



2024 Joint Guidance on Federal Title IX Regulations
Analysis on Section 106.44(i): Recipient's response to sex discrimination, Administrative leave

July 19, 2024

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

§ 106.44(i) states:

(i) *Administrative leave.* Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. This provision must not be construed to modify any rights under 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

This section essentially allows an institution the discretion to place respondents who are employees on administrative leave during the duration of an institution's grievance procedures.² In response to comments, the Department clarified that allowing administrative leave does not presume a respondent's responsibility, and that a respondent can only be found responsible under Title IX when an institution's grievance procedures conclude so under § 106.45, and if applicable § 106.46.³

The Department also clarified that nothing in this part prevents an institution's discretion to place respondents who are also employees (including student-employees), on administrative leave from their employment during the duration of the institution's procedures.⁴ The Department stated that an institution must comply with § 106.45, and if applicable § 106.46, prior to any

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, 33618 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter "2024 Title IX Final Rule").

³ 2024 Title IX Final Rule, 89 Fed. Reg. 33618.

⁴ *Id.*

disciplinary actions being imposed on the respondent who is a student-employee, and supportive measures can not be provided for the purposes of discipline.⁵

The Department clarified that this section of the final regulations is consistent with the Department’s position in the 2020 regulations that an institution “may place a student-employee respondent on administrative leave if it would not violate other regulatory provisions to do so.”⁶

Volunteers, Agents, or Other Authorized Individuals

The Department disagreed with some commenters who suggested that this section should be changed so that an institution can place volunteers, agents, and others authorized by the institution to provide a benefit, service, or aid on administrative leave.⁷ This section of the 2024 Title IX Regulations does not define administrative leave, and neither does the 2020 regulations, but the Department nonetheless understands the term to mean “a temporary separation from one’s employment, generally with pay and benefits, and thus, the term applies to” an institution’s employees.⁸ The Department reiterated as explained in the Preamble for § 106.8(d), that because there are varying state employment laws that impact institutions, each institution is in the best position to determine whether such volunteers, agents, and others that are authorized to provide a benefit, service, or aid is an employee respondent in which this section applies.⁹

However, the Department did note that even if individuals are deemed to be employees, nothing in this section will restrict an institution from following its own “policies related to administrative leave with respect to other individuals (including volunteers, agents, and the like), provided that the policies comply with these final regulations and other applicable laws.”¹⁰ Additionally, this section does not interfere with an institution’s ability to remove an agent, volunteer, or other authorized person “from their position as a supportive measure for non-punitive, non-disciplinary reasons to protect the safety of a party or the recipient’s educational environment, consistent with the requirements of § 106.44(g).”¹¹ The Department also clarified that this section does not interfere with an institution’s ability to remove a volunteer, agent, or other authorized person from their position due to an emergency when that removal meets the requirements of § 106.44(h).¹²

Due Process Concerns

⁵ *Id.*

⁶ *Id.*; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 85 Fed. Reg. 30026, 30237 (May 19, 2020) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2020 Title IX Final Rule”).

⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33618.

⁸ *Id.*; see 2020 Title IX Final Rule, 85 Fed. Reg. 30236.

⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33618.

¹⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33618-19.

¹¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33619.

¹² *Id.*

In terms of commenters' concerns about due process in relation to administrative leave, the Department noted that this section is essentially the same as section 106.44(d) in the 2020 regulations with only very minor changes in the 2022 Notice of Proposed Rulemaking.¹³ The Department wanted, as was its position in the 2020 regulations, to give each institution flexibility to determine when an administrative leave is appropriate, while considering its obligations under state laws as well as employment contracts.¹⁴

This section does not allow that an employee-respondent's due process rights be violated.¹⁵ If the institution places an employee on administrative leave as a supportive measure under section 106.44(g), then the institution must follow all procedural protections in that section.¹⁶ If administrative leave is utilized as a supportive measure, it would generally be paid so that the requirement that a supportive measure does not unreasonably burden a party under § 106.44(g)(2) is met.¹⁷ Additionally, if the institution seeks to remove someone on an emergency basis under § 106.44(h), then the procedural protections of that section apply.¹⁸

Administrative Leave in cases other than Supportive Measure or Emergency Removal

The Department recognized that there may be times when an institution decides to place an individual on administrative leave not for the reason of supportive measure or emergency removal.¹⁹ For example, as was explained in the 2020 regulations, "some State laws allow or require an employee to be placed on administrative leave, or its equivalent, and § 106.44(i) does not preclude compliance with such State laws while a Title IX investigation is pending."²⁰ Additionally, this section will not interfere with an institution's contractual obligations, like a collective bargaining agreement, nor does it interfere with an institution's own policies related to administrative leave.²¹ If an administrative leave is utilized outside of being a supportive measure or emergency removal, then the "final regulations provide [institutions] flexibility to use their existing procedures related to administrative leave."²²

Administrative Leave and Other Laws

The Department reiterated that it interprets the 2024 Title IX Regulations, including this section, "in a manner that complements an employer's obligations under Title VII for respondent to

¹³ *Id.*; see 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").

¹⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33619; see 2020 Title IX Final Rule, 85 Fed. Reg. 30236.

¹⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33619.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; see 2020 Title IX Final Rule, 85 Fed. Reg. 30236.

²¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33619.

²² *Id.*

matters involving sex-based harassment and discrimination.”²³ The Department noted that other laws or contractual obligations may limit the institution’s use of administrative leave, and that this section “is not intended to override or modify rights under other laws or collective bargaining agreements.”²⁴

The Department also noted that this section does not require an institution to place an employee on administrative leave during the duration of the institution’s grievance procedures.²⁵

Administrative Leave is Temporary

The Department clarified, as it did in the 2020 regulations, that administrative leave under this section is only temporary and this section only applies for the duration of the institution’s grievance procedures.²⁶ This was specifically crafted so as to protect due process rights.²⁷ If an administrative leave is imposed under a different law, agreement, or policy, this section does not prevent that, but that is outside the scope of this section.²⁸

Employee Rights under Title IX

The Department did wish to clarify that if an institution does place an employee on administrative leave, that does not deprive that employee of other rights that are available under Title IX.²⁹ The Department gave the following example: if “an employee believes that they have been subject to sex discrimination or retaliation through the application of an employer’s administrative leave policy, the employee would have recourse under Title IX and these final regulations.”³⁰

Employee & Workplace Hardship

The Department continues to acknowledge, as it did in the 2020 regulations, that being placed on administrative leave may amount to a hardship for an employee.³¹ However, such an administrative leave “may be necessary to ensure that a recipient’s education program or activity is operated consistent with Title IX’s nondiscrimination mandate.”³² The Department also knows “that placing an employee on administrative leave may impact the workplace, but for the reasons described above, the Department maintains that [an institution] should have flexibility not only to use administrative leave as a supportive measure or in the context of emergency removal, but

²³ *Id.*; see 2020 Title IX Final Rule, 85 Fed. Reg. 30237.

²⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33619.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; see 2020 Title IX Final Rule, 85 Fed. Reg. 30236-37.

²⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33619.

³⁰ *Id.*; see 34 C.F.R. §§ 106.45, 106.46, 106.71.

³¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33619; see 2020 Title IX Final Rule, 85 Fed. Reg. 30236.

³² 2024 Title IX Final Rule, 89 Fed. Reg. 33619.

also to comply with other State law or contractual obligations, and the [institution] would be in the best position to know whether administrative leave is appropriate.”³³

Department Declines to Remove this Provision

The Department declined to modify this section so that an institution can address an employee-respondent’s issues solely through its discipline processes.³⁴ The Department extended this provision of Title IX to employee-respondents in order to ensure that an institution meets its obligations under Title IX.³⁵ However, the Department reiterated, as it did so in 2020, that nothing in these regulations stop an institution from taking any additional action against an employee under its code of conduct or other policies,³⁶ or from honoring a collective bargaining agreement, or employment contract, “as long as doing so does not prevent the [institution] from fulfilling its obligations under the Department’s Title IX regulations.”³⁷

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³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; see 2020 Title IX Final Rule, 85 Fed. Reg. 30440.

³⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33619; 2020 Title IX Final Rule, 85 Fed. Reg. 30442.