



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45(b)(9): Informal Resolutions

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Note: This document focuses on a summary analysis of Section 106.45(b) of the 2020 Final Title IX Regulations,¹ specifically the discussion of informal resolutions. 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

§ 106.45(b)(9): Informal Resolutions

Section 106.45(b)(9) of the Final Rule states in full that:

A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and
- (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

¹ 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.

The Final Rule greatly expands the proposed rule's provision on informal resolution. Most notably, the Final Rule explicitly allows for either party to withdraw from any informal resolution process offered by an institution at any time and commence instead the formal grievance process, and the Rule prohibits the use of informal resolution in cases where the respondent is an employee of the institution and the complainant is a student.

We note that offering or use of informal resolutions by an institution are *not* required by the Final Regulations.

Options for Informal Resolution and Process

§ 106.45(b)(9) gives recipients the discretion to offer and facilitate informal resolution processes, such as mediation or restorative justice, subject to each party voluntarily agreeing after giving informed, written consent. The Department states that it views informal resolutions and potentially presenting a way to resolve sexual harassment allegations in a less adversarial manner than the investigation and adjudication procedures that comprise the § 106.45 grievance process. Informal resolution may only be offered after a formal complaint has been filed, so that the parties understand what the grievance process entails and can decide whether to voluntarily attempt informal resolution as an alternative. Recipients may never require any person to participate in informal resolution, and may never condition enrollment, employment, or enjoyment of any other right or privilege upon agreeing to informal resolution. Informal resolution is never allowed as an option to resolve allegations that an employee sexually harassed a student. *See* 85 Fed. Reg. 30054 (May 19, 2020).

An informal resolution process does not require the holding of a live hearing with cross-examination, which the Department adds may make it particularly desirable by the parties and the recipient in situations where the facts about the underlying incident are not contested by the parties and thus resolution does not turn on resolving competing factual narratives. *See id.* At 30329.

The final regulations do not require more than one person to facilitate an informal resolution process. In this regard, the Department notes that it recognizes the importance of giving recipients flexibility and discretion to satisfy their Title IX obligations in a manner consistent with their unique values and the needs of their educational communities, and the wishes of the parties to each formal complaint. *See id.* At 30372.

Facilitators

§ 106.45(b)(1)(iii) requires recipients to ensure any individuals who facilitate an informal resolution process to receive training on:

- the definition of sexual harassment under § 106.30(a);
- the scope of the institution's education program or activity;
- how to conduct informal resolution processes; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

The Department believes that it is unnecessary to encourage recipients to enter MOUs with third party informal resolution providers, though the Department notes that the final regulations permit recipients to outsource informal resolutions to third party providers. *See* 85 Fed. Reg. at 30405.

Informal Process Facilitator Serving as a Witness

With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, the Department leaves this possibility open to recipients. However, if recipients were to accept such witnesses, then the Department states it would expect this possibility to be clearly disclosed to the parties as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared. *See* 85 Fed. Reg. 30400-30401.

Discipline, up to and including expulsion, Permitted

The Department is clear that under § 106.45(b)(9), an informal resolution may result in the parties, and the recipient, agreeing on a resolution of the allegations of a formal complaint that involves punishing or disciplining a respondent. The Department explains that this result comports with the prescription in § 106.44(a) and § 106.45(b)(1)(i) that a recipient may not discipline a respondent without following a grievance process that complies with § 106.45, because § 106.45 expressly authorizes a recipient to pursue an informal resolution process (with the informed, written, voluntary consent of both parties). *See* 85 Fed. Reg. at 30401.

Further, as described below, because of the requirement of obtain voluntary written consent from all parties in order to pursue an informal resolution, and the explicit right of either party to withdraw from the informal resolution process at any time prior to agreeing to the resolution (which may or may not include expulsion of the respondent), the Department believes that these mechanisms will adequately protect the respondent's interest in a fair process before the sanction of expulsion is imposed. The Department explains that if expulsion is the sanction proposed as part of an informal resolution process, that result can only occur if both parties agree to the resolution. The Department notes that if a respondent, for example, does not believe that expulsion is appropriate then the respondent can withdraw from the informal resolution process and resume the formal grievance process under which the recipient must complete a fair investigation and adjudication, render a determination regarding responsibility, and only then decide on any disciplinary sanction. As a result, through an informal resolution process a recipient may impose disciplinary sanctions against a respondent without concluding an investigation or adjudication. § 106.45(b)(9). *See* 85 Fed. Reg. at 30407.

Formal Complaint Must Be Filed

The Department notes that the “default” is that a formal complaint must be investigated and adjudicated by the recipient; however, within the parameters of § 106.45(b)(9) a recipient may choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient

determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution. Thus recipients may not offer informal resolution unless a formal complaint has been filed. 85 Fed. Reg. at 30407.

Notice Provision

To ensure that the parties do not feel forced into an informal resolution by a recipient, and to ensure that the parties have the ability to make an informed decision, § 106.45(b)(9) requires recipients to inform the parties in writing of the allegations, the requirements of the informal resolution process, any consequences resulting from participating in the informal process, and to obtain both parties' voluntary and written consent to the informal resolution process. *See* 85 Fed. Reg. at 30402.

Voluntary Written Consent

Informal resolutions must be voluntarily agreed to by each party, forbidding recipients from requiring any party to participate in an informal process, and preventing recipients from conditioning enrollment, employment, or any other right on a party's participation in informal resolution.

§ 106.45(b)(9) in the final regulations impresses upon recipients that a recipient cannot condition enrollment, employment, or any other right on the waiver of rights under § 106.45, nor may a recipient ever require parties to participate in an informal resolution process. Participating in mediation, which is a form of informal resolution, should remain a decision for each party, individually, to make in a particular case, and the Department will not require the parties to attempt mediation. *See* 85 Fed. Reg. at 30361.

Prohibition on use in Employee/Student Cases

To ensure that mediation or other informal resolution is truly voluntary on the part of students who report being sexually harassed by a recipient's employee, due to the power differential and potential for undue influence or pressure exerted by an employee over a student, the Department makes clear that recipients cannot offer an informal resolution process to resolve formal complaints alleging that an employee sexually harassed a student.

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