



2024 Joint Guidance on Federal Title IX Regulations
Analysis on Section 106.46(j): Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions, Informal resolution

July 8, 2024

Note: This document focuses on a summary analysis of Section 106.46(j), specifically Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions, Informal resolution.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/>.

§ 106.46(j): Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions, Informal resolution

§ 106.46(j) states:

(j) *Informal resolution.* If a postsecondary institution offers or provides the parties to the grievance procedures under § 106.45 and under this section with an informal resolution process under § 106.44(k), the postsecondary institution must inform the parties in writing of the offer and their rights and responsibilities in the informal resolution process and otherwise comply with the provisions of § 106.44(k)(3) in writing.

Summary and Analysis

As discussed more fully below, where an institution has determined to offer parties, one or all of whom are students, the opportunity to resolve a sex-based harassment claim informally, § 106.46(j) requires the institution to provide the parties **written** notice of the regulatory strictures of informal resolution. There is a special distinction for offering informal resolution in cases of sex-based harassment at postsecondary institutions, unlike the procedures for complaints of sex discrimination under § 106.45.

By way of background, in responding to conduct that could reasonably be considered sex-based harassment involving student complainants or respondents, institutions do have the authority to offer informal resolution to the parties as an alternative to addressing the conduct under the

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.

required grievance procedure set forth in § 106.46. This is similar to the institution’s authority to offer informal resolution as an alternative to the grievance procedures under § 106.45, applicable to allegations of sex discrimination, generally. 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.”² Informal resolution that can be provided to the parties is subject to conditions set forth in § 106.44(k).³

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.”⁴ 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.⁵

Institutions have broad discretion on whether to offer informal resolution to parties involved in a sex-based harassment complaint involving student complainants or respondents. Therefore, even though an institution may have developed an informal resolution process as an alternative to resolving allegations of sex discrimination, generally, under § 106.45, it may decline to offer informal resolution in situations of sex-based harassment allegations where the complainants and/or respondents are students, choosing to resolve all such cases under the grievance procedures set forth in § 106.46. On the other hand, where an institution would generally afford parties an informal resolution process as an alternative to the § 106.46 grievance procedure to resolve sex-based harassment conduct in which a complainant and/or respondent is a student, it may decline to do so 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.”⁶

Under § 106.46(j), if the institution has an informal resolution process and decides to offer such process to the parties as an alternative to the grievance procedure under § 106.46, applicable to allegations of sex-based harassment where the complainant and/or respondent is a student, then

² 34 C.F.R. § 106.44(k)(1).

³ 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.

⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33624 (Apr. 29, 2024) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2024 Title IX Final Rule”); 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”).

⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33633.

⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33628.

it “must inform the parties **in writing** of the offer and their rights and responsibilities in the informal resolution process and otherwise comply with the provisions of § 106.44(k)(3) **in writing**”⁷[emphasis added].

Specifically, § 106.44 (k)(3) requires the institution to provide the “parties notice that explains: [t]he allegations; [t]he requirements of the informal resolution process; [t]hat, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the [institution’s] grievance procedures; [t]hat 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; [t]he 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; and [w]hat information the [institution] will maintain and whether and how the [institution] could disclose such information for use” in the grievance procedure.⁸

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.”⁹

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.”¹⁰ 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.¹¹ 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

⁷ 34 C.F.R. § 106.46(j).

⁸ 34 C.F.R. § 106.44 (k)(3)(i)-(vi).

⁹ 34 C.F.R. § 106.44(k)(2).

¹⁰ 34 C.F.R. § 106.44(k)(4).

¹¹ 34 C.F.R. § 106.44(k)(4).

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.”¹²

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.¹³

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].¹⁴

The Joint Guidance on the 2024 Title IX Regulations is prepared as a service by in-house and firm attorneys, but does not represent legal advice. The 2024 Joint Guidance is compliance advice and no attorney/client relationship is formed with any contributor or their organization. Legal advice for specific situations may depend upon state law and federal and state case law and readers are advised to seek the advice of counsel. The 2024 Joint Guidance is available absolutely free pursuant to a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license](#) (meaning that all educational institutions are free to use, customize, adapt, and re-share the content, with proper attribution, for non-commercial purposes, but the content may not be sold).

¹² 2024 Title IX Final Rule, 89 Fed. Reg. 33625.

¹³ 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.

¹⁴ 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”).