



Joint Guidance on Federal Title IX Regulations: 106.45(b)(3): Dismissal of Complaints

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Note: This document focuses on discussion of the Final Rule Section 106.45(b)(3), specifically the dismissal of formal complaints. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§106.45(b)(3) - Dismissal of a formal complaint

The Final Rule states that recipients must investigate the allegations in a formal complaint of sexual harassment. The Final Rule then sets forth the specific bases for mandatory and discretionary dismissals under Title IX and specifically provides that recipients are not precluded from addressing conduct that is not within the scope of Title IX (as defined by the regulations). The Final Rule also requires that the recipient provide the parties with simultaneous, written notice of a dismissal and the reason(s) for the dismissal.

Final Rule §106.45(b)(3) states as follows:

- (1) Dismissal of a formal complaint—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.
- (ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- (iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

Requirement to Investigate

The Final Rule states that the recipient must investigate the allegations in a formal complaint of sexual harassment. The terms, “formal complaint” and “sexual harassment” are defined in § 106.30(a). Section 106.44(b) also provides, “In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45.”

Mandatory Dismissal

The Final Rule requires that a recipient dismiss a formal complaint of sexual harassment in three specific circumstances:

1. The alleged conduct would not constitute sexual harassment as defined under the Final Rule § 106.30, even if proved;
2. The alleged conduct did not occur in the recipient’s education program or activity;
or
3. The alleged conduct did not occur against a person in the United States.

This provision incorporates the terms “sexual harassment,” “education program or activity” and “against a person in the United States,” which are defined and/or explained in other sections in the Title IX regulation. Section 106.30 defines sexual harassment. Section 106.8(d) provides that the requirements of § 106.8(c) (“Adoption of grievance procedures”) apply only to sex discrimination occurring against a person in the United States. Section 106.44(a) defines “education program or activity.” These terms essentially describe the scope of Title IX sexual harassment under the Final Rule.

The Final Rule states that the complaint must be dismissed “for purposes of sexual harassment under title IX or this part.” As discussed below, the Final Rule then specifically provides that such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

Discretionary Dismissal

The Final Rule allows a recipient to dismiss a formal complaint of sexual harassment or any allegations therein if at any time during the investigation or hearing:

1. A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. The respondent is no longer enrolled or employed by the recipient; or
3. Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

The Department explained its view that complainants should have the autonomy to decide whether or not they would like to proceed with or withdraw a formal complaint of sexual harassment. When a recipient receives a complainant’s withdrawal request during the investigation or hearing, the recipient may dismiss the complaint or may decide to continue with the investigation and hearing.

When a complainant submits a written withdrawal to the Title IX Coordinator, a recipient may choose to continue with the investigation in certain situations. The Department gave as examples: when the information obtained supports that the respondent may pose an ongoing risk to the recipient's community, where the recipient has "gathered evidence apart from the complainant's statements and desires to reach a determination regarding the respondent's responsibility," when "a determination regarding responsibility provides a benefit to the complainant even where the recipient lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons." 85 Fed. Reg. 30290.

When the respondent is no longer enrolled or employed, the recipient may choose to dismiss the complaint "because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint, and the recipient has no way to gather evidence sufficient to make a determination." 85 Fed. Reg. 30290.

Finally, the Department permits a recipient to dismiss a formal complaint of sexual harassment when "specific circumstances" exist that prevent the recipient from "gathering evidence sufficient to reach a determination" as to the formal complaint or allegations. In the preamble, the Department offered the following examples of situations that may present "special circumstances" supporting dismissal:

1. When no complainant is identified during the investigation. The Department explained, "[W]ithout knowing a complainant's identity a recipient may not be able to gather evidence necessary to establish elements of conduct defined as 'sexual harassment' under § 106.30, such as whether alleged conduct was unwelcome, or without the consent of the victim." 85 Fed. Reg. 30133 n. 594.
2. When a formal complaint contains allegations that are precisely the same as allegations the recipient has already investigated and adjudicated. 85 Fed. Reg. 30214 n. 939.
3. When the length of time elapsed between an incident of alleged sexual harassment, and the filing of a formal complaint, prevent a recipient from collecting enough evidence to reach a determination. 85 Fed. Reg. 30214.
4. When the complainant has stopped participating in the investigation but has not sent a written withdrawal request and the only inculpatory evidence available is the complainant's statement in the formal complaint or as recorded in an interview by the investigator. 85 Fed. Reg. 30282 and 30290.

The Department emphasized that this provision "is not the equivalent of a recipient deciding that the evidence gathered has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence, but rather is intended to apply narrowly to situations where specific circumstances prevent the recipient from meeting its burden in § 106.45(b)(5)(i) to gather sufficient evidence to reach a determination." 85 Fed. Reg. 30290.

Misconduct Outside the Scope of the Final Rule

The Final Rule specifically states that the mandatory dismissal of a formal complaint or allegations of sexual harassment does “not preclude a recipient from taking action under another provision of the recipient’s code of conduct.” The Department emphasized that recipients may continue to address conduct that is outside the Department’s jurisdiction due to the conduct not meeting the Title IX definition of sexual harassment and/or occurring outside the recipient’s education program or activity or against a person who is not located in the United States. 85 Fed. Reg. 30037-38. The Department explained that it “does not have authority to require recipients to investigate and adjudicate misconduct that is not covered under Title IX, nor to preclude a recipient from handling misconduct that does not implicate Title IX in the manner the recipient deems fit.” 85 Fed. Reg. 30289.

This is a major change from the proposed regulations, which “created confusion among commenters as to whether the NPRM purported to forbid a recipient from addressing conduct that does not constitute sexual harassment under § 106.30.” 85 Fed. Reg. 30157. The Department explained that this change was made to emphasize that in dismissal of a formal complaint, recipients have discretion as to how they can handle complaints or allegations of sexual misconduct that do not meet the definitions in the regulations. The Department stated it was persuaded by comments received during the rulemaking, arguing that the Department did not have jurisdiction to dictate how recipients could or could not handle sexual harassment complaints or allegations that are outside the scope of the final Title IX regulations.

The Department also noted that the regulations do not preclude a recipient from “enforcing a code of conduct that is separate and apart from what Title IX requires,” such as requirements under Title VII and/or State law that may define “actionable” sexual harassment differently than the Final Rule. 85 Fed. Reg. 30440.

Finally, the Department consistently states that a recipient may take action under other provisions of their “code of conduct”, and notes that this term applies to the disciplinary processes used by recipients. 85 Fed. Reg. 30204 n. 905.

Written Notice

The Final Rule requires that for any dismissal, mandatory or permissive, a recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

The Final Rule, in § 106.45(b)(8)(i), provides either party may submit a request to appeal the dismissal of a formal complaint or allegations therein of sexual harassment. Under the Final Rule, appeal bases must include: procedural irregularity, new evidence, and conflict of interest or bias on the part of the Title IX Coordinator, investigator(s), or decision-maker(s). The Department explained that the opportunity for either party to appeal helps to “ensure that a recipient is not erroneously dismissing an allegation due to a procedural irregularity, lack of knowledge of newly discovered evidence, or a conflict of interest or bias.” 85 Fed. Reg. 30053. The Department stated that it views the requirement “as important to ensuring a fair process for both parties rooted in the fundamental due process principles of notice and meaningful opportunities to be heard.” *Id.*

The Department explained that both complainants and respondents may want to appeal a dismissal. The Department gave as an example, if a recipient dismisses a formal complaint because it concludes that the misconduct alleged does not meet the definition of sexual harassment, the complainant can appeal that dismissal, for example, by asserting that newly discovered evidence demonstrates that the misconduct in fact does meet the definition of sexual harassment, or alternatively by asserting procedural irregularity on the basis that the alleged conduct in fact does meet the definition of sexual harassment. 85 Fed. Reg. 30276 and 30397. The Department also gave as an example, situations where a respondent may desire to challenge the recipient's conclusion that, for instance, the conduct alleged did not constitute sexual harassment, "because if the conduct constitutes Title IX sexual harassment the recipient is not permitted to discipline the respondent without first following the § 106.45 grievance process, which may provide stronger procedural rights and protections than other disciplinary proceedings a recipient might use if the recipient charges the respondent with a non-Title IX code of conduct violation over the allegations." 85 Fed. Reg. 30283 n. 1129.

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