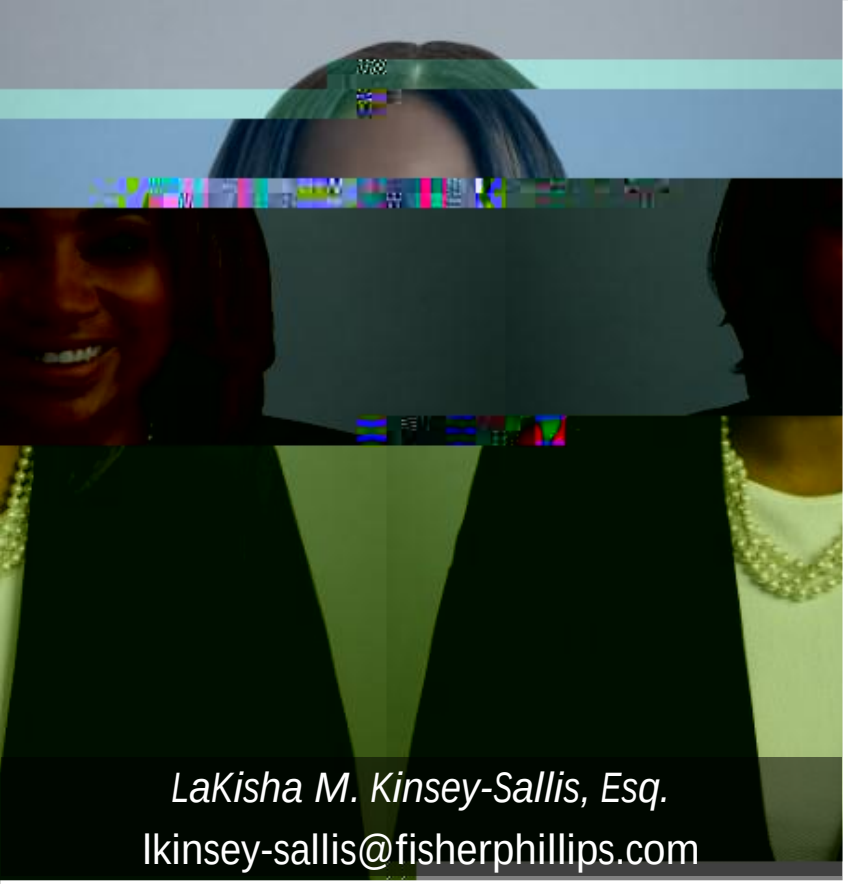
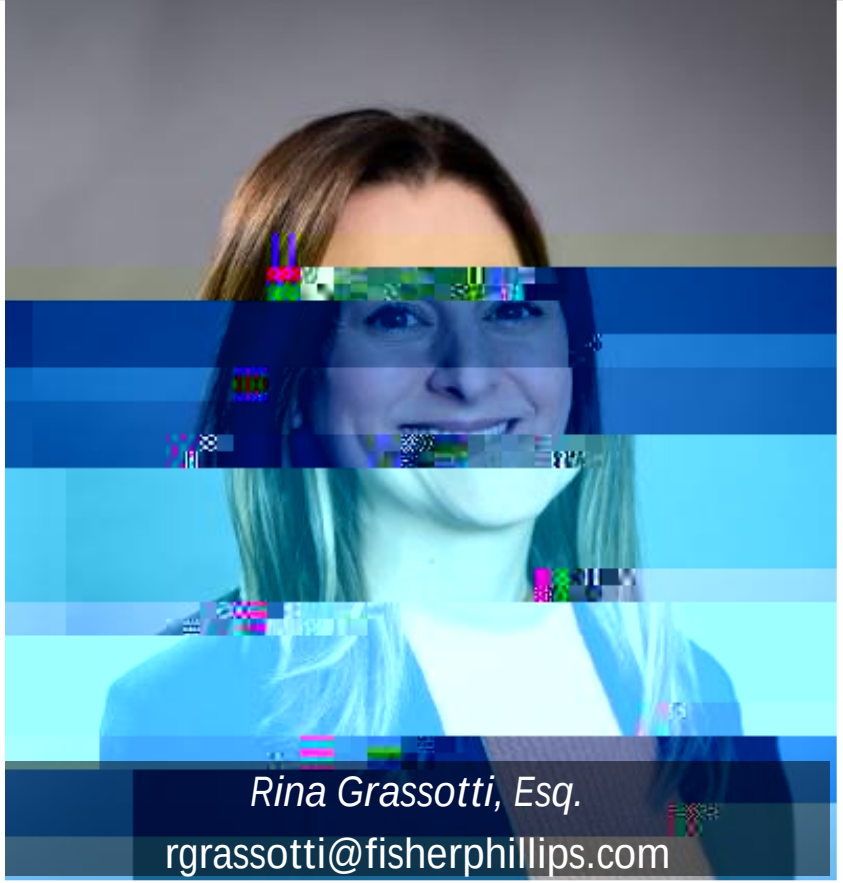
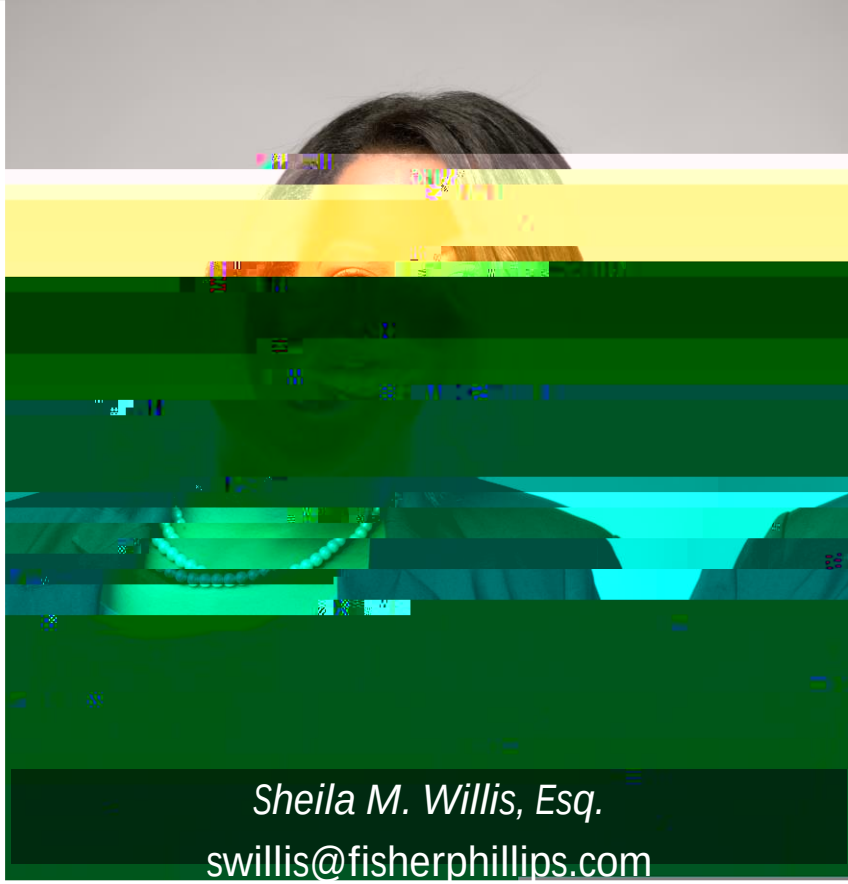
Today's webinar will begin shortly.
We are waiting for attendees to log on.



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

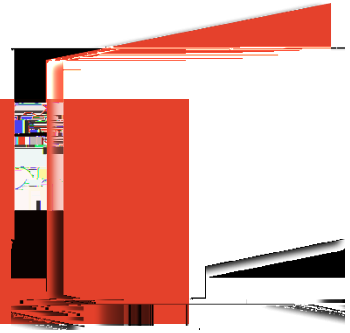
Implementation Considerations

Other Considerations

Questions

What's Going On?

Status of the Regulations

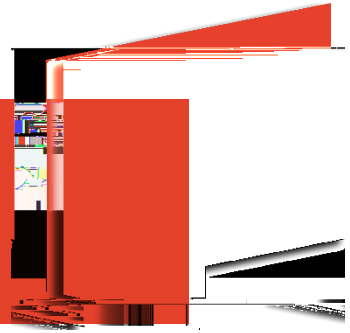


Released by DOE on May 6th

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 14th)
- *State of New York v. Dept. of Education, et. al*. (SDNY) (filed June 4th)
- *Commonwealth of Pennsylvania, et. al.* v. *DeVos, et. al.* (D.D.C.) (filed June 4th)
- *Victim Rights Law Center, et. al., v. DeVos, et. al.* (D. Mass.) (filed June 10th)

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

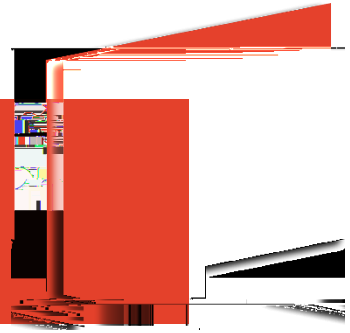
Even if injunction is granted, may not be a nationwide injunction; recent SCOTUS opinions calling into question the validity of nationwide injunctions

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)

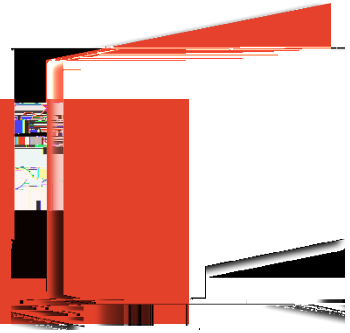
Gebser/Davis Framework



1. Did the institution have actual knowledge?

2. Whether the behavior at issue met the definition of sexual harassment?

Institutional Response

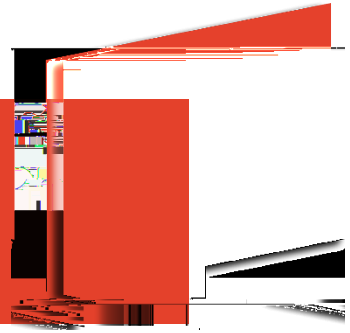


If receive a report of sexual harassment, must:

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

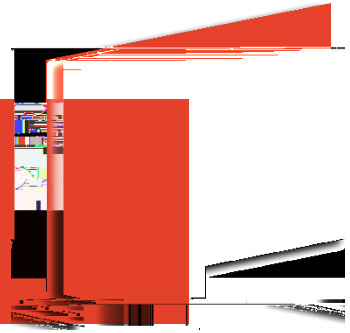
If receive a formal complaint, must:

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



Jurisdictional Changes

Jurisdictional Requirements



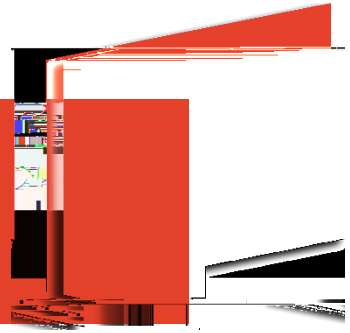
1. “Actual knowledge”

2. “Program or activity”

3. Complainant

4. Required v. Permissive Dismissal by the Title IX Coordinator

Jurisdictional Issue 1: Actual Knowledge

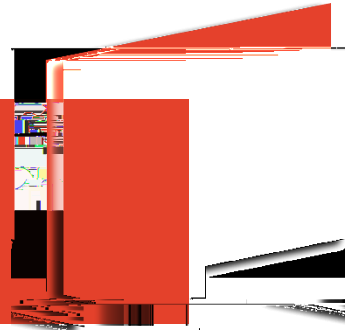


If Title IX Coordinator or “any official….who has authority to institute corrective measures on behalf of the recipient” knows (OWA’s)

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

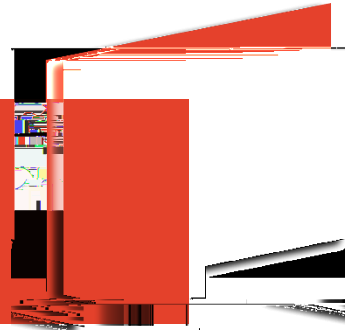
Preamble suggests supervisors and deans would be OWAs

Consider who has authority to impose sanctions in code of conduct

Not required to list OWAs in policy (except for Title IX Coordinator)

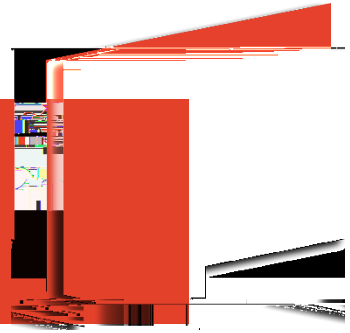
Consider community expectations/transparency

What About Responsible Employees?



DOE has left institutions with the flexibility to determine who will be subject to mandatory reporting

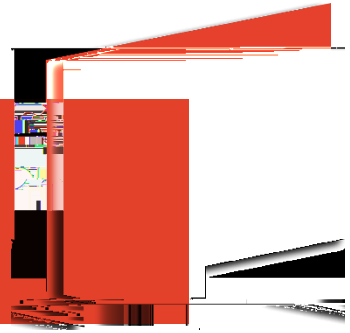
Jurisdictional Issue 2: Program or Activity



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

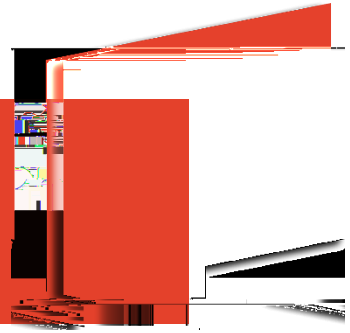
Jurisdictional Issue 2: Program or Activity



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 4: Required v. Permissive Dismissal

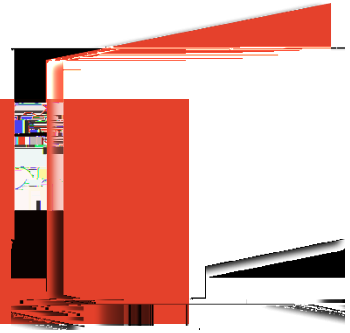


Dismissal may be required or permitted

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

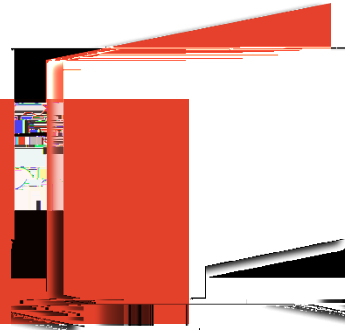


MUST dismiss when the conduct does not meet the jurisdictional requirements:

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



Changes to the Formal Grievance Process

Framework

New regulations aim to

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 ¾

General Requirements: Grievance Process Ten Point Overview

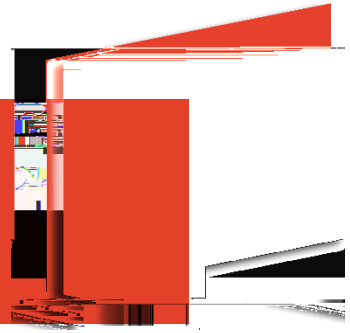
Process must describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.

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 Continued

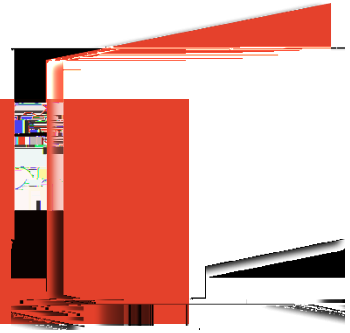
Implementation Pointers:

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)

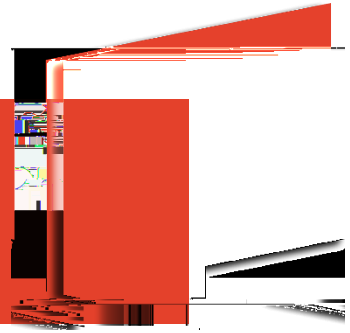
Do not act based on generalized or hypothetical scenarios

Virtual Hearings Under Section 106.45(b)(6)



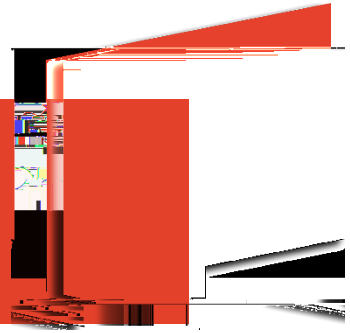
At the institution's discretion, hearings also may be conducted virtually, with the parties, witnesses, or other

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

Hearings: Evidentiary Considerations

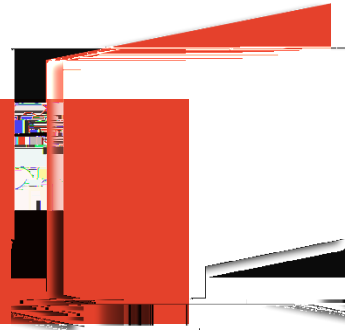
Under regulations, institutions may use a new evidentiary standard of proof; no longer limited to one standard

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

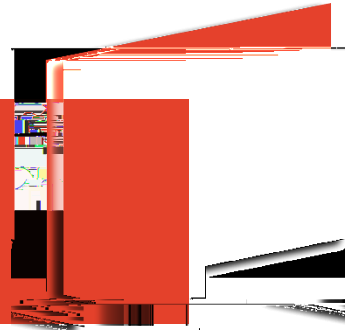
In considering what standard to select, may need to consider state law and collective bargaining agreements



Hearings: Evidentiary Considerations 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 complaBT/F.mBid9the

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)

Employee Considerations

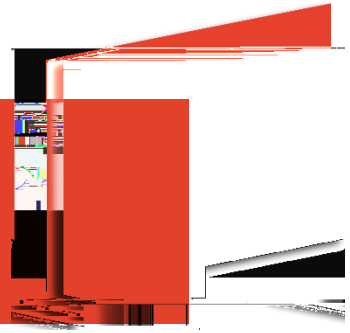
To Whom this Applies?

At will employees

Union employees

Employees in state employment system

Patient complaints against medical professionals

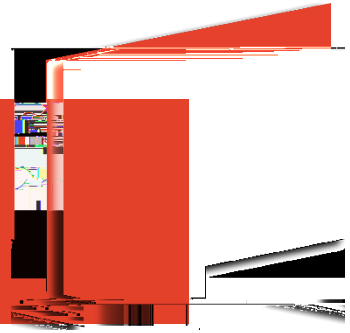


Title IX vs. Title VII

Title IX

Sexual harassment

Formal Complaints



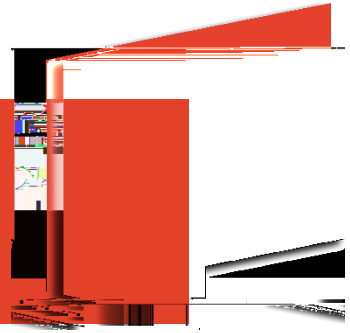
No requirement under Title VII

- 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?

Academic Medical Center

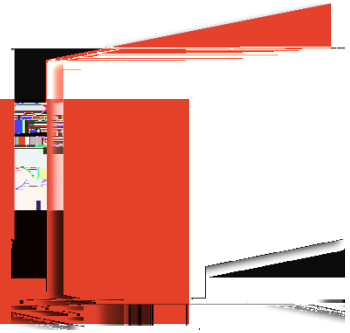


Academic medical centers are not postsecondary institutions even if affiliated with or considered a part of the same entity as the postsecondary institution

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



Other Considerations

Questions?