



2024 Joint Guidance on Federal Title IX Regulations
Analysis on Section 106.44(h): Recipient's response to sex discrimination, Emergency removal

July 19, 2024

Note: This document focuses on a summary analysis of Section 106.44(h), specifically Recipient's response to sex discrimination, Emergency removal.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(h): Recipient's response to sex discrimination, Emergency removal

§ 106.44(h) states:

(h) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision must not be construed to modify any rights under the Individuals with Disabilities Education Act, [20 U.S.C. 1400](#) *et seq.*, Section 504 of the Rehabilitation Act of 1973, [29 U.S.C. 794](#), or the Americans with Disabilities Act of 1990, [42 U.S.C. 12101](#) *et seq.*

Summary and Analysis

The U.S. Department of Education (“the Department”) agreed with commenters in the preamble to the 2024 Title IX Regulations that this section gives institutions needed flexibility to “remove a respondent on an emergency basis when the [institution] determines that the respondent poses an imminent and serious threat to the health or safety of members of its community.”² The Department considered comments related to the 2022 Title IX Notice of Proposed Rulemaking proposal to no longer require (as the 2020 amendments require) that the threat of harm be

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, 33614 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

physical in nature to utilize this section.³ The Department stated that an emergency removal may be warranted when there is a serious non-physical threat to student safety following an individualized assessment determining so.⁴ The Department gave the following example: “a complainant who is stalked by a respondent may not experience a physical threat, yet the stalking could present an imminent and serious threat to the student's health and safety.”⁵ The Department has concluded that non-physical, serious threats can be assessed objectively, and that it is appropriate to consider non-physical serious threats the same way an institution would consider physical threats.⁶

The Department acknowledged that an emergency removal poses a significant hardship on a respondent and stated that the 2024 Title IX Regulations consider both an institution’s responsibility to ensure a safe campus community as well as the rights of the respondent.⁷ The Department ensured that the 2024 Title IX Regulations in this section retained the protection from the 2020 Title IX Regulations that an institution is required to provide respondent with notice and an opportunity to challenge the determination immediately following an emergency removal.⁸ The Department clarified that this section does not allow an institution to remove someone permanently from its education program or activity.⁹

The Department reiterated and clarified that it retained the framework from the 2020 regulations that in response to comments requesting that the Department set a time limitation for emergency removals “the issue of whether a respondent needs to be removed on an emergency basis should not arise in most cases,” and an emergency removal may only be justified by an imminent and serious threat to health and safety.¹⁰

The Department clarified that emergency removal is not intended to substitute the grievance procedures that would resolve the allegations of sex discrimination.¹¹ The Department did not find it necessary to specify the maximum amount of time for emergency removal under these regulations.¹² However, if an institution did seek permanent expulsion or removal of an individual, then the institution must go through the grievance procedures under § 106.45, and if applicable § 106.46, prior to doing so.¹³

³ *Id.*; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41452 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2022 Title IX NPRM”).

⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33614-15.

⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33615.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 85 Fed. Reg. 30026, 30224 (May 19, 2020) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2020 Title IX Final Rule”).

⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33615.

¹⁰ *Id.*; 2020 Title IX Final Rule, 85 Fed. Reg. 30230.

¹¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33615; 2020 Title IX Final Rule, 85 Fed. Reg. 30229.

¹² 2024 Title IX Final Rule, 89 Fed. Reg. 33615; 2020 Title IX Final Rule, 85 Fed. Reg. 30230.

¹³ 2024 Title IX Final Rule, 89 Fed. Reg. 33615; 34 C.F.R. § 106.45(h)(4).

There were commenters who were concerned that determining whether a threat is “serious” is subjective, but the Department disagreed and felt that this is a familiar term that is flexible enough for an institution to determine through an individualized assessment based on the unique facts and circumstances whether there are health and safety risks posed by the respondent.¹⁴ The Department additionally retained from the 2020 regulations that it is “unnecessary to define what constitutes an emergency or to specify the level of process a recipient must provide through its procedures to challenge an emergency removal, beyond providing the respondent with notice and an opportunity to challenge the decision immediately following the removal.”¹⁵ The specific procedures utilized are left to the institution’s discretion.¹⁶

The Department believed that institutions “must have flexibility to address emergency situations and notes that § 106.44(h) appropriately balances the seriousness of a respondent’s removal and rights to receive the ‘essential’ protections of due process against the risks raised in situations in which emergency removal is justified.”¹⁷ The Department declined to require institutions “to follow the grievance procedures in § 106.45, and if applicable § 106.46, before a respondent is removed on an emergency basis.”¹⁸

Regarding the regulation’s requirement that recipients undertake an individualized risk assessment, the Department recognized that different recipients use different terms to describe their individualized assessments. Regardless of the precise terms or phrases used, recipients will satisfy the requirement in § 106.44(h) if they have a process to conduct an analysis of safety and risk that is particular to the respondent and circumstances at issue, regardless of the words recipients use to describe their assessment.

The Department clarified that the purpose of this section “is to protect against an imminent and serious threat to health or safety that arises from allegations of sex discrimination,” and that the provisions of §§ 106.45 and 106.46 give an institution the necessary tools to protect its community from sex discrimination allegations that “do not raise a concern of imminent or serious threats to health or safety.”¹⁹

Changes from 2022 NPRM

The Department replaced the phrase “immediate threat” with “imminent threat” in the 2024 regulations under this section.²⁰ This is due to the Department agreeing with commenters’ suggestion of this because “‘immediate’ threats involve emergency situations in which there is not time for recipients to assess risks and in which an immediate law enforcement response is necessary” while “‘imminent’ threats are those that while not active, are likely to occur soon but not immediately, and thus are appropriate for an individualized risk assessment.”²¹ The Department declined commenters’ suggestion that a threat should be ongoing in order to justify

¹⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33615

¹⁵ *Id.*

¹⁶ *Id.*; 2020 Title IX Final Rule, 85 Fed. Reg. 30226.

¹⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33615.

¹⁸ *Id.*

¹⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33616.

²⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33615.

²¹ *Id.*

an emergency removal “because a threat may present an imminent and serious risk to safety that justifies emergency removal, even if it is not shown to be an ongoing threat.”²²

Sex Discrimination and Protected Speech

There were comments in the Preamble to the 2024 Title IX Regulations which opposed allowing emergency removal for all forms of sex discrimination, as opposed to only sex-based harassment, which the Department carefully considered.²³ The Department stated, however, that it will not limit this section to sex-based harassment only “because the nondiscrimination mandate in Title IX—and therefore the basis for [an institution’s] response—applies to all forms of sex discrimination, including circumstances involving sex discrimination other than sex-based harassment.”²⁴ The Department stated that it does recognize that emergency removal may occur most frequently in the context of sex-based harassment, but the Department aims to give institutions flexibility to utilize it in cases that do not rise to the level of sex-based harassment, but fall into the definition of sex discrimination where there is an “imminent and serious threat to the health or safety” of the institution’s community.²⁵ The Department has and continues to recognize that an institution must have the ability to remove a respondent when a genuine emergency exists.²⁶

In response to commenters’ concerns that a respondent may be punished with emergency removal in response to unfavorable speech, the Department “reiterates that emergency removal is intended to apply only to those situations that pose an imminent and serious threat to health and safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination, an intentionally high standard. The Department does not anticipate that speech that simply and even strongly articulates a point of view on ethical, social, political, or religious topics would meet this standard even though others may find that speech offensive or objectionable.”²⁷ The Department reiterates that Title IX is enforced only as consistent with the First Amendment and that “nothing in these final regulations requires [an institution] to restrict any rights that would otherwise be protected from government action by the First Amendment.”²⁸

Additionally, the Department has “consistently recognized that threats beyond acts of physical violence may justify emergency removal.”²⁹

Partial Emergency Removals and Supportive Measures

The Department clarified in the preamble to the 2024 Title IX Regulations that the 2020 amendments do allow an institution to remove a respondent from a portion of the institution’s education program or activity as opposed to the entire program or activity, on an emergency

²² 2024 Title IX Final Rule, 89 Fed. Reg. 33615-16.

²³ 2024 Title IX Final Rule, 89 Fed. Reg. 33616.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; see for example, 2020 Title IX Final Rule, 85 Fed. Reg. 30224.

²⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33616.

²⁸ *Id.* (see 34 C.F.R. 106.6(d)).

²⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33616.

basis, where appropriate.³⁰ This can take the form of being removed only from certain clubs, classes, teams, organizations, activities, etc.³¹ The Department also stated that it will retain this in the 2024 Regulations, and stated that “under § 106.44(h) of the final regulations, [an institution] retains discretion to remove a respondent on an emergency basis from one or more parts of its education program or activity, as long as the recipient meets the other requirements of final § 106.44(h).”³²

The Department furthermore acknowledged confusion from some commenters about when an institution would remove a respondent from part of its education program or activity as an emergency removal under this part versus when the institution would do so as a supportive measure instead under § 106.44(g)(2).³³ The Department clarified that a “partial removal may be appropriate as a supportive measure, as long as it is consistent with the requirements of § 106.44(g) and the definition of supportive measures in § 106.2.”³⁴ The Department stated that an institution could also, in emergency situations, remove a respondent using the emergency removal procedures under this part of the 2024 Title IX Regulations.³⁵ If removing under an emergency under this part, the institution is permitted to remove the respondent from all or part of the education program or activity, so long as “it affords the respondent notice and an opportunity to challenge the decision immediately following the removal.”³⁶

The Department also reiterated that, like it was pointed out in the preamble to the 2020 amendments, in many cases an institution will “accommodate students who have been removed on an emergency basis with alternative means to continue academic coursework during a removal period.”³⁷ Respondents are provided a post-removal notice and opportunity to challenge such removal under this part of the 2024 Title IX Regulations which provides respondents with an opportunity to raise any concerns they may have about continuing to access coursework.³⁸

Emergency Removal and Other Legal Requirements

In response to commenters’ questions about how the final regulations interact with other laws, the Department reiterated what was stated in the 2020 amendments: that the 2024 Title IX Regulations may impose different requirements than Title VI or Title VII; however, these final regulations “do not present an inherent conflict with those statutes.”³⁹ Thus, the Department stated in the preamble to these regulations that even though an institution may be able to address other forms of discrimination under other laws by taking immediate action that would not satisfy the requirements under this section, the Department believed that this section in the final

³⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33617; 2020 Title IX Final Rule, 85 Fed. Reg. 30232.

³¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33617.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*; 2020 Title IX Final Rule, 85 Fed. Reg. 30226.

³⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33617.

³⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33617; 2020 Title IX Final Rule, 85 Fed. Reg. 30439.

regulations is appropriate for addressing sex discrimination, even if that means an institution has to handle other types of discrimination under separate procedures.⁴⁰

The Department reiterated in the Preamble to this part that the final regulations do not alter any requirements under FERPA or the Clery Act, “and disclosures pursuant to such requirements generally will be permitted under § 106.44(j).”⁴¹ The discussion surrounding § 106.44(j) has more information about “the circumstances under which a recipient may disclose personally identifiable information obtained in the course of complying with this part.”⁴²

The Department also clarified in this section as well as other sections that these regulations do not modify any rights under any part of the Americans with Disabilities Act.⁴³ The Department acknowledges that respondents do have rights to an assessment and other disability-related rights under Section 504, the IDEA, and the ADA.⁴⁴ The Department stated that “[e]mergency removal under § 106.44(h) provides flexibility to address imminent and serious threats to individual safety in a recipient's education program or activity, including threats to non-physical health, while safeguarding the rights of a respondent under applicable law.”⁴⁵

Lastly, the Department clarified that emergency removal is not “relevant evidence” for consideration in reaching a determination under § 106.45(b)(6) and (h)(1).⁴⁶

The Joint Guidance on the 2024 Title IX Regulations is prepared as a service by in-house and firm attorneys, but does not represent legal advice. The 2024 Joint Guidance is compliance advice and no attorney/client relationship is formed with any contributor or their organization. Legal advice for specific situations may depend upon state law and federal and state case law and readers are advised to seek the advice of counsel. The 2024 Joint Guidance is available absolutely free pursuant to a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license](#) (meaning that all educational institutions are free to use, customize, adapt, and re-share the content, with proper attribution, for non-commercial purposes, but the content may not be sold).

⁴⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33617; 2020 Title IX Final Rule, 85 Fed. Reg. 30226.

⁴¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33617-18.

⁴² 2024 Title IX Final Rule, 89 Fed. Reg. 33618.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*