



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45(b)(1)(i): Treating Complainants and Respondents Equitably

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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 treating complainants and respondents equitably. 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)(1)(i): Treating Complainants and Respondents Equitably

The Final Rule states in the introductory text for § 106.45(b):

“For the purpose of addressing formal complaints of sexual harassment, a recipient’s grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.”

The second sentence in the Final Rule is a new addition from the Notice of Proposed Rulemaking (“NPRM”). This addition emphasizes the Department’s focus, found in other sections, on instructing recipients that any rules or practices that it uses regarding any party to a complaint must equally apply to both parties, no matter if they are a complainant or respondent.

Some recipients have rules or practices not otherwise regulated by the Final Rules that have applied to only complainants or only respondents; be sure to do a comprehensive review of relevant policies for any institution you work at or represent.

This general requirement of applying policies not otherwise regulated under the Title IX Final Rule “equally,” however, is distinguished from specific instances within the Final Rules where the institution need only treat the parties “equitably,” as described below. In other words, the default rule is that rules or practices must be applied “equally” to the parties, unless the Department specifically indicates that they are to be provided “equitably.”

Basic Requirements for Grievance Process: § 106.45(b)(1)(i)

The Final Rule for § 106.45(b)(i) states that a recipient’s grievance process must:

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.

“Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;”

This section includes some significant changes from the NPRM, as well as consistencies, discussed below:

“Equitably”

Unchanged from the NPRM, the Final Rule states that the grievance process should treat complainants and respondents “equitably.”

The Department acknowledges a departure from its default rule of treating parties “equally” based on the parties’ respective interests in the process. In considering what the Department means by ‘equitably,’ the Preamble states that “106.45(b)(1)(i) is one of the few exceptions to strict equality where equitable treatment of the parties requires recognizing that a complainant’s interests differ from those of a respondent” in terms of the grievance process and that “strictly equal treatment of the parties does not make sense.” 85 Fed. Reg. 30026, 30242 (May 19,2020).

“Remedies”

The Final Rule specifically defines what an “equitable” process means relative to the complainant in terms of remedies. While the Final Rule’s wording changed slightly from the NPRM on what it means to treat a complainant “equitably,” the final regulations still state that an equitable resolution must include providing remedies to a complainant where a finding of responsibility has been made against a respondent. A grievance process must comply with the regulations before any disciplinary sanctions are imposed against a respondent “or other actions that are not the supportive measures as defined in § 106.30;” the quoted text is new in the Final Rule. The Preamble states that this was intended to clarify that the definition of supportive measures gives recipients “wide latitude to take actions to support a complainant.” *Id.* At30243.

“Designed to restore or preserve equal access”

While the NPRM stated that remedies must be “designed to restore or preserve access” to a recipient’s program or activity, the Final Rule specifies that remedies must be “designed to restore or preserve **equal** access” (emphasis added) which aligns with § 106.30. The addition of “equal” is a crucial addition because it reinforces Title IX’s long-standing focus on providing “equal access” regardless of sex, not simply “access” to education.

In explaining the meaning of this language, the Department purports to change its enforcement scheme, but its position appears at odds with the authors’ experience and understanding of OCR administrative policy and practice. To our knowledge, the Department has never applied a “strict

liability” framework in enforcing Title IX, nor does prior policy support such an interpretation. The Final Rule may point to a change in focus or priority, but not a wholesale revision of OCR policy and practice.

The Department references in the Preamble that it chose not to remove the words “designed to” from the provision, and states that “the Department does not believe it is reasonable to hold recipients accountable for situations where, despite a recipient’s reasonably designed and implemented remedies, a victim still suffers loss of access...due to the underlying trauma.” *Id.* at 30244. The Department references to its Preamble section on “deliberate indifference” and states that it believes that “remedies designed to restore and preserve equal access to the recipient’s education programs or activities is the appropriate focus of these final regulations and a recipient’s selection and implementation of remedies will be evaluated by what is clearly not unreasonable in light of the known circumstances.” In the Department’s view, the phrase “designed to” aligns with the “not clearly unreasonable” standard governing its judgments of institutional responses to reports of sexual harassment.

Underlying this discussion is the Department’s revisionist view that it has historically held institutions to a “strict liability” standard when evaluating their responses to sexual harassment. It states this position in the Preamble’s footnote 165 which states that the 2001 Guidance’s provision that a recipient take “effective” steps to end any harassment and prevent it from recurring “ostensibly” held a recipient strictly liable to stop and prevent sexual harassment (*see also* footnote 68). The Joint Guidance team is unaware of any investigation where OCR has held recipients strictly liable to actually stop or prevent harassment. Instead, as noted in the 2001 Guidance at 15, “once a school has notice of possible sexual harassment of students — whether carried out by employees, other students, or third parties — it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps **reasonably calculated** to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again” (emphasis added).

This conclusion is consistent with historical and recent OCR Letters of Finding that typically include the “reasonably calculated to end any harassment, eliminate a hostile environment...” language or other language conveying that schools must still take action to end harassment and prevent its recurrence.²

In eschewing its purportedly elevated compliance standards, however, the Department risks limiting the full scope of appropriate enforcement. Plainly, remedies designed to restore and preserve equal access to education should include remedies designed to end harassment and

² *See, e.g.*, OCR Letter of Finding, July 18, 2018, p. 2, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10122142-a.pdf>; OCR Letter of Finding, May 8, 2019, p. 5, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10191017-a.pdf>; OCR Letter of Finding, February 27, 2020, pp. 35-37, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09186901-a.pdf>. This is crucial: schools cannot be certain of compliance by taking an initial set of actions to address harassment without proper follow-up that evaluates whether or not supportive measures or other actions taken regarding respondents are actually effective in addressing the harassment. Indeed, OCR has found Title IX violations where schools took initial steps to address harassment but failed to enforce certain measures, leading to additional harassment beyond the initial incident. See OCR Letter of Finding, February 8, 2018, pp. 9-11, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10136001-a.pdf>.

prevent its recurrence. If those measures are not successful, the school must ratchet up its response; failure to do so has been considered by a number of courts to be an indicator of deliberate indifference.

The Preamble does state: “The mandatory obligations imposed on recipients under these final regulations share the same aim as the Department’s guidance (i.e., ensuring that recipients take actions in response to sexual harassment that are reasonably calculated to stop harassment and prevent recurrence of harassment);” 85 Fed. Reg. at 30046. Footnote 184 to the Preamble (at page 30046) adds: “The Department believes the preferable way of ensuring that recipients remedy sexual harassment in its education programs or activities is set forth in these final regulations, whereby a recipient *must* take specified actions, and a recipients’ decisions with respect to discretionary actions are evaluated in light of the known circumstances.” (Emphasis in original.) So, arguably, OCR will still look at what actions the recipient has taken to prevent the harassment from recurring, but the absence of any language in the regulations regarding *ending* the harassment and preventing it from recurring suggests troubling limits to the scope of its inquiry.

“Determination of responsibility”

Finally, the Final Rule substitutes “determination of responsibility” for “finding of responsibility” and has new text stating that remedies for complainants may include supportive measures, and do not need to be non-disciplinary or non-punitive. In other words, remedies may be disciplinary and punitive and may burden a respondent. Relatedly, the Final Rule adds to § 106.45(b)(7)(iv) that Title IX Coordinators are responsible for “effective implementation” of remedies. *Id.* at 30244-30245.

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