



## **2024 Joint Guidance on Federal Title IX Regulations**

### **Analysis on Section 106.45(b): Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Basic requirements for grievance procedures**

**July 19, 2024**

*Note:* This document focuses on a summary analysis of Section 106.45(b), specifically Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Basic requirements for grievance procedures.<sup>1</sup> 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(b): Basic requirements for grievance procedures**

§ 106.45(b) states:

- (b) *Basic requirements for grievance procedures.* A recipient’s grievance procedures must:
- (1) Treat complainants and respondents equitably;
  - (2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;
  - (3) Include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient’s grievance procedures for complaints of sex discrimination;
  - (4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by- case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (i.e., the recipient’s decision whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;

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<sup>1</sup> 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.

(5) Require the recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses, subject to §106.71; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures;

(6) Require an objective evaluation of all evidence that is relevant, as defined in §106.2, and not otherwise impermissible under paragraph (b)(7) of this section—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness;

(7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed or considered, except by the recipient to determine whether an exception in paragraphs (i) through (iii) applies; must not be disclosed; and must not otherwise be used), regardless of whether they are relevant:

(i) Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;

(ii) A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the recipient obtains that party's or witness's voluntary, written consent for use in the recipient's grievance procedures; and

(iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred; and

(8) If a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints articulate consistent principles for how the recipient will determine which procedures apply.

## **Summary and Analysis**

As explained in the Preamble,<sup>2</sup> the Title IX regulations have required recipients to adopt and publish grievance procedures for complaints of sex discrimination since 1975.<sup>3</sup> However, the 1975 and subsequent regulations only specified that the procedures be “prompt and equitable,” with no explanation of what that entailed.<sup>4</sup> The regulations for Section 504 of the Rehabilitation Act<sup>5</sup> and for Title II of the Americans with Disabilities Act<sup>6</sup> have the same requirement. Instead, guidance could be found in OCR’s complaint resolution letters over the years – the regulations for all these laws having the same “prompt and equitable” requirement. In these letters, OCR described the requirements for grievance procedures as incorporating appropriate due process standards and providing for the prompt and equitable resolution of complaints.<sup>7</sup> The letters indicated that OCR would examine a number of factors in evaluating whether an institution’s grievance procedures are prompt and equitable, including whether the procedures provide for:

- Notice of the procedure to students and employees, including where to file complaints.
- Application of the procedures to complaints alleging discrimination by employees, students, or third parties.
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.
- Designated and reasonably prompt timeframes for the major stages of the complaint process, without specifying what those stages were (in practice, however, required timeframes were generally understood to be those for filing a complaint (if any), notification of the parties, scheduling and conducting the investigation/grievance meeting/hearing, issuance of a decision, filing and resolution of an appeal, and a provision for modifying timelines with notification of the parties).
- An assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

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<sup>2</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33651 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

<sup>3</sup> As explained in the discussion of § 106.45(a), this section of the new regulations applies to *all* complaints of sex discrimination, not just sexual harassment (with additional requirements for sexual harassment complaints involving at least one student party in § 106.46). As such, the requirements go beyond those in the 2020 regulations, which are applicable just to complaints of sexual harassment.

<sup>4</sup> 34 C.F.R. § 106.8(b).

<sup>5</sup> 34 C.F.R. § 104.7(b).

<sup>6</sup> 28 C.F.R. § 35.107(b).

<sup>7</sup> *See, e.g.*, University of Maryland Eastern Shore, OCR Complaint No. 03222243 (2023) (Title IX); San Francisco Art Institute, OCR Complaint No. 09102097 (2010).

## **Threshold matters**

The new regulations retain and expand on each of these elements. First, though, the regulations remind recipients that their grievance procedures must treat the parties equitably.<sup>8</sup> The Preamble explains that this applies regardless of the sex of the complainant or the respondent, since any person regardless of sex may be one or the other, and that the procedures must be carried out in a nondiscriminatory manner.<sup>9</sup>

As another threshold matter, and consistent with the 2020 regulations for complaints of sexual harassment, the new regulations prohibit conflicts of interest or bias by those involved in the grievance process.<sup>10</sup> However, as discussed in greater detail later in the regulations, the new regulations reject the 2020 regulations' prohibition of the "single-investigator" model. Instead, the regulations provide that the decisionmaker may be the same person as the investigator; similarly, the Title IX Coordinator can serve as an investigator and/or decisionmaker.<sup>11</sup> However, the new regulations require a recipient to notify its community in advance of when the single-investigator model will be used,<sup>12</sup> e.g., when and/or if its grievance procedures provide for a live hearing for sex-based harassment complaints and a single-investigator model for other types of sex discrimination complaints.<sup>13</sup>

The new regulations also retain the presumption in the current regulations that a respondent is not responsible for alleged sex discrimination until a determination is made at the conclusion of the grievance procedures.<sup>14</sup>

## **Required elements for grievance procedures**

### **Timeframes**

Turning now to the required elements for grievance procedures generally, the new regulations provide additional information on the longstanding OCR requirement that there be reasonably prompt timeframes for the major stages of the grievance procedures. In particular, the regulations provide that the major stages include, for example, evaluation (i.e., the recipient's decision whether to dismiss or investigate a complaint of sex discrimination); investigation;

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<sup>8</sup> 34 C.F.R. § 106.45(b)(1). 2024 Title IX Final Rule, 89 Fed. Reg. 33657 explains that "equitable" is not the same as "equal." Since the interests of a respondent and a complainant may differ, there may be aspects of the grievance process in which the recipient may need to treat the parties differently; e.g., by providing remedies to a complainant after a finding of responsibility, or notifying the parties of supportive measures at different times.

<sup>9</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33657.

<sup>10</sup> 34 C.F.R. § 106.45(b)(2).

<sup>11</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33663.

<sup>12</sup> 34 C.F.R. § 106.45(b)(8).

<sup>13</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33664.

<sup>14</sup> 34 C.F.R. § 106.45(b)(3).

determination; and appeal.<sup>15</sup> They also specify that there must be a process for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay.<sup>16</sup> This goes beyond even the requirements of the 2020 regulations, which only require reasonably prompt time frames for *conclusion* of the grievance process, for filing and resolving appeals, and for informal resolution. Moreover, even though these are given as examples, the Preamble makes it clear that there must be timeframes for these specific stages (and perhaps others at the discretion of the recipient).<sup>17</sup> Currently, in an effort to not set unreasonable/enforceable expectations, many procedures state that the recipient would make reasonable efforts to meet the specified timeframes and/or that the timeframes are “goals,” adding that the parties will be notified of any delays; OCR seemed to find this acceptable regarding both general Title IX grievance procedures and those under the current sexual harassment regulations. It is not clear if the new regulations will allow the continued use of this sort of language.

One potentially significant change set out in the Preamble is what appears to be a prohibition against setting a time limit or “statute of limitations” for filing a sex discrimination complaint.<sup>18</sup> Even before the 2020 regulations, recipients generally didn’t impose such a limit for complaints of sexual harassment for a variety of reasons (e.g., an acknowledgment that some complainants may need time to decide whether to pursue what can be a stressful resolution process). However, some recipients may have continued to have time frames for the filing of complaints regarding other types of sex discrimination (e.g., a discrete instance of allegedly disparate treatment), particularly in the employment context.<sup>19</sup> The Preamble, without much explanation, seems to foreclose such time frames.

## Privacy

The 2020 regulations prohibit a recipient from restricting a party’s right to discuss the allegations under investigation or gather and present evidence – that is, they prohibit recipients from imposing a “gag order.” The Preamble to the new regulations point to “the many ways in which unrestricted disclosures jeopardize the fairness of the grievance procedures.”<sup>20</sup> In response, the new regulations require recipients to take (largely unspecified) reasonable steps to protect the

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<sup>15</sup> 34 C.F.R. § 106.45(b)(4).

<sup>16</sup> *Id.*

<sup>17</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33669.

<sup>18</sup> *Id.*

<sup>19</sup> Consider a situation in which an employee alleges that they were denied a promotion based on sex. Under Title VII, the employee must file a complaint with the Equal Employment Opportunity Commission (“EEOC”) within 180/300 days of the date of the alleged discrimination; only if they do so can they then file a private lawsuit should the EEOC process not be successful. *See generally* [EEOC Compliance Manual, 2-IV](#). While a complaint under an employer’s grievance procedure generally won’t extend this timeframe, a reasonable time limit in the procedure (say, 60 or 90 days) could provide an opportunity for the employer to address the alleged discrimination without the need for a subsequent EEOC charge or lawsuit. It would seem that OCR’s prohibition against such a timeframe could interfere with this process. In comparison, OCR generally requires that a complaint be filed with it within 180 days of the alleged discrimination; however, an internal grievance does extend this period. [OCR Case Processing](#)

<sup>20</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33674.

privacy of the parties and witnesses while a grievance is being addressed, as long as those steps don't prevent the parties from participating in the grievance procedures; e.g., from obtaining evidence, speaking to witnesses, or consulting with confidential resources (whether a confidential employee or an external confidential resource<sup>21</sup>) or their advisors.<sup>22</sup> According to the Preamble, this:

may include restrictions on discussing the allegations or investigation in an article or on social media as long as such restrictions are consistent with the First Amendment. Widespread disclosures of personally identifiable information on social media or in the media can threaten the fairness of the grievance procedures and lead to harassment, including retaliation.<sup>23</sup>

While not specifically addressed in the regulations, the Preamble jumps off from this section to explain that a recipient *may* redact information that is not relevant to the allegations but is contained within documents or evidence that are relevant; information that is relevant *must* be disclosed, even if it would be otherwise protected by FERPA. However, a recipient *must* redact (or otherwise refrain from disclosing) information that is impermissible under § 106.45(b)(7) (discussed further below) even if the information is contained within documents or evidence that are relevant to the allegations.<sup>24</sup>

### **Relevant evidence**

Like the 2020 regulations, the new regulations require an objective evaluation of all evidence that is relevant and not otherwise impermissible.<sup>25</sup> While the 2020 regulations do not define “relevant,” the new regulations define it as “related to the allegations of sex discrimination” and explain that “evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred”; the Preamble explains that this is not a significant change from the 2020 regulations.<sup>26</sup> However, the regulations drop the previous requirement for disclosure and evaluation of “directly related evidence.”

### **Impermissible evidence**

The 2020 and new regulations contain similar requirements as to impermissible evidence. Both exclude from consideration and disclosure evidence protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege; the

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<sup>21</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33671.

<sup>22</sup> 34 C.F.R. § 106.45(b)(5). *See also* the discussion of §§ 106.45(f)(4)(iii) and 106.46(e)(6)(iii) regarding unauthorized disclosure of material obtained solely through the grievance procedures.

<sup>23</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33674.

<sup>24</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33672.

<sup>25</sup> 34 C.F.R. § 106.45(b)(6).

<sup>26</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33675; *see also* discussion of the definition of “relevant” in § 106.2, at 89 F.R. 33524.

new regulations clarify that this applies to privilege as recognized by federal or state law. However, the new regulations add to this by specifying that evidence provided to a confidential employee is also impermissible.<sup>27</sup> Both the 2020 and new regulations exclude a party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional unless the recipient obtains that party's voluntary, written consent; the new regulations add psychiatrist to this list and extend this protection to witnesses.<sup>28</sup> Finally, the 2020 regulations provide that, *during a hearing*, questions and evidence related to a complainant's (but not a respondent's<sup>29</sup>) sexual predisposition or sexual behavior are not relevant, unless they are offered to prove that someone other than the respondent committed the alleged conduct, or if they concern specific incidents of the complainant's prior sexual conduct with the respondent and are offered to prove consent. The current regulations extend these prohibitions regarding the complainant's "sexual interests and prior sexual conduct" (note the slight change in wording) to the *entire* grievance procedures (investigation, hearing, decision-making).<sup>30</sup> Note that the Preamble explains that this last prohibition applies to both respondents and complainants: "Allowing complainants to broadly introduce the evidence prohibited by § 106.45(b)(7)(iii) threatens to deprive respondents of due process (e.g., allowing a complainant to introduce evidence of prior sexual conduct but not permitting the respondent to rebut) and might result in misuse by the parties. Complainants, like respondents, are only permitted to use such information under the exceptions..." contained in the regulation.<sup>31</sup> This would seem to prohibit a complainant from, e.g., stating that they were a virgin prior to an alleged sexual assault to support a claim that they had not provided consent.

### **Different procedures for different types of allegations?**

Finally, as explained above, a recipient can use different procedures for different types of sex discrimination allegations as long as it "articulate[s] consistent principles in its written grievance procedures for how the recipient will determine which procedures apply."<sup>32</sup> As explained in the Preamble, this means that a recipient must provide information as to what factors, if any, will be considered in determining under what circumstances or to which types of sex discrimination complaints the differing procedures would apply; it gives as examples complaints involving certain forms of sex-based harassment, student-to-student sex-based harassment complaints, complaints with certain types of evidence, and complaints involving students of certain ages or

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<sup>27</sup> 34 C.F.R. § 106.45(b)(7)(i).

<sup>28</sup> 34 C.F.R. § 106.45(b)(7)(ii).

<sup>29</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33678. *See also* 2024 Title IX Final Rule, 89 Fed. Reg. 33679: "The Department...declines to modify these final regulations to expressly permit evidence of a respondent's prior sex-based conduct as pattern evidence. Such evidence is governed by the relevance standard ... and must be assessed on a case-by-case basis. ... The Department notes that pattern evidence may be permissible ... as the recipient must objectively evaluate pattern evidence to the extent it is relevant, *i.e.*, related to the allegations of sex discrimination under investigation and may aid a decisionmaker in determining whether the alleged sex discrimination occurred."

<sup>30</sup> 34 C.F.R. § 106.45(b)(7)(iii).

<sup>31</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33679.

<sup>32</sup> 34 C.F.R. § 106.45(b)(8).

education levels. However, a recipient cannot use different procedures for different parties within a specific investigation; e.g., using a live hearing with questioning by an advisor for assessing the credibility of one party but using live questioning during individual meetings to assess the credibility of the other party (unless necessary as a disability-related accommodation or language access service).<sup>33</sup>

### **Practice note: grievance procedures for other prohibited characteristics**

As a practice note, since the regulations for Section 504<sup>34</sup> and Title II of the ADA<sup>35</sup> also require prompt and equitable grievance procedures, recipients may wish to weigh the pros and cons of adopting the procedures outlined in § 106.45(b) for grievances based on disability, both when there is a named respondent(s) and when the challenge is to a policy or practice. While Title VI doesn't require grievance procedures, recipients may also want to weigh the pros and cons of using § 106.45-compliant procedures for cases that involve alleged discrimination on the basis of race and national origin -- as well as any other protected characteristics in their nondiscrimination policies. On the positive side, doing so would promote consistency and a relatively robust decision-making process for disability, race and other protected characteristic-based complaints, while on the negative side, more robust decision-making processes may require more resources and attention to policy compliance. Institutions will have to decide what options will work best for them in making such decisions.

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<sup>33</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33680.

<sup>34</sup> 34 C.F.R. § 104.7(b).

<sup>35</sup> 28 C.F.R. § 35.107(b).