



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.44(a): Response to Sexual Harassment Generally

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Note: This document focuses on a summary analysis of Section 106.44(a) of the 2020 Final Title IX Regulations,¹ specifically the required institutional response to sexual harassment. 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

§ 106.44(a): Required Response to Sexual Harassment Generally

Section 106.44(a) provides, in part:

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

This section of the Final Rule is identical to what was proposed in the NPRM. But the Department significantly added to this section by defining “education program or activity” and detailing how an institution must respond to actual knowledge of sexual harassment, as further explained below.

Moreover, the Department added language to the end of this section clarifying that a recipient will not have satisfied the duty not to be deliberately indifferent “based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.”

“Educational program or activity”

Under the Final Rule, the Department added a definition of “education program or activity” as follows:

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.

For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

As this language illustrates, the Final Rule anticipates that some off-campus sexual harassment may fall within a recipient’s Title IX jurisdiction. Responding to concerns of ambiguity over what constitutes an “education program or activity,” regarding off-campus conduct, the Department explained that, under this new definition “a recipient’s Title IX obligations extend to incidents of sexual harassment that occur off campus if any of three conditions are met:

- the off-campus incident occurs as part of the recipient’s ‘operations’ pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
- the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to § 106.44(a).”

See 85 Fed. Reg. 30196-30197 (May 19, 2020).

Explaining the “substantial control” prong, the Department noted that, while factors “such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for recipients to consider . . . to determine the scope of a recipient’s program or activity, no single factor is determinative.” *Id.*

Of particular interest during the COVID-19 pandemic, the Department recognized that “the statutory and regulatory definitions of ‘program or activity’ encompass ‘all of the operations of such recipients, and such ‘operations’ may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, recipient.” Regarding whether an institution can exercise “substantial control” over a student in the context of while the student is studying remotely, the Department said only that “a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control,” but did not further elaborate. *Id.* at 30202.

Who must receive notice of an incident of sexual harassment for the recipient to have actual knowledge?

A postsecondary institution will be deemed to have actual knowledge if notice of sexual harassment or allegations of sexual harassment is provided to (i) the Title IX Coordinator; or (ii) “any official of the recipient who has authority to institute corrective measures on behalf of the recipient.” An elementary or secondary school has actual knowledge when notice is provided to any employee of the school.

The Final Rule does not include the term “responsible employee” to designate an individual whose receipt of a report of sexual harassment provides notice to a postsecondary institution

requiring further action. Starting with the Department’s 2001 Guidance, responsible employee was defined as “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.” The Department clarifies that “the first of the three categories described in guidance as ‘responsible employees’ are still used in these final regulations, because notice to an official with authority is the equivalent of the category referred to in guidance as an employee who has the authority to redress the harassment.” *Id.* at 30112-30113.

The Department provides flexibility to postsecondary institutions to designate the group of officials with authority narrowly or broadly. “A recipient (including a postsecondary institution recipient) may give authority to as many officials as it wishes to institute corrective measures on behalf of the recipient, and notice to such officials with authority will trigger the recipient’s response obligations.” *Id.* The Department notes that a recipient may choose to provide a list of officials with authority to students and employees. *Id.* at 30119. While the Final Rule does not mandate that certain categories of employees necessarily are officials with authority by virtue of position, the Preamble suggests that for employees supervisors would generally be considered officials with authority as would deans for students. *Id.*

Also absent in the Final Rule is a designation of which employees of a postsecondary institution must be mandatory reporters or a requirement that individuals mandated to report sexual harassment also are officials with authority, triggering an institution’s obligation to respond. In the Preamble, the Department states:

The Department revised the definition of actual knowledge in § 106.30 to add that the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual, as one who has the authority to institute corrective measures on behalf of the recipient.

Id. at 30113.

Further, as stated in the Preamble, the Department essentially gives institutions the ability to go above their standard and train all employees or require all employees to be mandated reporters:

Additionally, if a postsecondary institution would like to train all employees or require all employees to report sexual harassment to the Title IX Coordinator through policies that these final regulations do not require, then the postsecondary institution may do so without fearing that the Department will hold the postsecondary institution responsible for responding to sexual harassment allegations unless the recipient’s employee actually did give notice to the recipient’s Title IX Coordinator (or to an official with authority).

Id. at 30115.

Who may report an incident of sexual harassment that provides actual knowledge?

As in the NPRM, the Final Rule does not limit who may report an incident of sexual harassment that will provide actual knowledge and, thus, require a recipient to respond. “The proposed definition of complainant did not prevent third-party reporting, and while the final regulations revise the § 106.30 definition of complainant, the final regulations also do not prevent third-party reporting. Under both the proposed and final regulations, any person (i.e., the victim of alleged sexual harassment, a bystander, a witness, a friend, or any other person) may report sexual harassment and trigger a recipient’s obligation to respond to the sexual harassment.” *Id.* at 30121. If the report is made to any employee of an elementary or secondary school or the Title IX Coordinator or an official with authority of a postsecondary institution, the recipient must respond with supportive measures as described in § 106.44(a) and more fully explained below.

In contrast to the unlimited group of individuals who may report an act of sexual harassment, a formal complaint requiring the grievance procedures detailed in § 106.45 may only be filed by the individual who is the alleged victim of the harassment or the Title IX Coordinator. “These final regulations preserve the benefits of allowing third party reporting while still giving the complainant as much control as reasonably possible over whether the school investigates, because under the final regulations a third party can report – and trigger the Title IX Coordinator’s obligation to reach out to the complainant and offer supportive measures – but the third party cannot trigger an investigation.” *Id.* at 30194. (See further Joint Guidance discussion of the process in the Final Rule for filing of a formal complaint.)

What must be reported to trigger a recipient’s response obligations?

The Department mandates neither the means of reporting nor the information that must be included in a report. “With respect to both elementary and secondary schools as well as postsecondary institutions, the Department does not limit the manner in which the recipient may receive notice of sexual harassment. Although imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge, a Title IX Coordinator, an official with authority to institute corrective measures on behalf of the recipient, and any employee of an elementary and secondary school may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means.” *Id.* at 30115. In the postsecondary institution context, knowledge by a Title IX Coordinator or an official with authority - from any source, including anonymous reports or information - requires the response described in § 106.44(a). *See, Id.* at 30210.

Based on the discussion in the Preamble of the Final Rule, anonymous reports in social media such as Twitter or Instagram posts, or anonymous social media sites (e.g. the now-defunct Yik Yak app), would constitute actual knowledge requiring a response if such information is received by or provided to the Title IX Coordinator or an official with authority of a postsecondary institution or any employee of an elementary or secondary school. The Department states in the Preamble, “Section 106.44(a) requires a recipient to respond promptly where the recipient has actual knowledge of sexual harassment; a recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment.” *Id.*

When must a report be made?

The Final Regulations impose no limitations on when a report may be made that will constitute actual knowledge, either with regard to the length of time that has elapsed since the incident or the status of the complainant or respondent. Likewise, the Final Rule includes no time limitation on filing of formal complaints. The Department “decline[d] to impose a requirement that formal complaints be filed ‘without undue delay.’ The Department believes that imposing a statute of limitations or similar time limit on the filing of a formal complaint would be unfair to complainants because, as many commenters noted, for a variety of reasons complainants sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment, and it would be difficult to discern what “undue” delay means in the context of a particular complainant’s experience.” *Id.* at 30127.

At the time the report is made, a complainant does not have to be affiliated with the recipient to trigger the response obligations in § 106.44(a). “The definition of ‘complainant’ is any individual alleged to be the victim of conduct that could constitute sexual harassment; there is no requirement that the complainant must be a student, employee, or other designated relationship with the recipient in order to be treated as a ‘complainant’ entitled to a prompt, non-deliberately indifferent response from the recipient.” *Id.* at 30138. Similarly, a respondent does not have to be affiliated with the institution to require a response to a report in accordance with § 106.44(a). “The Department believes that § 106.30 contains sufficiently clear, broad language indicating that any ‘individual’ can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient. The Department intentionally does not limit a ‘respondent’ to include only individuals against whom a formal complaint has been filed, because even where a grievance process is not initiated, the recipient still has general response obligations under § 106.44(a) that may affect the person alleged to have committed sexual harassment (i.e., the respondent).” *Id.* at 30139.

Where must an incident of sexual harassment occur to be covered under Title IX?

Affiliated Student Organizations, including Greek Organizations

One major change from the NPRM to the Final Rule is in relation to coverage of off-campus incidents. The Department raised concerns that were in the NPRM comments in relation to off-campus Greek organizations. *Id.* at 30194-30195.

The Final Rule explicitly includes incidents in off-campus buildings owned or controlled by a recognized student organization in the scope of “education program or activity,” stating “where a postsecondary institution has officially recognized a student organization, the recipient’s Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building.” *Id.* at 30197.

The Department stated that they considered it prudent to create a bright line rule for official recognition of student organizations, to bring “buildings owned or controlled by the organization under the auspices of the postsecondary institution recipient and thus within the scope of the recipient’s Title IX obligations.” *Id.* . However, the Department also acknowledged that recipients may find significant challenges in investigating off-campus conduct on private property and property that is not owned and/or controlled by the institution.

The lynchpin here is the new language surrounding “owned or controlled” and how that can be interpreted by the institutions. What if an allegation is reported that takes place in a location that is not owned or controlled by the recognized student organization? The Department states:

Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient’s Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the “operations of” the recipient.

Id. .

This is important to note because the standard would change in these circumstances, despite the conduct potentially being something an institution would generally investigate under any other circumstance. The Department has instituted a bright line rule; however, it is unclear at this time if the Department also drew an arbitrary line relating to conduct that would normally be investigated and potentially sanctioned, based on location.

Organizations residing off-campus that are unaffiliated with the institution

Another issue that the Department has caused with the addition of its bright line rule is complications over whether conduct that is alleged to have occurred at an off-campus location in a building not owned or controlled by an unrecognized student organization can be investigated by an institution.

There could be questions here, about whether an institution is obligated to conduct a Title IX investigation if such alleged acts occurred in an unsanctioned location, thus creating tension and lack of clarity about an institution’s obligations in this situation. An argument can be made that many of the unaffiliated organizations that reside in towns where the institutions are located are a direct result of the institution’s operations as a higher education entity.

The Department states that it intentionally did not provide limiting language in the definitions of complainant and respondent to address these specific types of questions. *Id.* at 30139. The Department intentionally ensured that a respondent was not restricted “to being a person enrolled or employed by the recipient or who has any other affiliation or connection with the recipient.” *Id.* While the Department points out that these definitions are sufficiently broad, that

does not solve the wrinkle created by the Department's geography definition in relation to these types of unaffiliated/unrecognized off-campus organizations.

The Department does state in the Preamble that there will clearly be situations that conduct is alleged that is outside the institution's educational program or activity, that later gives rise to the complainant suffering Title IX sexual harassment in the institution's educational program or activity. In these situations, the Department states that there is nothing in this Final Rule that would bar an institution from investigating allegations the Department considers to be outside the purview of Title IX under these regulations in concert with the latter activity that does fall within the institution's jurisdiction, and that the institution can choose to address the prior conduct that was not under the institution's purview through its own student code of conduct. The Department states:

[A] recipient is not required by these final regulations to inefficiently extricate conduct occurring outside an education program or activity from conduct occurring in an education program or activity arising from the same facts or circumstances in order to meet the recipient's obligations with respect to the latter.

Id. at 30198.

Thus, even if this Final Rule no longer covers allegations in this specific setting, they do not specifically bar an institution from investigating these allegations under their own student code of conduct in the event of a formal complaint from a complainant.

Academic medical centers

Incidents that occur at an academic medical center, if such academic medical center receives federal assistance, are within the scope of Title IX and the Final Rule. The Department emphasizes that "Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX." *Id.* at 30446. The Final Rule does not carve out any category of respondent, including medical residents, for categorical exemption. The Department states, "If a medical resident is accused of sexual harassment in an education program or activity of the recipient against a person in the United States, the recipient must respond promptly in a manner that is not deliberately indifferent." *Id.* at 30446-30447.

The Department notes, however, that certain aspects of the recipient's response under the Final Rule may vary given the unique character of academic medical centers. If the complainant is a patient of the medical center, for example, supportive measures may center around removing that patient from interaction with the respondent. Informal resolution may be appropriate and offered to a patient who reports sexual harassment by a medical resident. The Department does emphasize, however, that the patient must be participating or attempting to participate in the education program or activity of the recipient to file a formal complaint. *Id.* at 30447.

While the Department repeatedly uses the example of medical residents as respondents, it remains unclear if the Department is taking the position that a patient who is treated by a medical

resident, as opposed to an attending physician, is necessarily participating in an education program or activity. What is clear is that the Department does not consider an academic medical center to be a postsecondary institution. “[A]cademic medical centers are not postsecondary institutions, although an academic medical center may be affiliated with a postsecondary institution or even considered part of the same entity as the institution of higher education.” *Id.* Thus, if a complaint involves an incident at an academic medical center outside of the educational programs and activities of the recipient, then the recipient may employ the written question process in § 106.45(b)(6)(ii) for entities that are not postsecondary institutions rather than the live hearing required in § 106.45(b)(6)(i).

Study Abroad Implications

Note that the multi-pronged definition of education program or activity does not apply beyond the United States, including with respect to study abroad programs: the Department’s position in the Final Rule is that “regardless of whether a study abroad program is part of a recipient’s education program or activity, Title IX does not have extraterritorial application.” *Id.* at 30206. After noting the paucity of judicial precedent on the issue, the Department argued that *King v. Board of Control of Eastern Michigan University*, 221 F. Supp. 2d 783 (E.D. Mich. 2002), in which the District Court for the Eastern District of Michigan held that Title IX applied to conduct that occurred abroad, would have been decided differently had it been preceded by the Supreme Court’s subsequent decisions in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), and *Morrison v. National Australian Bank*, 561 U.S. 247 (2010), in which the Supreme Court “acknowledged the presumption against extraterritoriality.” *Id.* at 30205. Instead, the Department endorsed the reasoning adopted in *Phillips v. St. George’s University*, No. 07-CV-1555, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007), in which the district court for the Eastern District of New York rejected extraterritorial application of Title IX.

In another significant clarification of the NPRM, the Department repeatedly explains that recipients are free to develop their own conduct proceedings for conduct occurring beyond the limited scope of Title IX in the Final Rule. “[N]othing in these final regulations precludes action under another provision of the recipient’s code of conduct that these final regulations do not address. For example, a recipient may choose to address conduct outside of or not in its ‘education program or activity,’ even though Title IX does not require a recipient to do so. *Id.* at 30091.

Conflicts relating to Clery Act in relation to geography definitions

The Department acknowledges that there is a deviation in definition under this section in reference to “a building owned or controlled by a student organization that is officially recognized by a postsecondary institution,” versus the Clery Act’s use of the term “noncampus building or property.” *Id.* at 30197. While this will be discussed in further detail in the Joint Guidance memorandums relating to the Final Rule’s interaction with other Federal laws, rules and regulations, we would be remiss not to discuss it in the context of geography. The Department argues that Clery and Title IX serve different purposes, and thus, it is acceptable to have definitions that are not “co-extensive.” *Id.* This, however, will serve to create arbitrary distinctions and cause more confusion for institutions going forward in attempting to meet all of their Federal obligations.

How must a recipient respond to a report of covered sexual harassment to not be deliberately indifferent?

Generally, a recipient's response to sexual harassment must not be deliberately indifferent, defined in the Final Rule exactly as defined in the NPRM as not "clearly unreasonable in light of the known circumstances." In a significant change, the Department removed the "safe harbor" for recipients that was in § 106.44(b) of the proposed regulations (see discussion below of § 106.44(b)) and, instead, mandates that a recipient must offer supportive measures to a complainant and conduct grievance procedures that comply with § 106.45 before the imposition of any sanction on a respondent that is not a supportive measure:

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. 34 C.F.R. §106.44(a).

The Department clarifies that the obligation to offer supportive measures to a complainant, regardless of the status of the complainant or the respondent, arises from a report of sexual harassment, whereas the requirement to follow a grievance process in accordance with procedures in § 106.45 is only required if the complainant or the Title IX Coordinator files a formal complaint. "The final regulations, like the proposed rules, draw a distinction between a recipient's general response to reported incidents of sexual harassment (including offering supportive measures to the complainant), on the one hand, and the circumstances that obligate a recipient to initiate a grievance process, on the other hand. With respect to a grievance process, the final regulations retain the proposed rules' approach that a recipient is obligated to begin a grievance process against a respondent (that is, to investigate and adjudicate allegations) only where a complainant has filed a formal complaint or a Title IX Coordinator has signed a formal complaint." *Id.* at 30122.

Supportive measures, defined in § 106.30 and discussed more fully in other sections of the *Joint Guidance*, must be offered to a complainant and may be offered to a respondent and are non-disciplinary, non-punitive, individualized, and without fee or charge to either party. The Department further explains in the definition of supportive measures that "such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment." *Id.* at 30574. Examples provided in the definition of supportive measures include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures." *Id.*

The Final Regulations also include in § 106.44(a) specific steps a recipient must take with regard to communication with a complainant regarding supportive measures and the formal complaint process:

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

In the initial contact by the Title IX Coordinator to the complainant the Title IX Coordinator must take four specific actions: (i) discuss the availability of supportive measures as defined in § 106.30; (ii) consider the complainant's wishes with respect to supportive measures; (iii) inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and (iv) explain to the complainant the process for filing a formal complaint. Failure to take these actions may render the recipient's response deliberately indifferent. "We have revised § 106.44(a) to specify that a recipient's prompt, non-deliberately indifferent response must include offering supportive measures to each complainant (i.e., a person who is alleged to be the victim), and specifically having the Title IX Coordinator contact the complainant to discuss the availability of supportive measures with or without the filing of a formal complaint, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint." *Id.* at 30128.

In the detailed discussion in the Preamble of these required actions by a Title IX Coordinator, the Department describes the offering of supportive measures as an "interactive process" and "a meaningful dialogue with the complainant to determine which supportive measures may restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment." *Id.* at 30209. Based on this interactive process, a recipient must *offer* supportive measures to a complainant. "[A] recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances, and so long as the Title IX Coordinator has contacted the complainant to engage in the interactive process also described in revised § 106.44(a)." *Id.*

If the complainant refuses supportive measures that are not clearly unreasonable the Department will not deem the recipient's response to be deliberately indifferent. *Id.* If the recipient does not provide the complainant with supportive measures, then the extensive recordkeeping required by § 106.45(b)(10)(ii) must include the reasons why such response was not clearly unreasonable in light of the known circumstances. The Department, however, recognizes that in the context of an anonymous report a "nondeliberately indifferent response" will vary depending on the extent of information in the report regarding the alleged victim. *See, Id.* at 30132.

As further provided in the definition of supportive measures in § 106.30, the recipient must keep supportive measures provided to complainants or respondents confidential if possible without impairing the ability to provide such measures. The Title IX Coordinator must coordinate "the

effective implementation” of supportive measures, but does not have to be the individual actually providing the measure.

Finally, § 106.44(a) provides that the Department may deem a recipient’s response to be deliberately indifferent if the response entails restriction of rights provided under the U.S. Constitution, including the First, Fifth, and Fourteenth Amendments. The Department explains that the purpose of this provision and similar language in § 106.6 is to protect First Amendment free speech and academic freedom rights, in particular, and the right to due process under the Fifth and Fourteenth Amendments. *Id.* at 30458, 30574-30575. “Due to significant confusion regarding the intersection of individuals’ rights under the U.S. Constitution with a recipient’s obligations under Title IX, the proposed regulations clarify that these regulations do not require a recipient to infringe upon any individual’s rights protected under the First Amendment.” *Id.* at 30418. A nearly identical explanation is included in the Preamble discussion of due process rights. The Department further clarifies that nothing in the Final Regulations affects the meaning or scope of free speech or due process rights. *Id.* at 30573. See further discussion in the *Joint Guidance* for § 106.6.

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