



2024 Joint Guidance on Federal Title IX Regulations Analysis on Section 106.2: Definition – Confidential Employee

July 2, 2024

Note: This document focuses on a summary analysis of Section 106.2, specifically Definition – Confidential Employee.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/>.

§ 106.2: Definition - Confidential Employee

As defined in the regulation,

Confidential employee means:

- (1) An employee of a recipient whose communications are privileged or confidential under Federal or State law. The employee’s confidential status, for purposes of this part, is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies;
- (2) An employee of a recipient whom the recipient has designated as confidential under this part for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee’s confidential status is only with respect to information received about sex discrimination in connection with providing those services; or
- (3) An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination-but the employee’s confidential status is only with respect to information received while conducting the study.

Analysis of the Definition of Confidential Employee

Overview

The addition of the definition for “confidential employee” is new, as it has not been previously defined in the final 2020 Title IX Regulations. An employee with a confidential status does not

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.

need to report conduct that reasonably may constitute sex discrimination to the Title IX Coordinator. Since confidential employees do not have to report such conduct, a recipient is “not considered to have knowledge of conduct that reasonable may constitute sex discrimination if the only employee who knows about such conduct is a confidential employee.”² However, other laws may require a confidential employee to disclose the information for other purposes.³

“Confidential employees” are divided into three different categories. Rather than designating specific types of individuals as confidential employees, the Department felt it necessary to provide institutions with the flexibility and discretion to identify individuals based on facts specific to their roles.⁴ For instance, a victim advocate would likely fall under the first or second category of confidential employee as outlined below.⁵

Three Categories of Confidential Employees

The first category of “confidential employees” consists of a recipient’s employees “whose communications are privileged or confidential under Federal or State law. The employee’s confidential status, for purposes of this part, is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies.”⁶

Suggestions by commenters swayed the Department to modify this category to include employees whose communications are “privileged or confidential.” This modification aligns with the rationale for protecting privileged communications with confidential employees and addresses employees whose communications are confidential under law.⁷ Also based on commenters’ suggestions, the scope in which a confidential employee’s confidential status applies for the purposes of Title IX is only with respect to information received while functioning within the scope of their duties that apply confidentiality or privilege.⁸ To further clarify, not all communications with confidential employees that fall under this category are confidential. Confidentiality only applies for purposes of the Title IX regulations when the employee is performing duties to which the privilege or confidentiality applies.⁹

The second category of “confidential employees” includes those who are designated by the institution “as confidential under this part for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those

² 2024 Title IX Final Rule, 89 Fed. Reg. 33579 (Apr. 29, 2024).

³ *Id.*

⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33579 (Apr. 29, 2024).

⁵ *Id.*

⁶ 34 C.F.R. § 106.2.

⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33579 (Apr. 29, 2024).

⁸ *Id.*

⁹ *Id.*

services, the employee’s confidential status is only with respect to information received about sex discrimination in connection with providing those services.”¹⁰

The third category of “confidential employees” includes “an employee if a postsecondary institution who is conducting Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination – but the employee’s confidential status is only with respect to information received while conducting the study.”¹¹

Differences between “Confidential Employees” and “Confidential Resources”

The term “confidential employee” refers only to employees of the recipient and should not be confused with confidential resources.¹² Confidential resources include those who provide privileged and confidential support such as physicians, clergy, and providers from community-based organizations that may provide support for students and employees.¹³ Additionally, confidential resources include individuals employed by the institution and meet the definition of “confidential employee,” including those designated by the institution as providers of confidential services to individuals who may have experienced or been accused of engaging in conduct that may constitute sex discrimination.¹⁴ While some individuals may qualify as both a confidential employee and confidential resource, “confidential resources” do not need to be an employee of the institution to fall under one of the three categories of confidential employees. Further, the Department has not expanded the confidential employee provision to cover non-employees.¹⁵

Second Category of Confidential Employee- Employee Designated to Provide Services Related to Sex Discrimination

*An employee of a recipient whom the recipient has designated as confidential under this part for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee’s confidential status is only with respect to information received about sex discrimination in connection with providing those services, the employee’s confidential status is only with respect to information received about sex discrimination in connection with providing those services...*¹⁶

If an employee is designated as confidential for the purpose of providing services to persons in connection with sex discrimination and that employee also has duties unrelated to providing

¹⁰ 34 C.F.R. § 106.2.

¹¹ 34 C.F.R. § 106.2.

¹² 2024 Title IX Final Rule, 89 Fed. Reg. 33578 (Apr. 29, 2024).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33882 (Apr. 29, 2024).

those services, the employee’s confidential status only applies to information received in connection with the employee providing services to persons related to sex discrimination.¹⁷ The employees who qualify as a “confidential employee” under the second category will vary by recipient and based on the employee’s assigned duties. These confidential employees may include, but are not limited to, guidance counselors, organizational ombuds, or staff within an on-campus sexual assault response center. The Department also confirms that these final regulations do not impose any limit on the number of employees a recipient can designate as confidential.¹⁸

Some individuals who are confidential employees as defined under this proposed § 106.2 may nonetheless be required to disclose certain information by law, such as mandatory reporting laws applying to the elementary school and secondary school context. The Department has added “under this part” to the definition in the second category to emphasize that employees who are designated as confidential by the recipient are so designated for purposes of the Title IX regulations and may not be considered confidential for purposes of other laws.¹⁹

Category Two and Confidential Resources

The Department notes that the second category of the proposed definition of “confidential employee” refers to an employee designated as a “confidential resource.” The Department acknowledges that the use of the phrase “confidential resource” within the definition of “confidential employee” may have caused confusion, and that the two unrelated uses of the phrase “confidential resource” within the Title IX regulations may have caused further confusion. To enhance clarity and minimize the risk of confusion, the Department has made a non-substantive revision to use the phrase “designated as confidential” rather than “designated as a confidential resource” and thereby removed the reference to a confidential resource.²⁰

See Discussion of § 106.45(b)(5) for further explanation of a confidential resource.²¹

Changes from the 2022 Proposed Regulations for Category Two

In the second category of the definition of “confidential employee,” the Department has replaced the phrase “designated as a confidential resource” with the phrase “designated as confidential.” The Department has also added “under this part” to clarify the applicability of the employee’s confidential status. The Department has also made the following non-substantive revisions: replacing the phrase “in connection with” with the phrase “related to”; replacing the phrase “limited to” with “only with respect to”; and replacing “status as confidential” with “confidential status.”²²

¹⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33580 (Apr. 29, 2024).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Third Category of “Confidential Employee”—Employee of a Postsecondary Institution Conducting an Institutional Review Board-Approved Research Study ²³

Commentators have urged the Department to expand the third category to cover employees of research institutions that conduct Institutional Review Board (IRB) approved research through a contract with a recipient to cover any individual or entity (*i.e.*, not limited to employees of postsecondary institutions) that conducts IRB approved research, or to cover an employee of a postsecondary institution who is conducting research studies that are exempt from the requirement for IRB approval, such as an employee who conducts sexual harassment climate surveys.²⁴

The Department responded by clarifying that the third category of the definition of “confidential employee” includes researchers who are employed by one recipient and are conducting research studies that were approved by another recipient’s IRB.²⁵

The Department acknowledged the suggestion to expand the third category of the definition of “confidential employee” to include employees of research institutions that are not affiliated with a recipient but that are collecting IRB-approved research as part of a partnership or contract with a recipient. However, the obligations under Title IX are limited to a recipient and would not cover research institutions that are not affiliated with a recipient. Thus, the Department has declined to expand the confidential employee provisions to cover non-employees generally, or to cover employees of research institutions that are not affiliated with a recipient.²⁶

Section 106.44(c) does not require a recipient to impose any reporting requirements on non-employees (unless the Title IX Coordinator has delegated some of the Title IX Coordinator’s obligations to a non-employee), and so there is no need to exempt non-employees who conduct IRB studies from Title IX’s reporting requirements.²⁷

Climate Surveys

The Department states that it recognizes that valuable information can be obtained through climate surveys and similar research and that some students may be reluctant to participate in such surveys or research if they fear the information they share could be disclosed. The Department went on further to explain that it recognizes that designating the employees who conduct these surveys as confidential could significantly impede the recipient’s ability to learn about and take appropriate actions to address concerns raised in climate surveys or similar studies. The Department notes that the recipient may take steps to protect the privacy of information shared on climate surveys, such as by making the surveys anonymous with an option

²³ *Id.*

²⁴ *Id.*

²⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33581 (Apr. 29, 2024).

²⁶ *id.*

²⁷ *Id.*

for students completing the survey to disclose their names. For this reason, the Department declines to expand the third category of “confidential employee” to include those who conduct climate surveys.²⁸

Department Declines to Delete Third Category in Definition

One commentator suggested deleting this third category in the definition of “confidential employee.” The Department countered by stating that the fact that studies require participants to consent or the fact that certain information from studies may be shared with the recipient does not obviate the need to exempt employees who are conducting IRB-approved human subjects research studies related to sex discrimination from the notification requirements of §106.44(c). Neither an individual’s consent to participate in a study nor the agreement of the employees conducting the study to share information with the recipient will necessarily encompass the sharing of information or conduct involving specific individuals with a Title IX coordinator, so protections for such individuals are still necessary even in these circumstances.²⁹

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²⁸ *Id.*

²⁹ *Id.*