, precluded attendance at commencement
- Made no contact order permanent after investigation and sanction for policy violation

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Doe v. Marian Univ. (7th Cir. 2020)

- Affirming summary judgment in Title

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