



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

July 19, 2024

Note: This document focuses on a summary analysis of Section 106.45(d), specifically Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Dismissal of a 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(d): Dismissal of a complaint

§ 106.45(d) states:

(d) *Dismissal of a complaint.* (1) A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable §106.46, for any of the following reasons:

- (i) The recipient is unable to identify the respondent after taking reasonable steps to do so;
- (ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;
- (iii) The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint under §106.44(f)(1)(v), and the recipient determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or this part even if proven; or
- (iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or this part. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

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) Upon dismissal, a recipient must promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing.

(3) A recipient must notify the complainant that a dismissal may be appealed and provide the complainant with an opportunity to appeal the dismissal of a complaint on the bases set out in §106.46(i)(1). If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent that the dismissal may be appealed on the bases set out in §106.46(i)(1). If the dismissal is appealed, the recipient must:

(i) Notify the parties of any appeal, including notice of the allegations consistent with paragraph (c) of this section if notice was not previously provided to the respondent;

(ii) Implement appeal procedures equally for the parties;

(iii) Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;

(iv) Ensure that the decisionmaker for the appeal has been trained as set out in §106.8(d)(2);

(v) Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and

(vi) Notify the parties of the result of the appeal and the rationale for the result.

(4) A recipient that dismisses a complaint must, at a minimum:

(i) Offer supportive measures to the complainant as appropriate under §106.44(g);

(ii) For dismissals under paragraph (d)(1)(iii) or (iv) of this section in which the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate under §106.44(g); and

(iii) 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 under §106.44(f)(1)(vii).

Summary and Analysis

The 2024 Final Rule sets out the permissible bases for dismissing all or part of a complaint, the considerations the Title IX Coordinator should take into account in deciding whether to accept the request, and the process for dismissing the matter. It also sets out the parties' appeal rights. Finally, the Preamble emphasizes that Title IX is intended to protect students, employees, and others participating in a recipient's programs and activities.² For this reason, the Preamble makes it clear that recipients shouldn't be too quick to dismiss a complaint and that, even if a complaint is dismissed, a recipient may need to pursue the matter and/or take steps to ensure that sex discrimination doesn't continue or happen again.

² OCR often refers to those protected by Title IX as "beneficiaries" of a recipient's programs or activities.

Dismissals are now all discretionary

Under the 2020 regulations, a recipient “must” dismiss a complaint if the alleged conduct, if proven, wouldn’t constitute sexual harassment, didn’t occur in the recipient’s program or activity, or didn’t occur in the United States. Under the new regulations, the four permissible bases for dismissal are all discretionary.

Bases

As a threshold matter, the new regulations no longer include the 2020 regulations’ “specific circumstances preventing the recipient from gathering evidence sufficient to reach a determination” as a basis for appeal, explaining that this basis was “vague and undefined.”³ As will be discussed below, this could lead to some practical difficulties in investigating some complaints.

Unable to identify respondent despite reasonable efforts to do so

The first permissible basis for appeal is when the recipient is unable to identify the respondent. This seems to be a specific example of the discontinued “specific circumstances” basis, albeit with the additional requirement to make reasonable efforts to try to identify the respondent. However, consistent with the emphasis on pursuing allegations despite there being a basis for dismissal, the Preamble gives examples of circumstances when a recipient might want to proceed even when it is unable to identify the respondent – for example, “providing closure to the complainant or addressing circumstances independent of the identity of the respondent that may have contributed to an incident (e.g., unsafe conditions, lack of monitoring, inadequate policies).” The Preamble⁴ discusses *Feminist Majority Foundation v. Hurley*,⁵ in which the court identified several steps that the university could have taken, including more vigorously denouncing the harassing conduct, mandating a student body assembly to discourage such harassment on social media platforms, seeking external advice to develop policies to address and prevent harassment, or offering counseling to the complainants. Finally, this discussion reminds recipients of that they cannot dismiss a sex discrimination complaint alleging the recipient’s policy or practices discriminate based on sex simply because no individual respondent was named in the complaint.

Similarly, the Preamble⁶ provides:

³Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33684 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

⁴ *Id.*

⁵ 911 F.3d 674 (4th Cir. 2018).

⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33514.

The Department notes that, when the elements of sex-based hostile environment are satisfied for an affected student, a recipient has an obligation to address that hostile environment, even if a particular respondent's conduct does not justify discipline. For example, in response to a hostile environment created by a series of incidents by different respondents, a recipient may offer supportive measures to the affected student or provide training for the broader school community.

Respondent is no longer participating in recipient's program or activity/no longer employed

Under the 2020 regulations, a recipient could dismiss a complaint if the respondent was no longer enrolled in or employed by the recipient. Consistent with the expansion of the scope of the regulations beyond just employees and students, the new regulations allow dismissal when the respondent is no longer participating in the recipient's educational programs or activities (which would include both students and other beneficiaries) or no longer employed. The Preamble⁷ gives examples of when a recipient might want to proceed with a complaint nonetheless, such as when a respondent poses an ongoing risk to the recipient's community; when a determination could provide a benefit to the complainant or assist the recipient in complying with its obligations under other laws related to addressing sexual misconduct involving minor students; and to assist another recipient if the respondent becomes a student or employee at another recipient.

Complainant requests withdrawal of all or part of complaint

Just as a complaint no longer has to be in writing under the new regulations,⁸ a request for withdrawal doesn't have to be in writing *unless* one of the parties is a student and the complaint alleges sexual misconduct.⁹

More substantively, the new regulations include additional considerations for the Title IX Coordinator in deciding whether to accept a complainant's request to withdraw their complaint or any of the allegations – whether the Title IX Coordinator might want to initiate the complaint and whether there are any remaining allegations that could be prohibited sex discrimination.¹⁰ The Preamble gives as examples a complaint involving multiple complainants, allegations against several respondents, alleged discrimination occurring on more than one occasion, or when there is an ongoing safety issue.¹¹

Allegations, even if true, would not be prohibited discrimination

⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33685.

⁸ 34 C.F.R. § 106.2.

⁹ 34 C.F.R. § 106.46(d)(2).

¹⁰ See also discussion of 34 C.F.R. § 106.44(f)(v) as to considerations for the Title IX Coordinator in deciding to initiate their own complaint.

¹¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33686.

This is a holdover from the 2020 regulations. However, under the new regulations, the recipient must now make reasonable efforts to clarify the allegations with the complainant. The Preamble doesn't discuss the practical implications of this. Can this be done as part of the initial intake interview? If not, can it be done through an email exchange with the complainant? Would a better practice be to meet with the complainant a second time? Could the Title IX Coordinator's attempts to clarify the allegations be challenged by a respondent as leading the complainant on?

This basis could, in some circumstances, possibly include allegations covered by the bases in the 2020 regulations for conduct not in the United States and conduct not part of a recipient's program or activity. However, see the discussion of § 106.11 of the new regulations which provides that "[a] recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States."

Practice points

Previously because of the requirement for a formal, signed complaint, questions could arise when it was clear from the outset that, e.g., the respondent couldn't be identified or was no longer associated with the recipient or that the allegations wouldn't be prohibited sex discrimination. Could the decision to not proceed with an investigation be made as part of the intake process before the formal complaint was filed (in which case there wouldn't seem to be a need to provide an appeal) or only after the complaint had been filed (in which case there would be)? This doesn't seem to be addressed directly in the regulations or the Preamble. However, because the definition of complaint in the new regulations¹² is simply an oral or written request that can be understood as a request for an investigation and determination, it would seem that such a decision would be part of the evaluation process and would have to be considered as taking place post-complaint, along with offering an appeal should the complaint be dismissed. This is reinforced by the Preamble¹³ which, in discussing the requirement in § 106.45(c) that notice of the complaint must be provided "upon initiation of the...grievance procedures" (rather than the 2020 regulations' "upon receipt of a formal complaint"), explains that this

...ensures a recipient has time to review a complaint, determine whether the complaint is appropriate for dismissal under § 106.45(d)(1), confirm the accuracy of information to be included in the notice, and address any safety concerns, if appropriate. However, a recipient will need to provide the notice as soon as these threshold issues have been resolved and the grievance procedures have been initiated.

¹² 34 C.F.R. § 106.2.

¹³ 2024 Title IX Final Rule, 89 Fed. Reg. 33681.

Similarly, the Preamble¹⁴ “recognizes that in many cases, it will not be clear at the beginning of an investigation whether alleged conduct could constitute sex discrimination,” with at least some investigation needed before a decision can be made as to dismissal. his stage? The Preamble¹⁵ gives several examples of this, e.g., when one or more of the parties may have been incapacitated during an incident of alleged sexual harassment, when witness interviews conducted as part of the investigation could provide additional information as to what happened, or when an investigation could provide information about severity or pervasiveness that isn’t available during intake.

The Preamble¹⁶ explains that the four reasons for dismissal in § 106.45(d)(1) are the *only* reasons a complaint can be dismissed. This could well put the recipient in a bind if, e.g., the complainant doesn’t withdraw their complaint but refuses to or stops cooperating with the investigation. Similarly, the Preamble¹⁷ “declines to offer more specific guidance at this time on how a recipient should investigate a complaint made by a person who is no longer participating in its education program or activity” but, helpfully (?), goes on to say that “[t]he Department will offer technical assistance, as appropriate, to promote compliance with these final regulations, the scope of which will be determined in the future.”

Notice of Dismissal

The regulations clarify the steps the Title IX Coordinator should take to notify the parties that all or part of a complaint has been dismissed. Under the 2020 regulations, a recipient only had to “promptly send written notice of the dismissal and reason(s)...simultaneously to the parties.” That raised questions as to why the recipient had to notify the respondent of a dismissal even when there hadn’t yet been notice of the complaint. Now, the recipient only has to notify the respondent of the dismissal if they had been provided notice of the complaint.

The notice of the dismissal no longer has to be in writing— though that would likely be a good practice – unless one of the parties is a student, the complaint involves allegations of sexual misconduct, and (again) the respondent has been notified of the allegations (if not, only the complainant would get written notice).¹⁸

Appeals

Notice of/right to appeal

As under the 2020 regulations, a recipient has to provide an appeal of a dismissal based on procedural irregularity that would change the outcome; new evidence that would change the

¹⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33683.

¹⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33686.

¹⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33684.

¹⁷ *Id.*

¹⁸ 34 C.F.R. § 106.46(d)(1).

outcome and that was not reasonably available before; and bias or conflict of interest.¹⁹ Under the 2020 regulations, both parties had the right to appeal a dismissal, even if the respondent hadn't received notice of the complaint. Under the new regulations, the recipient only has to give the respondent the right to appeal if the respondent had been given notice of the complaint (and thus had been required to take some action in response).²⁰ The Preamble does not give any other reason beyond this for giving the respondent an opportunity to appeal a dismissal – after all, the dismissal means that there won't be an investigation. However, it could be that in some circumstances a respondent who is certain they haven't engaged in discrimination would want to clear their name or get finality.

Appeals process

The handling of the appeal itself is much the same as under the 2020 regulations. As in the 2020 regulations, the appeals officer can't have participated in the investigation or determination and must be appropriately trained. The new regulations do have several additional steps or clarifications. If the complainant appeals and notice of the complaint hadn't been provided to the respondent, then the recipient has to provide the respondent with the allegations (since they wouldn't have learned of them previously). As a matter of practice, particularly where the respondent first gets notice of the allegations in the notice of appeal, the Coordinator may want to consider helping the respondent understand that the appeals process is not an opportunity to respond to the allegations but is limited to the permissible bases for appeal. Finally, unlike the 2020 regulations, the recipient doesn't have to notify the parties of the outcome of an appeal in writing.²¹

Post-Dismissal Measures

The new regulations remind recipients that, if a complaint is dismissed, they still have to offer supportive measures to the complainant and possibly the respondent if the respondent had been notified of the complaint (but apparently not if the only notice of the allegations to the respondent was as to the appeal).

The new regulations also remind recipients that, even if a complaint is dismissed, they might still have to take other measures “to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.” The Preamble²² gives as an example an allegation of a sex-based hostile environment that is based solely on a complainant's statement that, on multiple occasions, they heard strange voices while using the dormitory showers. Even though the complaint may have been dismissed, the recipient may decide to investigate to determine whether an individual is inappropriately surveilling private facilities, such as by interviewing witnesses or reviewing contemporaneous video footage outside the facilities. As another

¹⁹ See discussion of 34 C.F.R. § 106.46(i)(1) of how these bases differ from those in the 2020 regulations.

²⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33687.

²¹ 2024 Title IX Final Rule, 89 Fed. Reg. 33687-89

²² 2024 Title IX Final Rule, 89 Fed. Reg. 33689.

example, even though a complaint may have been dismissed, the recipient may choose to investigate whether other persons have been subjected to similar conduct as alleged in the complaint. Even if an investigation isn't deemed necessary, recipients should consider where there are "appropriate prompt and effective steps ... to ensure that sex discrimination does not continue or recur within the recipient's education program or activity."²³

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²³ 34 C.F.R. § 106.44(f)(vii).