Joint Guidance on Federal Title IX Regulations:
Analysis of Directed Question (2)

June 12, 2020

Note: This document focuses on a summary analysis of the response to Directed Question 2 as posted in the Title IX Notice of Proposed Rulemaking,[1] specifically discussing of what may constitute "discrimination on the basis of sex." 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

Directed Question 2: Applicability of provisions based on type of recipient or age of parties.

In the Notice of Proposed Rulemaking ("NPRM"), the Department of Education incorporated the following Directed Question 2:

> Some aspects of our proposed regulations, for instance, the provision regarding a safe harbor in the absence of a formal complaint in proposed § 106.44(b)(3) and the provision regarding written questions or cross examination in proposed § 106.45(b)(3)(vi) and (vii), differ in applicability between institutions of higher education and elementary and secondary schools. We seek comment on whether our regulations should instead differentiate the applicability of these or other provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes.

83 Fed. Reg. 61462, 61483 (November 29, 2018).

Overview

The NPRM's Directed Question 2 noted that proposed § 106.44(b)(3) regarding a safe harbor in the absence of a formal complaint, and § 106.45(b)(3)(vi) and (vii) regarding written questions or cross examination differed in applicability between higher education and K-12 schools, and sought comment on whether the regulations should instead differentiate based on whether the complainant and respondent were 18 or over.

For the Final Rule, the Department decided to keep the type of school, rather than the student's age, as the distinguishing factor. The Department notes that numerous commenters felt the NPRM appropriately distinguished between types of institutions rather than students' age. Some commenters felt that once a student attends a post-secondary institution, the student should be

[1] The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

treated as an adult for Title IX purposes, and cited FERPA's recognition of instances where "a student has reached 18 years of age or is attending an institution of post-secondary education." *See* 85 Fed. Reg. 30026, 30492 (May 19, 2020). The Department believes that distinguishing by type of institution "will minimize the situations where young students are subject to procedures conducted by a PSE [postsecondary education] institution…" although it notes that there will be occasions when a student under 18 attends a post-secondary institution and will be subject to cross examination. *Id*.

Despite the Department's assertion, all of the requirements that are applicable to PSE are applicable to an elementary and secondary school ("ESE"), with the only exception being the live hearing requirement. The Department categorizes the live hearing requirement and cross-examination requirement as "the most rigorous procedures required in PSE institutions." *See* 85 Fed. Reg. at 30492.

Potential issues in implementation

As explained further in the Joint Guidance team's analysis of Directed Question 1, many of the purportedly non-rigorous requirements of the § 106.45 grievance process pose disproportionately burdensome administrative obstacles in the ESE context. Moreover, requirements that may ensure fairness or accuracy in the PSE context may actually introduce unreliability based on parental management of a child's availability for interviews or control over other evidence, advocacy on behalf of a child, or defense of a child's conduct. While parents certainly have the right to protect their children and direct educational processes that directly impact their children, the mechanism described in § 106.45 is incongruent with the nature of ESE students and the realities of the ESE setting.

Without citing any supporting evidence, the Department "maintains that individuals developmentally capable enough to enroll in college are also capable enough to make decisions about and participate in a grievance process designed to advance the person's rights." *See* 85 Fed. Reg. at 30335. Yet this assertion has limited basis in research on student development; rather, experts in advanced learning note that such students who are high in intellectual ability may "show asynchronous (uneven) development - may be highly precocious cognitively while demonstrating age-appropriate or even delayed development emotionally or socially" (Teaching Advanced Learners in the General Education Classroom, Joan Franklin-Smutny, 2011, p. 12). Furthermore, minors who enroll in college programs must only demonstrate intellectual or academic advancement, not developmental advancement. Biologically, minors are developmentally behind their college classmates and may be victims of statutory rape by virtue of their biological age alone.

While the directed question contemplates the possibility of minors attending a PSE, the Department does not address that ESEs are required to continue providing a free, appropriate, public education to eligible students until age 21 under the IDEA. Directed question 5 obliquely mentions the IDEA's age range as it was referenced by a commenter. 85 Fed. Reg. at 30498.

Thus, the Department's distinction based on type of recipient, rather than age, of the parties may not fully address scenarios that arise when students who are eligible for special education and are between the ages of 18 and 21 engage in sexualized conduct, whether as a result of their

disability or not, or are victims of sexual harassment. As a more vulnerable population with potential barriers in the areas of communication, social skills, behavior regulation, intellectual ability, and physical autonomy, this oversight is notable. K-12 schools should prepare to accommodate the needs of eligible students whose age and enrollment status present issues that are different than those issues experienced by disabled and non-ESE students.

Live hearing option

The Department also notes that "nothing in the final regulations…prevents schools from, for example, holding live hearings at the ESE level when both parties are employees **or over age 18.**" 85 Fed. Reg. at 30492 (emphasis added).

The Joint Guidance team does not read this to mean that the Rule permits live hearings at the ESE level **only** when both parties are over age 18, as that distinction does not appear in § 106.45(b)(6)(ii) or any other part of the Final Rule, which states in other places that elementary and secondary schools **may** have live hearings (presumably with cross-examination). *See id.* at 30327, 30363-30364).

A K-12 school can, however, craft a Title IX Grievance Process that requires live hearings only under certain circumstances or even on a case-by-case basis (*id*. at 30365), so long as that decision is not clearly unreasonable or does not constitute discriminatory treatment. Therefore, a K-12 school may adopt a policy that requires live hearings all the time, not at all, on a case-by-case basis, or under circumstances that are defined by age or academic year of the parties.

Informal resolution

The Department notes that commenters objected to having informal resolutions at the K-12 level, stating "since adults sometimes groom their victims for sexual abuse, commenters argued that it would be inappropriate and harmful to permit a teacher to escape the grievance process by going through mediation or another informal resolution process when the 'choice' to participate in informal resolution may not be truly voluntary on the part of the young victim." 85 Fed. Reg. at 30493. The Department stated it was convinced by these concerns and thus revised § 106.45(b)(9) to preclude all recipients from offering or facilitating informal resolution processes to resolve allegations that an employee sexually harassed a student.

Statutory rape and lack of capacity to consent

The directed question does not address situations of student-on-student sexualized conduct where the respondent is over 18 and the complainant is below a state's statutory rape age or where the students are not peers because of a developmental or significant age disparity between the students.

Dual enrollment

The Department notes that commenters felt the regulation should more consciously address students who are dual-enrolled in high school and college, or that higher education institutions should be able to adopt separate policies for individuals who are "in their education program or activity, but who are not students or employees. These might include, according to the

commenter, students who are merely enrolled at the PSE institutions for athletic camp, 4-H programs, daycare students, or other individuals who are not taking normal college courses at the PSE institution." 85 Fed. Reg. at 30493. The Department declined to make any changes to the Final Rule based on these concerns, perceiving that the more exceptions that would be made, the less likely it would be for students and employees to know what to expect from an institution. Practically, both a K-12 school and a college would be considered recipients that must respond to complaints of sex discrimination by a student who is dually enrolled in a college program through the K-12 school. Without an MOU or other *ex ante* agreement regarding which institution responds to what types of scenarios and delineating information sharing expectations, both recipients risk liability exposure for failing to mount an appropriate response to complaints.
