



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.30(a): Definitions of Elementary and Secondary School and Postsecondary Institution

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Note: This document focuses on a summary analysis of Section 106.30(a) of the 2020 Final Title IX Regulations,¹ specifically the definitions of elementary and secondary school and postsecondary institution. 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

Elementary and Secondary School

In § 106.30(a), the Department defines “elementary and secondary school” for purposes of the Final Rule by borrowing the first half of the definition of “educational institution” from existing Title IX regulations. *See* 85 Fed. Reg. 30026, 30126 (May 19, 2020) (noting [34 C.F.R. § 106.2](http://www.ecfr.gov/current/title-34/chapter-I/subchapter-A/part-106/subpart-106.2) as the source of the definition). Accordingly, as defined in the Final Rule, the term “elementary and secondary school” includes the following three categories of schools:

- 1) a “local educational agency” or “LEA” as defined in the Elementary Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (the “ESEA”);
- 2) a preschool; and
- 3) a private elementary or secondary school.

See id. at 30574.

Under the ESEA, a LEA is “a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.” *See* § 20 U.S.C. 7801(30)(A).

Although the Department declined to expressly state so in the language of the Final Rule itself, the preamble to the Final Rule made clear the regulations are limited in application only to private schools that have received federal financial assistance. 85 Fed. Reg. 30188. In addition, the Final

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.

Rule applies its “religious exemption” provision to elementary and secondary schools controlled by religious organizations. *Id.* The preamble states:

The Department does not believe it is necessary to further explain in the final regulations that Title IX applies only to recipients of Federal financial assistance; the text of Title IX, 20 U.S.C. 1681, clearly states that the Title IX non-discrimination mandate applies to education programs or activities that receive Federal financial assistance, and expressly exempts educational institutions controlled by religious organizations from compliance with Title IX to the extent that compliance with Title IX is inconsistent with the religious tenets of the religious organization even if the educational institution does receive Federal financial assistance. Existing Title IX regulations already sufficiently mirror that Title IX statutory language by defining “recipient” and affirming the Title IX exemption for educational institutions controlled by religious organizations. *Id.* (internal footnotes omitted).

Postsecondary Institution

The Department borrowed the latter half of the definition of “educational institution” in existing Title IX regulations to define “postsecondary institution” for purposes of the Final Rule. *See* 85 Fed. Reg. 30126 (noting [34 C.F.R. § 106.2](#) as source of the definition). Accordingly, a “postsecondary institution” as defined in the Final Rule (at § 106.30) is a school that falls into one of four categories: (1) an institution of graduate higher education as defined in § 106.2(1); (2) an institution of undergraduate higher education as defined in § 106.2(m); (3) an institution of professional education as defined in § 106.2(n); and (4), or an institution of vocational education as defined in § 106.2(o). *See id.* at 30574.

34 C.F.R. § 106.2, incorporated by reference in the Final Rule, defines each of these respective “postsecondary institutions” as follows:

(1) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

The Final Rule refers to both elementary and secondary schools, and postsecondary institutions, collectively as “recipients” (of federal financial assistance covered by Title IX) and “schools.” *See* 85 Fed. Reg. 30026.

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