



HUSCH BLACKWELL

Title IX: Current Environment

November 2018

Presenter



Hayley Hanson

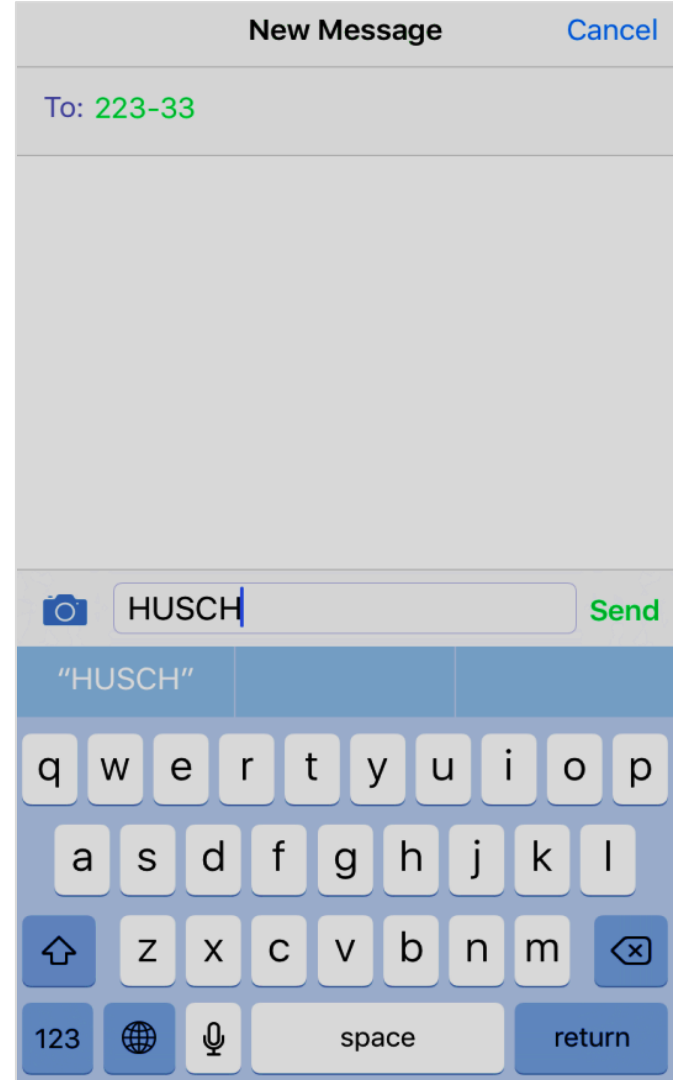
Partner

Higher Education Group

hayley.hanson@huschblackwell.com

Polling login

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



A close-up, angled view of a spiral-bound notebook. The notebook is open to a page that appears to be a calendar or a time log, with handwritten or printed time slots visible. The spiral binding is on the left side, and the page is white with some faint, illegible text. The notebook is resting on a dark surface.

Agenda

- #MeToo
- Bad Actors
- Due Process
- Challenges

#MeToo



What comes to mind when you think about the #MeToo movement?

Start the presentation to see live content. Still no live content? Install the app or get help at PollEv.com/app



Movement

- End
 - Sex discrimination
 - Sexual harassment
 - Sexual assault
- Time's up

Demands of institutions

- Action
 - Consequences
 - Communication
- Voice
 - Effective reporting channels
 - Opportunity to be heard by leadership/community
 - Workplace diversity
- Transparency



Elizabeth Dunn

20 hrs · 🌱

...

[CW Sexual Assault/Abuse]

Something that's been weighing me down for a while, especially after the #metoo movement, is how incredibly visible survivors can be, and yet how invisible the ones who violated our boundaries remain. So many people at middlebury are open about the trauma they've experienced here, and yet there's still reluctance to publicly name the ones who have caused this pain.

It's profoundly fucked up to me that I can write so much about my trauma, and see that and similar narratives hyper-consumed on so many platforms, and yet in my everyday life still see people associate with those who have perpetuated this violence as if nothing has happened.

So in the spirit of that, here's a short List of Men to Avoid: [redacted]
 (rapist), [redacted] (rapist), [redacted] (my rapist, don't know his last name), [redacted] (physically/emotionally abusive), [redacted]
 (sexual harassment, treats women but especially Black women like shit), [redacted]
 [redacted] (made fetishistic, racist, sexual comments about Black women), [redacted] (sexual harassment), [redacted] (rapist, sexual harassment), [redacted] (rapist, sexual harassment) [redacted]
 (rapist, sexual harassment) [redacted] (rapist, physically violent), [redacted]
 [redacted] (sexual harassment), [redacted] (rapist, sexual harassment), [redacted] (sexual assault), [redacted] (rapist, emotional abuse), [redacted] (rapist, sexual harassment), [redacted] (sexual harassment), [redacted] (serial rapist), [redacted] (rapist), [redacted]
 [redacted] (emotionally manipulative), [redacted] (rapist, sexual harassment, sexual assault), [redacted] (serial rapist), [redacted] (rapist), [redacted]
 [redacted] (rapist, sexual harassment, racist comments), [redacted]
 (emotional abuse, sexual harassment), [redacted] (sexual assault), [redacted]
 [redacted] (attempted rape), [redacted], [redacted] (rapist, sexual harassment), [redacted] (serial rapist), [redacted] (emotionally manipulative, sexual abuse), [redacted] (sexual harassment), [redacted]
 [redacted] (serial rapist)

+a lot of other people that I don't want to name to respect people's safety anyways here's to not being complicit in 2018, and feel free to dm me more names to add to this status because I could really give a fuck about protecting the privacy of abusers ❤️

Activism

- Information sharing
- Organizing
- Protests
- Backlash

Bad Actors



“News”?

- “Some Colleges Hush Up Charges to Get Rid of Problem Professors” (*Chronicle of Higher Ed.*, December 6, 1996)
- “Woman raped on campus after Missouri #MeToo rally” (*Kansas City Star*, Oct. 12, 2018)

Due Process

What's required?





Old guidance rescinded

- 2014 Sexual Violence FAQs
- 2011 Dear Colleague Letter
- Compliance assessed by
 - 2001 Revised Sexual Harassment Guidance
 - Q&A on Campus Sexual Misconduct (2017)

Which long-standing Title IX principle was rescinded?

Required use of
preponderance standard

Mutuality of any appeal
process

Interim measure
burden falls on
respondent

All of the above

Notable rescinded elements

- 60 day timeframe
- Preponderance standard
- Mutuality of appeal
- Discouragement of cross examination
- Ban on use of sexual history
- No reliance on criminal investigation
- Investigation of all reports, regardless of location
- Interim measures burden falls on respondent

Explanation for rescinding

- “Imposed new mandates”
- “Improper pressure . . . to adopt procedures that do not afford fundamental fairness”
- “Led to deprivation of rights for many students”
- “Not succeeded in providing clarity”
- “[I]mposed these regulatory burdens without affording notice and the opportunity for public comment”



Process impact

- Time for fair, impartial investigation
- Potential higher standard of proof
- Appeal may be allowed only for respondent, but must use equally available procedures if allowed for both
- No reliance on fixed interim measure rules
- Full, timely notice
- Access to evidence and report

Notice of proposed rulemaking



- August 25, 2018



Substantive standards

- Administrative enforcement aligned with the established legal standard for “deliberate indifference”
- “Hostile environment” standard aligned with federal case law

Safe harbors

- Institution follows its grievance procedures in response to a “formal complaint”
 - Must investigate allegations of policy violation
- “Supportive measures” implemented in the absence of a formal complaint





Emergency removal

- Individualized safety and risk analysis
- Determine immediate threat to health/safety of students/employees
- Provide notice and opportunity to challenge the decision immediately following removal

Grievance procedures: Key mandatory elements

- “Due Process” for respondent
- Consider all relevant evidence
- Credibility determinations cannot be based on status as complainant, respondent, or witness
- Respondent presumed not responsible during investigation
- “Reasonably prompt timeframes” can be extended for good cause
- “Good cause” includes concurrent law enforcement activity
- 3-year recordkeeping requirement

A wooden chair is positioned in the center of the frame, illuminated by a single lightbulb hanging directly above it. The background is a dark, textured wall, and the floor is also dark. The lightbulb is glowing, creating a soft pool of light on the chair and the wall behind it.

Key elements (cont.)

- Cannot limit ability of parties to discuss allegations or gather evidence
- Cannot limit the choice of support persons or advisors, but may limit their role
- Must permit parties to review and respond to
 - Relevant evidence before determination
 - Investigation report that summarizes relevant evidence prior to determination
- Equal opportunities to question and to ask all relevant questions



Constitutional protections

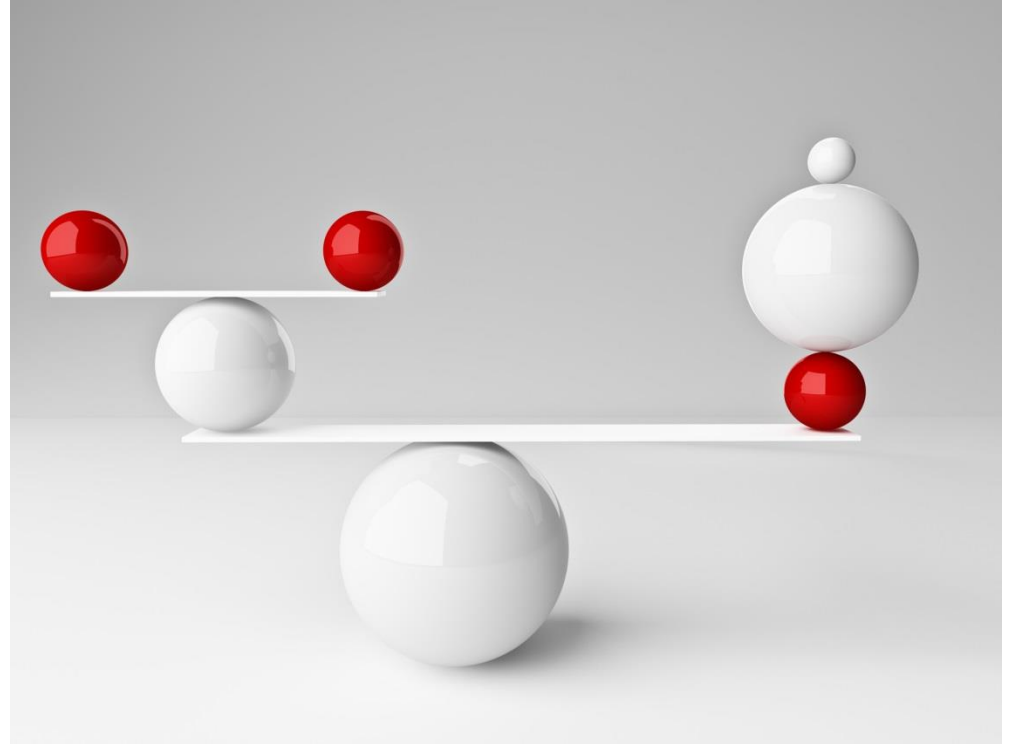
- Title IX does not require a recipient to restrict any right that would otherwise be protected by the First Amendment, Due Process Clause, or constitutionally protected rights

What lies ahead

- Lack of clarity/consistency in enforcement pending final rules
- Implementation of new interim guidance
- Courts marching on



Challenges



In addition to increased activism and the evolving regulatory landscape, what other challenges are institutions facing in this area?

Pain points

- Crisis communications
- Lack of buy-in
- Inadequate awareness and prevention programming
- Untimely or tone-deaf response to campus activism

Communications challenges

- Prevailing view is to not comment on specific cases or challenge allegations of failed process...
 - Chills reports
 - FERPA considerations
 - Perception of being self-serving
 - Potentially compromises litigation position
- ...but the wrong message can create bigger problems

Stale messaging

Words

- The University takes all reports of sexual misconduct seriously
- The University doesn't comment on specific cases to respect the privacy rights of the individuals involved
- The University will conduct an internal review to identify areas for improvement

Perception

- “Thoughts and prayers...”
- University is hiding behind privacy laws
- The University will take action behind closed doors to preserve its reputation



Michigan State example

- 2018 lawsuit alleged MSU failed to adequately respond to 2015 report of sexual assault involving 3 basketball players
- MSU issued statement rebutting the assertion that counseling center staff dissuaded plaintiff from filing a complaint
- Statement received instantaneous backlash: Retracted



No buy-in

- Institutions and their leadership must “walk the talk”
- Leaders who fail to demonstrate knowledge of and commitment to institution’s approach for addressing controversial problems unintentionally undermine efforts and credibility
- OSU example



USC example

- 150+ historical reports of sexual misconduct and failed response
- President steps down, with Emeritus and trustee status
- Criticism: Response was “window dressing”
- Prediction
 - Lower board tolerance
 - Swifter, firmer action



Comments Questions Experiences