



2024 Joint Guidance on Federal Title IX Regulations
Analysis on Section 106.44(k): Recipient's response to sex discrimination, Discretion to offer informal resolution in some circumstances

July 8, 2024

Note: This document focuses on a summary analysis of Section 106.44(k), specifically Recipient's response to sex discrimination, Discretion to offer informal resolution in some circumstances.¹ For a full overview of the changes from the 2020 Regulations and the 2024 Final Regulations, see *Title IX Text for Text 2020 and 2024 Regulation Final Comparison*, available at <https://system.suny.edu/sci/titleix/>.

§ 106.44(k): Recipient's response to sex discrimination, Discretion to offer informal resolution in some circumstances

§ 106.44(k) states:

(k) *Discretion to offer informal resolution in some circumstances.* (1) At any time prior to determining whether sex discrimination occurred under § 106.45, and if applicable § 106.46, a recipient may offer to a complainant and respondent an informal resolution process, unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law. A recipient that provides the parties an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

(i) Subject to the limitations in paragraph (k)(1) of this section, a recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or this part or when a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties' wishes.

(ii) In addition to the limitations in paragraph (k)(1) of this section, circumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others.

¹ The effective date of these Regulations will be August 1, 2024 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

(2) A recipient must not require or pressure the parties to participate in an informal resolution process. The recipient must obtain the parties' voluntary consent to the informal resolution process and must not require waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.

(3) Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:

(i) The allegations;

(ii) The requirements of the informal resolution process;

(iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;

(iv) That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;

(v) The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and

(vi) What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.

(4) The facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the recipient's grievance procedures. Any person designated by a recipient to facilitate an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. Any person facilitating informal resolution must receive training under § 106.8(d)(3).

(5) Potential terms that may be included in an informal resolution agreement include but are not limited to:

(i) Restrictions on contact; and

(ii) Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events, including restrictions the recipient could have imposed as remedies or disciplinary sanctions had the

recipient determined at the conclusion of the recipient's grievance procedures that sex discrimination occurred.

Summary and Analysis

In responding to conduct that could reasonably be considered sex discrimination, including sex-based harassment, institutions do have the authority to offer informal resolution to the parties as an alternative to addressing the conduct under the grievance procedures set forth under § 106.45 (applicable to allegations of sex discrimination, including sex-based harassment, generally) and § 106.46 (applicable to specific complaints of sex-based harassment where the complainant or respondent is a student). The only exceptions are “if the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law.”² For postsecondary institutions, therefore, the first analysis that needs to be undertaken before informal resolution may be offered is whether such a process would be prohibited under Federal, State or local law. Beyond that, institutions have the discretion to determine if, under the circumstances, informal resolution is appropriate. The Department maintains that institutions “must retain discretion to decline information resolution to fulfill its obligation to address sex discrimination in its education program or activity, similar to its discretion to initiate grievance procedures absent a complaint.”³ It is also important to note that the Department does not require institutions to provide reasons for declining informal resolutions in writing because such a requirement is burdensome and not required under Title IX’s nondiscrimination mandate.⁴

The Department understands the term “informal resolution” to have the same meaning as “alternative dispute resolution processes,” “with both referring to the processes that have been widely used as a substitute for the formal process.”⁵ Informal resolution may include such strategies as mediation or restorative or transformative justice. Some commenters expressed concern that mediation is not appropriate to resolve an allegation of sexual assault because it assumes each party shares responsibility whereas restorative processes “require the harasser to admit that they harmed the complainant, focus on the complainant’s needs, repair the harm caused, and change future behavior.”⁶ In declining to prohibit mediation in cases of sexual assault, the Department made clear that it wished to offer a framework of flexibility for institutions to design alternative procedures, noting that nothing prohibits a postsecondary institution from “declining to offer mediation if it concludes such a process would be inappropriate.”⁷ In acknowledging the

² 34 C.F.R. § 106.44(k)(1).

³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33628 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33628.

⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33624; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 85 Fed. Reg. 30026, 30400 (May 19, 2020) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2020 Title IX Final Rule”).

⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33632.

⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33633.

need for further guidance on informal resolution, the Department will offer technical assistance, as appropriate, to promote compliance with the 2024 Final Rule.⁸

In providing the parties an informal resolution, the institution “must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the [institution]’s education program or activity.”⁹ This may require the Title IX Coordinator to restrict contact amongst the parties, for example.¹⁰

The 2024 Final Rule makes clear that an institution “has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX” or the applicable part of the 2024 Final Rule or “when a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties’ wishes.”¹¹ The regulation specifically states that “circumstances when [an institution] may decline to allow informal resolution *include but are not limited to* when the [institution] determines that the alleged conduct would present a future risk of harm to others.”[emphasis added]¹² The Department makes clear that this stated circumstance in the regulation is “intended to identify only one illustrative situation in which [an institution] might reasonably decide not to offer parties the option of informal resolution.”¹³ However, there may be others. Specifically, there may be situations where “both parties wish to resolve an allegation informally, but because of the nature of the allegations or information involved, or other factors, such as the risk of future harm to others, or repeated allegations against the same respondent, the [institution] believes it is more appropriate to pursue resolution through grievance procedures.”¹⁴

Before initiating an informal resolution process, the institution “must provide the parties notice that explains the allegations; the requirements of the informal resolution process; and that, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume” either of the applicable “grievance procedures.”¹⁵ The institutional notice must also advise that the “parties’ agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations.”¹⁶ The institution must explain to the parties the “potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties.”¹⁷ For example, the informal resolution agreement cannot impose training upon the respondent’s

⁸ *Id.*

⁹ 34 C.F.R. § 106.44(k)(1).

¹⁰ Title IX Coordinator requirements are set forth generally in 34 C.F.R. § 106.44(f).

¹¹ 34 C.F.R. § 106.44(k)(1)(i).

¹² 34 C.F.R. § 106.44(k)(1)(ii).

¹³ 2024 Title IX Final Rule, 89 Fed. Reg. 33628.

¹⁴ *Id.*

¹⁵ 34 C.F.R. § 106.44(k)(3)(i)-(iii).

¹⁶ 34 C.F.R. § 106.44(k)(3)(iv).

¹⁷ 34 C.F.R. § 106.44(k)(3)(v).

fraternity or sorority if such organization is a non-party. Finally, the institution must disclose to the parties what information the institution “will maintain and whether and how the [institution] could disclose such information for use” in the applicable grievance procedures.¹⁸

Informal Resolution is Voluntary

There are other conditions imposed upon an institution’s use of informal resolution in Title IX cases. For instance, an institution is prohibited from requiring or pressuring the parties to participate in an informal resolution process. The institution “must obtain the parties’ voluntary consent to the informal resolution process and must not require waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise any other right.”¹⁹

Facilitator Requirements

Other specified conditions of the informal resolution process involve the facilitator. That is, the “facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the [institution’s] grievance procedures.”²⁰ The facilitator must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent and must receive training under § 106.8(d)(3) of the regulations.²¹

Because of the conditions imposed upon the facilitator, the Title IX investigator would not be allowed to lead or otherwise participate in an informal resolution process. Commenters raised concerns that barring the investigator from facilitating an informal resolution would require more staff, is inefficient because investigators are in the best position to offer supportive measures, recourse or follow-up actions, and is unnecessary as there is minimal risk of investigator bias since the investigator has made no determination of responsibility. In responding to these concerns, the Department states that the conditions imposed upon the facilitator in the final regulation are necessary to “guard against the appearance of bias or a conflict of interest, which could erode trust in an [institution’s] grievance procedures and decrease the ability to ensure fair and reliable outcomes in the event a party terminates informal resolution” and the grievance procedure must move forward.²²

Other Considerations

In contrast to the 2020 Title IX rules, the offer of informal resolution under the 2024 Final Rule can be made in the absence of a formal complaint. “In response to a commenter who asked what level of investigation would be required to proceed with informal resolution without a complaint, the Department clarifies that these regulations afford [an institution] discretion to offer the parties an informal resolution process at any time before determining whether sex discrimination

¹⁸ 34 C.F.R. § 106.44(k)(3)(vi).

¹⁹ 34 C.F.R. § 106.44(k)(2).

²⁰ 34 C.F.R. § 106.44(k)(4).

²¹ 34 C.F.R. § 106.44(k)(4).

²² 2024 Title IX Final Rule, 89 Fed. Reg. 33631.

occurred, including before an investigation commences, as well as during the course of an investigation.”²³

It is also noteworthy that informal resolution can be offered even if the respondent has admitted to sexually discriminatory conduct. It is the Department’s view that an admission alone, outside the context of a grievance procedure, is not a determination of whether sex discrimination occurred. “Accordingly nothing in § 106.44(k) prohibits an [institution] from offering an informal resolution process in which a respondent may accept responsibility or accountability for sex discrimination or harm caused. The Department intends for the limitation regarding such determinations in § 106.44(k)(1)- that an [institution] may offer an informal resolution process ‘prior to determining whether sex discrimination occurred under [the applicable grievance procedures]-to clarify at what point an [institution] may offer informal resolution, but not limit the types of informal resolution an [institution] may offer.’”²⁴ Therefore, absent an institutional determination that sex discrimination occurred, an institution may offer informal resolution in response to a situation where the respondent has already taken responsibility.

Finally, potential terms of an informal resolution agreement may include, but are not limited to, “restrictions on contact and restrictions on the respondent’s participation in one or more of an [institution’s] programs or activities or attendance at specific events, including restrictions the [institution] **could have imposed as remedies or disciplinary sanctions had the [institution] determined that sex discrimination occurred under the [institution’s] grievance procedure.**”[emphasis added].²⁵

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²³ 2024 Title IX Final Rule, 89 Fed. Reg. 33625.

²⁴ *Id.*

²⁵ *Id.*; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41456 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2022 Title IX NPRM”).