



2024 Joint Guidance on Federal Title IX Regulations Analysis on Section 106.44(j): Recipient's response to sex discrimination, Prohibited disclosures of personally identifiable information

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Note: This document focuses on a summary analysis of Section 106.44(j), specifically Recipient's response to sex discrimination, Prohibited disclosures of personally identifiable information.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(j): Prohibited Disclosure of Personally Identifiable Information

§ 106.44(j) states:

(j) *Prohibited disclosures of personally identifiable information.* A recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in the following circumstances:

- (1) When the recipient has obtained prior written consent from a person with the legal right to consent to the disclosure;
- (2) When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;
- (3) To carry out the purposes of this part, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity;
- (4) As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or

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.

(5) To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.²

Summary and Analysis

Prior Written Consent

The phrase “from a person with a legal right to consent to the disclosure” recognizes that there are various federal and state laws that may govern who has the legal authority to consent to disclosure of PII depending on factors such as the age of the person whose PII is at issue, whether the person at issue is in attendance at an institution of postsecondary education and whether the PII is in an education record. Schools must obtain consent from a person with legal authority under applicable law and, if that person is not the same person whose PII is at issue, the school need not also obtain consent from the person whose PII is at issue (e.g. a parent of a minor child).

If the PII is in an education record, the consent requirements of FERPA apply. If the PII is not in an education record, then there may be applicable state law requirements governing consent to disclosure.

Parent, Guardian, or Authorized Legal Representative

This paragraph does not prohibit any disclosure to a parent, guardian, or other authorized legal representative who has the legal right to receive disclosures on behalf of the person whose PII is at issue.

This must be applied consistent with FERPA. For example, if a student is a minor under state law but an “eligible student” under FERPA because they are attending a post-secondary institution, FERPA does not permit disclosure to parents unless the student provides prior written consent or one of FERPA’s permissive exceptions to FERPA’s written consent requirement applies.

Purposes of Title IX

As an example, a professor may receive information about a supportive measure that a student is receiving that is related to the professor’s classroom to ensure its implementation, but it is not permissible to disclose PII about any related complaint of sex-based harassment that is not necessary to implement the supportive measure absent prior written consent or one of the other exceptions.

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33890 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

As another example, parties must be provided an equal opportunity to access evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible.

Federal Law, Regulations or Award

The Rule clarifies that it does not prohibit disclosures required by the terms and conditions of a federal grant or award. The terms and conditions of a federal award, including a grant award or other funding agreement, must also be in accordance with FERPA in order to make a disclosure under such an award.

This exception permits disclosure of PII that is required under Title IX, FERPA, and HIPAA, as well as other federal statutes and their accompanying regulations. Permissive FERPA disclosures are generally permitted (see next section).

FERPA

Institutions must follow the requirements of both Title IX and FERPA, unless there is a conflict that prevents compliance with both.³ Disclosures that are permitted, but not required, under FERPA, to the extent such disclosures are not otherwise in conflict with Title IX or the Rule, are permitted. When there is a conflict between an institution's obligations under Title IX and under FERPA, §106.6(e) states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations.⁴ This FERPA override is known as the GEPA override.⁵ FERPA permits but does not require a school to disclose PII from a student's education record when one or more exceptions apply. However, disclosure of PII that creates a hostile environment or is made for the purpose of retaliation would be prohibited—because it is prohibited by Title IX—even if it would be permissible under FERPA.

Determinations of a hostile environment will be made following case-by-case review of specific facts, but it could be a violation of this provision if a school were to disclose PII about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment.

State and local laws that conflict with Title IX are preempted.⁶ Disclosures required under state or local law that would prevent or impede a school from carrying out its Title IX obligations are not permitted. Disclosures that are required under state law that are not in conflict—for example, a mandatory reporting law requiring disclosure of an employee accused of sexually assaulting a student—are permissible.⁷ Permissible disclosures must comply with FERPA.

³ *Id.* at 33536.

⁴ *Id.* at 33536.

⁵ *Id.*

⁶ *Id.* at 33578.

⁷ *Id.*

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