



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.71: Retaliation

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Note: This document focuses on a summary analysis of Section 106.71 of the 2020 Final Title IX Regulations,¹ specifically regarding retaliation. 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

§ 106.71 - Retaliation

The Final Rule Section 106.71 purports to address Title IX’s existing broad prohibition of retaliation. The section prohibits any recipient or other person from intimidating, threatening, coercing, or discriminating “against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

The Department states that the retaliation provision in the Final Rule is purposefully broad in scope. It protects any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, any witness, and any other individual who participates or refuses to participate in an investigation, proceeding, or hearing related to the Title IX regulations.

Although a wide variety of conduct may constitute retaliation, including acts of intimidation, threats, coercion, and discrimination, section 106.71(b)(1) states that the exercise of rights protected under the First Amendment does not constitute retaliation under the Final Rule.

What other requirements are there for institutions?

In an effort to prevent incidents of retaliation, the Final Rule also provides that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by FERPA,

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.

or as required by law, or to carry out the purposes of 34 CFR part 106, including conducting an investigation, hearing, or judicial proceeding.

When can a charge of a code of conduct violation constitute retaliation?

Charging an individual for a code of conduct violation that does not involve sex discrimination or sexual harassment, but arises out of the same facts or circumstances as a report or complaint of sex discrimination or sexual harassment, will constitute retaliation if it is for the purpose of interfering with any right or privilege secured by Title IX or the Final Rule.

In other words, under section 106.71, the determining factor for whether an additional code of conduct charge would be considered retaliatory is whether the charge is for the purpose of interfering with any right or privilege secured by Title IX or the Final Rule.

"Zero tolerance" and amnesty policies

For example, if a recipient punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes retaliation *if the punishment is for the purpose of interfering* with any right or privilege secured by Title IX or its implementing regulations. The Preamble states, however, that if a recipient always takes a zero tolerance approach to underage drinking and always imposes the same punishment, regardless of the circumstances, then imposing such a punishment would not be “for the purpose of interfering with any right or privilege” secured by Title IX and therefore would not constitute retaliation under the Final Rule. 85 Fed. Reg. 30026, 30356 (May 19, 2020).

Many institutions have adopted amnesty policies designed to encourage students to report incidents of sexual harassment by providing that the individual will not face disciplinary charges for certain code of conduct violations related to the incident of sexual harassment. Nothing in the Final Rule prevents or requires the adoption of such a provision. Instead the Final Rule provides that such code of conduct charges, if a recipient pursues them, will constitute retaliation *only if* such charges or resulting sanctions are imposed “for the purpose of interfering with the exercise of any person’s rights under Title IX” or its regulations.

False statements

The Final Rule also specifically addresses code of conduct violations related to false statements in the formal grievance process. Under § 106.71(b)(2), charging an individual with a code of conduct violation for making a materially false statement in bad faith during the grievance proceeding under the Final Rule does not constitute retaliation. Note, however, that the Final Rule provides that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. 85 Fed. Reg. at 30537.

Failure to participate in the grievance process

The preamble to the Final Rule does not address explicitly other potential code of conduct violations that may constitute retaliation, but institutions should note that the wording of the rule itself prohibits any actions against an individual “because the individual has made a report or

complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.” Thus, conduct action, or threats thereof, may not be used to compel witnesses or other parties to participate in an investigation, proceeding, or hearing under the Rule.

How should an institution handle a retaliation complaint?

Complaints alleging retaliation may be filed according to the “prompt and equitable” grievance procedures for sex discrimination required to be adopted under Final Rule Section 106.8(c). In addition, the “actual knowledge” requirement in Section 106.44(a) does not apply to retaliation and, accordingly, there is no actual knowledge requirement for a response to retaliation.

As with other conduct issues, the recipient’s ability to respond will depend in part on the relationship between the recipient and the individual who commits the alleged retaliation, but the Department states that the recipient should respond to a complaint of retaliation to the best of its ability. 85 Fed. Reg. at 30536.

If the person who is engaging in the retaliation is a student, the recipient may take measures such as pursuing discipline against the student. If the person who is engaging in the retaliation is a third party, the recipient may take measures such as issuing a no-trespass order against the third party to address the retaliation.

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