



2024 Joint Guidance on Federal Title IX Regulations
Analysis on Section 106.45(g): Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Questioning parties and witnesses to aid in evaluating allegations and assessing credibility

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Note: This document focuses on a summary analysis of Section 106.45(g), specifically Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Questioning parties and witnesses to aid in evaluating allegations and assessing credibility.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/>.

§ 106.45(g): Questioning parties and witnesses to aid in evaluating allegations and assessing credibility

The text of 106.45(g) is short and general. It states, in its entirety:

Questioning parties and witnesses to aid in evaluating allegations and assessing credibility. A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party’s or witness’s credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.²

The provision applies to cases handled under both 106.45 and 106.46; the text of 106.46 notes that compliance with its own credibility procedures automatically complies with 106.45.

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 34 C.F.R. § 106.45(g).

Overview

The 2020 Title IX Regulations permitted one method of questioning parties and witnesses to aid in the evaluation of allegations and assessing credibility.³ Under the 2020 Regulations, recipients were required to apply one set of grievance procedures to all matters involving “sexual harassment” (as defined in the 2020 regulations), and those grievance procedures required a live hearing process that included cross-examination.⁴

The 2024 Title IX Regulations no longer require institutions to utilize the live hearing with cross-examination model to question parties and witnesses to aid in the evaluation of allegations and to assess credibility.⁵ Under the 2024 Regulations, the U.S. Department of Education (“the Department”) offers more flexibility to recipients, by creating two levels of procedural protections for matters involving allegations of sex discrimination. These two levels of procedural protections are found in sections 106.45 and 106.46. The procedural protections of section 106.46 apply only to cases involving allegations of sex-based harassment at institutions of postsecondary education in which at least one party is a student, whereas section 106.45 provides protections that apply not only to that situation, but to every other situation of sex discrimination and sex-based harassment as well for both elementary and secondary education, as well as sex discrimination at the postsecondary level. Within the procedural protections outlined in 106.45, 106.45(g) sets forth the general requirements regarding the assessment of credibility for all matters of sex discrimination.

Implications of 106.45(g)

No Further Guidance on What Process Would Comply

The 2024 Title IX provision provides a significant amount of discretion for institutions to establish their own procedures for evaluating allegations and assessing credibility. However, this discretion is tempered by case law and state laws, which may restrict what procedures can be used by a public or private institution in a particular situation. Depending on case law and state law, some potentially compliant systems under this may include:

- Single-Investigator Model – A single investigator conducts interviews, gathers relevant information, and makes determinations about whether a policy violation occurred. This model can be implemented by more than one individual acting as the

³ See generally Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2020 Title IX Final Rule”).

⁴ See current 34 C.F.R. § 106.45(6)(i).

⁵ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33698-99 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

investigator/decisionmaker; for example, a panel of three investigators could be used in the same manner.

- Asynchronous Hearing – A single investigator records interviews, solicits questions and follow-up questions from parties to be asked of each party and witness based on the recordings or transcripts, and when all follow-up questions have been asked, the single investigator makes a decision (this can also be considered Single Investigator Model).⁶
- Live Hearing – A decisionmaker holds a hearing in which either the decisionmaker reviews questions in writing from the parties to ask those who testify, or the decisionmaker supervises cross-examination by the parties’ advisors.⁷

No “Paper Decisionmakers.”

The text of the regulation itself tells us that *the decisionmaker* must engage in questioning the parties and witnesses themselves.⁸ This appears to preclude a resolution process by which an investigator conducts the interviews and prepares a summary of the evidence gathered, and then sends it to a separate decisionmaker for a determination “on the papers only.” This is notable because under the 2020 Regulations, having a paper-only decisionmaker was a key part of the default process for resolving matters at the K-12 level.⁹

This would also appear to preclude a model whereby two investigators add in a third person after the investigation is complete to make up a three-person decisionmaker panel.

When Credibility Is Not in Dispute

The application of 106.45(g) is tied to cases “to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.”¹⁰ Cases in which credibility is not in dispute might include where the parties agree on the conduct that occurred, or where there is an objective source of evidence for the conduct itself, such as a security camera recording of the conduct, or the conduct occurred via written communication that has been preserved and the authenticity of which is not in question. In those cases, it may be possible to use another system of resolution where the decisionmaker has not had an opportunity to question the parties or witnesses. If that is the desire of the institution, it is recommended that the institution clearly delineate when different procedures will be used to resolve cases, such that the rubric is in the policy.¹¹

⁶ See 34 C.F.R. § 106.46(f)(1)(i).

⁷ See 34 C.F.R. § 106.46(f)(1)(ii).

⁸ 34 C.F.R. § 106.45(g).

⁹ 2020 Title IX Final Rule, 85 Fed. Reg. 30577 (May 19, 2020).

¹⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33741 (Apr. 29, 2024).

¹¹ See 34 C.F.R. § 106.45(b)(8).

Important Considerations

When institutions have discretion as to the policies they adopt, they may later be subject to claims that they abused their discretion. Therefore, institutions should carefully consider the reasons they make certain choices. For example, is the institution choosing a particular option due to state law or case law, transparency, sensitivity to trauma, the importance of obtaining the best evidence for consideration, helping to ensure parties are treated equitably in the process and are fully heard, and ensuring the integrity of the process? Some balancing of these values seems appropriate in a grievance process, though limits may apply based on the jurisdiction in which each institution is located.

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