



AACC Summary of Final Title IX Regulations

On May 7, the Department of Education (ED) released its long-awaited final regulations governing sexual harassment under Title IX of the Education Amendments of 1972. They were [published](#) in the *Federal Register* on May 19. The rules take effect on August 14, giving institutions just over three months to comply – a much shorter time than is typical. Compliance will be a significant challenge for all institutions – the regulations are extremely lengthy and complex and come at an extraordinarily challenging time. Advocacy organizations have challenged the regulations in court, but colleges are well advised to proceed as if the regulations will take effect as scheduled.

The rules mark a watershed in Title IX policy, as it is the first time that the government has promulgated a formal Title IX regulation addressing sexual harassment. Previously, implementation of the law in this area has been done through sub-regulatory guidance, which lacks the same legal force of regulation or the enabling statute. It also is important to remember that Title IX most directly concerns institutions, not students; it is institutions that incur liability if they fail to ensure that, regardless of sex, all students are able to participate in a college's programs and activities.

The following briefly analyzes some of the more salient aspects of the regulations for community colleges.

When an Institution is Obligated to Take Action

Definition of Sexual Harassment

The definition of sexual harassment, which specifies the conduct that triggers the application of Title IX, is narrower than that in effect during the Obama Administration. Under the regulations, sexual harassment is defined as either a quid pro quo proposed by a college employee for unwanted sexual conduct in trade for the "provision of an aid, benefit, or service" of the college; sexual assault as defined in the Clery Act and domestic violence, dating violence and stalking as defined in the Violence Against Women Act; and "unwelcome conduct on the basis of sex that is so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program of activity." This last category, which incorporates a definition employed in legal cases on this subject, would likely apply to a narrower set of circumstances than terms used in the Obama administration's guidance.

Actual Notice

One of the most substantial changes made by the regulations details when an institution is deemed to have notice of possible sexual harassment to which it has an obligation to respond. Under previous guidance, this obligation is triggered when a college knows or should have known about the possible harassment. Under the new regulations, the institution only has an obligation to respond under Title IX when it has *actual notice* of an alleged incident. This only occurs when a report is made to the institution's Title IX coordinator or another employee who has authority to take corrective action on behalf of the institution. Past guidance stated that a report to any "responsible employee" triggers an obligation to respond. In practice, many colleges have determined that a wide swath of their employees are "responsible employees," including adjunct professors. The new regulations may spur colleges to reexamine their policies in this area.

Off-Campus Incidents

Where and in what circumstances an incident must occur to trigger Title IX obligations has long been of great interest to community colleges, as the vast majority of their students live off campus and colleges often offer programming and activities in a wide variety of settings. The regulations state that an institution is obliged to respond to conduct that occurs within its "education program or activity." The regulation's preamble discusses several factors, drawn from legal opinions, which factor into this determination. These include whether the college owns the premises; exercises oversight, supervision or discipline; or funded, supported, promoted or endorsed the event or circumstance. The rules specifically include facilities owned by college-recognized student groups within the definition of "education program or activity." There is no geographical bright line between incidents that trigger a Title IX obligation and those that do not, except for incidents that happen outside of the country, which are explicitly not covered (even if they are within an education program or activity).

Consequently, off-campus incidents may trigger Title IX obligations if the institution determines they are within its education program or activity. The Obama administration's 2011 guidance, however, also suggested that schools may have a Title IX obligation to respond to student-on-student sexual harassment that initially occurred off campus and outside of an institution's education program or activity if there were "continuing effects" from that off-campus incident that created a hostile environment for the student on campus. The new regulation does not encompass these situations. However, as detailed below, colleges are free to pursue sexual harassment and violence cases that occur outside of their educational programs or activities in non-Title IX student conduct proceedings.

How an Institution Must Respond

Reports and Formal Complaints

Under the new rules, a college violates Title IX when the school has actual notice of sexual harassment allegations and responds to them in a way that is "deliberately indifferent," which in turn means "clearly unreasonable in light of the known circumstances." This is a lower hurdle for institutions than under previous guidance.

As is now the case, an institution is obligated to respond to all reports (under the narrower set of circumstances described above) of activity that meets the definition of sexual harassment and takes place within its education program or activity. The regulations distinguish between reports and "formal

complaints,” which are documents signed by the complainant. Only upon the filing of a formal complaint is an institution obligated to launch a formal investigation and use its grievance procedures.

Schools must respond to all reports (of which they have actual notice) by offering “supportive measures” to the claimant, and in some cases the respondent, student. These services, similar in concept to “interim measures” under previous guidance, must be non-disciplinary and no-cost to the students. The measures described in the regulation include counseling, mutual restrictions on contact between the parties, leaves of absence, increased security, and other measures.

Due Process Requirements

The regulations delineate due process protections that must be accorded to the parties in sexual harassment disciplinary proceedings that result from a formal complaint. Failure to meet these procedural requirements could itself be a Title IX violation. In general, colleges would be required to conduct proceedings that more closely resemble formal judicial proceedings than under past guidance. Disciplinary proceedings must involve many things that colleges are likely doing already, such as providing sufficient and timely notice of relevant actions to both parties. But for many community colleges, especially smaller institutions, some of the new requirements may go beyond current practice. For instance, the Title IX coordinator, investigator, and decision maker (or makers) for any given case must all be different people. The “single investigator” model, where one person plays more than one of these roles, would no longer be allowed, potentially straining personnel resources at smaller institutions. In addition, colleges must make the final determination in a case in a live hearing where the parties, through their advisors, have the option to cross-examine one another. If one of the parties does not have an advisor, the institution must provide one. There are several other requirements in addition to those described here, including the parties’ right to examine all evidence gathered in the investigation. These provisions, which are intended to ensure fair treatment for all parties, have drawn concern, as colleges are not legal entities and do not aspire to be so, and also because of individuals’ vulnerability that is inherent in many Title IX proceedings. Institutions must now offer an appeal to both parties in Title IX cases.

Standard of Evidence

Whereas the Obama administration guidance effectively required institutions to use the “preponderance of the evidence” standard (i.e., “more likely than not”) in disciplinary proceedings, the regulation allows an institution to use that as well as the more stringent “clear and convincing evidence” standard. However, institutions must use the same standard in all Title IX cases, including employee cases.

Regulations Not the Final Word on Institutional Action

Finally, it’s important to note that the regulations address one thing and only thing only – the minimum steps an institution must take in order to comply with Title IX. The final regulations more clearly state that an institution may handle incidents that don’t meet the Title IX definition of sexual harassment through other parts of their disciplinary codes. In most cases, institutions are free to go beyond the regulations, as long as their policies are consistent with them. For instance, colleges may choose to respond to activity even when no report has been made or help students involved in off-campus incidents. It is also hoped that, given the intense focus given to issues of sexual harassment and assault,

colleges have developed campus-specific policies that ensure the safety of their students and the ability of all them to fully participate in institutional activities.

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