

FREQUENTLY ASKED QUESTIONS IN FOLLOW-UP TO TITLE IX TRAINING

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***Please note that the Title IX Training Materials and these Frequently Asked Questions (FAQs) should not be considered legal advice or opinion. The intent is to provide information from the Title IX regulations effective August 14, 2020, and the Department of Education's statements in the Preamble. This information is not the advice or opinion of the Colorado Attorney General. Institutions of higher education (IHEs) are encouraged to consult their legal counsel on any questions concerning the Title IX Training Materials and these FAQs.*

Intake and Response

1. Must a formal complaint be submitted on a form provided by the IHE?

- A. No. A formal complaint may take a variety of formats as long as the elements defined in the regulations, discussed below, are included. A document labeled "Formal Complaint" that does not contain the required elements would not trigger an IHE's duty to commence a formal grievance process.

The regulations define a formal complaint as "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the [IHE]¹ investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the [IHE] with which the formal complaint is filed." § 106.30(a). (p. 30574).

A person may file a formal complaint online, in person, by email, or by any additional method designated by the IHE. § 106.30(a). This could include electronic submission, such as through an online portal. (p. 30473).

A Title IX Coordinator may help a complainant fill out a formal complaint so long as what the complainant files is a document or electronic submission

¹ As in the Title IX Training Materials, for ease of reading, the word "recipient" as used in the regulations has been replaced in these FAQs with "institution of higher education," or "IHE."

that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the complaint. (p. 30137).

2. Does a *report* of sexual harassment trigger the same IHE response obligation as a *formal complaint*?

- A. No. The regulations distinguish an IHE's required general response to reports of sexual harassment from situations requiring an IHE to initiate a formal grievance process. Upon receipt of a report, an IHE must respond promptly in a manner that is not "deliberately indifferent."² At a minimum, the Title IX Coordinator must contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without filing a formal complaint, and explain the process for filing a formal complaint. § 106.44(a). Upon the filing of a formal complaint, the IHE must initiate a Title IX-compliant grievance process. § 106.44(b).

3. Can a complainant remain anonymous, or have their identity kept confidential from the respondent?

- A. A complainant may receive supportive measures without the IHE disclosing their identity to the respondent, to the extent that it's possible to implement the supportive measures while keeping the complainant's identity confidential. A complainant cannot remain anonymous, or keep their identity confidential from the respondent, if the complainant files a formal complaint. When a complainant files a formal complaint, the regulations require the formal complaint to contain the complainant's signature or otherwise indicate that the complainant is the person filing the complaint. (pp. 30127 & 30133).

When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the Department of Education ("Department") notes in the Preamble that, "the written notice of allegations in § 106.45(b)(2) requires the [IHE] to send both parties details about the allegations, including the identity of the parties if known, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual harassment but does not reveal the complainant's identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is necessary to sign a formal complaint, even

² "[An IHE] is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." §106.44(a).

though the written notice of allegations does not include the complainant's identity." (p. 30133).

4. When should a Title IX Coordinator sign a formal complaint?

- A. The regulations allow a Title IX Coordinator, instead of a complainant, to sign a formal complaint. § 106.30(a). A Title IX Coordinator's decision to sign a formal complaint should occur only after the Title IX Coordinator has promptly contacted the complainant to discuss availability of supportive measures, considered the complainant's wishes with respect to supportive measures, and explained to the complainant the process for filing a formal complaint including the fact that a formal complaint may not be filed anonymously by the complainant. (p. 30217).

In the Preamble, the Department states that a Title IX Coordinator's decision to sign a formal complaint should take into account the complainant's wishes regarding how the IHE should respond to the complainant's allegations. (p. 30217). The Department lists factors for consideration by a Title IX Coordinator when deciding whether to sign a formal complaint: (1) a pattern of alleged misconduct by a particular respondent; (2) allegations involving violence; (3) use of weapons; (4) threats; (5) serial predation; or (6) similar factors. (p. 30218).

5. For purposes of actual knowledge, who is an "official of the [IHE] who has authority to institute corrective measures?"

- A. The determination of who falls in this category depends upon the IHE's operational structure and the employee's specific roles and duties. (p. 30039).

IHEs may also designate "officials with authority" for corrective measures or other mandatory reporters. The Preamble indicates the Department's intent to leave discretion to IHEs "to craft and implement the [IHE's] own employee reporting policy to decide (as to employees who are not the Title IX Coordinator and not officials with authority) which employees are mandatory reporters, . . . which employees may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent." (p. 30043).

6. Is there a time limitation for reporting sexual harassment or filing a formal complaint?

- A. No. The regulations do not impose time limits on when a report may be made or a formal complaint filed. But, at the time of filing a formal complaint, a

complainant must be participating in or attempting to participate in the education program or activity of the IHE with which the formal complaint is filed. § 106.30(a).

Investigations

7. Do the regulations prohibit investigators from including recommended findings or conclusions in the investigative report?

A. No. In the Preamble, the Department states that “[it] does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.” (p. 30308). As noted in the Title IX Training Materials, investigators should be mindful to exercise caution to avoid bias if they include recommended findings or conclusions in the investigative report.

8. Must an investigator disclose the identity of witnesses to the parties?

A. An IHE must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. § 106.45(5)(vi). An IHE must also create an investigative report that fairly summarizes relevant evidence and send the report to each party and party advisor. § 106.45(5)(vii). Thus, disclosure of the witness’s identity is necessary if the witness is directly related and/or relevant to the allegations. But an investigator may redact a student’s personally identifiable information from education records if such information is not directly related to the allegations. (p. 30429).

9. How does disclosure of witness identities, when the witnesses are students, square with FERPA?

A. § 106.6(e) provides: “The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.” In the Preamble, the Department takes the somewhat contradictory view that FERPA and Title IX generally do not conflict but, in the event of a conflict the Department states it included § 106.6(e) “[t]o expressly state that the obligation to comply with the final regulations under Title IX is not obviated or alleviated by the FERPA statute or regulations.” (p. 30424). The Department considers the parties’ access to all related evidence to be a due process component that IHEs must protect when implementing the regulations. (p. 30422).

10. Can an investigator redact or otherwise decline to disclose certain evidence?

- A. Yes, but only if the evidence is not subject to disclosure under the regulations. The regulations recognize that some information and records are not subject to disclosure. The investigator need not disclose information that is not “directly related” to the allegations. § 106.45(b)(5)(vi). The investigator should not disclose information subject to a legally recognized privilege,³ unless the person holding the privilege has waived it. § 106.45(b)(1)(x). An investigator also should not disclose a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the IHE obtains that party’s voluntary, written consent to do so. § 106.45(b)(5)(i).

Investigators may redact information that is not directly related to the allegations or that is otherwise barred from use, such as privileged information. (p. 30429). Personally identifiable information may be redacted from education records if the information is not directly related to the allegations in a formal complaint, but the Department cautions IHEs to be “judicious” and not redact more information than necessary. (p. 30429).

The Department notes that, upon review, it may determine that an IHE violated § 106.45(b)(vi) if the IHE does not provide evidence that is directly related to allegations raised in a formal complaint to the parties. (p. 30423).

11. May a Title IX Coordinator dismiss a formal complaint because the Title IX Coordinator does not believe the IHE can meet its burden of proof?

- A. Probably not, unless specific circumstances prevent the IHE from gathering evidence sufficient to reach a determination. The regulations allow an IHE to dismiss a formal complaint if “specific circumstances prevent the [IHE] from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.” § 106.45(b)(3)(ii). However, the Department emphasizes that this provision “is *not* the equivalent of an IHE 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.” (p. 30290). Rather,

³ In the Preamble, the Department notes a “legally recognized privilege” could include: “attorney-client privilege, doctor-patient privilege, spousal privilege, and so forth.” (p. 30277).

it applies narrowly to situations where specific circumstances prevent the IHE from meeting its burden to gather sufficient evidence to reach a determination.⁴ *Id.*

Accordingly, the Department advises that an IHE should not apply a discretionary dismissal in situations where the IHE does not know whether it can meet the burden of proof under § 106.45(b)(5)(i). Decisions about whether the IHE burden of proof has been carried must be made in accordance with §§ 106.45(b)(6)–(7), not prematurely made by persons other than the decision-maker, without following those adjudication and written determination requirements.⁵ *Id.*

Hearings

12. Do the regulations require IHEs to allow witnesses to participate in a hearing in a separate room?

- A. No. In the Preamble, the Department states that it declines to grant witnesses the right to demand to testify in a separate room but allows IHEs the discretion to permit any participant to appear remotely. (p. 30356). The Department explains that, unlike complainants, witnesses usually do not experience the same risk of trauma through cross-examination. *Id.* Witnesses also are not required to testify (because IHEs and the parties do not have

⁴ In the Preamble, the Department notes specific circumstances that may prevent an IHE from meeting its burden to collect evidence sufficient to reach a determination regarding responsibility may include, for example, “[w]here a complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the [IHE] (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complain[ant]), and the [IHE] has no way to gather evidence sufficient to make a determination.” (p. 30290). As another example, the Department notes, “Passage of time could in certain fact specific circumstances result in the [IHE’s] inability to gather evidence sufficient to reach a determination regarding responsibility.” (p. 30127, fn. 562).

⁵ As a reminder, for mandatory dismissals, as opposed to discretionary dismissals, the regulations provide, “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 [IHE’s] education program or activity, or did not occur against a person in the United States, then the [IHE] 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 [IHE’s] code of conduct.” § 106.45(b)(3)(i).

subpoena powers (p. 30348)), and witnesses may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate, or affect them. *Id.* With respect to a witness who claims to also have been sexually assaulted by the respondent, the institution has discretion to permit the witness to testify remotely, or to hold the entire live hearing virtually. *Id.*

13. Who may accompany parties at a hearing besides the parties’ advisors?

A. The Title IX Training Materials contain some notes on this topic, but some additional information from the regulations and the Preamble is included below for consideration.

§ 106.45(b)(5)(iv) states that IHEs must “[p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the [IHE] may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”

In the Preamble, the Department notes that the confidentiality restrictions in § 106.71 may limit an IHE’s ability to authorize parties to be accompanied at the hearing by persons other than advisors. (p. 30339). § 106.71 provides, in part, “The [IHE] must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.”

14. What does it mean for a party or witness to submit to cross-examination?

A. The regulations require that each party’s advisor be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. § 106.45(b)(6)(i). In the Preamble, the Department states that “submit to cross-examination” means answering

those cross-examination questions that are relevant. (p. 30349). In reference to cross-examination, the Department also notes that it “[d]eclines to allow a party or witness to ‘waive’ a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions’ Title IX adjudications.” *Id.*

As a reminder, § 106.45(b)(6)(i) provides, “If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”

15. Are a party’s statements subject to exclusion under § 106.45(b)(6)(i) if the party does not respond to the decision-maker’s questions?

- A. No. The regulations provide that if a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility. §106.45(b)(6)(i). However, the Department notes that the exclusion of statements does not apply to a party’s or witness’s refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker’s questions, the decision-maker is not precluded from relying on that party or witness’s statements. (p. 30349).

The Department explains that cross-examination differs from questions posed by a neutral fact-finder. *Id.* However, the decision-maker still cannot draw any inference about the determination regarding responsibility based solely on a party’s refusal to answer questions posed by the decision-maker; the final regulations refer in § 106.45(b)(6)(i) to not drawing inferences based on refusal to answer “cross-examination or other questions.” (p. 30349, fn. 1341).

Written Determinations Regarding Responsibility

16. Can an IHE have one decision-maker who decides the findings regarding responsibility, and another decision-maker who decides sanctions, if any?

- A. Yes. In an OCR Blog post, the Department stated that the regulations do not preclude an IHE from using one decision-maker to reach the determination regarding responsibility, and using another decision-maker, who may be an employee or administrator of the IHE (*e.g.*, a tenure committee), to determine

appropriate disciplinary sanctions, including making such decisions in separate hearings. However, both the determination finding responsibility and disciplinary sanctions imposed by the IHE against the respondent must be contained in one single, unitary document, which is the written determination required under § 106.45(b)(7). In other words, the IHE’s written determination may not be issued piecemeal, as different parts of the grievance proceedings occur.

IHEs should also keep in mind their duty to conclude the grievance process within the reasonably prompt time frames designated in the IHE’s grievance process under § 106.45(b)(1)(v). Additionally, each decision-maker—whether an employee of the IHE or an employee of a third party, such as a consortium of schools—owes an individual an ongoing duty under § 106.45(b)(1)(iii) not to have a conflict of interest, or bias for or against a single complainant or multiple complainants or respondents, and must be trained in accordance with that subparagraph. *See* OCR Blog 20200903, <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>.

- 17. Can an IHE enter a determination regarding responsibility even if there is no objective or corroborating evidence?**
- A. Yes. The Department recognizes that some situations will involve little or no evidence other than the parties’ statements. In the Preamble, the Department reiterates that § 106.45(b)(1)(ii) requires an IHE to objectively evaluate the relevant evidence, but “this provision does not require ‘objective’ evidence (as in, corroborating evidence).”⁶ (p. 30247).

General Applicability Questions

- 18. Do the new regulations apply to sexual harassment alleged to have taken place before August 14, 2020?**
- A. No. The regulations do not apply to IHEs’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the regulations as to sexual harassment that allegedly occurred on or after August 14, 2020. *See* OCR Blog, 20200805, <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>.
- 19. Can an entire organization be a respondent under Title IX?**
- A. No. The Preamble clarifies that the regulations define “respondent” as an “individual.” (p. 30096). The Department notes that § 106.45(b)(4) gives IHEs the discretion to consolidate formal complaints involving multiple parties

⁶ The Department does not further define “objective” or “corroborating” evidence.

where the allegations of sexual harassment arise from the same facts or circumstances; in such consolidated matters, the grievance process applies to more than one complainant and/or more than one respondent, but each party is still an “individual” and not a group or organization. (p. 30096, fn. 454).

20. Do the regulations treat complainants and respondents the same in all respects?

- A. Generally yes, with three notable exceptions. Any additional provisions, rules, or practices that an IHE adopts as part of its formal grievance process must apply equally to both parties. § 106.45(b). And, generally, § 106.45’s procedural protections apply equally to both parties, but with three exceptions: (1) one provision that treats complainants and respondents equitably instead of equally (by recognizing a complainant’s interest in a IHE providing remedies, and a respondent’s interest in disciplinary sanctions imposed only after an IHE follows a fair process); (2) one provision that applies only to respondents (a presumption of non-responsibility until conclusion of a fair process); and (3) one provision that applies only to complainants (protection from questions and evidence regarding sexual history).

Additional resources:

- Department of Education’s Questions and Answers Regarding the Department’s Final Title IX Rule, September 4, 2020, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf>.
- Office of Civil Rights Blog, *available at* <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>.
- Office of Civil Rights Tutorials and Technical Assistance, *available at* <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crt-ta.html>.