



## 2024 Joint Guidance on Federal Title IX Regulations Analysis on Section 106.45(c): Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Notice of allegations

July 19, 2024

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

### **Overview**

The 2020 Title IX Regulations included a specific list of information to be included in a notice of allegations to be provided to both parties at the outset of the process. Section 106.45(c) of the 2024 Final Rule alters that list in a way that requires the provision of less information to parties than was previously required. Note, however, that where the heightened process applies, Section 106.46(c) requires additional information to be provided as part of this notice in a manner similar to what was required under the 2020 Title IX Regulations.

### **Text of Regulations**

Section 106.45(c), in its entirety, reads as follows:

“Upon initiation of the recipient’s grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known.

(1) The notice must include:

- (i) The recipient’s grievance procedures under this section, and if applicable § 106.46, and any informal resolution process under § 106.44(k);

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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.

(ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s) to the extent that information is available to the recipient;

(iii) A statement that retaliation is prohibited; and

(iv) A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence as set out in paragraph (f)(4) of this section; and if the recipient provides a description of the evidence, the parties are entitled to an equal opportunity to access to [sic] the relevant and not otherwise impermissible evidence upon the request of any party.

(2) If, in the course of an investigation, the recipient decides to investigate additional allegations of sex discrimination by the respondent toward the complainant that are not included in the notice provided under paragraph (c) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.”<sup>2</sup>

### **Method of Notice – Considerations for an Oral versus Written Notice**

The final language of Section 106.45(c)(ii) states that the notice of allegations must provide “sufficient information” but no longer specifies that notice must be “written.” Notably, this is distinct from the written notice requirement expressly set forth in Section 106.46(c), which sets forth the grievance procedures for complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions.

The Department suggested that determinations for method of notice should be fact-specific and take into consideration factors such as the nature of the allegations and the age and developmental maturity of the parties.<sup>3</sup> The Department provided discussion regarding the form of the notice of allegations, noting that “a written notice of allegations can promote predictability, transparency, consistency, and legitimacy in a recipient’s implementation of its grievance procedures.”<sup>4</sup> However, the Department maintained that, as it explained in the July 2022 NPRM, a written notice requirement “may limit a recipient’s ability to respond promptly and in a developmentally and age-

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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, 33891 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

<sup>3</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33681.

<sup>4</sup> *Id.*

appropriate way when a student complains of sex discrimination.”<sup>5</sup> Notably, the Department emphasizes that prompt oral notice of allegations in an elementary or secondary school context may be the most age-appropriate method for delivery of the notice.

Although some comments requested that the Department carve out a written notice requirement in 106.45(c) for postsecondary institutions, the Department declined to do so. However, 106.8(f) requires recipients to maintain records documenting their response to complaints of sex discrimination, which would include documentation demonstrating provision of a notice of allegations, whether the notice was provided orally or in writing. The Department also clarified that oral notice may be appropriate in complaints without a respondent, such as complaints outside the harassment context, because the complainant would “presumably...already have information about the alleged sex discrimination.”<sup>6</sup>

### **Timing of Notice**

Section 106.45(c) requires that notice of the allegations be provided to the parties, where known, “*upon initiation of the recipient's grievance procedures.*” This is a change from the 2020 requirement that notice be provided upon receipt of a formal complaint. The Department explains that this change “ensures a recipient has time” to resolve the following list of “threshold issues,” listed below:

- Determine whether the complaint is appropriate for dismissal under Section 106.45(d)(1);
- Confirm the accuracy of the information to be included in the notice; and
- Address any safety concerns, if appropriate.<sup>7</sup>

The Department emphasized that notice should be provided “as soon as these threshold issues have been resolved and the grievance procedures have been initiated, to ensure that any delay does not undermine a recipient’s obligation to resolve a sex discrimination complaint promptly and equitably.”<sup>8</sup>

The Department clarified that the final regulations require notice to the parties who are known but that simultaneous notice is not required.<sup>9</sup> The Department stated that, although Section 106.45(b)(1) requires equitable treatment of complainants and respondents during the grievance procedures, equitable treatment “does not necessarily require simultaneous notice, particularly when it would be inappropriate or impractical to do so.”<sup>10</sup>

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<sup>5</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33681.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

As it relates to informal resolution, because the final regulations require the notice of allegations to be provided upon initiation of the grievance procedures, the notice will precede offering the parties opportunity for informal resolution.

### **Content of Notice - Sufficient Information**

Regarding the minimum requirements for “sufficient information” under the 2024 Final Regulations, the Department requires notice to include “the conduct alleged to constitute sex discrimination under Title IX or this part...” This is a change from the 2020 language, which required the notice to include “the conduct allegedly constituting sexual harassment under § 106.30.”

The Department continues to require that the notice states 1) the identities of the parties involved in the incident, and 2) the date and location of the alleged incident, if available.<sup>11</sup>

The recipient may, but is not required to, include additional information beyond what is required in 106.45(c)(ii). The Department acknowledges that more detailed notices may be helpful in cases involving more serious conduct or consequences.<sup>12</sup> The Department notes that “streamlined notice will be easier for a recipient to implement consistently and easier for parties to understand.”<sup>13</sup> The Department also warns that more detailed notices “may prevent a recipient from responding promptly and appropriately to all forms of sex discrimination in the educational environment...”<sup>14</sup>

Note that while Section 106.45(c) requires less information than does 106.46(c), there is nothing in the 2024 Regulations prohibiting a more robust notice to parties under the procedures in Section 106.45, provided that the parties receive the same information.

### **Disclosures of Personally Identifiable Information**

The Department confirmed that the notice requirements in Section 106.45(c)(ii) do not conflict with Section 106.44(j). The Department noted that Section 106.44(j) carves out an exception for disclosure of personally identifiable information. Section 106.44(j)(3) provides that a recipient may disclose personally identifiable information “to carry out the purposes of this part, including any action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient’s education program or activity,” which includes disclosures made in accordance with Sections 106.44, 106.45, and 106.46.<sup>15</sup>

### **Equal Opportunity to Access the Relevant Evidence**

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<sup>11</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33681.

<sup>12</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33682.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33890.

The Department revised the July 2022 NPRM proposed language for Section 106.45(c)(1)(iv). 89 Fed. Reg. 33,682. Under the final regulations, notice must include a statement that the parties are “entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence...”

If the recipient provides the parties with only a description of the evidence, the parties may request access to the relevant and not impermissible evidence. Under Section 106.45(f)(4)(j), a party who requests access to the relevant evidence, after being provided a description, *must* be provided access to the relevant and not impermissible evidence.<sup>16</sup>

### **Other Changes**

As it relates to 106.45(c)(2), the Department revised the July 2022 proposed language to specify that this paragraph applies to additional allegations *of sex discrimination* by the respondent.<sup>17</sup>

The Department modified Section 106.45(c)(1)(ii) to make plural the words “incident,” “date,” and “location,” to account for allegations that span several dates or locations and/or that include multiple incidents.

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<sup>16</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33682.

<sup>17</sup> *Id.*