



Title IX Final Rules: Key Issues for Community Colleges

The Biden administration's final Title IX rule, [published in the Federal Register](#) on April 29 and effective as of August 1, 2024, marks a sea change from the current regulations that were promulgated by the Trump administration. As the information below outlines, implementing these regulations in the very short time frame allotted will be a tremendous challenge for most community colleges. States and others have already filed lawsuits challenging the regulations, and therefore the Dept. of Education (ED) may be blocked from enforcing them, but institutions would be prudent to assume that the regulations will go into effect.

If the new regulations were to be described in comparison to the current regulations in one word it would be "broader." Colleges will be required to respond in specific ways to a broader array of conduct taking place in a broader set of circumstances, in response to a broader group of potential complainants, and involve and train a broader percentage of their employees to report possible sex discrimination.

What follows is not a comprehensive summary of the new regulations, but rather a description and analysis of key provisions that are of particular importance to community colleges, in the order in which they appear in the regulations. References to "current regulations" are to the 2020 rule implemented during the Trump administration.

106.8 (b)(2) – Adoption of Grievance Procedures (modifies current 106.8 (c))

The changes to this subsection implement one of the regulation's major changes. Under the current regulation, institutions are generally held responsible for addressing sex discrimination on their campuses and must have a grievance procedure of their own design to deal with such cases. The current regulations specify a specific grievance procedure, as laid out in 106.45, that must be used in cases where there is a formal complaint of sexual harassment occurring within the institution's educational program or activity. The revised subsection in the new rules will require institutions to follow the grievance procedure in 106.45 in *all* sex discrimination cases (assuming both parties don't agree to informal resolution). While, as discussed below, the revised grievance procedure laid out in 106.45 (and in 106.46 in some cases) is more flexible than under current regulations, it will now potentially need to be used more often.

106.8 (d) – Training

This new subsection requires institutions to train *all* employees on the college's responsibility for addressing sex discrimination, the scope of conduct that constitutes sex discrimination under Title IX (which is not clearly defined), and the employees' obligations for reporting possible sex discrimination to the Title IX coordinator. Additional training is required for the Title IX coordinator, employees involved in informal resolution processes and the Title IX grievance procedures. This will be a huge undertaking for community colleges, especially those who scaled back on the number of employees involved in "mandatory reporting" under the current regulations. Colleges that maintained a practice of requiring all or nearly all their employees to report sexual harassment, as under the Obama-era guidelines, may have an easier time complying. However, as with other

aspects of the legislation, reporting must now occur of all possible incidents of sex discrimination, not just sexual harassment. This may include policies and practices of the institution itself, not just conduct by an individual or group of individuals. It is also important to note, for purposes of training and institutional notice discussed below, that because “educational program or activity” comprises of locations well beyond the traditional campus, employees at satellite learning centers, off-campus college events, and other locations that are subject to the institution’s control are included.

106.10 – Scope

This section stipulates that discrimination on the basis of sex “includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” This is not an exhaustive definition – in fact there is no formal definition of “sex discrimination” in the new regulations – but it does represent a significant broadening of the types of conduct that will now trigger an institution’s responsibility to respond in a way that meets Title IX requirements. The inclusion of gender identity on this list has been very controversial and is the focus of much of the opposition to the new rule. Subsequent provisions in the regulation refer back to this section as a reminder of the conduct that must be addressed in the ways laid out in the regulation.

106.11 – Application

The revisions to this section reiterate that the institution is responsible for addressing all sex discrimination that occurs within its educational programs or activities in the United States. The basic contours of what is considered within an educational program or activity are not significantly different than under the current regulations. However, this section introduces two new concepts that would require an institution to address under Title IX conduct that otherwise takes place outside of its educational program or activity.

Disciplinary Authority

First, 106.11 stipulates that “conduct that is subject to the recipient’s disciplinary authority” is considered within the institution’s educational program or activity and thus covered by Title IX. In other words, if a college chooses to address off-campus student conduct under its disciplinary code, any such conduct that might reasonably be sex discrimination must be addressed according to the Title IX regulations. This is a 180-degree change from current regulations, which require institutions to dismiss complaints that allege conduct that falls outside of the institution’s program or activity under Title IX but allows institutions to address these instances under its general disciplinary procedures. As a result, many institutions have a bifurcated disciplinary process, entailing one procedure for Title IX cases and a different one for those outside of Title IX. The new regulations would require institutions to address *all* possible sex discrimination that it chooses to subject to its disciplinary authority – wherever the conduct occurs - according to the procedures laid out in the revised Title IX regulations. Community colleges may wish to reexamine their disciplinary codes with this in mind.

Outside Conduct Contributing to a Hostile Environment

Second, 106.11 requires an institution to address alleged sex-based hostile environments in its program or activity, “even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.” This concept of addressing outside conduct that contributes to a hostile environment within the program or activity was part of ED guidance during the Obama administration but is not part of the current regulations, which seek to draw a bright line between within and outside of a program or activity. The potential issue with this provision is the extent to which it will require colleges to evaluate conduct that happened outside of its purview entirely.

Especially for community colleges and their older students, this may include conduct that happened long in the past between two people that are now students. ED notes in the preamble that it changed the wording from “sex-based harassment” to “some conduct” so that institutions would not have to determine whether the conduct outside its program or activity constituted sex-based harassment. However, an institution would still need to determine whether the alleged conduct occurred to then determine whether it contributes to a hostile environment on campus. So the necessity of investigating and evaluating conduct outside of the institution’s purview does not seem to be entirely relieved.

The regulation is also vague as to what extent a hostile environment within the program or activity might be based on conduct that is alleged to have happened outside of it. For example, might a hostile environment for Student A exist on campus due to the mere presence of Student B, because Student A alleges that Student B assaulted him or her at some point in the past? Or in that same scenario, what if Student B’s on campus conduct was, on its face, completely innocuous, such as simply saying “Hi” to Student A?

The regulations do not expressly address these scenarios in the preamble. However, 106.11 does refer to “some” conduct outside the program or activity contributing to the hostile environment, implying (but not clearly stating) that there must also be some conduct within the program or activity that contributes to the hostile environment. The scenario that ED outlines in the preamble seems to back this concept, as it entails taunting on campus combined with an alleged assault off campus. However, questions remain as to the outer limits of this concept, which may impact community colleges more than other types of institutions.

106.44 – Recipient’s Response to Sex Discrimination

As noted above, under current regulations, sections 106.44 and 106.45 detail the actions institutions must take in response to alleged sexual harassment. As the revised title of 106.44 makes clear, these sections now apply to all conduct that may constitute sex discrimination (which includes *sex-based* harassment, which is itself much broader than *sexual* harassment). Beyond this broadened scope, at the outset there are two major differences from current regulations:

Notice

Current regulations require an institution to respond when it has “actual knowledge” of sexual harassment. A college has “actual knowledge” when the Title IX coordinator or other select

employees have knowledge of the incident. The revised regulations require action when the institution has “knowledge of conduct that may reasonably constitute sexual discrimination.”

Generally speaking, it is unclear what the difference between “knowledge” and “actual knowledge” is. However, the new regulations require that any employee “that is not a confidential employee and who either has authority to institute corrective measures on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising” report anything that may reasonably constitute sex discrimination to the Title IX coordinator. All other employees must either report possible sex discrimination to the Title IX coordinator or provide the contact information for the Title IX coordinator and information about how to make a complaint of sex discrimination to the person that provided that employee with information about conduct that may reasonably be considered sex discrimination. So, all employees are required to take some action, with most of them required to report information to the Title IX coordinator.

It is reasonably clear, though not stated outright, that the institution has knowledge of any possible sex discrimination that is reported to the Title IX coordinator. Whether such knowledge exists when an employee simply provides the Title IX coordinator’s contact information to the other person is less clear. In any case, the “knowledge” requirement in the final rule is an improvement over the proposed rule, which did not refer to the institution’s knowledge of alleged conduct at all and appeared to hold colleges strictly liable for responding to all sex discrimination on its campus.

Standard for Adequacy of the Response

Current regulations deem an institution to have violated Title IX only when its response to alleged sexual harassment is “deliberately indifferent” to the situation at hand. The revised regulations require the institution to respond “promptly and effectively” *and* comply with the requirements of 106.44, implying that following the regulations may not be enough to satisfy the institution’s overarching Title IX responsibilities.

The remainder of 106.44 details the responsibility to offer supportive measures and what that may entail, and provisions governing the use of an informal resolution process rather than the grievance procedure laid out in 106.45 (and in some cases 106.46).

106.45 - Grievance Procedures For The Prompt And Equitable Resolution Of Complaints Of Sex Discrimination

The most notable difference between the current and revised regulations with regard to the required grievance procedures is the fact that colleges have more flexibility in designing their procedures, including the use of the “single investigator” model which is barred under the current rule. Notably, colleges are no longer required to conduct live hearings with cross examination of the parties by their advisors. 106.46 details additional grievance procedure requirements for alleged sex-based harassment cases where there is a student complainant and/or respondent. Other important differences in the new regulations include:

1. As stated, 106.45 now applies to all allegations of sex discrimination - which includes sex-based harassment – not just allegations of sexual harassment.

2. There is no longer a requirement that a signed, formal complaint must be submitted before section 106.45's requirements apply. 106.45 applies to all complaints of sex discrimination except those in which all the parties have agreed to informal resolution, with certain exceptions such as when the respondent cannot be identified.
3. Because 106.45 now applies to all alleged sex discrimination, it now applies to cases where a complaint alleges that the institution's policy or practice is discriminatory. The regulation stipulates that the institution is not considered a respondent in such cases, and thus the requirements of 106.45 related to respondents do not apply. Therefore, the new rules do not require that there be an individual respondent for 106.45 to apply.
4. A broader spectrum of people can bring a complaint. In particular, beyond what is typically thought of as a complainant, *any* student, employee or other individual seeking to access the institution's program or activity may bring a complaint of sex discrimination (but not sex-based harassment).
5. The recipient must use the "preponderance of the evidence" standard in determining whether sex discrimination occurred. The college may use a "clear and convincing evidence" standard only if that standard is used for all other comparable disciplinary cases, including other types of discrimination. Under the current regulation, colleges have more latitude to choose between the two standards.