



2024 Joint Guidance on Federal Title IX Regulations Analysis on Section 106.45(a)(2): Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Complaint

July 19, 2024

Note: This document focuses on a summary analysis of Section 106.45(a)(2), specifically Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Complaint.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/>.

Section 106.45(a)(2): Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Complaint

(2) *Complaint.* The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient investigate and make a determination about alleged discrimination under Title IX or this part:

- (i) A complainant;
- (ii) A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant;
- (iii) The Title IX Coordinator, after making the determination specified in § 10644(f)(1)(v);
- (iv) With respect to complaints of sex discrimination other than sex-based harassment, in addition to the persons listed in paragraphs (a)(2)(i) through (iii) of this section,
 - (A) Any student or employee; or

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.

(B) Any person other than a student or employee who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged sex discrimination.

Summary and Analysis

The Final Rule provides needed clarification on both who can make a complaint of sex discrimination and sex-based harassment, as well as when they may make that complaint. The language in this section also reflects a shift from the prescriptive manner by which a complaint could be made under the 2020 Title IX Regulations (previously defined as a formal complaint.) As further detailed below, complaints may now include oral disclosures, non-signed documents, and other requests for action that can be objectively understood as such.

Complaints of Sex-Based Harassment

Complaints of sex-based harassment, which would include quid pro quo harassment, hostile environment harassment, and other specific offenses, can only be initiated by complainants, their parent or legal guardian in cases where they have the legal right to act on behalf of the complainant, or by the Title IX Coordinator under certain circumstances.

By its definition in § 106.2, a complainant is:

(1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or

(2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged sex discrimination.²

Additionally, consistent with § 106.6(g):

Nothing in Title IX or this part may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, subject to paragraph (e) of this section, including but not limited to making a complaint through the recipient’s grievance procedures for complaints of sex discrimination³.

This definition, notably, does not limit the time in which an individual will be considered a complainant and can file a complaint. Specifically, unlike the 2020 Title IX Regulations, the Final Rule does not require that the student or employee subjected to alleged sex-based harassment be

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33882 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

³ 2024 Title IX Final Rule, 89 Fed. Reg. 33885.

participating in or attempting to participate in the education program or activity of the recipient when the formal complaint is filed.

Practically speaking, therefore, only those who are alleged to have experienced sex-based harassment or sex discrimination personally have standing file as a complainant. The term is not inclusive of individuals who report sex-based harassment experienced by another person, other than the exception for parents, guardians, and legal representatives. Sex based harassment complaints may also be made by a parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant or the Title IX Coordinator, under certain circumstances. In addition to those individuals, complaints of sex discrimination other than sex-based harassment may also be made by any student or employee, or any person other than a student or employee who was participating or attempting to participate in the institution's program or activity at the time of the alleged sex discrimination.⁴

When a Complainant has not chosen to initiate an institutional process, a Title IX Coordinator has the discretion to act independently. They are given this authority through § 106.44(f)(1)(v) which states:

In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, [the Title IX Coordinator may] determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under § 106.45, and if applicable § 106.46.⁵

This decision must be made via a fact-specific determination considering multiple factors such as risk of further acts of sex discrimination or sex-based harassment, severity of the alleged conduct, age and relationship of the parties, patterns of behavior, availability of evidence and more.⁶ Practically speaking, however, this does not mean that the Title IX Coordinator becomes the complainant.

With respect to sex-based harassment complaints only:

The Department has limited the class of persons who may make complaints of sex-based harassment because such complaints may involve deeply personal aspects of the complainant's life, and because permitting complainants (or those with the legal authority to act on their behalf) to choose whether to ask the recipient to initiate grievance procedures, except in the very limited circumstances in which a Title IX

⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33891.

⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33889.

⁶ *Id.*; 34 C.F.R. § 106.44(f)(1)(v)(A) provides the list of factors a Title IX Coordinator should consider when making this determination.

*Coordinator may initiate the recipient's grievance procedures, best protects complainant autonomy interests while effectuating Title IX.*⁷

The Final Rule does not allow for third parties to initiate complaints regarding sex-based harassment. These individuals may still report the alleged conduct; however, they will not have the ability to request that the recipient investigate and make a determination about alleged discrimination through a complaint. In these situations, institutions should consider appropriate methods to extend support to the complainant, such as providing the third party with information about available processes and support that may be available to the complainant and requesting they share it or consider contacting the complainant directly with the same information.

Complaints of Sex Discrimination Other Than Sex-Based Harassment

As to incidents of sex discrimination that are not considered sex-based harassment, the group of individuals who may make complaints becomes more expansive. Any student or employee of the institution may make a complaint about sex discrimination other than sex-based harassment. Additionally, any individual aside from a student or employee, who was participating or attempting to participate in the institution's education program or activity may also make a complaint. As an example, if an attendee of a sporting or cultural event on campus observed sex discrimination, they could make a complaint. Similarly, an individual participant in a non-credit bearing experience, such as 4-H programming, a conference, or a summer camp, could make a complaint. The language provided does not allow for complaints from individuals who were not participating in or attempting to participate in the education program.⁸

The Department provides this rationale for expanding who may make a complaint about sex discrimination:

*Allegations of sex discrimination that are not sex-based harassment often implicate a recipient's policies or practices, are more likely to represent community-wide experiences, and are made against a recipient instead of against another person, such as a peer. Expanding reporting options to include those who have not been subject to sex discrimination will help recipients root out prohibited discrimination, protect their communities from sex-based harms, and ensure that all community members impacted by sex discrimination.*⁹

It is important to note that sex discrimination other than sex-based harassment includes allegations of retaliation under § 106.71, allegations that a recipient failed to make reasonable modifications under 106.40(b)(3)(ii), and/or allegations that a recipient's policy or procedures discriminate on

⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33653.

⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33891.

⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33654.

the basis of sex.¹⁰ In cases where a recipient's policy or procedures are alleged to be discriminatory, this does not mean that the institution is considered the respondent in the matter.

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¹⁰ *Id.*