



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

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

§ 106.45(e) states:

(e) *Consolidation of complaints.* A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances. If one of the complaints to be consolidated is a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures for investigating and resolving the consolidated complaint must comply with the requirements of §106.46 in addition to the requirements of this section. When more than one complainant or more than one respondent is involved, references in this section and in §106.46 to a party, complainant, or respondent include the plural, as applicable.

Summary and Analysis

The Final Rule continues to allow for the consolidation of complaints as introduced in the 2020 Title IX Regulations. Recipients retain the discretionary option to consolidate complaints against more than one respondent, complaints from more than one complainant against one or more

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.

respondents, and to consolidate cross-complaints in which parties name each other as a respondent when the allegations arise out of the same facts or circumstances. When recipients choose to consolidate complaints, the Department has emphasized that “each party retains their status as an individual, as opposed to a group or organization.”² This ensures that each party “has each right granted to a party under § 106.45, and if applicable § 106.46.”³

With the addition of distinct grievance procedures for student complaints of sex-based harassment at postsecondary institutions in §106.46, institutions must take care when consolidating complaints that involve both student and non-student parties. “[I]f one of the complaints to be consolidated is a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures for investigating and resolving the consolidated complaint must comply with the requirements of §106.46 in addition to the requirements of this section.”

Though not expressly covered in this section of the Preamble, practical experience and discretion granted in the Final Rule allows institutions to consolidate allegations which may implicate other non-Title IX policies, such as student and employee codes of conduct and other nondiscrimination policies. For example, if a student is alleged to have broken windows in a residence hall during a domestic violence incident, the institution may decide to investigate the potential code of conduct violation for destruction of campus property within the larger Title IX investigation. However, institutions should always ensure they are following the Title IX grievance process when consolidating allegations involving other policies or procedures to protect the due process safeguards afforded by Title IX. It may also be advisable for institutions to add an item to their Student Code of Conduct or Title IX grievance procedure explaining how the institution will handle one or more allegations falling under multiple policies.

Same Facts or Circumstances

Again, the 2024 Title IX Regulations retain the language that institutions may consolidate complaints “when the allegations of sex discrimination arise out of the same facts or circumstances.” The Department did not provide guidance on the distinction between same facts, similar facts, and pattern offenses and opted not to broaden the language of the guidelines to be inclusive of similar facts. Rather, the Department continues to emphasize that any decision to consolidate should remain fact specific. The Preamble shares:

The Department declines to broaden § 106.45(e) to expressly permit consolidation in other circumstances, such as those involving facts or circumstances that are similar but not the same. The Department views the guidelines set forth in § 106.45(e) as covering the complaints in which consolidation is most likely to be fair to all parties, to create

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33691 (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. 33691.

*efficiencies in the grievance procedures, and to comply with FERPA. Nothing in these final regulations expressly prohibits recipients from consolidating in circumstances other than those outlined in § 106.45(e), and § 106.45(j) expressly permits a recipient to adopt additional provisions as long as they apply equally to the parties.*⁴

Institutions will need to make fact specific determinations regarding the decision to consolidate complaints that weigh their ability to carry out a fair and impartial process, protect privacy and afford the parties the same rights resulting from the decision to consolidate.

Decision to Consolidate Complaints

One of the primary benefits of consolidating Title IX complaints is the increased efficiency of the grievance process. Consolidation can significantly reduce the duplication of efforts required by Title IX personnel. Instead of handling each complaint in isolation, which often involves repetitive tasks such as conducting multiple interviews and redundant recordkeeping, consolidation allows these efforts to be streamlined. This efficiency can potentially shorten the overall timeline of the grievance process, enabling a prompt resolution of cases. Consolidation of complaints may also promote more consistent analysis and outcomes, leading to greater equity in outcomes.

Additionally, consolidation reduces the burden of participation by the parties involved. For instance, in cases involving multiple complainants against a single respondent, or vice versa, consolidation means that witnesses and parties may not need to repeatedly recount their experiences in separate proceedings. This not only lessens the impact on their educational program or activity but also fosters a more trauma-informed process by minimizing the need for repetitive recounting of potentially traumatic events.

However, consolidation of Title IX complaints is not without its drawbacks. One significant concern is the perceived or potential vulnerabilities that arise when dealing with one complainant and multiple respondents or multiple complainants and one respondent. Consolidation may create a power dynamic that feels imbalanced for the parties involved or may lead the parties to raise concerns about biases on the part of the Title IX administrators involved.

Privacy concerns also become more pronounced with consolidation. While institutions can redact information to protect privacy, they must still comply with the requirements to provide evidence for review. Schools bear the responsibility to “protect the privacy of the parties”⁵ involved under § 106.45(b)(5) and must also “prevent and address unauthorized disclosure of information.”⁶ as stipulated in §§ 106.45(f)(4)(iii) and 106.46(e)(6)(iii). This increased need to protect privacy may come at a higher administrative cost, possibly making case management bulkier, and may implicate obligations under FERPA.

⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33691.

⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33692.

⁶ *Id.*

As to the latter, the Preamble notes that, when there is a direct conflict between Title IX and FERPA, Title IX is paramount. However, because consolidation is discretionary, “[i]f consolidation of certain complaints means that a recipient is unable to comply with FERPA, the recipient is not permitted to exercise its discretion to consolidate those complaints.”⁷ It goes on to explain that “[w]hen there is a direct conflict between the requirements of Title IX and FERPA ... a recipient must comply with Title IX. When there is a direct conflict between constitutional due process rights and FERPA, a constitutional override applies. The interaction between FERPA and Title IX is explained in greater detail in the discussion of § 106.6(e) in this preamble.”⁸

The Department acknowledges that certain evidence that is relevant to the allegations may not necessarily be directly related to all parties for the purposes of FERPA. While there may be instances in which unrelated material could be redacted without compromising due process, to the extent that these Title IX regulations require disclosure of information from education records to the parties ... that would not comply with FERPA, the constitutional override and the GEPA override apply and require disclosure under §§ 106.45(f)(4) and 106.46(e)(6) to the parties and their advisors.⁹ Thus, consolidation under *any* circumstances (one complainant and multiple respondents, multiple complainants and one respondent, multiple complainants and multiple respondents, and perhaps pattern situations) would only be permissible if the relevant educational records of the parties can be shared. The Preamble notes that a recipient “may redact information that is not relevant to the allegations of sex discrimination; however, a recipient must, when redacting information, ensure that the recipient is fully complying with its obligations under § 106.45, and if applicable § 106.46.”¹⁰ In addition, while not specifically discussed in the Preamble section on consolidation, a recipient may be able to share records and information with the parties under FERPA’s “directly related” exception.¹¹

Institutions should consider the toll that separate proceedings can take on the parties involved, weighing this against the risks to fairness and impartiality of the process and outcome. Additionally, the structure and resources of the school may play a significant role in this decision. For instance, larger institutions with more resources may handle consolidated cases more effectively than smaller ones.

It should be noted that there are instances where it may be more practical to consolidate efforts rather than complaints. For example, in scenarios with multiple complainants against a single respondent, schools might choose to keep each case separate while consolidating interviews with the respondent. This can be managed by clearly transitioning between cases during questioning and pausing recordings as necessary, rather than conducting multiple, separate interviews. This

⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33692.

⁸ *Id.*

⁹ 2024 Title IX Final Rule, 89 Fed. Reg. 33698.

¹⁰ *Id.* The Preamble goes on: “For additional discussion of a recipient's ability to redact information as part of the grievance procedures, see the discussions of §§ 106.6(e), 106.45(b)(5) and (f)(4), and 106.46(e)(6).”

¹¹ For further discussion on FERPA’s interaction with Title IX, see the Joint Guidance related to § 106.6(e) and the FERPA and GEPA override.

approach can enhance efficiency without compromising the integrity or fairness of the grievance process.

Again, and above all, the Department continues to highlight that the decision to consolidate Title IX complaints rests at the discretion of the institution and must consider the unique circumstances of each case.

Title IX Safeguards for Consolidation of Complaints

The Department acknowledged concerns presented in public comment regarding the consolidation of complaints. In defense of their decision to provide more guidelines of when and how to consolidate complaints, the Department stresses the 2024 Regulations “give recipients the flexibility to determine whether to consolidate in a manner that best addresses the parties, the complaints, and the recipient’s unique structure and resources.”¹² The potential challenges posed by commenters are mitigated by due process safeguards shared elsewhere in the 2024 Regulations. Specifically, the Department stresses the consolidation of complaints does not relieve institutions of their responsibilities to ensure Title IX administrators “do not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent”¹³; further, the regulations prohibit retaliation;¹⁴ require an “adequate, reliable, and impartial investigation of complaints;”¹⁵ (and, when credibility is at issue, require the recipient to assess the credibility of the parties and witnesses).¹⁶

If the requirements established under Title IX are being upheld, institutions may continue to consolidate complaints in a way that provides equitable, efficient, and effective outcomes for all involved.

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¹² 2024 Title IX Final Rule, 89 Fed. Reg. 33692.

¹³ 34 C.F.R. § 106.45(b)(1).

¹⁴ 34 C.F.R. § 106.71.

¹⁵ 34 C.F.R. § 106.45(f).

¹⁶ 34 C.F.R. § 106.45(g).