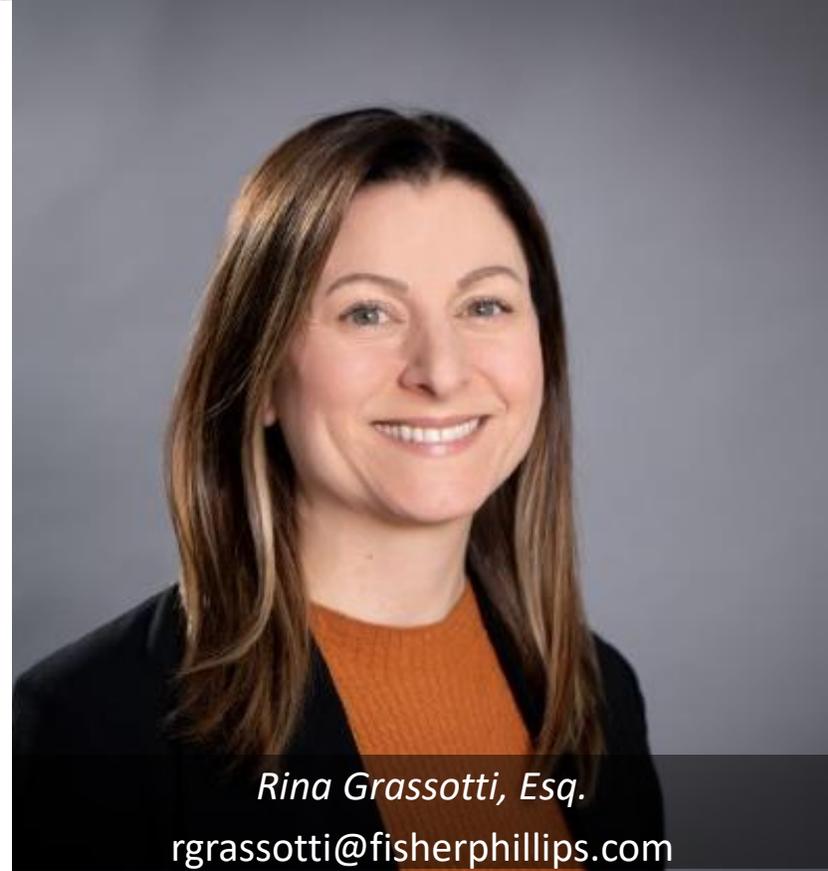


***Today's webinar will begin shortly.  
We are waiting for attendees to log on.***

***Participants need to dial in – there is no  
computer audio for this presentation***



*LaKisha M. Kinsey-Sallis, Esq.*  
lkinsey-sallis@fisherphillips.com



*Rina Grassotti, Esq.*  
rgrassotti@fisherphillips.com



*Sheila M. Willis, Esq.*  
swillis@fisherphillips.com

## *The New Title IX Regulations: Overview and Policy Considerations for Colleges and Universities*

# Agenda

- What's Going On?
- Jurisdictional Changes
- Changes to the Formal Grievance Process
- Employee Impact
- Implementation Considerations
- Other Considerations
- Questions

# What's Going On?

# Status of the Regulations

- Released by DOE on May 6<sup>th</sup>
- 61 days until the August 14th deadline to be in compliance
- DOE's stated intent is to begin enforcement on that date; no grace period or good faith compliance standard

# Possibility of an Injunction

- Four lawsuits have been filed since the regulations were issued:
  - Know Your IX, et. al. v. DeVos, et. al. (D. Md.) (filed May 14<sup>th</sup>)
  - *State of New York v. Dept. of Education, et. al.* (SDNY) (filed June 4<sup>th</sup>)
  - *Commonwealth of Pennsylvania, et. al. v. DeVos, et. al.* (D.D.C.) (filed June 4<sup>th</sup>)
  - *Victim Rights Law Center, et. al., v. DeVos, et. al.* (D. Mass.) (filed June 10<sup>th</sup>)
- All of the complaints seek injunctive relief; no motions seeking injunctive relief have been filed in any of the suits
- The NY and DC suits challenge the new rule in its entirety; the suits filed by the ACLU and victims advocacy groups challenge only certain aspects of the regulations
- Even if injunction is granted, may not be a nationwide injunction; recent SCOTUS opinions calling into question the validity of nationwide injunctions

# Definition of Sexual Harassment

- Sexual harassment is defined as misconduct meeting any one of 3 types of conduct on the basis of sex:
  - Quid pro quo sexual harassment by an employee (not by a student)
  - Unwelcome conduct of a sexual nature that is severe and pervasive and objectively offensive (reasonable person standard) that it effectively denies a person equal educational access
  - Sexual assault (also includes dating violence, domestic violence and stalking as defined by the VAWA Amendments to Clery)

# Gebser/Davis Framework

1. Did the institution have actual knowledge?
2. Whether the behavior at issue met the definition of sexual harassment?
3. Whether the institution's response demonstrated deliberate indifference (clearly unreasonable in light of known circumstances)

# Institutional Response

If receive a report of sexual harassment, must:

- Offer supportive measures, including contacting the complainant and explaining process for filing a formal complaint

If receive a formal complaint, must:

- Investigate it; and
- Employ the grievance process mandated by the regulations
- Unless circumstances require or permit dismissal

# Report v. Formal Complaint

- The regs draw a bright line between reporting for purpose of receiving supportive measures versus wanting the school to investigate the allegations
- Reporting can be done by any person (parent, 3d parties, survivors, etc)
- A formal complaint can only be filed by a complainant or Title IX Coordinator
- A signed document can include digital or physical signature or other indication that complainant is the one filing the document
- Parents and guardians can file a formal complaint in line w/ their legal rights to act on a student's behalf
- Title IX Coordinator still has discretion to be the person who signs the formal complaint and commence an investigation, but doesn't become the complainant and is in no way a party to the grievance process
- Title IX Coordinator has discretion as to whether to consolidate formal complaints arising out of the same facts and circumstances

# Jurisdictional Changes

# Jurisdictional Requirements

1. “Actual knowledge”
2. “Program or activity”
3. Complainant
4. Required v. Permissive Dismissal by the Title IX Coordinator

# Jurisdictional Issue 1: Actual Knowledge

- If Title IX Coordinator or “any official....who has authority to institute corrective measures on behalf of the recipient” knows (OWA’s)
  - Emails, observations, conversations with a third party
- Carveout: respondent’s knowledge does not rise to “actual knowledge” on behalf of institution even if they’re an OWA (departure from Title VII)

# Officials With Authority

- Institutions can decide
- Preamble suggests supervisors and deans would be OWAs
- Consider who has authority to impose sanctions in code of conduct
- Not required to list OWAs in policy (except for Title IX Coordinator)
- Consider community expectations/transparency

# What About Responsible Employees?

- DOE has left institutions with the flexibility to determine who will be subject to mandatory reporting and who to designate as a confidential resource without automatically triggering a mandatory report to the Title IX Coordinator
- Can keep current RE designations and require RE's to report sexual harassment to Title IX Coordinator
- However, calling someone an RE doesn't necessarily equate with them being an OWA
- DOE will only consider an institution to have actual knowledge (and potentially find deliberate indifference) if that knowledge is held by the Title IX Coordinator or an OWA
- Understand that policy may create contractual liability

## Jurisdictional Issue 2: Program or Activity

- Locations, events or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs
  - Institutions can still address off-campus activity in their policies but won't fall under Title IX
- Carveout: “locations” include buildings owned or controlled by officially-recognized student organizations (e.g., a fraternity)

## Jurisdictional Issue 2: Program or Activity

- Considerations:
  - Whether to use the same Title IX process or use a parallel process for sexual misconduct occurring at student organizations and locations (including study abroad programs) that the institution does not exercise substantial control over
    - Institutional mission and ethos
    - Community expectations
    - Whether students know difference between which organizations are recognized and which are not

## Jurisdictional Issue 3: Complainant

- Anyone who has experienced sexual harassment: student, employee or third party (including patients of hospital or health center)
- A complainant must be participating in, or attempting to participate in, the institution's education program or activity at the time of filing a formal complaint
- Attempting to participate:
  - Attending, on leave, graduated but intended to return for another program or degree
  - Participation in alumni activities (gray area)

## Jurisdictional Issue 3: Complainant

- Who can be a respondent?
  - Any “individual” can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person, with or without any affiliation with the recipient”

## Jurisdictional Issue 4: Required v. Permissive Dismissal

- Dismissal may be required or permitted
- Determined only after a formal complaint is received
- Dismissal can occur at any time during the investigation/hearing process; institutions must be mindful of jurisdictional considerations from beginning to end

# Jurisdictional Issue 4: Required v. Permissive Dismissal

- MUST dismiss when the conduct does not meet the jurisdictional requirements:
  1. If the allegations would not constitute sexual harassment even if proven (still must investigate; contact complainant and seek more information)
  2. If the sexual misconduct did not occur in institution's program/activity
  3. If the sexual misconduct did not occur against a person in the United States (respondent doesn't need to be in the United States)
- MAY dismiss:
  1. If complainant requests to withdraw their complaint
  2. If respondent is no longer enrolled or employed
  3. When specific circumstances prevent gathering evidence sufficient to reach a determination

# Jurisdictional Issue 4: Required v. Permissive Dismissal

## Anonymous Complaints

- Any person can report and put school on notice to promptly respond, but anonymous report is different than a formal complaint
- Title IX Coordinator could choose to sign a formal complaint but note that the rule requires identification of the parties to extent known
- If Title IX Coordinator is truly unaware of complainant's identity, they can proceed to make the complaint but it will be difficult to conduct grievance process

# Jurisdictional Issue 4: Required v. Permissive Dismissal

- If dismiss complaint:
  - Parties must receive simultaneous written notice of dismissal with reason(s)
  - Parties must have opportunity to appeal dismissal
  - Dismissal does not preclude other institutional action

# Considerations

- Whether to use the same Title IX process for all sexual misconduct, or use a parallel process for non-Title IX sexual misconduct
  - Ensure adjudication is consistent with state law
- When using two processes, consider:
  - Public institutions may have a double jeopardy issue
  - Subsequent processes may violate the prohibition on retaliation

# Changes to the Formal Grievance Process

# Formal Grievance Process: The “Standardized” Framework

- New regulations aim to “[e]stablish procedural due process protections that must be incorporated into a recipient's grievance process to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a formal complaint of sexual harassment.”
- Require sweeping changes to the manner in which institutions respond to sexual harassment complaints.

# General Requirements: Grievance Process Ten Point Overview

- Process must treat complainants **equitably** by providing remedies any time a respondent is found responsible and treat respondents **equitably** by not imposing disciplinary sanctions without following the grievance process (note: **equitably** ≠ **equally**).
- Remedies outlined in process must be designed to maintain the complainant's equal access to education.
- Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process must be trained and free from conflicts of interest or bias for or against complainants or respondents.
- Process must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Grievance process must include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames.

# General Requirements: Grievance Process Ten Point Overview

- Process must describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.
- Process must identify the appropriate evidentiary standard for all formal complaints of sexual harassment.
- Process must describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents.
- Process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any provisions, rules, or practices other than those required by regulations that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

# Emergency Removals & Administrative Leaves of Respondents

The regulations provide that a respondent *may* be removed on an emergency basis (prior to adjudication) “provided that the [institution] undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following removal.” (§ 106.44(c))

Regulations also permit institutions to put non-student, employee respondents on leave during the pendency of the grievance process.

# Emergency Removals & Administrative Leaves of Respondents Continued

## *Implementation Pointers:*

- Emergency removals are not going to be appropriate in all circumstances → fact specific inquiry
- Be sure to adopt procedures for undertaking this analysis and defining the steps to take if there is a challenge to the removal (DOE has not mandated a specific process and stated that institutions have flexibility here)
- Do not act based on generalized or hypothetical scenarios

# Live Hearings Under Section 106.45(b)(6)

- Grievance process must provide for live hearings for institutions (note: optional for K-12 and other recipients)
- Live hearings may be conducted with all parties physically present in the same geographic location. At the request of either party, a live hearing may be conducted in separate rooms with technology that connects the decision-makers to the parties and witnesses
- Hearings must allow for the parties' advisors to question witnesses and parties
- Rape Shield protections apply to proceedings. Questions and evidence about a complainant's sexual disposition or prior sexual history are to be considered irrelevant, with two limited exceptions relating to proving someone other than the respondent committed the alleged conduct or to prove consent

## Virtual Hearings Under Section 106.45(b)(6)

At the institution's discretion, hearings also may be conducted virtually, with the parties, witnesses, or other participants appearing using technology to allow participants simultaneously to see and hear each other. Institutions must create an audio or visual recording or a transcript of the hearing.

## Hearings: Provision of an Advisor Present

If a party does not have an advisor present at the hearing, the institution must provide one free of charge to the party to conduct cross-examination on behalf of that party. The advisor provided by the institution may be, but is not required to be, an attorney, as no training or qualification is necessary for a person to serve as an institution-provided advisor.

## Hearings: Rules & Decorum

- Institutions **may** adopt rules of order or decorum
- Institutions **may** adopt rules of procedures
- Institutions **may** adopt rules of evidence BUT
  - institutions may **not** adopt any rule of evidence that excludes relevant evidence on the grounds that it is unduly prejudicial, concerns prior bad acts, or constitutes character evidence
  - institutions may **not** adopt a rule that conflicts with the regulations
- Institutions may **not** adopt a rule granting the institution subpoena power

*[Note: This is a non-exhaustive list]*

# Hearings: Evidentiary Considerations

- Under regulations, institutions may use a new evidentiary standard of proof; no longer limited to one standard
- BUT the grievance process must state the standard being used, either:
  - **Clear and convincing:** highly and substantially more probable than not
  - **Preponderance of the evidence:** more likely than not
- Evidentiary standard selected must be used consistently in resolving *all* complaints irrespective of the parties involved
- In considering what standard to select, may need to consider state law and collective bargaining agreements

# Hearings: Evidentiary Considerations

## Cross Examination of Witnesses

The opportunity to cross examine witnesses must be part of the grievance process but there are rules:

1. each party's advisor must be permitted to ask party and witnesses all relevant questions and follow-up questions, including those challenging credibility;
2. if a party or witness does not submit to cross-examination at the hearing, the decision-maker may not rely on any statement of that party or witness in reaching a decision of responsibility;
3. cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally; and
4. if a party does not have an advisor present at the live hearing, the institution must provide, without fee or charge to that party, an advisor of the institution's choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party.

# Hearings: Evidentiary Considerations Continued

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the cross-examiner the decision to exclude a question as not relevant.

## Hearings: Written Determination

After an investigation and hearing is concluded, the decision-maker must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. This determination must be sent simultaneously to the parties along with information about how to file an appeal.

*Note: Decision-maker ≠ Title IX Coordinator or investigator*

## Appeal Process Under Section 106.45(b)(8)

- The regulations adopt DOE's recommendation from a 2011 Dear Colleague Letter that recipients should provide an appeal process for both parties.
- Now, institution grievance processes must offer the opportunity for appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any specific allegations in the formal complaint.

# Appeal Process

- Appeal bases: (must impact the hearing)
  - *procedural irregularity*
  - *new evidence*
  - *conflict of interest or bias*
  - *erroneous relevancy determinations*
  - *any additional bases (but must be available to both parties)*
- Must be equitable to both parties
- Notice must be given to both parties when appeal filed
- Decision-maker for the appeal ≠ initial decision-maker on the formal complaint, the investigator, or the Title IX Coordinator
- Both parties must have a chance to submit a written statement and must both receive the issuing written decision

# Discretionary Informal Resolutions Options

- Under new regulations, institutions have the discretion to decide whether to offer informal resolution options (e.g., arbitration, mediation, restorative justice, etc.) but cannot mandate use of them
- Cannot be required as a condition of initial or continued enrollment or employment (i.e., no waiver of formal complaint process)
- Can only be initiated after a formal complaint filed and written notice of the allegations have been provided to both parties
- Parties must give voluntary, informed written consent (can be withdrawn)
- Facilitator of process must be “well-trained”
- Not available for complaints that employee sexually harassed a student

# No Retaliation

- Charging an individual with code of conduct violation related to facts/circumstances of report/formal complaint of sexual harassment could = retaliation
  - Bad faith material false statement = discipline OK
- To avoid retaliation concerns, regulations require institutions to keep the identity of parties and witnesses confidential (exceptions: FERPA, state law, or hearing concerns)
- Retaliation complaints may be made through grievance process

# Recordkeeping Requirements Under Section 106.45(b)(10))

Institutions must maintain records (including recording or transcript of proceedings) relating to sexual harassment complaints for a period of seven years. In addition, all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be kept and made publicly available on its website (or available in response to a request from the public if it does not maintain a website).

# Employee Considerations

## To Whom this Applies?

- At will employees
- Union employees
- Employees in state employment system
- Patient complaints against medical professionals

# Employment Considerations

- Title IX vs. Title VII – knowledge and definition
- Addressing a “formal complaint” in the employment context
- Extraterritoriality
- Patient Complaints Against employees
- The “confidentiality” aspect of retaliation

# Title IX vs. Title VII

## Title IX

- Sexual harassment “severe *and* pervasive”
- Actual knowledge

## Title VII

- Sexual harassment “severe *or* pervasive”
- “knew or should have known”
- vicarious liability for acts of supervisors, no exception when the supervisor is the one engaging in the harassment

# Formal Complaints

- No requirement under Title VII
  - Must address the matter if you “knew or should have known.”
- Ensure policies and procedures comply
  - Do they address matters when you learn of them, regardless of whether a “formal complaint” is received?
  - Consider using a different procedure when no formal complaint is received or when a formal complaint is dismissed.
  - Are your training programs synced to offer a consistent message?

# Extraterritoriality

- Title IX – “must dismiss” a formal complaint if conduct is not against a person in the United States
- Title VII – applies to United States citizens working abroad
  - Will your policies appropriately address employees working outside of the US?

# Academic Medical Center

- Academic medical centers are not postsecondary institutions even if affiliated with or considered a part of the same entity as the postsecondary institution
- Patients may be offered an informal resolution
- Academic medical centers can use the live hearing process, but it is not required
- Applies to all complainants, not just patients

# Implementation

# Implementation Considerations

- Communicating with stakeholders
  - Students/Prospective Students/Parents
  - Board
  - Faculty and Staff
- Recommendations
  - Working Group?
  - Gathering all materials that need to be revised or considered
  - Identify community stakeholders
  - Draft and adopt a timeline working backwards from August 14th

# Other Considerations

# Additional Considerations

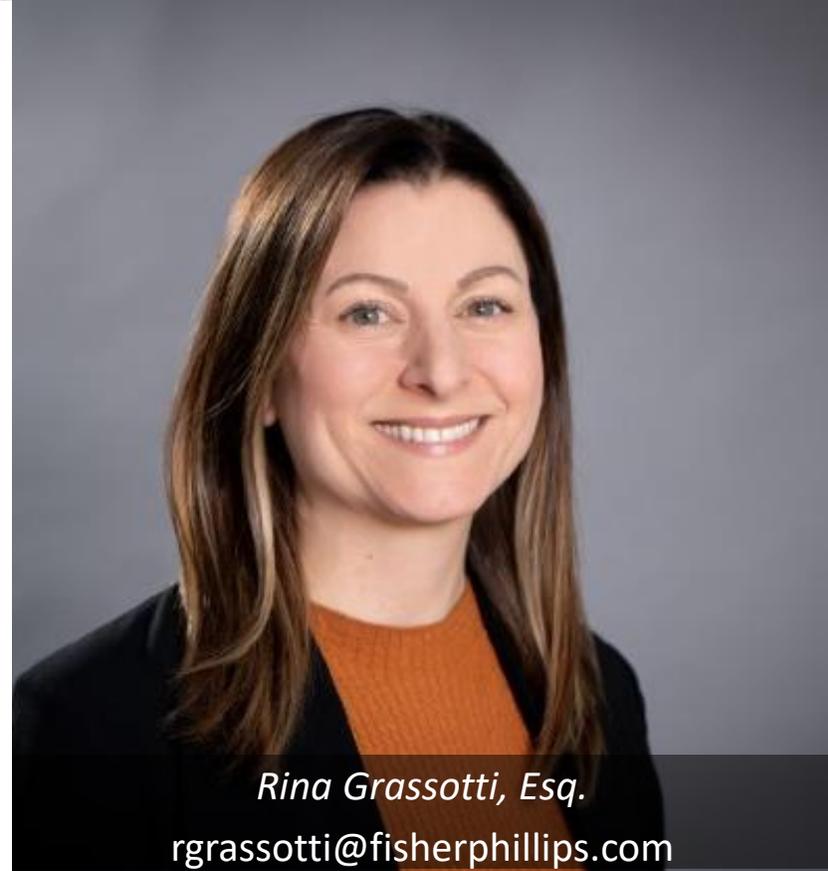
- Title IX personnel training requirements
  - Public postings
- Anti-retaliation provision
  - May not retaliate because participation or refusal to participate in an investigation, proceeding, or hearing
    - Exception: making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation

Questions?





*LaKisha M. Kinsey-Sallis, Esq.*  
[lkinsey-sallis@fisherphillips.com](mailto:lkinsey-sallis@fisherphillips.com)



*Rina Grassotti, Esq.*  
[rgrassotti@fisherphillips.com](mailto:rgrassotti@fisherphillips.com)



*Sheila M. Willis, Esq.*  
[swillis@fisherphillips.com](mailto:swillis@fisherphillips.com)

*Thank You*