



ACHA Advocacy Update: 2024 Title IX Sexual Harassment Final Rule Overview

May 1, 2024

INTRODUCTION

On April 19, 2024, the U.S. Department of Education shared updated regulations of Title IX of the Education Amendments Act of 1972 in the form of a final Rule, which applies to institutions of higher education that receive federal funds, such as financial aid for students.¹ The update to the Title IX regulations has been an ongoing project for the current White House Administration since the spring of 2021. However, due to multiple regulatory reviews, the release date was extended several times since then, with this final Rule originally expected in May 2023. Notable provisions potentially applicable to ACHA members include the following:

- **Classification of pregnancy termination as a pregnancy-related condition** – The updated Rule includes provisions that list pregnancy termination as a pregnancy-related condition, requiring recipients to not discriminate against individuals based on the termination of a pregnancy. The final Rule incorporates requirements for accommodations for the management of pregnant individuals within an institution’s educational program or activity, such as the inclusion of lactation spaces.
- **Inclusion of gender identity within the scope of the Rule** – The new final Rule codifies provisions relating to discrimination prohibition for transgender individuals through its updated scope for gender identity.
- **Informal resolution process** – The updated Rule allows colleges to offer complainants the option to address Title IX complaints through an informal resolution process while maintaining actions and initiatives that address complainant privacy and autonomy.

The Rule has been officially published in the [Federal Register](#) meaning the official clock for 1) Congressional review, and 2) implementation has started. The former is important because under the Congressional Review Act, the House and Senate have 60 legislative/session days to review the Rule, and should there be a change in Administration, the incoming Administration can withdraw the Rule without formal rulemaking should those 60 days not be concluded before the outgoing Administration leaves office. To count as a legislative/session day, the chamber must be gavelled in for business, something that tends to happen with less frequency during an election year.

The final Rule is set to go into effect on August 1, 2024, giving institutions of higher education an estimated three months to update policies and to fulfill compliance. That being said, it is expected that the Rule will be challenged in court, and courts, at least within their jurisdiction, may order that the Rule not be implemented until after the case is decided.

¹ Throughout the document the term college is used referring to just those institutions of higher education that receive federal funds.

Of particular note, the 2020 Rule will still apply to incidents occurring before the August 1 implementation date, and this new Rule will apply to those incidents occurring on or after August 1. This means that colleges may need to implement two sets of Rules depending on when incidents occur. Also, with the legal challenges that are expected, such as that a court may rule that those colleges within its jurisdiction are not to follow the Rule until a court determination on the Rule is handed down.

In 2020, ACHA joined a group of student affairs organizations in submitting a public comment relating to the Rule as originally proposed. Earlier this year, when the Rule was being reviewed by the US Office of Information and Regulatory Affairs at the White House, ACHA wrote to the White House with additional concerns and recommendations based on feedback from ACHA members. This statement requested additional clarification and highlighted potential issues for the regulatory implementation of Title IX.

This document provides a summary of the final Rule, along with analysis as it pertains to ACHA-provided recommendations, as well as references to Department of Education-published guidance to ensure proper compliance with the Final Rule. The document also includes major coverage of Title IX as published by major publications.

SUMMARY

Per the Department of Education’s shared materials, the final regulations provide policies and requirements for the following three pillars:

- Sex-based harassment provisions updates
- Recipient accountability updates
- Student support updates

The updated final Rule does not widely differ from the previously shared proposed Rule, both of which differ in several ways from the current 2020 Rule.

Sex-Based Harassment and Discrimination Provisions within the Final Rule

Updated “Sex-Based Harassment” Definition (§ 106.2): The final Rule implements an updated definition of the term “sex-based harassment.”² The term “sex-based harassment” is defined as a form of sex discrimination and means “sexual harassment and other harassment based on sex, which may include sex stereotypes, sex characteristics, pregnancy and related conditions, sexual orientation, and gender identity.” As updated, the definition includes sex-based harassment as a form of sex discrimination and prohibits discriminatory actions from occurring in federally funded educational institutions. The definition also states that sex-based harassment can take the form of:

- Quid pro quo harassment
- Specific offenses, which may include sexual assault, dating violence, domestic violence, and/or hostile environment harassment

As an update to the language, “hostile environment harassment” is defined as an “unwelcomed sex- based conduct that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit” from an institution’s education program or activity.

The updated definitions differ from the 2020 Rule in that they include expanded information on sex- based

² <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf#page=17&zoom=100,93,437>

harassment and unwelcomed sex-based conduct. Additionally, the 2020 version of the definition stated that unwelcomed sex-based conduct constituted conduct that was “so severe, pervasive and objectively offensive,” that it denied access to participation in education.³ The 2024 Rule removes the requirement for unwelcomed conduct to be pervasive and severe, thereby broadening the scope of what could constitute sex-based harassment. The definition of “sex-based harassment” is also expanded in the 2024 update through the inclusion of terminology related to gender identity and pregnancy, along with pregnancy-related conditions.

Effect of other requirements and preservation of rights (§ 106.6): A college’s obligation under Title IX cannot be removed by any State or local law or any other existing requirement that may interfere with the compliance of Title IX. The Rule states that compliance with Title IX therefore cannot be interfered with or contradicted by Family Educational Rights and Privacy Act (FERPA) requirements.

Pregnancy or related condition accommodation and discrimination prohibition provisions (§§ 106.2, 106.21(c), 106.40, 106.51(b)(6), 106.57): Through its updated Rule, the Department of Education establishes new definitions and requirements applicable to colleges for the treatment and management of pregnant individuals. The new Rule defines “pregnancy or related conditions” so that the term includes “pregnancy, childbirth, termination of pregnancy, and lactation,” as well as “all related medical conditions and recovery.”⁴ The new Rule also states that colleges may not institute different treatment of parental status. Additionally, the term “parental status” is updated to include adoptive parents, stepparents, and legal guardians. The updated definitions and regulations differ from previous iterations of the Rule through the inclusion of terminology applicable to lactation and the applicability of a “termination of pregnancy” as a pregnancy-related condition.

The final Rule maintains the requirement for institutions to treat pregnant students, employees, or applicants equitably. Therefore, colleges are still prohibited from implementing different policies to address individuals who may be pregnant. This Rule adds the prohibition of colleges from requiring documentation from students so that they can obtain reasonable accommodations for pregnancy or parental status conditions, unless such documentation is necessary and reasonable.

Colleges, under this Rule, must inform students and staff of their rights relating to pregnancy and pregnancy-related conditions. When a student (or student’s legal representative) notifies a college employee of a pregnancy or pregnancy-related condition, the employee will be required to provide the student or student representative with the institution’s Title IX Coordinator contact information. Once the Title IX Coordinator is notified, the college will be required to:

- Inform the student of the college’s obligations to students who are pregnant or experiencing pregnancy-related conditions and restrictions on recipient disclosure of personal information.
- Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the recipient’s education program or activity.
- Allow the student a voluntary leave of absence for, at minimum, the medically necessary period and reinstatement upon return.
- Provide pregnant employees with a clean and private space, as well as reasonable break time, for lactation purposes.

Through its Rule-release webinar, the Department of Education also clarified that pregnancy accommodations will be required to meet the pre-birth and post-birth requirements for pregnant individuals. Post-birth requirements may include the designation or creation of lactation spaces.

³ <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>

⁴ <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>

As updated, the new version of the Rule now accounts for pregnancy termination as a pregnancy-related condition. In addition, the new Rule establishes a protocol for colleges to follow when it comes to the lactation needs of individuals within their educational program or activity.

Transgender Community and Gender Identity provisions (§§ 106.2, 106.10; §106.31(a)(2)): The new final Rule codifies provisions relating to discrimination prohibition for transgender individuals. The Rule adds “gender identity” to the list of classes that are protected from sex-based discrimination. The final Rule states that “the need to respond to a student’s allegation of gender identity discrimination” does not interfere with another student’s right to freedom of expression.⁵ Therefore, under the updated Rule, colleges are prohibited from separating or treating any individual differently in a manner that subjects the individual to more than de minimis harm.

The Department of Education recognizes that preventing a person from participating in a recipient’s education program or activity consistent with their gender identity subjects that person to more than de minimis harm. De minimis harm is a risk assessment term and principle that refers to the highest level of risk that is still too small to be concerned with. Thus, institutional policies and practices that prevent a student from participating in a recipient’s education program or activity consistent with their gender identity impose more than de minimis harm and therefore violate Title IX.

Of note, while gender identity is listed as a protected class under the new Rule, the Department of Education has not finalized the Rule that would apply to transgender athlete participation in collegiate athletics. The Department of Education continues to revise a specific Rule that would prohibit a blanket ban on transgender athletes from participating on teams aligned with their gender identity. According to the Department of Education, that process is still ongoing. During a webinar conducted on the day the final Rule was published, Senior Department of Education officials clarified that the de minimis standard is already applied by the Department of Education’s Office for Civil Rights (OCR).

Administrative Management of Title IX Provisions within the Final Rule

Title IX Coordinator designation, nondiscrimination policy adoption (§ 106.8): Colleges are required to appoint at least one employee to act as a Title IX Coordinator, who will be responsible for coordinating efforts to comply with the institution’s responsibilities under Title IX. In addition, colleges will now be required to adopt, publish, and implement a non-discrimination policy that prohibits sex-based discrimination within their education programs and activities. Such policies will account for Title IX grievance procedures and provide for the “prompt and equitable” resolution of complaints made by students, employees, or other individuals who are participating in the recipient’s education program.

Recipient accountability and Title IX Coordinator notification procedure provisions (§ 106.44): Under the new Rule, colleges with knowledge of behavior that may constitute sex-based discrimination are required to take action to address the sex-based discrimination and remedy it. Upon learning of such an instance within its education program or activity, college employees are required to notify the institution’s Title IX Coordinator and take prompt action to address the situation causing sex-based harassment. These requirements would apply to any non-confidential employee at a college who either has authority to take corrective action on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity. This means that an institution is assumed to know when such a person becomes aware.

Title IX Coordinators are required to monitor their institution’s education programming and activities to identify actions interfering with the implementation of Title IX under the Final Rule. The updated final Rule widely differs from the 2020 Rule in its implementation of recipient accountability provisions. In the previous iteration of the Rule, colleges were only required to initiate Title IX procedures and respond to complaints when they had “actual knowledge” of allegations of “sexual harassment,” and only in a manner that is not deliberately indifferent. The term, “actual knowledge” was measured for colleges by providing that “actual knowledge” constituted the Title IX

⁵ <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf#page=1048&zoom=100,93,610>

Coordinator or employee with institutional corrective authority obtained notice of allegations of sexual harassment. The current version of the Rule eliminates this classificatory requirement for commencing Title IX investigations and protocols.

Complainant privacy and autonomy provisions (§§ 106.2, 106.8(d), 106.44(c), (d), (f), 106.45(a)(2)): The final Rule requires that colleges provide information and training to their employees on when they must notify the institution's Title IX Coordinator about sex-based discrimination. Employees will also be required to receive training on how students impacted by sex-based discrimination may seek confidential assistance or formally start a complaint requiring the initiation of a Title IX grievance procedure. The training provided must also account for who would constitute confidential employees that students can address without immediately triggering Title IX grievance procedures. The Rule requires colleges to notify all participants in the college's education program or activity of how to contact its confidential employees.

The new Rule provides that confidential employees are not required to notify the Title IX Coordinator about conduct that may constitute sex-based discrimination. However, confidential employees are required to provide anyone who approaches them with information about their status as a confidential employee, information on how to contact the Title IX Coordinator, and information on how to make a formal Title IX complaint. Individuals who come forward with Title IX complaints are allowed to make their formal complaints relating to sex discrimination even if they have chosen to leave the recipient's education program or activity.

If a Title IX complaint is not formally made, but a recipient still has knowledge of Title IX violations, the Title IX Coordinator is allowed to initiate a complaint only if the conduct presents an imminent and

serious threat to someone's health or safety, or if it interferes with equity in an education program or activity through the creation of a hostile environment.

The 2024 privacy and complainant autonomy provisions for the Rule differ from the 2020 iteration of the Title IX Rule, since the 2020 Rule does not permit former students or employees to file formal complaints, even if they have chosen to leave the education program or activity. Furthermore, the new provisions address the management and protocols for confidential employees that allow students to come forward with information without necessarily starting an official Title IX complaint grievance procedure. Non-confidential employees were not included in the 2020 iteration of the Rule.

Sex Discrimination Response by Title IX Coordinators (§ 106.44(f)-(g)): Upon learning of any instance of sex-based discrimination conduct within an education program or activity, Title IX Coordinators, or their designees, are required to address the conduct in a prompt manner. In addressing complaints, Title IX Coordinators are required to:

- Treat complainant and respondent parties equitably.
- Offer support measures as appropriate for the complainant. If the complaint was formally introduced by the federally funded recipient or offered resolution through an informal procedure, then appropriate support services must be offered and provided to the complainant.
- Inform complainants of Title IX grievance procedures and the availability of an informal resolution process, if appropriate. If a complainant is not known, the individual who reported the Title IX violation would be notified of the grievance procedure.
- Initiate grievance procedures or informal resolution procedures.
- In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and the absence or termination of an informal resolution process, make a fact-specific determination by considering, at a minimum, eight listed factors, and determining whether the conduct as alleged presents an imminent and serious threat to the health or safety of a complainant or other person or prevents the recipient from ensuring equal access based on sex to its education program or activity such that the Title IX Coordinator may initiate a complaint.

Colleges are also required to provide support measures for complaint-involved parties. Supportive measures cannot unreasonably burden or impose disciplinary actions on complainants or respondents. Examples of Rule-provided support measures include counseling, extension of deadlines, and contact restrictions between one or more involved parties as applicable to classes, work, or housing.

These provisions differ from the 2020 iteration of the Title IX Rule, since Title IX Coordinators are currently allowed to contact both complainants and respondents with information on supportive measures. Furthermore, the previous iteration of these provisions requires immediate action from Title IX Coordinators through the removal of the “actual knowledge” categorization for addressing complaints used by the previous version of the Rule.

Title IX Grievance Procedures Update (§ 106.45 & § 106.46): The Department of Education reported receiving several comments addressing the current handling of Title IX grievance procedures and protocols. In response to such comments, the updated Title IX Rule modifies grievance procedures for complaints of sexual harassment and makes the protocols applicable to all complaints dealing with sex discrimination. Furthermore, the updated regulations address the age, maturity, and level of independence of students in various educational settings, and the particular contexts of employees and persons other than students or employees. The updated Rule requires colleges to adopt grievance procedures in writing.

Such procedures must account for and/or allow:

- Notification of allegations to all involved parties.
- The equitable treatment of complainants and respondents.
- The provision of bias-free and no conflict-of-interest Title IX Coordinators, investigators, and decision-makers handling Title IX violation complaints. A Title IX Coordinator is allowed to be an investigator so long as he or she does not present a conflict of interest in the case.
- The presumption is that respondents are not responsible for a violation or alleged conduct until a determination is made whether sex-based discrimination occurred at the end of the recipient’s grievance procedures.
- Prompt timeframes for all stages of the grievance procedure.
- Privacy safeguards for witnesses and involved parties.
- Objective evaluation of all relevant and not otherwise impermissible evidence.
- If a recipient adopts grievance procedures that apply to the resolution of some, but not all complaints, articulate consistent principles for how the recipient will determine which procedures apply.
- Consolidation of complaints arising from the same set of facts or circumstances.
- Allowed parties, with some exceptions, to participate in informal resolution proceedings. The informal resolution process is not available to instances of alleged sex-based harassment involving an employee.

As applicable to Title IX investigations, the new final Rule establishes procedures and presumptions for addressing investigations of complaints. First, the burden of proof is on the recipient, so colleges are required to gather sufficient evidence when investigating a complaint. Second, the investigation must allow equal opportunity for involved parties to present facts, witnesses, and other inculpatory and exculpatory evidence that is relevant and not otherwise impermissible. Additionally, the investigation process must allow parties the opportunity to address and receive all relevant evidence. The investigation must provide steps to prevent the informal disclosure of evidence through unauthorized channels.

Colleges are also required to establish a clear process for determining whether sex-based discrimination occurred through using the preponderance of the evidence standard of proof unless the clear and convincing

evidence standard is used in all other comparable proceedings, including other discrimination complaints, in which case that standard may be used in determining whether sex-based discrimination occurred. When a determination has been made, the recipient is required to notify the involved parties. Additionally, disciplinary actions may not take place until the total conclusion of the respondent's grievance procedures.

Additionally, the final Rule specifies grievance procedure requirements as applicable to colleges. Under the Rule, colleges are required to provide written notice informing the parties of allegations, dismissals, delays, meetings, and proceedings. Furthermore, parties are required to have the equal opportunity to have an advisor present during meetings or proceedings. Colleges are permitted, but not required, to have expert witnesses during proceedings. In addition, colleges must allow for a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility when credibility is in dispute and relevant. When questioning parties, questions are prohibited from being unclear or harassing the parties being questioned. Finally, an appeal process is required for final determinations.

The 2020 iteration of the Title IX Rule contained similar provisions; however, requirements were only applicable to complaints of sexual harassment.

Retaliation (§ 106.71): Under the final Rule, once a determination is made, colleges are required to prohibit retaliation against either party, which may include peer retaliation. Colleges will be required to respond to behavior that may be considered retaliation using the same procedures it uses for other forms of sex-based discrimination. The Rule defines "retaliation" as "intimidation, threats, coercion, or discrimination against any person by the recipient, student, or an employee or other person authorized by the recipient to provide aid, benefit or services" under the recipient's education program or activity.

Emergency removal of respondents who are determined to be responsible is still an available option for colleges under the updated Rule. However, the regulations require that if emergency removal is implemented, then the process for appealing or addressing allegations must be present at the college.

The previous iteration of the Rule, while still prohibiting retaliation, did not include the definition of the action. The 2024 Rule includes the definition to help colleges identify what constitutes "retaliation" and "peer retaliation."

Informal resolution procedure (§ 106.44(k)): The new Rule allows for complaints to be addressed and handled through an informal resolution process. However, this action will not apply to cases where a sex-based harassment complaint involves an employee and a student of a K-12 school or if the informal resolution process would otherwise conflict with federal, state, or local law. Participation by parties in the informal resolution process is required to be voluntary.

The Assistant Secretary of Education for Civil Rights, Catherine Lhamon, stated during an Department of Education-conducted webinar that to address Title IX complaints without an investigation, a college would have to ensure that the complainant's autonomy is balanced with the school's responsibility. For this reason, Title IX Coordinators are required to assess and see if the grievance procedure would still need to be applied while ensuring the respect and privacy of the complainant. However, simple resolutions that do not require investigation or input, such as adding increased safety or lighting solutions to campus areas, can still be pursued by the college without the need for a formal grievance procedure.

The previous iteration of the Title IX Rule only allowed informal resolution protocols to be initiated if a formal complaint alleging sexual harassment was filed with the recipient.

ACHA-PROVIDED RECOMMENDATIONS

As noted above, in addition to jointly submitting a comment to address Title IX requirements with other student affairs organizations, ACHA also provided feedback to the Office of Information and Regulatory Affairs, located within the White House's Office of Management and Budget (OMB). The ACHA feedback was directly provided through a statement addressing health and well-being issues for college students across the country. ACHA

urged federal administrators to ensure the well-being of students, faculty, and staff by promoting Title IX regulations that:

1. Successfully reduce sex-based harassment and effectively redress victims;
2. Provide clear and accessible guidance on adequate training for administrators;
3. Include and address gender-based harassment as part of sex-based harassment.

Above all, ACHA emphasized that the final Rule should place the well-being and safety of college students at the center of all related protocols and requirements. Based on ACHA-provided recommendations, the Department of Education-shared final Rule incorporates the following well-being-focused items and provisions:

Live Hearings – The ACHA-provided Title IX statement called for live Title IX hearings to not be treated like judicial procedures. ACHA cited that the equity judicial standard for this process created harm through the prioritization of procedural completion, rather than the focus on the mental health and well-being support of victims. Furthermore, hearings occurring in a process similar to legal battles/courts create an uneven balance of power dynamic between the parties through the use of counsel and representation. As a recommendation, ACHA suggested that Title IX hearings and procedures be used as an opportunity to find better campus climate solutions rather than culpability through a judicially- adjacent procedure.

Relating to this recommendation, the Department of Education-shared final Rule still provides the option for sex-based harassment grievance procedures to be held through a live hearing process; however, it is clarified that colleges are not required to conduct their grievance procedures through live hearings. If the grievance procedure is to be conducted through a live hearing, then the college is authorized to use its discretion to “upon the request of either party it must conduct the live hearing with the parties physically present in separate locations, with technology enabling the decisionmaker and parties to simultaneously see and hear the party or the witness while that person is speaking.”⁶ If the college chooses to not conduct a live hearing, the college will allow investigators and decision-makers to ask relevant and not otherwise impermissible questions during individual meetings with a party or witness. During private questioning, parties are allowed to propose relevant questions that the party wants to be asked of any party or witness and have those questions asked by the decision-maker or investigator during individual meetings. Lastly, each party will be provided with an audio/visual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions. The final Rule also requires the equitable treatment of complainants and respondents. In terms of proceeding representation, the final Rule provides that parties are allowed to have an advisor of the party’s choice at meetings or proceedings, which may be an attorney.

Compliance adherence prioritization over student well-being: The ACHA provided a statement acknowledging the necessity of regulatory compliance with Title IX while highlighting that prioritization on compliance impacts the role of Title IX Coordinators. The statement noted that Title IX Coordinators operate with limited resources and are required to multi-task several ongoing issues within Title IX implementation. For Title IX Coordinators, the statement stressed that the Department of Education considers the implementation of regulations that do not solely focus on regulatory compliance but also account for student well-being prioritization.

With the aim of accommodating the well-being of students who are Title IX complainants, the Department of Education established several provisions focusing on privacy and autonomy, which create new protocols for Title IX coordinators to follow. Notable within the new Rule is the requirement for colleges to provide information and training as to which employees are required to notify a Title IX Coordinator about actions that can be considered sex-based discrimination, as well as training on how students can seek assistance or file a formal sex-based discrimination complaint to begin formal grievance procedures.

Additionally, if a formal complaint is not made or is made and withdrawn, Title IX Coordinators are allowed to make a fact-specific determination by considering, at a minimum, eight listed factors, and determining whether

⁶ <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>

the conduct as alleged presents an imminent and serious threat to the health or safety of a complainant or other person. The Title IX coordinator must also determine whether the ongoing conduct will prevent the college from ensuring equal access based on sex to its education program or activity such that the Title IX Coordinator may initiate a complaint. The inclusion of these provisions allows sex-based harassment to be investigated or remedied while allowing a complainant to remain private. Furthermore, to prevent future instances of sex-based discrimination, colleges will require their Title IX Coordinators to monitor the institution's education program or activities to identify barriers to reporting complaints and take the necessary steps to address such barriers, under the 2024 updated Rule.

As a potential item to maintain complainant autonomy, the final Rule allows complaints to be addressed and handled through an informal resolution process. It is important to note that informal resolution is not available in cases where a sex-based harassment complaint involves an employee and a student of a K-12 school, or if the informal resolution process would otherwise conflict with federal, state, or local law. Participation in the informal resolution process must be voluntary. Colleges are required to provide supportive measures, which may include counseling, extension of deadlines, restrictions on contact applied to one or more parties, and changes in class, work, or housing, during both official grievance proceedings and/or informal resolution proceedings.

Mandated reporting under Title IX: The ACHA-provided statement explained that the current requirements for mandated reporting for Title IX present several issues for the well-being of students and the management of Title IX on college campuses. The statement also highlighted that current mandated reporting practices could potentially erode trust between faculty and staff and impact students by mandating the reporting of delicate issues stated in confidence. As a potential solution,

ACHA recommended that the final Title IX regulation amend mandatory reporting requirements to better focus on the well-being and safety of the students who report instances of sex-based harassment or discrimination.

The updated Rule allows for the appointment of confidential employees, which allows students to come forward with grievances without necessarily triggering an official Title IX grievance procedure. The final Rule defines "confidential employee" as "an employee of a recipient whose communications are privileged or confidential under Federal or State law" and further provides that the employee's "confidential status" is only concerning information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies.⁷ Specifically for colleges, confidential employees can be considered employees who conduct "an Institutional Review Board- approved human-subjects research study" designed to gather information about sex-based discrimination. The confidential employees are not required to notify Title IX Coordinators of a potential complaint; however, they are still required to provide information to the potential complainant with information about their status as a confidential employee and methods by which the Title IX Coordinator can be contacted or a formal complaint can be made, thereby allowing a complainant to have autonomy and privacy throughout the process. For further context on mandated reporting changes, the Department of Education confirmed that mandated reporting is not incorporated into regulatory text because the mandated reporting requirements vary on a state-by-state basis and type of recipient. However, a college's obligation under Title IX cannot be removed by any State or local law or any other existing requirement that may interfere with the compliance of Title IX.

The Department of Education reported additional information relating to comments and recommendations provided concerning mandated reporting requirements with the final Rule. According to the Department of Education, several comments requested the inclusion of a definition for the term "employee" to better address which employees are required to have reporting requirements and which employees are required to be trained under Title IX. Through the shared rule, the Department of Education noted that there are variations to the definition of "across-state law", and therefore, colleges and other federal funding recipients are "better

⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>

positioned to determine” who would constitute an employee. Non-confidential employees of federal recipients that are not K-12 schools are required to follow the following procedure for notifying the institutional Title IX Coordinator:

- Employees who have the authority to institute corrective measures on behalf of the recipient or have responsibility for “administrative leadership, teaching, or advising” within the recipient’s education program are required to notify the Title IX Coordinator upon learning of conduct that “may reasonably constitute sex discrimination” under Title IX.
- All employees who are not confidential are not covered by the above-stated category will either:
 - Notify the Title IX Coordinator upon learning information about conduct that may reasonably constitute sex-based discrimination under Title IX; or
 - Provide the contact information of the Title IX Coordinator, as well as information about making sex-based discrimination complaints, to individuals who informed them of conduct that constitutes sex-based discrimination.
- As applicable to student-workers, colleges are required to make reasonable determinations that specify whether and under what circumstance these individuals fall under the above-described mandated reporting categories. The mandated reporting conditions do not apply to employees of a recipient who have personally been subject to conduct that reasonably may constitute sex-based discrimination.

Therefore, although the final Rule does not explicitly mention medical providers working at college health centers, seeing as how they may be considered potentially non-confidential employees, they would be required to notify the recipient’s Title IX Coordinator of sex-based discrimination or provide the Title IX Coordinator’s contact information to the individuals that informed them of the sex-based discrimination occurrence. The final Title IX Rule does not contain language requiring medical providers to compile a report of incidents as part of report submissions by colleges to the Department of Education.

Restorative justice: Included within ACHA’s statement to the US Office of Information and Regulatory Affairs was a call for the Rule to prioritize restorative justice practices. The restorative justice field of thought prioritizes actions that eliminate future instances of harassment, rather than focusing on retribution or compliance adherence.

Although not directly addressed under “restorative justice” terms, the final Rule includes provisions that support the emerging ideology. First, Title IX Coordinators are required to investigate barriers that interfere with the intake of future complainants or other students coming forward. Second, the final Rule establishes that during grievance procedures, both complainants and respondents are to be treated equitably by bias-free and conflict-free Title IX Coordinators, investigators, and decision-makers. The grievance procedures are required to operate under the presumption that the respondent is not responsible for the alleged conduct of sex-based discrimination until a final determination is made, which can only occur after the grievance procedures. Third, the burden of proof for making determinations is placed upon the college, requiring the institution to gather evidence that is relevant or impermissible, and not the complainant. If an institution determines a respondent is responsible, it is required to address actions that ensure that the sex-based discrimination does not re-occur. In addition, the final Rule clarifies that supportive measures provided during a formal grievance procedure or informal resolution cannot be imposed for punitive or disciplinary reasons.

DEPARTMENT OF EDUCATION-PROVIDED RESOURCES

The Department of Education published the following resources with the announcement of the final Rule:

[Unofficial Published Final Rule](#) – The document is the unofficial text for the Department of Education’s final Title IX Rule. Note: This document is 1577 pages in total. The actual provisions pertaining to the Title IX update begin on page 1505.

[U.S. Department of Education’s 2024 Title IX Final Rule Overview Fact Sheet](#) – A document providing a brief overview of requirements within the Final Title IX Rule.

[Key Provisions of the Department of Education’s 2024 Title IX Final Rule](#) – This document is a chart summarizing major provisions of the Final Rule section by section.

[Resource for Drafting Nondiscrimination Policies, Notices of Nondiscrimination, and Grievance Procedures under 2024 Amendments to the U.S. Department of Education’s Title IX Regulations](#) – A document guiding how to draft and file Title IX nondiscrimination policies, notices of nondiscrimination, and grievance procedures for federal funding.

RULE COVERAGE

Several media outlets and organizations have published informational pieces covering the release of the final Title IX Rule. Below is a highlighted collection of notable publications addressing the Department of Education’s reveal for Title IX.

[Finalized Biden Title IX regulations add protections for transgender students \(article by The Hill\)](#)

[Education Department’s final Title IX regulations draw mixed reactions \(article by Higher Ed Dive\)](#)

[Final Title IX Rule enshrines protections for LGBTQ+ students \(article by Higher Ed Dive\)](#)

[2024 Title IX Regulations Are Here. Now What? \(information compilation article by the Association of Title IX Administrators \[ATIXA\]\)](#)

[Title IX Rewrite Focuses Law on Victims, Including LGBTQ Students \(article by The 74\)](#)

[Conservatives prep lawsuits as Biden’s Title IX rewrite to include gender identity condemned \(article by The College Fix\)](#)

GOVERNMENTAL REACTIONS TO THE RELEASED RULE

As this final Rule has been long awaited since 2021, many lawmakers and Administration officials have expressed a variety of opinions on the published Rule. Below is a compilation of notable reactions among lawmakers:

- “These final regulations build on the legacy of Title IX by clarifying that all our nation’s students can access schools that are safe, welcoming, and respect their rights.” – US Secretary of Education Miguel Cardona
- “Title IX requires more, and these final regulations provide it.” – Catherine Lhamon, Assistant Secretary, Office for Civil Rights, US Department of Education
- “This final rule dumps kerosene on the already raging fire that is Democrats’ contemptuous culture war that aims to radically redefine sex and gender.” – Rep. Virginia Foxx (R-NC), per her remarks in a statement from the House Education and the Workforce Committee, of which she is the Chair

CONCLUSION

With the Title IX Rule finalized, federal funding recipient institutions will be required to meet compliance beginning on August 1, 2024, providing a brief window of three months to begin training procedures.

Based on the contents of the final Rule, the Department of Education has opted to implement most of the ACHA-provided recommendations as applicable to Title IX in some capacity. Overall, the new Title IX Rule updates the following:

- Requirements for colleges to take prompt action when investigating and addressing complaints of sex-based harassment or discrimination.

- Requirements for colleges to communicate their non-discrimination policies and procedures to all students, employees, and other participants in their education programs so that students and families understand their rights.
- Updates to the Title IX grievance procedures requirements for colleges.
- Requirements for new actions addressing the management and protocols for pregnant individuals in educational programs or activities.
- Confidentiality and reporting protocols.

The final Rule marks a shift from the previous iteration of Title IX formerly handled under the previous White House Administration. Most of the differences are marked through the expansion of defamatory language, as well as the inclusion of new grievance procedure requirements and protocols. To better improve upon existing regulations and ensure proper compliance with Title IX, ACHA may offer services, data capabilities, and higher education knowledge.



