



## Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.30(a): Complainant and Respondent

June 16, 2020

*Note:* This document focuses on a summary analysis of Section 106.30(a) of the 2020 Final Title IX Regulations,<sup>1</sup> specifically on the definitions of **complainant** and **respondent**. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at [system.suny.edu/sci/tix2020](http://system.suny.edu/sci/tix2020)

### **§ 106.30(a): Complainant**

The regulations define “complainant” as “an individual who is *alleged* to be the victim of conduct that could constitute sexual harassment,” irrespective of whether a formal complaint has been filed. 34 C.F.R. § 106.30(a) (emphasis added).

In the Preamble to the Final Rules, the Department of Education states that “complainant” is a term that communicates both institutional neutrality (that a person’s making of a report does not imply responsibility) and flexibility in who can report sexual harassment.

The Department notes that other terms might have been used to connote neutrality, such as describing this person as the “reporting party”; it found this term less than ideal, however, because describing this person as the “reporting party” could imply that the alleged “victim” has to be the person who reported the matter. See 85 Fed. Reg. 30026, 20120 (May 19, 2020). The Preamble goes on to encourage third party reporting as promoting Title IX’s non-discrimination mandate, referring to § 106.8(a) as expressly stating that “any person” may report sexual harassment “whether or not the person reporting is the person alleged to be the victim.” *Id.* at 30121. Under this definition, the “complainant” may not necessarily be the person who files the formal complaint, and not every complainant’s case will actually trigger or be resolved through a school’s Title IX grievance procedure.

#### *Complaints brought by parents or guardians*

Indeed, the person who files the formal complaint will not always be the person alleged to be the victim of sexual harassment. Other sections of the Regulations and Preamble provide further information regarding which “individual[s]” can actually file such a formal complaint under the school’s grievance procedure. For example, Final Rule § 106.6(g) states that nothing about the final regulations may be read in derogation of the legal rights of parents or guardians to act on behalf of any individual in the exercise of rights under Title IX, including filing a formal

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<sup>1</sup> The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

complaint on a complainant's behalf. In such a situation, like where the parent or guardian has an appropriately structured power of attorney, the parent or guardian does not become the "complainant" but may act on behalf of the complainant.

#### *Complaints brought by employees*

Section 106.8(c) provides that the requirements of § 106.45 apply to complaints by employees; *see also* 85 Fed. Reg. at 30031 (definitions in § 106.30 apply to the entirety of 34 CFR part 106, including subparts D (applicable to students) and E (applicable to employment)). "Accordingly, recipients are expected to handle any formal complaints of sexual harassment in an education program or activity against a person in the US through the grievance process in 106.45. The grievance process in 106.45 applies irrespective of whether the complainant or respondent is a student or employee." 85 Fed. Reg. at 30373. For more information on the application of the Regulations on employees, see the Joint Guidance Memo on *Directed Question 3: Application to Employees*.

#### *Complaints brought by third-parties*

The definition of "formal complaint" in § 106.30 states that, at the time of filing a formal complaint, a complainant "must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." This would preclude a school from using its Title IX complaint process to respond to many reports by third parties, e.g., where a student or employee from School A alleges sexual harassment by a student or employee of School B occurring at School A, School B, or at another location -- unless the alleged incident occurred in conjunction with an education program or activity of the reporting school. This is consistent with decisions by several courts, e.g., *Doe v. Brown University*, 896 F.3d 127 (1<sup>st</sup> Cir. 2018); *Borkowski v. Baltimore County, MD*, Civ. Action No. DKC18-2809 (D. Md. September 30, 2019); *Doe v. Rector and Visitors of University of Virginia*, Civ. Action No. 3:19CV00038 (W.D. Va. June 28, 2019); However, if School B's code of conduct prohibited such misconduct, School B could handle the matter under a non-Title IX process.

#### *Complaints brought by former students and employees*

This provision would also seem to mean that one of the school's own students could not file a formal complaint under Title IX after they graduate, unless they are otherwise intending to return to participate in other activities such as graduate school or alumni activities, which differs from many school policies that provide a greater time period for the filing of complaints (e.g., as long as the respondent is still a student or employee) or no time limit at all. Consider the not-uncommon situation in which a school receives multiple reports from alumni alleging sexual harassment by a professor or other employee that occurred while they were students. While the alumni would still be considered complainants and perhaps entitled to some sort of supportive measures, this provision would seem to preclude use of the school's Title IX complaint process to investigate and adjudicate the matter.

This provision would also seem to preclude use of that process when a student-complainant has withdrawn from school or an employee-complainant has left their employment, even if they did so precisely because of the effects of the alleged harassment, unless they are hoping to return

should the harassment end. Again, this rule does not preclude a school from otherwise addressing such circumstances via a non-Title IX process.

### *Complaints brought by Title IX Coordinators*

The Preamble also explains that, where the Title IX coordinator files the complaint, the reported “victim” remains the “complainant” and must be treated as a party, including receiving all required communications and opportunities to participate in the investigation and adjudication. 85 Fed Reg. at 30122 n. 547.

### **§ 106.30(a): Respondent**

Section 106.30(a) defines a “respondent” as an “individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” In the Preamble to the Final Rule, the Department notes that the rule *does not* restrict “a respondent to being a person enrolled or employed by the recipient or who has any other affiliation or connection with the recipient” but that an institution “may in its discretion” dismiss a formal complaint if the respondent is “no longer enrolled or employed” by the institution, in recognition that a institution’s “general obligation to provide a complainant with a prompt, non-deliberately indifferent response might not include completing a grievance process in a situation where the recipient lacks any disciplinary authority over the respondent.” 85 Fed. Reg. at 30198.

In the Preamble to the Final Rule, the Department also clarifies that a respondent is an “individual,” and that it does not contemplate that the designated Title IX process under 106.45 be applied to organizations. 85 Fed. Reg. at 30096.

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