



Joint Guidance on Federal Title IX Regulations: 106.30(a): Consent

June 24, 2020

Note: This document focuses on discussion of the Final Rule Section 106.30(a), specifically the definition of “consent.” 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

§ 106.30: Consent

Overview

Final Rule Section 106.30 states that “[t]he Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.” A recipient therefore retains the discretion to select a definition of consent that best serves the unique needs, values, and environment of its educational community. *See* 85 Fed. Reg. 30026, 30174 (May 19, 2020).

The Department acknowledges that under applicable State law, many recipients must apply specific definitions of assault for purposes of their campus sexual assault policies. *Id.* at 30124-25. But the Department states it has declined to impose a “federalized definition” of consent for Title IX purposes. *Id.* at 30125. Additionally, it notes that the Final Rule provides recipients the discretion on how to define terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force). *Id.*

While the definitions themselves are left up to Recipients, the Final Rule does require Recipients to clearly define consent and apply that definition consistently, including as between men and women and between the complainant and respondent in a Title IX grievance process. *Id.* The Rule does not permit the recipient to shift the burden to a respondent to prove consent or a complaint to prove absence of consent. *Id.*

It should be noted that in the 2014 Final Rule implementing the Violence Against Women Act amendments to the Clery Act, the Department considered, and ultimately rejected, a uniform definition of consent. 79 Fed. Reg. at 62,755-62,756 (2014).

Required Training of Officials on “Consent”

Further, under § 106.45(b)(1)(iii), discussed in detail in the Joint Guidance memorandum “Training of Officials,” the Title IX coordinator, investigators, decision-makers, and any person who facilitates an informal resolution must be trained on how to conduct an investigation and grievance process, which must include training on the application of the recipient’s definition of

consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other requirements of the grievance process. The training is required to instruct that a recipient may not vary its definition of consent from one grievance process to the next and as between a complainant and respondent in the same grievance process. 85 Fed. Reg. 30125.

Use of Consent in the “Rape Shield” Exemption

§ 106.45(b)(6)(i) exempts some questions about past sexual history from a postsecondary institutions’ hearing under the required grievance process, stating that “[q]uestions and evidence about the complainant’s sexual predisposition or *prior sexual behavior are not relevant, unless* the questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or *if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.*” (Emphasis added). This is referred to by the Department as the “rape shield” exception, which is discussed further in the Joint Guidance memorandum on “Hearings.”

In the preamble to the Final Rules, the Department notes that commentators have informed it that alleged sexual assaults often concern incidents between intimate partners, and a commonly asserted defense maintains that the sexual encounter between the partners was consensual. 85 Fed. Reg. 30353. The recipient’s definition of consent will determine the scope of the rape shield exception that refers to “consent.” *Id.*

For an elementary and secondary school, which may or may not hold a hearing in its grievance process, the rape shield exemptions relating to a complainant’s sexual predisposition or prior sexual history still apply, subject to the same exceptions including questions and evidence relating to the complainant’s prior sexual behavior with respect to the respondent to prove consent. § 106.45(b)(6)(ii).

While, if permitted, a respondent may ask questions and present evidence under the rape shield exception in § 106.45(b)(6)(i)-(ii), it is not the respondent’s (or complainant’s) burden to prove or establish consent, the burden is always on the institution; questions and evidence may also be posed or presented by the recipient during its investigation and adjudication. 85 Fed. Reg. 30125.

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