



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

**July 8, 2024**

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

**§ 106.45(k): Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination, Informal resolution**

§ 106.45(k) states:

(k) *Informal resolution.* In lieu of resolving a complaint through the recipient's grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.44(k) if provided by the recipient consistent with that paragraph.

**Summary and Analysis**

In responding to conduct that could reasonably be considered sex discrimination, including sex-based harassment, institutions do have the authority to offer informal resolution to the parties as an alternative to addressing the conduct under the grievance procedures set forth under § 106.45 (applicable to allegations of sex discrimination, including sex-based harassment, generally) and § 106.46 (applicable to specific complaints of sex-based harassment where the complainant or respondent is a student). The only exceptions are “if the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law.”<sup>2</sup> Informal resolution that can be provided to parties involved in a sex discrimination complaint is subject to conditions set forth in § 106.44(k) of the 2024 Title IX Regulations.<sup>3</sup> Therefore, “in lieu of resolving a complaint through the institution’s grievance procedure” under § 106.45, the language under §

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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.

<sup>2</sup> 34 C.F.R. § 106.44(k)(1).

<sup>3</sup> 2024 Joint Guidance on Federal Title IX Regulations, Analysis on Section 106.44 (k): Recipient’s response to sex discrimination, Discretion to offer informal resolution in some circumstances.

106.45(k) allows parties to “instead elect to participate in an informal resolution process” developed by an institution under the strictures of § 106.44(k).<sup>4</sup>

The Department understands the term “informal resolution” to have the same meaning as “alternative dispute resolution processes,” “with both referring to the processes that have been widely used as a substitute for the formal process.”<sup>5</sup> Informal resolution may include such strategies as mediation or restorative or transformative justice. In acknowledging the need for further guidance on informal resolution, the Department states that it will offer technical assistance, as appropriate, to promote compliance with the 2024 Final Rule.<sup>6</sup>

Institutions have broad discretion on whether to offer informal resolution to parties involved in a sex discrimination complaint. Therefore, even though an institution may have developed an informal resolution process as an alternative to resolving a sex discrimination complaint under its grievance procedure under § 106.45, it may decline to offer such a process to the parties when it determines informal resolution would be inappropriate under the facts and circumstances presented by the complaint. Specifically, there may be situations where “both parties wish to resolve an allegation informally, but because of the nature of the allegations or information involved, or other factors, such as the risk of future harm to others, or repeated allegations against the same respondent, the [institution] believes it is more appropriate to pursue resolution through grievance procedures.”<sup>7</sup>

In providing the parties an informal resolution, the institution “must, to the extent necessary, also 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 institution’s education program or activity.”<sup>8</sup> This may require the Title IX Coordinator to restrict contact amongst the parties, for example.<sup>9</sup>

Before initiating an informal resolution process, the institution “must provide the parties notice that explains the allegations; the requirements of the informal resolution process; and that, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume” either of the applicable “grievance procedures.”<sup>10</sup> The institutional notice must also advise that the “parties’ agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations.”<sup>11</sup> The institution must explain to the

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<sup>4</sup> 34 C.F.R. § 106.45(k)

<sup>5</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33624; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 85 Fed. Reg. 30026, 30400 (May 19, 2020) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2020 Title IX Final Rule”).

<sup>6</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33633.

<sup>7</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33628.

<sup>8</sup> 34 C.F.R. § 106.44(k)(1)

<sup>9</sup> Title IX Coordinator requirements are set forth generally in § 106.44(f).

<sup>10</sup> 34 C.F.R. § 106.44(k)(3)(i)-(iii).

<sup>11</sup> 34 C.F.R. § 106.44(k)(3)(iv).

parties the “potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties.”<sup>12</sup> For example, the informal resolution agreement cannot impose training upon the respondent’s fraternity or sorority if such organization is a non-party. Finally, the institution must disclose to the parties what information the institution “will maintain and whether and how the [institution] could disclose such information for use” in the applicable grievance procedures.<sup>13</sup>

### **Informal Resolution is Voluntary**

There are other conditions imposed upon an institution’s use of informal resolution in Title IX cases. For instance, an institution is prohibited from requiring or pressuring the parties to participate in an informal resolution process. The institution “must obtain the parties’ voluntary consent to the informal resolution process and must not require waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise any other right.”<sup>14</sup>

### **Facilitator Requirements**

Other specified conditions of the informal resolution process involve the facilitator. That is, the “facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the [institution’s] grievance procedures.”<sup>15</sup> The facilitator must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent and must receive training under § 106.8(d)(3) of the regulations.<sup>16</sup> Because of the conditions imposed upon the facilitator, the Title IX investigator would not be allowed to lead or otherwise participate in an informal resolution process.

### **Other Considerations**

In contrast to the 2020 Title IX rules, the offer of informal resolution under the 2024 Final Rule can be made in the absence of a formal complaint. “In response to a commenter who asked what level of investigation would be required to proceed with informal resolution without a complaint, the Department clarifies that these regulations afford [an institution] discretion to offer the parties an informal resolution process at any time before determining whether sex discrimination occurred, including before an investigation commences, as well as during the course of an investigation.”<sup>17</sup>

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<sup>12</sup> 34 C.F.R. § 106.44(k)(3)(v).

<sup>13</sup> 34 C.F.R. § 106.44(k)(3)(vi).

<sup>14</sup> 34 C.F.R. § 106.44(k)(2).

<sup>15</sup> 34 C.F.R. § 106.44(k)(4).

<sup>16</sup> 34 C.F.R. § 106.44(k)(4).

<sup>17</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33625.

It is also noteworthy that informal resolution can be offered even if the respondent has admitted to sexually discriminatory conduct. It is the Department’s view that an admission alone, outside the context of a grievance procedure, is not a determination of whether sex discrimination occurred. Therefore, absent a grievance proceeding pursuant to which an institution determines that sex discrimination occurred, an institution may offer informal resolution in response to a situation where the respondent has already taken responsibility.<sup>18</sup>

Finally, potential terms of an informal resolution agreement may include, but are not limited to, “restrictions on contact and restrictions on the respondent’s participation in one or more of an [institution’s] programs or activities or attendance at specific events, including restrictions the [institution] **could have imposed as remedies or disciplinary sanctions had the [institution] determined that sex discrimination occurred under the [institution’s] grievance procedure.**”[emphasis added].<sup>19</sup>

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<sup>18</sup> For a full discussion of the Department’s position of this issue, see 2024 Joint Guidance on Federal Title IX Regulations, Analysis on Section 106.44 (k): Recipient’s response to sex discrimination, Discretion to offer informal resolution in some circumstances.

<sup>19</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33625; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41456 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2022 Title IX NPRM”).