



2024 Joint Guidance on Federal Title IX Regulations
Analysis on Section 106.44(b): Recipient's response to sex discrimination, Barriers to reporting

July 8, 2024

Note: This document focuses on a summary analysis of Section 106.44(b), specifically Recipient's response to sex discrimination, Barriers to reporting.¹ For a full overview of the changes from the 2020 Regulations and the 2024 Final Regulations, see *Title IX Text for Text 2020 and 2024 Regulation Final Comparison*, available at <https://system.suny.edu/sci/titleix/>.

§ 106.44(b): Recipient's response to sex discrimination, Barriers to reporting

§ 106.44(b) states:

- (b) *Barriers to reporting.* A recipient must require its Title IX Coordinator to:
- (1) Monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and
 - (2) Take steps reasonably calculated to address such barriers.

Summary and Analysis

Explanation and Examples of Adequate Response to Reporting Barriers

The U.S. Department of Education (“the Department”) acknowledged and agreed that some institutions’ “Title IX reporting and complaint processes and grievance procedures can create barriers to reporting sex discrimination.”² The Department also agreed that “inaccessible complaint reporting processes, confusing grievance procedures that lack transparency, and difficult-to-reach Title IX Coordinators or staff who discourage individuals from making reports all serve as barriers to reporting sex discrimination under § 106.44(b).”³ Additionally, the Department agreed with commenters “that poorly managed report and complaint processes, or grievance procedures in which individuals have little confidence due to delays or perceptions of

¹ The effective date of these Regulations will be August 1, 2024 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33564 (April 29, 2024) (hereinafter “2024 Title IX Final Rule”).

³ 2024 Title IX Final Rule, 89 Fed. Reg. 33564.

bias, pose serious barriers to reporting sex discrimination that recipients will be required to address to comply with § 106.44(b).”⁴

The Department furthermore stated in the Preamble that it rejected commenters’ suggestions to require campus surveys or to take other specific steps to monitor barriers.⁵ The Department acknowledged that other laws already require campus climate surveys, and that nothing in the 2024 Title IX Regulations prevents an institution from using surveys to monitor barriers and to increase awareness about Title IX’s protections.⁶ For example, New York State Education Law Article 129-B, enacted in 2015, requires campus climate surveys already relating to sexual assault, dating violence, domestic violence and stalking.⁷

The Department stated in the Preamble to the 2024 Title IX Regulations that when an institution becomes “aware of a barrier to reporting sex discrimination, the recipient must take steps that are reasonably calculated to address that barrier.”⁸ The Department clarified that an institution’s response to reporting barriers “should be tailored to the specific impediments and obstacles it identifies, and recipients should choose strategies that work best given factors unique to their educational environment.”⁹

The Department gave examples of what may be an appropriate response to a barrier to reporting when an institution deems it so: “trainings targeted at a particular academic department or other subdivision of the recipient where the barriers were identified; in-depth training for specific program staff; or widespread training for staff and students.”¹⁰ In addition, responses could include “more frequent and prominent publication of the Title IX Coordinator's contact information; relocation of the Title IX Coordinator's office to a more visible, central, and accessible location; provision of adequate staff for the Title IX Coordinator's office; enhanced training for employees with Title IX responsibilities, including training to ensure that they are free of conflicts of interest and do not discourage reporting; and the development and circulation of user-friendly Title IX materials.”¹¹

Some commenters suggested that this section require an institution to follow up with an individual who reports sex discrimination to make sure that they are not experiencing any further discrimination or retaliation due to their report or their complaint.¹² However, the Department decided not to mandate a particular response because of the fact-specific nature of identifying

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ N.Y. Ed. L. Art. 129-B (2015).

⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33564-65.

⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33565.

¹⁰ *Id.*

¹¹ *Id.*; *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41436 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2022 Title IX NPRM”).

¹² 2024 Title IX Final Rule, 89 Fed. Reg. 33565.

barriers and an institution’s response as warranted by those specific facts.¹³ This section instead allows institutions flexibility to respond to identified barriers to reporting, and the Department believes that because discrimination and retaliation are already prohibited by the 2024 Title IX Regulations in other sections, it is not necessary to include it in section 106.44(b).¹⁴

The Department clarified that the purpose of this section was focused on barriers to reporting and that some commenters had misunderstood its purpose.¹⁵ The Department stated in the Preamble to the 2024 Title IX Regulations that this section did not require a Title IX Coordinator to monitor generally for sex discrimination.¹⁶ The aim of this section, instead, was to ensure that institutions required its “Title IX Coordinators to monitor for and address barriers in their education programs or activities that would prevent or deter individuals from reporting possible sex discrimination.”¹⁷

The Department also disagreed with some commenters’ assertions that this section was vague. The Department stated that the provision set out two clear requirements in its language and that both the Preamble to this section of the 2024 Title IX Regulations as well as the July 2022 Title IX Notice of Proposed Rulemaking (“NPRM”) provided examples of how to monitor barriers and how to address such barriers.¹⁸ This section did not require that an institution’s Title IX Coordinator monitor all conduct in its education program or activity, and rather this section “imposes a specific duty to monitor the recipient’s education program or activity for barriers to reporting sex discrimination, and to take steps reasonably calculated to address those barriers.”¹⁹

Based on comments, the Department changed the title of this section from “Monitoring” to “Barriers to Reporting.”²⁰

Reporting Channels

In the Preamble to the 2024 Title IX Regulations, the Department acknowledged a commenter who “asked the Department to confirm that a recipient’s Title IX Coordinator would be required only to monitor formal channels to reporting sex discrimination and not informal channels, because, the commenter stated, monitoring informal channels would undermine a recipient’s confidential resources and deter individuals from seeking support due to concerns of losing autonomy over their reports.”²¹ The Department clarified that an institution is not permitted to compromise its confidential resources in order to monitor for barriers to reporting.²² However,

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See id* for more examples; *see* 2022 Title IX NPRM, 87 Fed. Reg. 41436.

¹⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33565.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

the Department gave the following example: “if a recipient learns...that some confidential employees mistakenly believe that discrimination based on sexual orientation or gender identity should not be reported to the Title IX Coordinator and are discouraging individuals from making their own reports of such discrimination to the Title IX Coordinator, then the Title IX Coordinator would be required to take steps reasonably calculated to address such barriers, for example, through publicizing corrected information and training employees.”²³

The Department did note that some individuals could be deterred from reporting due to concerns about losing autonomy over their report, and if a Title IX Coordinator learns of this type of barrier, the institution could address this for example by “developing and circulating user-friendly Title IX materials or provide information sessions that clarify the available support options, including confidential resources.”²⁴

Free Speech and Academic Freedom

Some commenters had concerns that this section would restrict speech, limit constitutional rights, and diminish academic freedom.²⁵ The Department reiterated what it stated in the July 2022 NPRM that institutions “are not expected to monitor students’ online activity, including social media.”²⁶ Additionally, this section does not require an institution to monitor the academic discourse of teachers or students in the classroom.²⁷ The Department reiterated that “Title IX is intended to protect students from invidious discrimination, not to regulate constitutionally protected speech.”²⁸ The Department “intends these Title IX regulations to be interpreted consistent with rights protected under the First Amendment, and the protections of the First Amendment must be considered if issues of speech or expression are involved, including academic freedom.”²⁹

The Department stated that they do not believe comments that occur in a classroom as part of academic discourse would constitute a barrier to reporting most of the time.³⁰ However, the Department clarified that if an institution were to become aware of speech that would create a barrier to reporting, the institution “would be obligated to address those barriers in ways that do not infringe on an individual's otherwise protected First Amendment rights by, for example, clarifying the recipient's policies for reporting possible sex discrimination.”³¹

Compliance Burdens

²³ *Id.*

²⁴ *Id.*

²⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33566.

²⁶ *Id.*; see also 2022 Title IX NPRM, 87 Fed. Reg. 41440.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

The Department did acknowledge some of the commenters' concerns with potential compliance burdens.³² However, the Department reiterated an institution's obligation to operate its education program and activities free from sex discrimination when it is federally funded, and that obligation outweighed any burden described by the commenters.³³ In order to meet this obligation, institutions must ensure that individuals are able to report practices and conduct that reasonably may constitute sex discrimination, and requiring institutions to monitor for barriers to reporting is necessary in order for institutions to effectively address sex discrimination when it occurs "and otherwise meet their obligation to ensure that no individual is subjected to sex discrimination in their education program or activity."³⁴

The July 2022 NPRM gave institutions suggestions and examples of how to comply with this section while also acknowledging concerns about institution's differing sizes and resources.³⁵ The Department reiterated the flexibility in how an institution addresses barriers to reporting.³⁶ Additionally, the Department stated that this section "does not require a recipient to address barriers to reporting sex discrimination in its education program or activity as a substitute for 'actual knowledge.'"³⁷ This section ensured that institutions are proactive in determining barriers to reporting.³⁸

The Department clarified that the Title IX Coordinator must monitor for barriers to reporting regardless of whether the institution has been made aware of concerns about barriers.³⁹ The Department also wanted to remind institutions that in addressing a Title IX Coordinator's capacity to adequately perform its required tasks under these regulations, the Title IX Coordinator may delegate specific duties to others as long as there is one Title IX Coordinator who retains ultimate oversight.⁴⁰

Additionally, the Department clarified that the obligations under the final regulations ultimately fall on the institution to require the Title IX Coordinator to take all required actions.⁴¹ Lastly, the Department stated that if an institution fails to ensure that its Title IX Coordinator complies with the duty under this section, it will not meet the requirements of this section and thus the institution "would then potentially be the subject of an administrative enforcement action through which the recipient would be provided notice and an opportunity to come into compliance."⁴²

³² 2024 Title IX Final Rule, 89 Fed. Reg. 33566-67.

³³ 2024 Title IX Final Rule, 89 Fed. Reg. 33567.

³⁴ *Id.*

³⁵ *Id.*; see also 2022 Title IX NPRM, 87 Fed. Reg. 41436.

³⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33567.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

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