

Joint Guidance ON FEDERAL TITLE IX REGULATIONS

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Joint Guidance on Federal Title IX Regulations: Reasonably Prompt Time Frames - 106.45(b)(1)(v)

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I. Summary of Regulatory Text

Section 106.45(b)(1)(v) requires recipients to set a reasonably prompt time frame for concluding the formal complaint grievance process, and also to set a reasonably prompt time frame for concluding appeals and, where applicable, informal resolution options. The Department distinguishes this section’s “reasonably prompt time frame” requirement, which applies *only* to the grievance process for formal complaints of sexual harassment, from the generally applicable requirement under § 106.8(b), which “provid[es] for prompt and equitable resolution” of complaints of sex discrimination. 85 Fed. Reg. 30026, 30047 (May 19, 2020).

The regulatory text of this section does not prescribe a minimum or maximum number of days, but the recipient’s grievance process policy must articulate the time frame for the process by referencing a number of days or some other measurable unit of time. This time frame need not be sixty days, but can be if the recipient deems that time frame appropriate and indicates that time frame within its policies. *Id.* at 30270. The Department cautions that “no avenue for handling a formal complaint of sexual harassment is subject to an open-ended time frame.” *Id.* at 30269. A comprehensive summary of the procedural steps requiring an articulated time frame is provided below.

Additionally, the regulatory text states that the policy must also include a mechanism for deviating from the time frame under specified circumstances. Allowable exceptions to the timeframe are described as limited extensions or temporary delays. A delay or an

extension must be supported by good cause. A non-exhaustive list of examples of “good cause” are provided in the regulations and are further explained below. If good cause exists for the recipient to deviate from the timeframe, then the recipient must provide written notice explaining the reasons for deviating from the established time frame to both the complainant and respondent. Ultimately, such delays will also have to be accounted for in the institution’s mandated recordkeeping.

Importantly, the Department will measure a recipient’s compliance regarding time frames for compliance purposes. The measuring stick is the published grievance policy’s self-established deadlines, which must be reasonable considering the recipient’s characteristics. Recipients “must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process.” *Id.*

A recipient cannot choose unreasonably long deadlines, however. The Department believes that “prompt resolution is important to serve the purpose of Title IX’s non-discrimination mandate.” *Id.* at 30272. The time frames must balance expediency, “reflect[ing] the goal of resolving a grievance process as quickly as possible,” *id.* at 30269, with “fairness and accuracy based on the recipient’s unique attributes and the recipient’s experience with its own student disciplinary proceedings.” *Id.*

II. Establishing a Time Frame

All recipients must set and publish a time frame for the conclusion of the grievance process for resolving formal complaints of sexual harassment. According to § 106.45(b)(1)(v), the basic elements that must be specified are:

1. “reasonably prompt time frames for conclusion of the grievance process,” which, under the Final Rules, would include the time period from the filing of the formal complaint until the issuance of a written determination;
2. the time period for filing an appeal and the time period from the initiation of an appeal until the issuance of a written appellate determination of that appeal;
3. if informal resolutions are offered, the time period that applies to the informal resolution option.

In addition to those elements, recipients should be aware of the various procedural requirements included in the new grievance process and the stated *or implied* duration required for each of the procedural steps.

The Department anticipates that recipients will adopt different time frames because “the reasonableness of the time frame is evaluated in the context of the recipient’s operation of an education program or activity.” 85 Fed. Reg. at 30269. Thus, an audit of the length of previous processes may be useful to inform the selection of time frames for the various portions of the grievance process.

III. Components of the Grievance Process

While many components of the grievance process as outlined in § 106.45 do not have a specified time frame in the text of the regulations, the due process concepts of notice and opportunities for meaningful participation prevent a certain level of expediency in favor of methods that are intended to promote thoroughness and accuracy. Recipients should compare the new process with the recipient’s former process and its “unique attributes (for example, their size, population, location, or mission),” 85 Fed. Reg. at 30268, to set these “reasonably prompt” time frames. If the recipient realizes that the time frame is too long or too short, the recipient should modify the policy to reflect the realities of the recipient’s educational context.

Specifically, a recipient may want to consider the following components of the grievance process when comparing the new process to the length of time needed for past processes:

Event	Reg Cites (All at 106)	Relevant Language	Days	Notes
Report of sex discrimination.	8(b)	Grievance procedures must provide for “prompt and equitable resolution” of reports of sex discrimination.	N/A	<p>This is the generally applicable principle to any report of sex discrimination whether or not it triggers the sexual harassment process.</p> <p>Unlike the sexual harassment specific provisions, there is no requirement that the complainant be participating or attempting to participate in the educational program or activity. The participation requirement may act as a substitute for a statute of limitations. Additionally, a formal complaint may be dismissed based on “specific circumstances” that “prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”</p>

Submission of formal complaint alleging sexual harassment and requesting investigation to Title IX Coordinator or any other person who would be deemed to have actual knowledge.	30(a)		N/A	<p>This triggers the grievance process. This is day 0 of the time frame.</p> <p>Potential element to include in a policy would be confirming receipt by Title IX Coordinator.</p> <p>Consider: requiring the Title IX Coordinator to provide <i>some</i> response to Complainant or filer within a set time frame. Note, however, that if that time frame is included in the policy, it will be binding.</p>
Notice of allegations.	45(b)(2)(B)	“including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”	None specified in regs	<p>Before an initial interview with a Respondent, the recipient must provide written notice of allegations to both parties with sufficient time for Respondent to prepare for Respondent’s response and to secure an advisor, among other things.</p> <p>This should be completed promptly because the time frame has been initiated and an investigation is required.</p> <p>While this should be done as soon as practicable and must precede even an initial interview with the Respondent, both parties need to receive notice about the pending investigation.</p> <p>This element informs both parties about a pending investigation, or could serve to inform the Complainant that the formal complaint has been dismissed from the TIX process.</p> <p>Consider: requiring a notice to be generated as soon as practicable but no more than X days after the receipt of a formal complaint.</p>
Conduct an investigation.	45(b)(5)(i)		None specified in regs	<p>The burden is on the recipient to compile evidence.</p> <p>This element should have a specific amount of time in the policy.</p> <p>Consider: “no more than X days, but may be extended in Y day intervals with written notice explaining the reason for the extension.”</p>
Allowing sufficient time for	45(b)(5)(v)	Provide written notice “to a party whose	None	The amount of time that is “sufficient for the party to prepare to

participation in hearings, investigative interviews, or other meetings.		participation is invited or expected...with sufficient time for the party to prepare to participate.”	specified in regs	participate” needs to be considered on a case-by-case basis, but will add time to the length of the grievance process.
Informal resolution options.	45(b)(9)	“At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process”	None specified in regs	<p>If informal resolution options are offered, consider establishing parameters for those options, which is likely a requirement per the Department. If the attempt at informal resolution does not succeed, then the adjudication/decision has been delayed. Parties should understand the nature of the delay in order to be able to make an informed decision about entering into an informal resolution process.</p> <p>When an informal resolution process begins, the formal grievance process stops. If either party withdraws from informal resolution, then the grievance clock restarts from when the parties entered the informal process.</p>
Inspection and Review of the evidence, prior to completion of the investigative report/investigation itself, but after gathering all the evidence, including evidence upon which the recipient does not intend to rely.	45(b)(5)(vi)	Give both parties an “equal opportunity to inspect and review any evidence” ... “so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation” by sending “the evidence subject to inspection and review” then give the parties “at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”	10 days	<p>If the written response triggers additional investigative responsibilities and those responsibilities uncover additional evidence, then the parties will be given another opportunity to respond. This may result in a second cycle of inspection and review of evidence, if not more, so the complexities of this process should be factored into your planning.</p> <p>Consider: “up to 10 days to provide a response, after which the investigator will not be required to accept a late submission. Investigator has X days to generate a report or, alternatively, may provide the parties with written notice extending the investigation for Y days and explaining the reason for the extension.”</p>
Investigative report/hearing preparation.	45(b)(5)(vii)	Provide the parties with the investigative report at least 10 days before a live hearing or, for K-12 if not holding a live hearing, 10 days before the “other time of determination regarding responsibility.”	10 days	<p>Parties may submit a written response after reviewing the investigative report and prior to the hearing.</p> <p>Consider: investigative report provided “at least 10 days before the hearing date. If a party wishes to submit a written response to the investigative report, the party must submit the report at least [24</p>

				hours or Y day(s)] prior to the scheduled start of the hearing.”
Hearing.	45(b)(6)(i)	Provide a live hearing. Recipients must create a recording or transcript “and make it available to the parties for inspection and review.”	None specified in regs	<p>Consider the manner in which hearings will be held: Maximum number of hours per day? Maximum number of days per week? If held in multiple sessions or if a continuance is needed, how will scheduling be managed to expedite the completion of the hearing/try to present all evidence economically and thoroughly, manage competing scheduling needs of all stakeholders, allow for emergencies or unanticipated events, and keep sessions temporally close together?</p> <p>In addition to holding the hearing, the parties must be provided with the ability to inspect a recording or transcript of the hearing. Consider that an appeal decision may be informed by reviewing a transcript or recording.</p> <p>Consider having the availability of the recording or transcript play a part in triggering the appeal time frame. (Note that the regulations do not require a copy of the recording or transcript to be provided to the parties-- it must be available for inspection – 85 Fed. Reg. at 30363)</p>
K-12: Non-live hearing option.	45(b)(6)(ii)	After the parties receive the investigative report per 45(b)(5)(vii) (second 10 day window), “the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.”	None specified in regs; must be at least 10 days per 45(b)(5)(vii)	<p>The written question and response provision “may overlap with that ten-day period, so that the written questions procedure need not extend the time frame of the grievance process.” (85 Fed. Reg. at 30365).</p> <p>While the preamble states that the question/response <i>may overlap</i>, it does not state that the parties are limited to only 10 days for this back and forth, nor does it lay out the rules for how long a party would have to respond or how many questions may be asked/cycles of follow-up questions may be completed. The Department states that schools have “discretion to set reasonable limits” (85 Fed. Reg. at 30364) when articulating in the school’s policy how the “limited” part of the follow-up questions process will work.</p>
Written determination.	45(b)(7)	Decision-maker must issue a written determination that includes the elements	None specified	Defining the timeline for when the written determination will be provided simultaneously to both parties and providing a date by

		in the subsection.	in regs	<p>which both parties must take an appeal (otherwise it is waived) is essential. The decision does not become final until the time period for appeal has lapsed or, if an appeal is taken, until the determination of the appeal.</p> <p>Remember: Respondent cannot be excluded from school (unless emergency removal applies) or subject to other punitive measures until the written determination becomes final.</p> <p>Written determination is not required to be issued at the hearing (85 Fed. Reg. at 30393).</p>
Appeal.	45(b)(7)(iii); 45(b)(8)		None specified in regs	<p>Consider defining in the policy:</p> <ul style="list-style-type: none"> ● Number of days the parties have to take the appeal (if this time period lapses, then the determination becomes final). This could be a tight time frame with a longer time frame for the next bullet point. This would allow a determination to be final quickly, but would also allow for a party to lodge the intent to appeal (and that could be withdrawn or dismissed if no written statement of appeal is submitted). The intent to appeal stays the sanctions at least until the next deadline is met. Supportive measures and remote learning opportunities are available during the pendency of the appeal. ● Deadline for written statement of appeal (identifying reason and providing an explanation) to be submitted to recipient, which recipient must provide to the other party while implementing appeal procedures equally ● Time frame for giving each party opportunities to submit written statements in support of or challenging the outcome <ul style="list-style-type: none"> ○ Back and forth does not seem to be required ● Deadline to issue a written decision and provide it to both parties simultaneously

Recipients may continue to apply the 60-day time frame from the rescinded 2011 “Dear Colleague” letter if a recipient concludes that it can resolve the grievance process according to the § 106.45 requirements in 60 days. The Department acknowledges that the 60-day

time frame may have presented burdens to some recipients or may have been unnecessary for others, so a longer or shorter time frame may be adopted based on the recipient's "own unique educational community and operations." *Id.* at 30269.

Again, recipients should consider the impact of the new procedural requirements on the anticipated length of their process. A recipient may determine that meeting the 60-day deadline was reasonable under the recipient's past grievance process, but realistically may anticipate that the recipient will need more time to complete an accurate and fair process according to the new regulatory requirements.

The Department repeatedly states that (1) recipients must articulate these time frames, and (2) the time frames must be "reasonably prompt," "balanc[ing] the need to conclude Title IX grievance processes promptly with providing the fairness and accuracy that these final regulations require." *Id.* at 30272.

IV. Exceptions to the Time Frame

Recipients may deviate from the time frames established in their policies under limited circumstances. A policy may give the recipient discretion to grant or deny requests for a temporary delay or limited extension, and recipients are not required to offer extensions of delays. A "delay" means "a postponement of a deadline that would otherwise have applied." 85 Fed. Reg. at 30273.

Any deviation from the published time frames must (1) have a temporal limit; and (2) be justified by "good cause."

The Department stresses that extensions or delays are "temporary" or "limited." The Department considered and rejected putting 3 to 10 day limits on delays supported by various types of justifications, which commenters suggested as temporal limits. Aside from explaining that an extension or delay is temporary or limited, the policy need not specify the exact duration of a delay in days or other measurable units of time. The length of the delay may be made on a case-by-case basis and recipients can ask the parties to verify a continued need. The recipient has discretion in this element of policy making.

Any delay or extension must be supported by good cause. An illustrative, non-exhaustive list of examples of "good causes" are included in the regulation: "the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities." *See*, § 106.45(b)(1)(v)

"Delays caused solely by administrative needs...would be insufficient to satisfy this standard." *Id.* at 30269. A "temporary delay caused by a recipient's need to provide an advisor to conduct cross-examination...may constitute good cause rather than mere administrative convenience, although a recipient aware of that potential obligation ought to take affirmative steps to ascertain whether

a party will require an advisor provided by the recipient or not, in advance of the hearing, so as not to delay the proceedings.” *Id.* The Preamble also states that with respect to administrative delay, the Department intended that concept to apply to delays caused by “recipient inefficiencies or mismanagement of their own resources but not necessarily circumstances outside the recipient’s control” such as a power outage that prevents the technology needed for a live hearing from being used. *Id.* at 30273.

The Preamble states that “while recipients must attempt to accommodate the schedules of parties and witnesses throughout the grievance process...it is the recipient’s obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness. *Id.* at 30270.

In addition, the fact that the “good cause” is prolonged does not justify a non-temporary or unlimited delay. The Department cites *Williams v. Bd of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007) for the proposition that an 11 month delay to allow for the conclusion of a criminal matter was unreasonable. 85 Fed. Reg. at 30271. This case is consistent with prior OCR guidance and has proven to be a benchmark in defining the meaning of an institution’s “deliberate indifference” to its Title IX obligations.

If the recipient provides an extension or delay per the constraints on duration and justification, the recipient must provide written notice to both parties. The written notice must include the reason for the action. The regulations do not provide a mechanism for parties to challenge the delay, although an unreasonable delay could plausibly be grounds for a procedural error underlying an appeal.

V. Other Considerations

- A “day” may be a calendar day, a school day, or some other calculation, but recipients should define how a “day” is calculated.
 - See “Other Language/Terminology Comments” subsection of the “Section 106.30 Definitions” section of the preamble, 85 Fed. Reg. 30188.
- Check for statutory obligations under Title VI, Title VII, the Equal Educational Opportunities Act of 1974 (“EEOA”), ADA, Section 504, and the Clery Act.
 - The Department states that “if a recipient is precluded by another law from extending a time frame the recipient is not required to do so under these final regulations.” 85 Fed. Reg. 30272.
- Check for state law requirements regarding time frames for exclusionary discipline or sexual harassment proceedings.
 - The Department believes that where there is a true conflict between state requirements for timelines and these regulations, the regulations preempt state timelines.
- If choosing to provide the option for extensions or delays, create a process for evaluating “good cause” that can be uniformly applied and documented.

- Avoid the appearance of bias by evaluating every request for a delay or extension through the same established process.
- Define who may request delays or extensions (the parties and the Title IX Coordinator, for example), the “good cause” for doing so, what the process is for making the request, and who the decision-maker is.
- The regulations do not state whether both parties must be notified upon the denial of a request.
- Any grant or denial of a request for extension or delay should be indicated in the Determination Regarding Responsibility.
- Any grant or denial of a request for extension or delay must be documented by the Title IX Coordinator in their mandated recordkeeping.
- Update grievance procedure timelines in Collective Bargaining Agreements or other employment-related contracts and handbooks.
- Gather information about potential “good cause” needs-- such as language interpreters or disability accommodations-- at the initiation of the process, if possible, to prevent delays.
- Check for implications with relevant law enforcement bodies.
 - Relationships with law enforcement are “independent of recipients’ obligations to cooperate or coordinate with law enforcement with respect to investigations or proceedings affecting the recipient’s students or employees. These final regulations do not attempt to govern the circumstances where such cooperation or coordination may be required under other laws, or advisable as a best practice.” *Id.*, at 30272.
 - Revise any MOUs with local law enforcement agencies if needed
 - State law, such as New York Education Law 129-B, provides law enforcement with the ability to request a ten (10) day delay; institutions within New York should consider how this law will impact their time frame for Title IX investigations.
- Use virtual meetings or virtual hearing options to avoid delays or extensions if possible.
 - “[T]he need for parties, witnesses, and other hearing participants to secure transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.” *Id.* at 30262.

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