



Joint Guidance on Federal Title IX Regulations Analysis on Section 106.6(e): Impact on GEPA/FERPA

July 29, 2020

Note: This document focuses on a summary analysis of Section 106.6(e), specifically the impact of the Title IX Final Rules on GEPA and FERPA.¹ For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Title IX Summary Proposed to Final Comparison*, available at https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/TIX-Regulations-Text-for-Text-Comparison-Chart_v2.pdf

106.6(e): Impact on GEPA/FERPA

Section 106.6(e) of the Title IX Final Rules 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.

The Family Educational Rights and Privacy Act (FERPA) promotes accuracy and privacy of student education records by giving students access to these records, the opportunity to correct perceived errors therein, and some control over disclosure of the records. FERPA protects students against the improper disclosure of their education records and personally identifying information (PII) by placing conditions on federal funding available to educational agencies or institutions. For example, no funding is available to institutions that have a policy or practice of releasing student education records or non-directory PII to certain individuals, agencies, or organizations without the student’s written consent. See 20 U.S.C.A. §1232g(b)(1).

FERPA provides both negative and positive definitions of the term “education records.” In the positive definition, records must both contain information directly related to a student and be maintained by an educational agency, institution, or person acting for the agency or institution. 20 U.S.C. § 1232g(b)(4)(A). The negative definition excludes medical records, employee records, or records maintained or created by campus law enforcement. See 20 U.S.C. § 1232g(b)(4)(B).

As part of the General Education Provisions Act (GEPA), FERPA cannot be interpreted to interfere with Title IX. *Bigge v. Dist. Sch. Bd. of Citrus Cty., Fla.*, No. 5:11-CV-210-OC-10TBS, 2011 WL 6002927, at *2 (M.D. Fla. Nov. 28, 2011). Therefore, in the event of any conflict between FERPA and Title IX’s ability to address sex-based discrimination, Title IX ostensibly overrides FERPA. *Id.*

¹ The effective date of 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.



The Department of Education explicitly states this view in the Preamble to the Final Rule. *See*, 85 Fed. Reg. at 30426. In any event, the Department of Education does not believe that FERPA and Title IX conflict. *Id.* at 30,422. The Department of Education also insists that neither Title IX nor FERPA may be interpreted to deprive parties of their constitutionally recognized due process rights. *Id.* at 30421. Essentially, the Department articulates an interpretive hierarchy which ultimately allows due process to prevail in the unforeseen moments of tension between FERPA and Title IX. The Department insists this is not a matter of “favoring” due process over FERPA, but rather simply behaving as the Constitution demands. *Id.* at 30,422. This means that Title IX must not be interpreted in a way that impedes any federally recognized due process right involved in a complaint proceeding. *Id.* at 30421.

The Department of Education enumerates several items it considers “due process” rights that institutions must protect when implementing the Final Rule. These include notice of allegations, a meaningful opportunity to respond, access to all evidence related to a formal complaint, and access to an advisor of choice, along with the right of cross-examination. Where FERPA might traditionally prevent a disclosure of a record without permission of the student identified, the Department’s expansive view of due process rights has primacy; student records that otherwise might be shielded from disclosure under FERPA would be shared to protect these constitutional rights.

Note, however, that the right to access relevant evidence is not limitless, and both Title IX and FERPA apply the same “directly related” standard for evidence gathered in the Title IX investigation. § 106.45(b)(vi) of the final Title IX regulations states in relevant part:

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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

34 C.F.R. §106.45(b)(vii).

By using the same “directly related” standard for the evidence gathered in the Title IX complaint investigation as FERPA does in defining education records, the Department notes it is “well positioned to determine whether records constitute education records and also whether records are directly related to the allegations in a formal complaint.” 85 Fed. Reg. 30423. The Department further explains that the choice to use the FERPA “directly related” standard for evidence in the Title IX realm will make things easier for recipients that are already subject to FERPA’s restrictions because they will already understand how to assess this relatedness requirement. *Id.* at 30434.



In the Department’s view, applying the same relatedness standard will bypass most FERPA concerns. The Department asserts that any evidence directly related to the complaint at hand is necessarily directly related to the parties involved. *Id.* at 30433. This interpretation allows both complainant and respondent in a grievance process access to inspect and review any records an investigation into the complaint collects because every record would be (1) directly related to them as a student, and (2) maintained by the institution. *Id.* at 30432.

There are, however, still some records which the Department of Education identifies as protected from disclosure by FERPA. Medical records, for example, are excepted from both FERPA disclosures and use in a Title IX grievance process unless permission is granted by the student. *Id.* at 30423. Both FERPA and Title IX define medical records as “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 provision of treatment to the party.” *Id.* However, if a complainant or respondent provides any such record as part of their response to the investigative report, this may be taken as permission to disclose that record, and the other party must be granted time to inspect and review it as they would any other evidence supplied. *Id.* as 30427.

Similarly, if the institution finds any information in the evidence provided by a complainant which includes information otherwise barred by Title IX’s rape shield provision (evidence of the complainant’s sexual predisposition or prior sexual behavior offered to prove that someone other than the respondent committed the conduct alleged by the complainant or to prove consent) that institution should allow both parties equal opportunity to inspect and review this evidence. *Id.* at 30432.

However, the application of FERPA to some of these records might result in mandated redactions to protect the privacy interests of any students identified therein. *Greenfield v. Newman Univ., Inc.*, No. 218CV02655DDCTJJ, 2020 WL 2766172, at *3 (D. Kan. May 28, 2020). As with FERPA, Title IX does not prohibit redactions, but it does limit them to information not directly related to the allegations raised in a formal complaint. *Id.* at 30429. This would leave much evidence included in the investigative report as well as any witness statements at a hearing largely unredacted.

One final example given in the Title IX Preamble, involving attendance records, illustrates how far the Department’s concept of “directly related” evidence which is thus not subject to FERPA protections, goes. The Department explains that if a complainant makes their academic standing or school attendance material to their allegations by claiming that they missed class or otherwise suffered academically as a result of sexual harassment, then the records pertaining to those allegations become directly related to the complaint. *Id.* at 30432. Because evidence directly related to the complaint is directly related to the respondent of that complaint, the academic records of the complainant (very clearly within the FERPA conception of student record) become student records of the respondent as well.



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