



2024 Joint Guidance on Federal Title IX Regulations Analysis on Section 106.44(c): Recipient's response to sex discrimination, Notification requirements

Note: This document focuses on a summary analysis of Section 106.44(c), specifically Recipient's response to sex discrimination, Notification requirements.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/>.

Section 106.44(c): Recipient's response to sex discrimination, Notification requirements

Overview

The 2024 Title IX Regulations require institutions to require its employees to take certain steps regarding what they must do when they become aware of conduct that reasonably may constitute sex discrimination.² For purposes of K-12 institutions, all employees (aside from confidential employees) are required to report such information to the Title IX Coordinator.³ At all other institutions subject to Title IX, including postsecondary institutions, the requirements are more nuanced depending on the duties of the employee in question.⁴

Text of the Regulation

34 C.F.R. 106.44(c)(1) states

(1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part.⁵

34 C.F.R. 106.44(c)(2) provides different standards for notification from employees depending on their duties. One set of employees *must* report conduct that reasonably may constitute sex discrimination, assuming that the employee in question is not the complainant who experienced the conduct.

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 34 C.F.R. § 106.44(c).

³ 34 C.F.R. § 106.44(c)(1).

⁴ 34 C.F.R. § 106.44(c)(2).

⁵ 34 C.F.R. § 106.44(c)(1).

34 C.F.R. 106.44(c)(2)(i) states that institutions must require:

Any employee who is not a confidential employee and who either has authority to institute corrective measures on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part[.]⁶

The preamble refers to these employees as “Category 1” employees.⁷

All other non-confidential employees (who are not themselves the complainants) must either report to the Title IX Coordinator *or* provide the potential complainant with contact information about how to contact the Title IX Coordinator.

34 C.F.R. 106.44(c)(2)(ii) states that institutions must require:

All other employees who are not confidential employees and not covered by paragraph (c)(2)(i) of this section to either:

- (A) Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part; or
- (B) Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or this part.⁸

The U.S. Department of Education (“the Department”) refers to these other employees as “Category 2” employees.⁹

For purposes of student employees, the regulations recognize that they represent a group that needs special consideration.

To that end, 34 C.F.R. 106.44(c)(3) provides:

⁶ 34 C.F.R. § 106.44(c)(2)(i).

⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33574 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

⁸ 34 C.F.R. § 106.44(c)(2)(ii).

⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33574.

A postsecondary institution must reasonably determine and specify whether and under what circumstances a person who is both a student and an employee is subject to the requirements of paragraph (c)(2) of this section.¹⁰

Interestingly, the regulations do not appear to contemplate student employees that perform any of the duties listed in (c)(1) that require reporting to the Title IX Coordinator.

Finally, as noted above, employees are not required to make reports to the extent they are, themselves, the potential complainant.

34 C.F.R. 106.44(c)(4) states:

The requirements of paragraphs (c)(1) and (2) of this section do not apply to an employee who has personally been subject to conduct that reasonably may constitute sex discrimination under Title IX or this part.¹¹

The Department recognized, in the preamble to the 2024 Title IX Regulations, that these notifications are “broader,” stating that it “has come to view broader notification requirements as more important in the time since the previous guidance was issued.”¹²

Confidential Employees

As a reminder, “confidential employee” is now defined in *34 C.F.R. 106.2*, and *34 C.F.R. 106.44(d)* addresses notification requirements for such confidential employees.

What “Reasonably” Constitutes Sex Discrimination?

While commenters worried that this requirement would be too broad in scope, the Department responded:

[E]mployees should be able to assess conduct under a standard that requires them to act based on information about conduct that reasonably may constitute sex discrimination under the recipient’s program or activity. ... [I]t is not necessary for the employee to have factual information that definitively indicates that sex discrimination occurred in order for the employee’s notification requirements ... to apply.¹³

The Department believes that required employee training on what constitutes sex discrimination will assist them in making appropriate determinations about when they are required to make a

¹⁰ 34 C.F.R. § 106.44(c)(3).

¹¹ 34 C.F.R. § 106.44(c)(4).

¹² 2024 Title IX Final Rule, 89 Fed. Reg. 33568.

¹³ 2024 Title IX Final Rule, 89 Fed. Reg. 33569.

report.¹⁴ Certainly, an employee who witnesses the conduct “that reasonably may constitute sex discrimination, including sex-based harassment...will be considered to have ‘information about conduct that reasonably may constitute sex discrimination,’” and will thus have reporting requirements as required under this part.¹⁵

The Department also considered arguments that the reporting requirements would result in reports regarding protected speech under the First Amendment, but rejected these, noting that academic discourse generally does not meet the standard for sex discrimination.¹⁶ The Department noted, “nothing in the Title IX regulations restricts any rights that would otherwise be protected by the First Amendment.”¹⁷

Regarding conduct that occurs outside the United States, such as in a study abroad program, the Department noted that the regulations do not apply to conduct that occurred outside the country but does involve situations in which the student returns to the United States and conduct that occurred outside the country contributes to the hostile environment occurring within its program in the United States.¹⁸ The Department also noted that nothing prohibits an institution from adopting procedures to address conduct beyond what Title IX requires, but that Title IX does not apply outside of the United States.¹⁹

Finally, where a commenter argued that Title IX does not apply to sex discrimination against employees, the Department noted that Title IX has always covered discrimination against employees.²⁰

Does This “Chill” Reporting?

Commenters expressed concerns that the reporting requirements would “chill” reporting, but the Department indicated that it disagrees. The Department noted that commenters “presented no persuasive evidence or reasons to believe that this framework will so significantly deter reporting that the provision’s potential chilling effect outweighs its important benefits.”²¹ Later in the preamble, the Department acknowledged information submitted by commenters regarding the efficacy of mandatory reporting, which offered conflicting evidence, but the Department concluded that its reporting requirements under the 2024 Title IX Regulations are nonetheless appropriate.²²

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33570.

¹⁷ *Id.*

¹⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33576.

¹⁹ *Id.*

²⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33576 (citing *See N. Haven Bd. of Educ.*, 456 U.S. at 520).

²¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33568.

²² 2024 Title IX Final Rule, 89 Fed. Reg. 33572.

The Department similarly rejected comments suggesting that the reporting requirements in 106.44(c) undermine complainant autonomy.²³ The Department indicated that complainants still have the ability to decide whether to move forward with a process and how much they wish to participate, and noted that Title IX Coordinators are only permitted to move forward without complainant’s support in specific situations.²⁴

Must the Two-Tier System Be Used?

The regulations set minimum standards for employee reporting, but do not prohibit institutions from requiring all non-confidential employees (not just those listed in (c)(1)) to report information about conduct that reasonably may constitute sex discrimination to the Title IX Coordinator.²⁵ Category 2 employees either must notify the Title IX Coordinator or provide the contact information of the Title IX Coordinator and information on “how to make a complaint sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations.”²⁶ The Department notes in the preamble, “[t]he recipient will have discretion to determine which of these two actions Category 2 employees must take or whether to leave the discretion to those employees.”²⁷

Can Institutions Require Reporting to Someone Other Than the Title IX Coordinator?

In response to commenters questioning whether reports could be made to a third party, or to supervisors, or other individuals as may be required by state law, the Department noted that there is no prohibition under Title IX against requiring employees to make additional reports.²⁸ However, the Department stated that none of these additional reports could supplant the Title IX regulatory requirement to make such reports to the Title IX Coordinator directly.²⁹

Documentation of Compliance

Best practice suggests that employees should document their compliance with the requirement imposed by 34 C.F.R. 106.44(c). Where reports are made to the Title IX Coordinator, the Coordinator should document the report and reach out to the potential complainant to offer supportive measures and to discuss their options under the institution’s Title IX policy. However, it may be more difficult to document that employees have provided potential complainants with information about how to contact the Title IX Coordinator and make a report.

²³ 2024 Title IX Final Rule, 89 Fed. Reg. 33571.

²⁴ *Id.*

²⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33575.

²⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33574.

²⁷ *Id.*

²⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33568-69.

²⁹ *Id.*

Some institutions have considered that such notice can be sent through an online system. Other institutions have considered providing employees with QR code stickers that will direct individuals to the appropriate information on the spot. Whatever the method chosen, it is recommended that such steps be documented and, preferably, that the documentation is available to the Title IX Coordinator to ensure that such notice is being provided appropriately.

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