



## Joint Guidance on Federal Title IX Regulations: Discussion of Directed Question 1: Elementary and Secondary School Issues

June 16, 2020

*Note:* This document focuses on discussion of issues raised by the Final Rule relating to the Notice of Proposed Rulemaking’s (NPRM) Directed Question 1. 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](http://system.suny.edu/sci/tix2020)

### **I. Directed Question 1**

In its Notice of Proposed Rulemaking (“NPRM”), the Department of Education included the following Directed Question 1:

Applicability of the rule to elementary and secondary schools. The proposed rule would apply to all recipients of federal financial assistance, including institutions of higher education and elementary and secondary schools. The Department is interested in whether there are parts of the proposed rule that will be unworkable at the elementary and secondary school level, if there are additional parts of the proposed rule where the Department should direct recipients to take into account the age and developmental level of the parties involved and involve parents or guardians, and whether there are other unique aspects of addressing sexual harassment at the elementary and secondary school level that the Department should consider, such as systemic differences between institutions of higher education and elementary and secondary schools.

83 Fed. Reg. 61462, 61483 (November 29, 2018). Below, this memorandum discusses a variety of issues relating to the application of aspects of the Final Rule to the elementary and secondary schools context.

### **II. Elementary and Secondary Education Grievance Procedures and Process**

#### **A. Title IX Coordinator, investigators, decision-makers, appellate decision-makers**

Under the Final Regulations, all elementary and secondary (ESE) schools must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities. That employee must be referred to as the “Title IX Coordinator.” The visibility of a Title IX Coordinator is emphasized through the Final Regulations. Schools must widely disseminate the Title IX Coordinator’s contact information by notifying “applicants for

admission and employment, students, parents or legal guardians . . . employees, and all unions or professional organizations holding collective bargaining or professional agreements . . .” with the school of the name, title, office address, email and telephone number of the Title IX Coordinator. *See* Final Rule § 106.8 (a). Moreover, schools must prominently display the contact information on its website and in each handbook or catalog that it makes available to those individuals listed above. *See* Final Rule § 106.8 (b)(2).

In addition to Title IX Coordinators, the Title IX process prescribed by the Final Rule requires schools to have an investigator, decision maker, appellate decision maker and informal resolution facilitator. The investigator, decision maker, and appellate decision maker must be separate individuals; however, the Title IX Coordinator may also serve as an investigator or informal resolution facilitator. 85 Fed. Reg. 30026, 30370 (May 19, 2020). Schools should exercise caution in determining whether a Title IX Coordinator should serve in dual roles given issues that may arise with conflicts of interest and, from a practical standpoint, the ability to manage the duties of a Title IX Coordinator which include initiating and tracking supportive measures.

The Final Regulations require that all of these individuals receive specific training to fulfill their roles. For further discussion on such training, see Joint Guidance Memorandum on “[Training of Officials](#).”

### **B. Making a report/filing a complaint**

Under the Final Rule, any person can report sexual harassment, whether or not the person reporting is the alleged victim or has any affiliation to the school. Final Rule § 106.8(a). Accordingly, third parties, employees, and parents may all report sexual harassment to a school. Further, a report of conduct that could constitute sexual harassment made to any ESE employee constitutes “notice” for the purpose of triggering a school’s obligations under Title IX. § 106.30(a). This means that in ESE, all school employees (coaches, counselors, teachers, janitors, etc.) should be trained in how to handle disclosures of sexual harassment, identify conduct that could constitute sexual harassment, and report such conduct to the school’s Title IX Coordinator, who is responsible for coordinating the school’s response. In practical effect, this makes all ESE school employees “mandatory reporters” to the school’s Title IX Coordinator for the purposes of Title IX.

The Department explained its rationale for requiring ESE school employees to be mandated reporters to the Title IX Coordinator as follows:

Under these final regulations, in elementary and secondary schools, notice to “any employee” (in addition to notice to the Title IX Coordinator or to any official with authority) triggers the recipient’s response obligations, so there is no longer a need to use the responsible employees rubric. Under these final regulations, an elementary and

secondary school must respond whenever *any* employee has notice of sexual harassment or allegations of sexual harassment, so there is no need to distinguish among employees who have “authority to redress the harassment,” have the “duty to report” misconduct to appropriate school officials, or employees who “a student could reasonably believe” have that authority or duty. In the elementary and secondary school setting where school administrators, teachers, and other employees exercise a considerable degree of control and supervision over their students, the Department believes that requiring a school district to respond when its employees know of sexual harassment (including reports or allegations of sexual harassment) furthers Title IX’s non-discrimination mandate in a manner that best serves the needs and expectations of students. The Department is persuaded by commenters who asserted that students in elementary and secondary schools often talk about sexual harassment experiences with someone other than their teacher, and that it is unreasonable to expect young students to differentiate among employees for the purpose of which employees’ knowledge triggers the school’s response obligations and which do not. Elementary and secondary schools generally operate under the doctrine of *in loco parentis*, under which the school stands “in the place of” a parent with respect to certain authority over, and responsibility for, its students. Further, employees at elementary and secondary schools typically are mandatory reporters of child abuse under State laws for purposes of child protective services. The Department is persuaded that employees at elementary and secondary schools stand in unique position with respect to students and that a school district should be held accountable for responding to sexual harassment under Title IX when the school district’s employees have notice of sexual harassment or sexual harassment allegations.

85 Fed. Reg. at 30040.

A report of sexual harassment to any ESE school employee triggers the school’s obligation to respond in a manner that is not deliberately indifferent. To ensure that the school’s response is not deliberately indifferent, the Title IX Coordinator must promptly offer the complainant supportive measures and explain the process for filing a formal complaint. § 106.44(a). Unlike a report of sexual harassment, a formal complaint triggers a school’s obligation to investigate and proceed with the formal grievance process outlined in § 106.45. A formal complaint is a document signed by the complainant, meaning the person alleged to be the victim of conduct that could constitute sexual harassment, or the Title IX Coordinator. The Final Rule specifically allow parents and guardians with the legal authority to act on behalf of their students (e.g., because of the student’s age) to act on behalf of student parties in the Title IX grievance process, including by signing a formal complaint. § 106.6(g).

### C. Investigations

The Final Regulations require schools to follow specific procedural steps prior to initiating an investigation into alleged conduct covered under Title IX. For many ESE schools, the process outlined in the Final Regulations will be a substantial departure from common investigation practices. School administrators will no longer be permitted to summon a student “to the principal’s office” to ask questions about an incident of alleged sexual harassment (or any conduct covered by Title IX). Rather, under the Final Regulations, when a formal complaint is made alleging sexual harassment covered under Title IX, the school must send both parties a detailed written notice, which contains:

- Sufficient details of the allegations, including the identities of the parties if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known;
- The presumption of innocence of the Respondent;
- A statement that the parties are entitled to an advisor of their choice;
- A statement that the parties can request to inspect and review evidence;
- Inform the parties of any prohibition on knowingly making false statements;
- The option for informal resolution; and
- A copy of the school’s Grievance Procedures.

§ 106.45(b)(2). This written notice must be provided to the parties prior to any investigative interviews, meetings, or hearings. The Final Rule states this notice must be provided “with sufficient time to prepare a response before any initial interview” and that advance written notice be provided prior to any subsequent interviews, meetings, or hearings to allow “sufficient time to prepare to participate.” *Id.*; § 106.45(b)(5)(v). Further, the parties are each entitled to have an advisor of their choice (who could be an attorney or a parent) accompany them to any meeting, interview, or hearing, though the school may establish restrictions on the advisor’s participation in such proceedings. § 106.45(b)(5)(iv).

Given these procedural steps, which must take place before any investigative interviews, it will be important for schools to develop template written notice forms and allow parties sufficient time to review them and select an advisor prior to initiating an investigation.

In addition, during the course of the investigation, the burden rests on the school, not the parties, to collect evidence sufficient to reach a determination regarding responsibility. Nonetheless, the school cannot restrict either party from discussing the allegations under investigation or gathering and collecting evidence to support their version of events. Under the Final Rule, the parties must be given an equal opportunity to present witnesses (including fact and expert witnesses), and other inculpatory and exculpatory evidence. § 106.45(b)(5)(i) – (vii).

At the completion of the information-gathering phase, the investigator must send the parties and their advisors all evidence directly related to the allegations even if the evidence will not be relied upon in reaching a determination regarding responsibility. The parties must be given 10 days to review this evidence and provide a written response, which the investigator must in turn consider prior to completing the investigative report. The investigator must then generate a written investigative report that fairly summarizes the relevant evidence, which is also sent to both parties and their advisors. *Id.* As discussed further below, the parties and advisors must then be given an opportunity to formulate and pose written questions to one another and witnesses prior to a determination on responsibility by a separate decision-maker.

The Final Regulations will require ESE schools to implement a more formal and structured investigation process than many currently follow. Because this will represent a significant departure for many ESE schools, schools should plan to meet with stakeholders to explain the new procedural requirements and how they will impact and elongate the timeframe for investigations. Schools will also need to train Title IX Coordinators, investigators, and decision-makers to ensure these procedures are followed in every complaint covered under Title IX.

#### **D. Hearing/No Hearing**

Section 106.45(b)(6)(ii) of the Final Rule provides that ESE schools “may, but need not, provide for a hearing” to resolve formal complaints of sexual harassment after the investigation has concluded. First, regardless of whether a hearing is held, and before any determination regarding responsibility is reached, the decision-maker(s) must afford each party “the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.” Second, regardless of whether a hearing is held, the provision limits questions about the complainant’s sexual predisposition or prior sexual behavior except under certain circumstances. Finally, the decision-maker(s) “must explain to the party proposing the questions any decision to exclude a question as not relevant.” Each of these provisions is discussed in more detail in the section of the Joint Guidance Memorandum on [Section 106.45\(b\)\(6\)\(ii\)](#).

Despite the purported hearing/no hearing option for ESE institutions, some ESE institutions must offer a hearing pursuant to state law. The Joint Guidance group has compiled a summary chart of state expulsion hearing requirements available [here](#).

### **III. Students**

#### **A. Emergency removal**

As explained further in the Joint Guidance Memorandum on [Emergency Removal](#), the Final Rule permits removal from a recipient’s educational program prior to a finding of responsibility under

limited emergency circumstances in which an immediate threat to physical health or safety exists.

In addition to implementing IDEA and Section 504-compliant practices for emergency removal, ESE recipients should be aware of state-specific requirements for excluding students from school. The Department promised to offer technical assistance for schools that need to meet competing compliance requirements for laws under the Department's authority. (FR 30228). The Department's believes, however, that the regulations preempt processes for excluding students as described in various state laws and "nothing in § 106.44(c) relieves a recipient from complying with State laws requiring that students under a certain age receive government-provided education services." 85 Fed. Reg. at 30228-29.

## **B. Supportive measures**

Like post-secondary institutions, ESE institutions must promptly offer supportive measures to a complainant under § 106.44(a) regardless of whether a formal complaint is filed. Supportive measures are generally discussed by the Joint Guidance team in Memos on [Institutional Response & Liability](#) and [Supportive Measures, Defined - § 106.30](#).

The Joint Guidance team anticipates that formal complaints filed by elementary or secondary school-aged students will be less common than formal complaints filed by parents pursuant to § 106.6(g) or, where parents or students decline to file a formal complaint but where the recipient's failure to initiate formal complaint procedures would amount to deliberate indifference, signed by the Title IX Coordinator. Acknowledging that possibility, the Department clarifies that "regardless of who actually witnesses or reported the sexual harassment," the "complainant" who must be offered supportive measures is the "person alleged to be the victim of conduct that could constitute sexual harassment." 85 Fed. Reg. at 30483. "[I]f a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances." *Id.* at 30181.

Some commenters noted that an extensive grievance process at the ESE level limits ESE recipients' ability to react to time-sensitive situations. The Department responded that an ESE recipient's obligation to promptly respond by offering supportive measures to a complainant "gives ESE recipients wide discretion to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant's equal educational access." *Id.* at 30483. Supportive measures offered to a complainant may not be "paired with actions that are punitive, disciplinary, or unreasonably burdensome on the respondent," *Id.*; however, recipients are permitted to offer supportive measures that somewhat burden a respondent "so actions such as changing a respondent's class or activity schedule" could be appropriate supportive measures. *Id.*

Recipients are required to define the range of disciplinary sanctions and supportive measures in their policies. In doing so, ESE recipients must be careful not to define a potential supportive

measure as a disciplinary sanction because disciplinary sanctions cannot be imposed prior to the conclusion of the grievance process. *Id.* at 30182. Also, supportive measures may be implemented without a finding of responsibility and a recipient may continue to provide supportive measures upon a finding of non-responsibility. *Id.* at 30183. For example, removal from an extracurricular activity may be considered a supportive measure; therefore, an ESE recipient that anticipates offering that type of supportive measure should not also include removal from an extracurricular activity in the range of possible disciplinary sanctions.

### **C. Parent/Guardian involvement**

Though not addressed in the NPRM, the Final Rule added § 106.6(g) to specifically recognize the legal rights of parents or guardians to act on behalf of minor complainants, respondents, witnesses, or any other individual during a Title IX grievance process. Whether a parent or guardian has the legal right to act on behalf of an individual is determined by State law, court orders, child custody arrangements or other sources granting legal rights to parents or guardians. *See* 85 Fed. Reg. at 30453. If a parent or guardian has a legal right to act on behalf of the student, then they must be permitted to exercise the rights granted to the student under the Final Regulations. This includes requesting supportive measures, filing a formal complaint, receiving written notice of the allegations, deciding whether to participate in an informal resolution, inspecting evidence obtained as part of the investigation, reviewing the investigation report, posing and responding to written questions to and from the other party, and filing an appeal. *See Id.* at 30453-30454. The Final Regulations also amend the “notification” provisions to make clear that, to effectively exercise these rights, parents and legal guardians of elementary and secondary school students must receive notice of the school’s Title IX policy, including the contact information for the school’s Title IX Coordinator. § 106.8(a)-(b); *See 85 Fed. Reg.* at 30468.

In addressing concerns about parents controlling the Title IX grievance process, the Department stated as follows:

In response to commenters concerned about whether a minor party has the right to have a parent help pose questions and answers under this provision, we have added § 106.6(g) to clarify that nothing in these regulations changes or limits the legal rights of parents or guardians to act on behalf of a party. The Department declines to specify whether a parent writing out questions or answers on behalf of the student-party must consult their child; this matter is addressed by other laws concerning the scope of a parent’s legal right to act on behalf of their child. The Department understands commenters’ concerns that the written submission of questions procedure may “devolve into a fight” between parents of minor parties, but reiterates that recipients retain discretion to adopt rules of decorum that, for example, require questions to be posed in a respectful manner (e.g., without using profanity or irrelevant *ad hominem* attacks). Further, the decision-maker has the obligation to permit only relevant questions to be asked and must explain to the party posing the question any decision to exclude a question as not relevant.

*See* 85 Fed. Reg. at 30365.

The Department also makes clear that parents or guardians must be permitted to accompany the student to meetings, interviews, and hearings during the Title IX grievance process. The Department notes, however, that the right of parents or guardians to act on behalf of a student does not preclude student parties from also having an advisor of their choice during the Title IX grievance process. As the Department explained, “where a young student’s parent is unsupportive or unable to assist the student, the student is still entitled to an advisor of choice (under § 106.45(b)(5)(iv)) and nothing in the final regulations precludes a recipient from adopting a policy of offering to provide an advisor to students, as long as such a policy makes a recipient-offered advisor equally available (on the same terms) to complainants and respondents, per the revised introductory sentence of § 106.45(b).” *See* 85 Fed. Reg. at 30491.

In light of these additions to the Final Rule, schools must ensure that parents and legal guardians of elementary and secondary school students receive notice of the school’s Title IX policy, including contact information for the Title IX Coordinator. Further, parents and legal guardians must be notified of any report or allegations of sexual harassment involving their minor child. Schools may also want to consider adopting written expectations for parents who participate in a Title IX grievance process, such as rules of decorum or non-disclosure obligations related to the review of evidence. Finally, schools may want to consider training school employees to serve as advisors to students in navigating the Title IX process.

#### **D. Manifestation Determinations and Other IDEA/504 issues**

The final rule does not supersede the IDEA, Section 504 or the Americans with Disabilities Act. *See* 85 Fed. Reg. at 30487. Without further explanation, the Department states that “[t]he final regulations provide significant flexibility for recipients, and recipients may utilize this flexibility in challenging cases, including where a recipient must comply with both these final regulations, and applicable disability laws.” *Id.*

The IDEA and Section 504 are likely to present barriers to Title IX compliance because of the separate procedural safeguards that must be used when changing the educational program or placement of a student with disabilities. In cases where the respondent, the complainant, or both students are identified under the IDEA or Section 504, a Local Educational Agency is prohibited from unilaterally changing the respondent’s educational program. Similarly, a Local Educational Agency is obligated to provide a Free, Appropriate Public Education (FAPE), and the individualized educational needs of certain students may prevent schools from implementing some of the Department’s suggestions, such as virtual classes, while a process is pending. The IDEA requires parental participation and consent, which will impede swift implementation of emergency removals and supportive measures.

Most importantly, Local Educational Agencies are prohibited from applying student conduct rules and discipline to students with disabilities where proposed disciplinary measures would result in a change of the student’s educational placement and the student’s conduct is a

manifestation of the student’s disability. *See* 34 C.F.R. 300.530(e). The nuanced requirements for manifestation determinations differ state by state, but the general process involves a team decision with parent involvement, a procedural safeguard for parents to challenge the decision, and mandated special education responses to conduct that is a manifestation of a student’s disability.

Local Educational Agencies should also be aware of their obligation to provide FAPE to students with disabilities. So, for example, the Department makes a distinction between supportive measures that are “designed” to restore or preserve a complainant’s equal access to the recipient’s educational program rather than supportive measures that “do” accomplish that equal access goal. 85 Fed. Reg. at 30181. The Department states that requiring recipients to design supportive measures “for that purpose rather than insisting that such measures actually accomplish that purpose protects recipients against unfair imposition of liability” under Title IX. *See Id.* However, when supportive measures are implemented for students with disabilities, Local Educational Agencies must continue to provide FAPE. A supportive measure provided to a student with disabilities that is designed to provide equal educational access but that fails to actually provide that access may expose the Local Educational Agency to liability under the IDEA even if the Department believes that the same situation would not result in liability exposure under Title IX.

#### **IV. Staffing/Personnel**

##### **A. Responsible Employees Definition**

The commonly used term “responsible employee” is not used in the Final Regulations; however, the regulations state that a school district has “actual knowledge” of sexual harassment or allegations of sexual harassment when any employee of an elementary and secondary school has knowledge of said conduct. § 106.30. This is a significant change from the NPRM.

##### **B. Special Cases: Coaches, Contractors, etc.**

It is recommended that all employees receive training on their role to ensure compliance with these regulations, but training is not required under the regulations. These employees may include school bus drivers, janitorial staff, cafeteria workers, counselors, school nurses, and school resource officers (SROs). School districts will need to evaluate these positions, and likely more, to determine how to implement this requirement to ensure compliance.

## V. Other Elementary and Secondary Education Policy Issues

### A. Definitions/Applicability Issues

#### 1. VAWA Definition

In addition to defining sexual harassment using the *Davis v. Monroe* standard (conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education, discussed further in the Joint Guidance Memo on [Definitions: Sexual Harassment](#)), the Final Rule incorporates the definitions of sexual assault, dating violence, domestic violence, and stalking from the Clery Act as amended by the Violence Against Women Act (VAWA). The Department explains that these four Clery/VAWA offenses need not meet the *Davis* elements of severity, pervasiveness, and objective offensiveness to constitute sexual harassment under Title IX. Therefore, a single instance of sexual assault, dating violence, domestic violence or stalking may be covered under Title IX. *See Final Regulations*, at 40-42.

Although elementary and secondary schools are not subject to the Clery Act unless they receive funding under the Higher Education Act, ESE schools must now look to the Clery/VAWA definitions of sexual assault, dating violence, domestic violence and stalking in order to address these forms of sexual harassment under Title IX. ESE schools will therefore want to amend their Title IX policies to include the Clery/VAWA definitions of sexual assault, dating violence, domestic violence and stalking (condensed definitions below), where such conduct is on the basis of sex:

“Sexual Assault”: Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.

- “Rape” is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.
- “Fondling” is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity. Fondling is recognized as an element of other sex offenses.
- “Incest” is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- “Statutory Rape” is sexual intercourse with a person who is under the statutory age of consent.

“Domestic violence” includes asserted violent misdemeanor and felony offenses committed by the victim's current or former spouse, current or former cohabitant, person

similarly situated under domestic or family violence law, or anyone else protected under domestic or family violence law.

“Dating violence” means violence by a person who has been in a romantic or intimate relationship with the victim. Whether there was such relationship will be gauged by its length, type, and frequency of interaction.

“Stalking” means a course of conduct directed at a specific person that would cause a reasonable person to fear for her, his, or others' safety, or to suffer substantial emotional distress.

Under the Final Rule, “sex-based” conduct that meets the Clery/ VAWA definitions of sexual assault, domestic violence, dating violence or stalking must be addressed through the school’s Title IX process and comply with the procedural requirements outlined by the Department.

## **2. Clery (in special cases)**

In some cases, elementary and secondary schools may receive Higher Education Act funding, such as where they provide adult education programs where students can access Federal Student Aid funds. In those situations, the requirements of the Clery Act apply to the school. The Clery Act is codified at 20 U.S.C. 1092(f), and its regulations may be found at 34 C.F.R. 668.46.

Schools with Clery Act obligations must continue to comply with those requirements, including the procedural requirements imposed by 34 C.F.R. 668.46(k), which imposes special procedures for institutional disciplinary action in cases of alleged sexual assault, dating violence, domestic violence, or stalking. Under this regulation, a Clery-compliant formal grievance procedure relating to one of these four types of allegations must include:

- The types of disciplinary proceedings available to resolve such complaints at the institution
- The steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding
- How to file a disciplinary complaint
- How the institution determines which type of proceeding to use based on the circumstances of a complaint
- The standard of evidence that will be used during the proceeding
- All possible sanctions that the institution may impose
- A provision that the proceedings will include a prompt, fair, and impartial process from the initial investigation to the final result
- Proceedings conducted by official who, at minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking, and on how to

conduct an investigation and hearing process that protects the safety of victims and promotes accountability

- The same opportunities for both “the accuser and the accused” to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice
- No limitations on the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding, except that the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both [all] parties
- Simultaneous notification, in writing, to both “the accuser and the accused” [all parties] of:
  - The result of an institutional disciplinary proceeding,
  - The institution’s procedures to appeal the result of the proceeding, if such procedures are available,
  - Any changes to the result, and
  - When such results become final

Applicable definitions relating to these requirements may be found in the Clery regulation itself, and additional information can be found in the [\*Handbook for Campus Safety and Security Reporting\*](#), which is published by the U.S. Department of Education’s Office of Postsecondary Education and is available on its website.

### **3. CARES Act and applicability to private schools that received federal financial assistance**

Title IX applies to schools that receive federal financial assistance. Historically, many private, independent ESE schools have not received federal financial assistance and therefore have not been subject to Title IX’s requirements. However, in the wake of Covid-19, many private ESE schools applied for a loan under the Paycheck Protection Plan (PPP) in the CARES Act with the Small Business Administration (SBA). According to the SBA, Private ESE schools that received a PPP loan are deemed recipients of federal financial assistance and required to comply with certain federal non-discrimination laws, including Title IX. However, the SBA guidance states that “once the loan is paid or forgiven, the nondiscrimination obligations will no longer apply.”

PPP borrowers are required to comply with SBA’s Title IX regulations, which are much less detailed and prescriptive than the Department of Education’s Final Rule. However, the SBA may choose to revise their regulations to conform with the Department’s Final Rule. Private schools that received PPP loans will want to monitor any changes to the SBA’s Title IX regulations and ensure they are complying with the SBA’s regulations under Title IX, which require schools to have a Title IX policy, institute a “prompt and equitable resolution” process for addressing Title IX complaints, designate a Title IX coordinator to oversee the school’s compliance with Title IX,

and provide a Title IX-compliant notice of non-discrimination to students, parents, employees and applicants.

## **B. Relationship to other common elementary and secondary education policies**

When a student is having a difficult time in the educational environment, the parent or student may not always use the “right” words to express which policies may be implicated based on the conduct being described. For example, a student may report being “bullied,” but upon further discussion, the conduct could implicate a school’s policies on bullying, sexual harassment, disability discrimination, and its code of conduct provisions regarding disruptive behavior. It is incumbent on the administrator who receives the initial report to work with the complainant on a description of the problematic behavior, then identify the policies that could be implicated by that behavior.

Each of these policies must then be reviewed to determine the appropriate procedure for resolving the report of misconduct, as it is sometimes the case that such procedures are not entirely compatible. For example, a bullying policy may require the building-level administrator to conduct an investigation and make a determination as to appropriate discipline, while a sexual harassment policy (not yet revised) may require the Title IX Coordinator to do the same with regard to allegations of sexual harassment. Identifying the relevant policies in advance will help to unify the procedures to the extent possible and minimize the number of concurrent investigations for greater efficiency.

This will become increasingly important with the heightened procedural requirements in the Final Rule for Title IX matters. For example, in a bullying investigation, the policy may permit a respondent to be interviewed about the allegations with no advisor and no prior written notice, but that same action would not comport with the final Title IX regulations. As new Title IX policies are prepared, care should be taken to make sure commonly used policies are revised at the same time to prevent incompatibilities to the extent possible, while still ensuring compliance with state and federal laws.

Further information on state bullying laws can be found online at <https://www.stopbullying.gov/resources/laws>.

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