



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

July 3, 2024

Note: This document focuses on a summary analysis of Section 106.44(a), specifically Recipient's response to sex discrimination, General.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(a) General. Recipient's Duty to Address Sex Discrimination.

Section 106.44(a) provides that:

(a) *General.* (1) A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively; and (2) A recipient must also comply with this section to address sex discrimination in its education program or activity.²

Summary and Analysis

New Notice Standard: "Knowledge of conduct that may reasonably constitute sex discrimination"

In its reconfigured expectation for recipients' general duty to address sex discrimination, the Department returns to a broader standard for the administrative enforcement of the new 2024 Title IX Final Rule. This standard applies to all possible sex discrimination, not just sexual harassment. In the 2020 Title IX Regulations, recipients were only required to respond to possible sexual harassment when it had "actual knowledge" of sexual harassment/alleged sexual harassment.³ For elementary and secondary schools, actual knowledge in the 2020 Title IX Regulations meant notice to any employee of sexual harassment or allegations of sexual harassment; for post-secondary schools, actual knowledge meant notice of sexual harassment or allegations of sexual harassment to the institution's Title IX coordinator or any institution official who had the authority to institute corrective measures on behalf of the institution.⁴

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(a).

³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33560 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter "2024 Title IX Final Rule").

⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33560.

In the 2024 Title IX Regulations, the Department requires that a recipient must respond promptly and effectively when it has knowledge of conduct that reasonably may constitute sex discrimination.⁵ A recipient is deemed to have such knowledge when any non-confidential employee has information about conduct that may reasonably constitute sex discrimination.⁶ The Department described its concern that the 2020 Title IX Regulations’ definition of “actual knowledge” meant that post-secondary institutions might be able to ignore allegations if they were not reported to the “right” employee, so for the 2024 Title IX Regulations, the Department decided that limiting post-secondary institutions that way was not effective in the administrative enforcement context, “because all recipients of Federal financial assistance have a duty to operate their education programs or activities free from sex discrimination regardless of the age of the students they serve.”⁷

Revised requirement for the nature of a recipient’s response to knowledge of conduct: must be “prompt and effective”

Per the 2020 Title IX Regulations, a recipient with “actual knowledge” of sexual harassment had to respond promptly in a manner that was not “deliberately indifferent.”⁸ The 2024 Title IX Regulations remove the “deliberate indifference” standard and require that the nature of a recipient’s response must be “prompt and effective.”⁹ This requirement is described more thoroughly in 106.44(f), where the regulations describe which actions must be taken in order to “promptly and effectively end any sex-based discrimination in its education program or activity, prevent its recurrence, and remedy its effects.”¹⁰

The Department describes that the 2020 Title IX Regulations “created a troubling gap in implementing Title IX’s prohibition on sex discrimination” as a recipient’s employee could have information about possible sex discrimination in a program or activity, yet the recipient would have no obligation to take any action to address it, unless a formal complaint was filed or the Title IX coordinator became aware of it.¹¹ The Department states that “Title IX does not permit a recipient to act merely without deliberate indifference,” but rather it is responsible for ensuring that federal funds it has received are not used to further discrimination.¹²

The Department clarifies that the 2024 Title IX Final Regulations do not impose a strict liability standard, and explains that the new standard does not mean that the recipient is responsible for conduct that occurred before an employee of the recipient became aware of the conduct.¹³ The

⁵ 34 C.F.R. § 106.44(a).

⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33561.

⁷ *Id.*

⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33560.

⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33561; 34 C.F.R. § 106.44(a).

¹⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33592.

¹¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33561.

¹² *Id.*

¹³ 2024 Title IX Final Rule, 89 Fed. Reg. 33562.

Department explains that it declines to impose a “knew or should have known” standard; it feels that such a standard is not necessary given the 2024 Title IX requirement that employees respond promptly and effectively to information about conduct that may reasonably constitute sex discrimination.¹⁴ It notes that consistent with the 2020 Title IX Regulations, “the recipient need not have incontrovertible proof that conduct violates Title IX for it to have an obligation to respond; if the conduct reasonably may be sex discrimination, the recipient must respond in accordance with § 106.44”.¹⁵

The Department emphasizes that the 2024 Title IX Regulations focus on the administrative enforcement context, in which recipients must fully effectuate Title IX so the Department can ensure its funds are not used to further discrimination, and that it is not required to adopt the Gebser/Davis deliberate indifference standard for its administrative enforcement purposes.¹⁶ It notes that recipients must comply with both the Department’s administrative enforcement regulations, and they are subject to the Gebser/Davis standard for private damages liability.¹⁷

The language of the title for § 106.44 was revised from the 2022 Proposed Title IX Regulations to clarify that “this section covers a recipient’s response to sex discrimination as opposed to a recipient’s responsibility to operate its education program or activity free from sex discrimination.”¹⁸ The Department noted that § 106.44(a)(2) was added in order to clarify that a recipient must take the actions outlined in § 106.44(b)-(k) to comply with the obligation to operate its education program or activity free from sex discrimination, both to ensure it has knowledge of conduct that reasonably may constitute sex discrimination, and also to be able to respond appropriately once they have that knowledge.¹⁹

The Department addressed the question of whether a recipient is relieved of its Title IX obligations in situations where the respondent is the only employee in an elementary or secondary school who is aware of possible sex discrimination. It stated that “a recipient is not relieved of its Title IX obligations simply because the respondent is the only employee of the recipient with knowledge of possible sex discrimination,” but acknowledged that a recipient may be “practically unable to respond until after a complaint is made” or the conduct becomes known to another employee.²⁰

Comparisons to Title VII

The Department considered public comments that opposed having different standards of liability for Title IX and Title VII, and concluded that although the 2024 Title IX Regulations are aligned more closely with Title VII, it is not bound by Title VII standards in terms of establishing Title

¹⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33563 (Apr. 29, 2024).

¹⁵ *Id.*

¹⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33560

¹⁷ *Id.*

¹⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33562.

¹⁹ *Id.*

²⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33563.

IX implementation standards.²¹ It refers to the Preamble discussions for sections II.C. and § 106.2, and notes that differences between the workplace and educational environments make certain regulation differences appropriate.²²

Interplay between Title IX, Section 504, and the IDEA

In response to public comment that removal of the “actual knowledge” standard would encourage recipients to take drastic measures in response to possible sex discrimination, such as removal of a student in conflict with Section 504 or the IDEA, the Department disagreed, and noted that nothing in the 2024 Title IX Regulations modifies any rights under Section 504 or the IDEA, noting also that § 106.44(h) on emergency removals requires a recipient to undertake an individualized safety and risk analysis.²³

Response to concerns about the neutrality of Title IX Coordinator

In response to public comments that § 106.44(a) would eliminate the neutrality/impartiality of Title IX coordinators by making them seek out discrimination and harassment, or seek to initiate a certain number of complaints per year, the Department stated that the regulations do not require those things.²⁴ It reiterated that the recipient’s overall role is to ensure that its education program or activity is free of unlawful sex discrimination, and that the regulation provisions help ensure that all parties are treated fairly and without bias.²⁵

Title IX’s application to dual-enrollment programs

In response to public comments, the Department stated that “in circumstances in which a student is enrolled in two recipient institutions at the same time, each recipient has its own obligations to protect participants from sex discrimination under Title IX.”²⁶ It noted that neither institution should assume that the other is solely responsible for responding to a complaint of sex discrimination given that effective supportive and remedial measures may implicate both institutions.²⁷

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²¹ *Id.*

²² *Id.*

²³ 2024 Title IX Final Rule, 89 Fed. Reg. 33563-64.

²⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33564.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

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