



August 30, 2021

2021 Legislative Session

Equity, Inclusion, and Free Speech for Community Colleges

Preliminary Guidance

Introduction

Governor Reynolds signed several pieces of legislation into law that created new substantive requirements concerning equity and inclusion, as well as student free speech for public institutions of higher education, including community colleges. This guidance is structured around the following bills:

- House File 744: Student Free Speech, and
- House File 802: Parameters for Racism and Sexism Training.

House File 744: Student Free Speech

Who is governed by this law?

[House File \(HF\) 744](#) governs public school districts and public institutions of higher education. Nonpublic schools and institutions of higher education are not covered.

When is this law effective?

HF 744 took effect on July 1, 2021.

What does this law require?

HF 744 does several major things:

- It requires community colleges to establish a policy on free speech, which shall include the following elements.
 - “That the primary function of an institution of higher education is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. This statement shall provide that, to fulfill this function, the institution must strive to ensure the fullest degree of intellectual freedom and free expression allowed under the first amendment to the Constitution of the United States.”
 - “That it is not the proper role of an institution of higher education to shield individuals from speech protected by the first amendment to the Constitution of the United States, which may include ideas and opinions the individual finds unwelcome, disagreeable, or even offensive.”
 - “That it is the proper role of an institution of higher education to encourage diversity of thoughts, ideas, and opinions and to encourage, within the bounds of the first amendment to the Constitution of the United States, the peaceful, respectful, and safe exercise of first amendment rights.”
 - “That students and faculty have the freedom to discuss any problem that presents itself, assemble, and engage in spontaneous expressive activity on campus, within the bounds of established principles of the first amendment to the Constitution of the United States, and subject to reasonable time, place, and manner restrictions that are consistent with established first amendment principles.”
 - “That the outdoor areas of campus of an institution of higher education are public forums, open on the same terms to any invited speaker subject to reasonable time, place, and manner

restrictions that are consistent with established principles of the first amendment to the Constitution of the United States.”

HF 744 § 1, amending Iowa Code § 261H.2.

- It requires each community college to “protect the first amendment rights of the institution’s students, staff, and faculty and shall establish and publicize policies that prohibit institutional restrictions and penalties based on protected speech, including political speech, to the fullest extent required by the first amendment to the Constitution of the United States” (HF 744 § 1, adding new Iowa Code § 261H.2(3)(a)).
- It forbids a community college from retaliating against “against a member of the campus community who files a complaint for a violation of” the applicable provisions of HF 744 under the complaint procedures in [Iowa Code section 261H.5](#) (HF 744 § 1, adding new Iowa Code § 261H.2(3)(a)).
- It provides the following for faculty members who are accused of violating HF 744;

If it is determined, after exhaustion of all available administrative and judicial appeals, that a faculty member knowingly and intentionally restricts the protected speech or otherwise penalizes a student in violation of this subsection, the faculty member shall be subject to discipline by the institution through the normal disciplinary processes of the institution, and such discipline may include termination depending on the totality of the facts. If the faculty member is licensed by the board of educational examiners under chapter 272, the board of educational examiners shall conduct a hearing pursuant to section 272.13, and the faculty member may be subject to disciplinary action by the board.

HF 744 § 1, adding new Iowa Code § 261H.2(3)(b).

- It requires community colleges to provide training on the First Amendment to “to all students, faculty, and staff on an annual basis, which elected officials and staff shall be permitted to attend.” (HF 744 § 2, adding new Iowa Code § 261H.6).

Are there portions of HF 744 that do not apply to community colleges?

Yes. First, HF 744 requires the state board of regents to develop “materials, programs, and procedures to ensure that those persons who are responsible for discipline, instruction, or administration of the campus community, or who have oversight of student government organizations, or distribute activity fee funds, including but not limited to presidents, vice-presidents, deans, department directors, administrators, campus police officers, residence life officials, faculty, and members of student government organizations, understand the policies, regulations, and duties of the institution regarding free expression on campus consistent” with HF 744 and Chapter 261H. HF 744 § 1, adding new Iowa Code § 261H.2(2). While community colleges are able to use these materials, they are not required to develop them.

Second, new section 261H.7¹ creates requirements for student organizations for institutions of higher education “governed by the state board of regents.” HF 744 § 3, adding new Iowa Code § 261H.7.² While this

¹ **NEW SECTION. 261H.7 Student government organizations — student fees — appeals — liability.**

1. Each institution of higher education governed by the state board of regents shall make a student government organization’s access to and authority over any moneys disbursed to the student government organization by the institution contingent upon the student government organization’s compliance with the first amendment to the Constitution of the United States and the provisions of this chapter.

2. If, after exhaustion of all administrative appeals, it is determined that a student government organization knowingly and intentionally violated the first amendment rights of a member of the campus community or that an action or decision of a student government organization is in violation of this section, the institution shall suspend the student government organization’s authority to manage and disburse student fees for a period of one year. During this period of suspension, such student fees shall be managed and disbursed by the institution.

² Between HF 744 and HF 802, two new sections numbered section 261H.7 were adopted. This is a matter that will be resolved by the Code editor.

does not directly apply to community colleges, community colleges are urged to voluntarily comply with this provision, as a matter of prudence.

What does “intellectual freedom” mean in this context?

“Intellectual freedom” or “academic freedom” is, as a concept, inextricably linked to the First Amendment’s Free Speech Clause (although the concepts are not synonymous). According to Justice William Brennan:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’

Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 603 (1967) (citations omitted).

Students and community college employees must be permitted to enjoy the full breadth of the First Amendment’s guarantee, regardless of the particular viewpoint expressed. However, certain speech is not protected under HF 744 because such speech is not protected by the First Amendment or is antithetical to academic or extracurricular pursuits. The following is a non-exhaustive list of speech that is subject to regulation:

- Speech encouraging the commission of a crime or the violation of school rules.
- Harassment under state or federal civil rights laws.
- Obscenity or crude speech.
- Other speech that harms members of the school community (e.g., libel, slander, invasion of privacy).
- Plagiarism or other academic misconduct.
- Speech that violates the property rights of others (e.g., copyright infringement, disclosure of trade secrets, software piracy).
- Speech that is a crime, such as:
 - “Disorderly conduct” under [Iowa Code section 723.4](#),
 - “Extortion” under [Iowa Code section 711.4](#),
 - A “false report” under [Iowa Code section 718.6](#),
 - “Hazing” under [Iowa Code section 708.10](#), or
 - A “threat of terrorism” under [Iowa Code section 708A.5](#).
- Speech that is not responsive to the academic assignment, such as:
 - A professor gives an assignment to “describe the current scientific consensus on climate change.” The student states that climate change is a “hoax” and any warming is attributable to natural causes, such as solar cycles. Although the answer is well-written, the student receives a low mark. Because the student’s answer is not responsive to the assignment, the low mark would not be a violation of HF 744.
 - A professor gives an assignment to “describe your personal view on climate change.” The student states that climate change is a hoax and any warming is attributable to natural causes, such as solar cycles. Although the answer is well-written, the student receives a low mark. Because the student’s answer is responsive to the assignment, the low mark would appear to be a violation of HF 744 in the absence of other facts.
- Speech by participants or spectators at an athletic event that would be considered unsportsmanlike conduct, taunting, or another similar infraction.

What portion of HF 744 apply to contracted and concurrent enrollment courses?

A contracted or concurrent enrollment course is a community college course that is taught by a qualified instructor meeting the requirements established and verified by the community college, regardless of where the course is physically delivered (e.g., community college campus, online, school district location, etc.).

Therefore, the requirements applicable to community colleges are the default requirements for all contracted/concurrent enrollment courses. A school district will need to review any additional expectations established for the district and ensure those are appropriately implemented within the parameters of the course established by the community college. A community college is not be required to modify any aspect of a course based on a requirement applicable only to school districts.

House File 802: Parameters for Racism and Sexism Training

Who is governed by this law?

In relevant part, [HF 802](#) governs public school districts and public institutions of higher education. Nonpublic schools and institutions of higher education are not covered.

When is this law effective?

HF 802 took effect on July 1, 2021.

What does this law require?

This law requires community colleges to do several important things:

1. The “president, vice presidents, deans, department directors, or any other administrator of a” community college must ensure “any mandatory staff or student training provided by an employee of” the community college or by a contractor hired by the community college “does not teach, advocate, act upon, or promote specific defined concepts.” (HF 802 § 2, adding new Iowa Code § 261H.7(2)).
 - New section 261H.7(2) also contains the following exception: “This subsection shall not be construed as preventing an employee or contractor who teaches any curriculum or who provides mandatory training from responding to questions regarding specific defined concepts raised by participants in the training.”
 - This language applies to a curriculum or staff or student training that is specific to diversity, equity, and inclusion. This language shall not be construed to prohibit these discussions anywhere in the school, such as in the course of a broader academic discussion (see below).
2. Community college “diversity and inclusion efforts shall discourage students of the school district from discriminating against another by political ideology or any characteristic protected under the federal Civil Rights Act of 1964, Pub. L. No. 88-352, as amended, and applicable state law” (HF 802 § 2, adding new Iowa Code § 261H.7(3)).
3. HF 802 requires each community college to “prohibit its employees from discriminating against students or employees by political ideology or any characteristic protected under the federal Civil Rights Act of 1964, Pub. L. No. 88-352, as amended, and applicable state law” (HF 802 § 2, adding new Iowa Code § 261H.7(3)).

How Does the Act Define “Mandatory Staff or Student Training”?

The Act does not define of what is or is not a “mandatory staff or student training.” However, institutions are encouraged to review mandatory and voluntary training opportunities and clearly differentiate between the two in all publications and advertisements for the events. Any trainings identified by the institution as mandatory are not to include any of the defined concepts prohibited by this legislation. Institutions are further encouraged to avoid any use of terms which could be construed as mandating attendance (e.g., “encouraged to attend”).

May community colleges continue to offer diversity, equity, and inclusion training to their employees?

Yes, subject to the terms of HF 802. HF 802 specifically provides: “Each public institution of higher education may continue training that fosters a workplace and learning environment that is respectful of all employees and students” (HF 802 § 2, adding new Iowa Code § 261H.7(2)).

What are the characteristics protected under the Civil Rights Act of 1964?

The Civil Rights Act, as amended, protects individuals from discrimination based on race, color, religion, sex, and national origin. Apply the prohibition against sex discrimination to include discrimination based on sexual orientation or gender identity (see *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)). Assume that provision also includes discrimination based on disability (see the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213).

What are characteristics protected by state law?

Iowa's Civil Rights Act prohibits community colleges from discrimination based on "race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability" (Iowa Code § 216.9(1)).

What does "race or sex scapegoating" mean?

According to HF 802, "race or sex scapegoating" means:

[A]ssigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex, or claiming that, consciously or unconsciously, and by virtue of persons' race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

HF 802 § 2, adding new Iowa Code § 261H.7(1)(a).

Discussions of bias and oppression are still permitted (see below); however, what is not permitted is stating that a particular race or sex is inherently biased or oppressive.

What does "race or sex stereotyping" mean?

According to HF 802, "race or sex stereotyping" means "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of the individual's race or sex" (HF 802 § 2, adding new Iowa Code § 261H.7(1)(b)).

What are HF 802's "specific defined concepts"?

HF 802 added a new Iowa Code section 261H.7(1)(c), which contains the list of specific defined concepts. Those concepts are as follows:

- (1) That one race or sex is inherently superior to another race or sex.
- (2) That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.
- (3) That an individual, solely because of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
- (4) That an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race or sex.
- (5) That members of one race or sex cannot and should not attempt to treat others without respect to race or sex.
- (6) That an individual's moral character is necessarily determined by the individual's race or sex.
- (7) That an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.
- (8) That any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual's race or sex.
- (9) That meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.
- (10) Any other form of race or sex scapegoating or any other form of race or sex stereotyping.

HF 802 § 2, adding new Iowa Code § 261H.7(1)"c".

While most of these concepts are self-explanatory, a few deserve additional attention:

- (2) *That the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.* It would not implicate this concept to mention actual or purported racist or sexist policies implemented by the United States or the State of Iowa, so long as the United States or the state of Iowa are not described as “fundamentally or systemically racist or sexist.”
- (7) *That an individual, by virtue of the individual’s race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.* This provision does not bar discussions of how to redress the effects of past discrimination. This section is implicated only if individuals are asked to bear responsibility, based on their race or sex, for past discrimination that they did not commit.
- (10) *Any other form of race or sex scapegoating or any other form of race or sex stereotyping.* This provision is implicated only if an individual is expected to “feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual’s race or sex.” The emotions of “discomfort, guilt, [or] anguish” may be rational responses to discussions of oppression. This section does not require elimination of emotional discussions; what it does require is that trainings or curricula not assign blame or imply individuals ought to feel pain based on their race or sex.

What does HF 802 not do?

The drafters of HF 802 included several explanations and limitations:

1. Community colleges are specifically allowed to continue diversity, equity, and inclusion training for students and staff. A community college remains able to promote “racial, cultural, ethnic, intellectual, or academic diversity or inclusiveness, provided such efforts are consistent with the provisions of this section, chapter 216, and other applicable law” (HF 802 § 2, adding new Iowa Code § 261H.7(4)(b)).
2. HF 802 is to be construed consistent with the First Amendment. HF 802 provides that it shall not be construed to:

Inhibit or violate the first amendment rights of students or faculty, or undermine a school district’s duty to protect to the fullest degree intellectual freedom and free expression. The intellectual vitality of students and faculty shall not be infringed under this section. (HF 802 § 2, adding new Iowa Code § 261H.7(4)(a))

This provision should also be read consistently with Article I, section 7, of the Constitution of the State of Iowa, and [HF 744’s protection of intellectual freedom](#) (see the previous section).

3. HF 802 provides that specified defined concepts may be included “as part of a larger course of academic instruction” (HF 802 § 2, adding new Iowa Code § § 261H.7(4)(c)). Later in section 3, HF 802 provides it shall not be construed to prohibit “the use of curriculum that teaches the topics of sexism, slavery, racial oppression, racial segregation, or racial discrimination, including topics relating to the enactment and enforcement of laws resulting in sexism, racial oppression, segregation, and discrimination” (HF 802 § 2, adding new Iowa Code §§ 261H.7(4)“f”). HF 802 allows a robust discussion of the causes and consequences of racism, sexism, and oppression.

Are there other provisions of HF 802?

HF 802 allows state or federal courts or agencies to require “training or remedial action containing discussions of specific defined concepts as a remedial action due to a finding of discrimination, including discrimination based on race or sex” (HF 802 § 2, adding new Iowa Code § § 261H.7(4)“e”).

Further, HF 802 does not create “any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the state of Iowa, its departments, agencies, or entities, its officers, employees, or agents, or any other person” (HF 802 § 2, adding new Iowa Code § § 261H.7(4)“d”).

How will the Department monitor compliance with HF 802?

As with any other requirement for school districts, the Department will apply its ordinary monitoring and support procedures for community colleges.

Will the Department issue rules regarding HF 802?

The Department is determining whether rules are required.

What portion of HF 802 apply to contracted and concurrent enrollment courses?

A contracted or concurrent enrollment course is a community college course that is taught by a qualified instructor meeting the requirements established and verified by the community college, regardless of where the course is physically delivered (e.g., community college campus, online, school district location, etc.). Therefore, the requirements applicable to community colleges are the default requirements for all contracted/concurrent enrollment courses. A school district will need to review any additional expectations established for the district and ensure those are appropriately implemented within the parameters of the course established by the community college. A community college is not be required to modify any aspect of a course based on a requirement applicable only to school districts.

Who may I contact if I have questions about this document?

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