



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.44(b): Response to Formal Complaints

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Note: This document focuses on a summary analysis of Section 106.44(b) of the 2020 Final Title IX Regulations,¹ specifically the required response to formal complaints. 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(b): Required Response to Formal Complaints

Final Rule Section 106.44(b)(1) reiterates the requirement to comply with § 106.44(a) in response to each report of sexual harassment falling within the scope of the regulations, as well as the grievance process obligations established in § 106.45 in response to a formal complaint.

Final Rule Section 106.44(b)(2) states “the Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.” This section reflects a change of the phrase “merely because” (in the proposed regulation) to “*solely* because” (in the final regulation), the significance of which the Department discusses in detail in the Preamble. *See* 85 Fed. Reg. 30026, 30221 (May 19, 2020).

The distinction is important to understand when predicting how the Department might apply its “deliberate indifference” standard to a given case. The Department states it will not find a recipient deliberately indifferent “solely” based on the Department’s disagreement with how an institution weighed evidence to reach a determination regarding responsibility. *See id.* However, where other aspects of the institution’s process are challenged or under review, the Department may consider the institution’s determination regarding responsibility when evaluating overall compliance with the regulations. The Department explained: “Nothing about § 106.44(b)(2) prevents OCR from taking into account the determination regarding responsibility *as one of* the factors OCR considers in deciding whether a recipient has complied with these final regulations, and whether any violations of these final regulations may require setting aside the determination regarding responsibility in order to remediate a recipient’s violations.” *Id.* (Emphasis in original).

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.

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