



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45(a): Discrimination on the Basis of Sex

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Note: This document focuses on a summary analysis of Section 106.45(a) of the 2020 Final Title IX Regulations,¹ specifically the discussion of what may constitute “discrimination on the basis of sex.” For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison and Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§ 106.45(a): Discrimination on the Basis of Sex

Section 106.45(a) of the Final Rule states:

A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

This regulation condenses and simplifies the text in the Notice of Proposed Rulemaking (“NPRM”) without changing the underlying meaning of this section. Although this section was minimally edited from the NPRM, the Department devotes several pages to it in the Preamble, and the discussion merits attention.

In particular, this portion of the Preamble directly addresses the Department’s position that a Title IX grievance process that does not follow the steps required under § 106.45(b) could constitute discrimination on the basis of sex, whether the respondent was male or female. As such, it both frames the purpose of the process under § 106.45(b) and will undoubtedly inform case law brought by respondents claiming a flawed process in violation of Title IX. But unlike those judicially-developed interpretations of Title IX, the Department appears less willing to distinguish between “victim-centered” and “anti-male” approaches in evaluating whether the process amounted to sex-based discrimination; rather, the Department views any divergence from the Final Rule’s mandates as amounting to a violation of its regulations, whether that error stemmed from an articulable bias or not.

The Department describes comments that praised and criticized this section. Supportive commenters tended to perceive institutional bias against male respondents and that Title IX grievance procedures have historically favored complainants. Critical commenters stated that the

¹ The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

NPRM improperly categorized the experience of a respondent subject to a potentially unfair grievance process as a form of sex discrimination covered under Title IX, and improperly conflated the impact on a respondent of a potentially unfair grievance process with the impact on a complainant of sexual harassment and sexual violence.

In response to these comments, the Department advises recipients “against sex discriminatory practices during the grievance process and to avoid different treatment favoring or disfavoring any party on the basis of sex.” It states that a violation of § 106.45 “need not, and might not necessarily, constitute sex discrimination, whether the violation disfavored a complainant or respondent.” 85 Fed. Reg. 30238 (May 19, 2020). But this distinction highlights the ambiguity within the Department’s approach: it is unclear how a Title IX violation could be found if there was no sex discrimination.

While the Supreme Court acknowledged in *Gebser v. Lago Indep. Sch. Dist.* (1997) that the Department can “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” 524 U.S. at 292 (85 Fed. Reg. at 30241), neither the Preamble nor the Final Rule explain how the provisions protecting respondents foster its “non-discrimination” mandate regarding sex-based discrimination against this category of individuals. Indeed, while the Preamble highlights that the provision uses the term “may” *Id.* at 30239, neither the Preamble nor the Regulations appears to ground any of the specific grievance process requirements protecting respondents in the prohibition against sex discrimination. Put another way, the Department’s explanation does not wholly articulate how those protections contribute to protections against sexual harassment, or relate to possible different treatment of respondents on the basis of sex (rather than, say, simply their status as respondents); e.g., as to how the requirements relate to or prevent “sex-based biases, stereotypes, and generalizations.” *Id.* at 30240.

It is true that the Preamble states that this section “does not assume that any unfair treatment constitutes sex discrimination. It cautions recipients that treatment of any party could constitute sex discrimination.” But the only examples it gives of possible sex discrimination involve disparate treatment of male and female complainants, or of male and female respondents – but not as between complainants and respondents. Indeed, the Department expressly declines to “further describe how and when a recipient’s treatment of a complainant or respondent might constitute sex discrimination.” *Id.* at 30241.

While the Preamble asserts that it is not creating a new protected class of respondents, that seems to be exactly what it is doing. *Id.* at 30240. Indeed, the Preamble seems to admit as much when it says that a respondent could file a complaint and OCR could require corrective action for a recipient’s failure to comply with § 106.45 “...regardless of whether the violation of § 106.45 ... otherwise constituted sex discrimination (as to a respondent). *Id.* A violation of § 106.45 need not, and might not necessarily, constitute sex discrimination, whether the violation disfavored a complainant or a respondent.”

Notably, the Department recognizes that its interpretation of Title IX may not neatly align with judicial precedent. The Preamble does acknowledge court cases holding that unfair treatment of a respondent does not equate to sex discrimination unless the respondent can show that the unfair

treatment was motivated by the party's sex, but simply reiterates that a violation of § 106.45 doesn't necessarily equate to sex discrimination. *Id.*

Additionally, the Preamble denies that this provision conflates the treatment of a respondent during a grievance process as the same type of behavior that prompted the respondent to become a respondent, and denies that this permits respondents to file a Title IX claim based simply on a recipient opening an investigation into their conduct. *Id.*

The Final Rule notes that §106.45 contains procedural protections that apply equally to both parties with three exceptions: "one provision that treats complainants and respondents equitably instead of equally (by recognizing a complainant's interest in recipient-provided remedies, and a respondent's interest in disciplinary sanctions imposed only after a recipient follows a fair process); one provision that applies only to respondents (a presumption of non-responsibility until conclusion of a fair process); and one provision that applies only to complainants (protection from questions and evidence regarding sexual history). *Id.*

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