



Joint Guidance on Federal Title IX Regulations Analysis on Section 106.30(a): Definition of “Formal Complaint”

July 17, 2020

Note: This document focuses on a summary analysis of Section 106.30(a), specifically the definition of “formal complaint.”¹ For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Title IX Summary Proposed to Final Comparison*, available at https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/TIX-Regulations-Text-for-Text-Comparison-Chart_v2.pdf

106.30(a): Formal Complaint

A Formal Complaint is required to initiate either the § 106.45 investigation and hearing process or an institution’s informal resolution process. In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45, which sets out the permissible formal grievance resolution processes for either an investigation and hearing, or an informal resolution. Without a Formal Complaint, neither process may commence. 85 Fed. Reg. 30126-27 (May 19, 2020).

The term “Formal Complaint” has a very specific definition within the Title IX Final Rule, and whether one is filed does not depend on the label applied, but depends on whether certain specific elements are met. *See*, 34 C.F.R. § 106.30(a).

As the Department explains in the Preamble to the Final Rules, a Formal Complaint means “a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 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.” *See*, 85 Fed. Reg. at 30574.

A “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Under certain circumstances, the Title IX Coordinator may also sign the formal complaint, but that act does not make the Title IX Coordinator the “complainant” for purposes of the required Title IX process.

¹ The effective date of 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.



A Formal Complaint May Be Filed by Mail, In Person, or by E-Mail

A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail (e-mail), by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the institution. A Formal Complaint may also be filed through an online portal provided for this purpose by the school, if the school has such a mechanism in place.

As noted elsewhere, the document filed is only considered a Formal Complaint when the complaint filed meets *all* the required elements. Otherwise, a document that is labeled “Formal Complaint” but that does not meet the required elements (for example, does not allege sexual harassment as defined in § 106.30), is not yet a Formal Complaint triggering the school’s obligation to commence a formal resolution process. *See*, 85 Fed. Reg. at 30574.

Identity of the Parties and Complainant Anonymity

A formal complaint must contain the complainant’s physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint. This requirement appears to mean that a complainant cannot file a formal complaint anonymously. The Department explains:

where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant’s identity from being disclosed to the respondent (via the written notice of allegations). Fundamental fairness and due process principles require that a respondent knows the details of the allegations made against the respondent, to the extent the details are known, to provide adequate opportunity for the respondent to respond. The Department does not believe this results in unfairness to a complainant.

85 Fed. Reg. at 30133. The Department goes on to analogize the process to claims, charges, or complaints in civil or criminal proceedings, noting that these “generally require[] disclosure of a person’s identity for purposes of the proceeding,” and that “[e]ven where court rules permit a plaintiff or victim to remain anonymous or pseudonymous, the anonymity relates to identification of the plaintiff or victim in court records that may be disclosed to the public, not to keeping the identity of the plaintiff or victim unknown to the defendant.” *Id.*

In sum, as a Formal Complaint is required before the commencement of either an investigation of alternative resolution process under § 106.45, and as all elements must be met before a complaint or allegation is considered a Formal Complaint, the identity of the Complainant must be known.

This is not the case for supportive measures. The Department distinguishes the threshold that must be met in order for a complainant to receive supportive measures with the threshold that



must be met in order to proceed with a formal resolution process (investigation and hearing, or alternative resolution), under § 106.45. For supportive measures, the complainant’s identity may remain confidential from the respondent (to the extent possible while implementing the supportive measure), but in order to implement a grievance process to resolve allegations that a respondent has perpetrated sexual harassment against a complainant, the complainant’s identity must be disclosed to the respondent, if the complainant’s identity is known. *Id.* at 30127, 30133.

A Formal Complaint Must Allege Sexual Harassment

The Formal Complaint must allege sexual harassment as defined under § 106.30(a) of the Regulations, meaning that the conduct that is the subject of the complaint must (a) meet the definition, (b) have occurred on campus, within a program or activity, or in a building owned or controlled by a student organization that is officially recognized by the institution (postsecondary institution), (c) have occurred in the United States, (d) and, 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.

Identity of the Respondent

The identity of the respondent need not be known in order to file a Formal Complaint. Instead, the Department provides that, in the event the respondent’s identity is not known at the time a formal complaint is made, an institution “must investigate...because an investigation might reveal the respondent’s identity, at which time the recipient would be obligated to send both parties written notice of the allegations.” 85 Fed. Reg. at 30138. Ultimately, if the respondent cannot be identified through the investigation, the Formal Complaint may be dismissed. See, 34 C.F.R. 106.45(b)(3)(ii) (permitting dismissal where “specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”).

Circumstances Where Title IX Coordinator May Sign Formal Complaint

A complainant filing a formal complaint may choose to sign it. If, however, all the other definitional and jurisdictional elements are met, or appear to be met, the Title IX Coordinator may instead sign the Formal Complaint. In the proposed rules, Section 106.44(b) required a Title IX Coordinator to sign a formal complaint under certain circumstances even absent a willing complainant; it also included an associated safe harbor provision. The Final Rule does not include either this mandate or the safe harbor. Instead, the Preamble makes clear that a “Title IX Coordinator’s decision to sign a formal complaint includes taking into account the complainant’s



wishes regarding how the recipient should respond to the complainant’s allegations.” *See* 85 Fed. Reg. at 30217. By signing the formal complaint, the Title IX Coordinator does not become a party to the grievance process. *See id.* at fn 558. In addition, the Preamble delineates the following factors for consideration by a Title IX Coordinator when determining whether to exercise discretion to sign a formal complaint on behalf of the recipient: allegations of violence, threats, use of weapons, and serial predation. *See id.* The Preamble acknowledges that a “Title IX Coordinator may believe that signing a formal complaint is not in the best interest of the complainant and is not otherwise necessary for the recipient to respond in a non-deliberately indifferent manner.” *See id.* at 30218.

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