Joint Guidance on Federal Title IX Regulations:
Analysis of Section §106.45(b)(6)(ii):
Elementary & Secondary Schools – Live Hearing Optional

May 22, 2020

Note: This document focuses on a summary analysis of Section of the 2020 Final Title IX Regulations,[1] specifically the requirements for elementary and secondary schools as they relate to live hearings. For further analysis of the Final Rules' application in the elementary and secondary school context, please see the Joint Guidance memo on Directed Question 1: Applicability to elementary and secondary schools. For a full overview of the changes as well as a comparison with the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*.

§106.45(b)(6) (ii) - Elementary and secondary schools – live hearing optional

In a major shift from the Notice of Proposed Rulemaking ("NPRM"), the Department's Final Rule states that elementary and secondary schools may, but do not need to, provide for a live hearing when responding to formal complaints of sexual harassment as defined in § 106.30.

Section 106.45(b)(6)(ii), found on page 85 Fed. Reg. 30577, begins with text signaling that, unlike the previous paragraph in (b)(6)(i) above, which applies to "postsecondary institutions," this provision applies to "elementary and secondary schools, and other recipients that are not postsecondary institutions." 85 Fed. Reg. 30026, 30577 (May 19, 2020). According to the definitions found in Section 106.30(b), this provision applies to "local educational agencies" as defined by the Elementary and Secondary Education Act of 1965—typically, public school districts—as well as preschools and private elementary and secondary schools that receive federal financial assistance. The commentary suggests that "other entities that are not postsecondary institutions" may include entities such as libraries, museums, or cultural centers that accept federal education funding. 85 Fed. Reg at 30227.

Entities subject to this provision "may, but need not, provide for a hearing." The provision then specifies only three further requirements for such entities' grievance procedures.

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."

[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. Further analysis available at: system.suny.edu/sci/tix2020

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 will be discussed in turn below.

"May, but need not, provide for a hearing"

Commentary accompanying the final regulations at page 85 Fed. Reg. at 30364 indicates that the Department changed the language from the NPRM so that the final regulations would "state even more clearly that hearings are optional and not required" for this category of recipients. The Department states, at page 85 Fed. Reg. 30365 that the language gives flexibility for entities to allow for no hearings or for hearings in circumstances they may define by policy.

For example, the Title IX Coordinator may determine it is appropriate to hold a live hearing where the students are above a certain age, where the students are in high school, or where both parties request or consent to a hearing. The Department notes, however, that because rules must apply equally to both parties, a recipient's policy could not allow for a hearing only if a respondent requests it or only if a complainant agrees to it, as this would not be an equal application of a rule to both parties. *See* 85 Fed. Reg. 30365 at footnote 1395.

Critically, even where a non-postsecondary entity chooses to hold a hearing, it does not necessarily need to follow the procedures defined in § 106.45, such as cross-examination. A review of the introductory text to Section 106.45(b)(6)(i) and (ii) suggests that the two paragraphs were not meant to apply to the same entities, with section (i) applying to postsecondary institutions, and section (ii) applying to all other entities subject to Title IX (including elementary and secondary schools). This intention is confirmed on pages 85 Fed. Reg. 30365 of the final regulations, wherein the Department states:

> If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions. The Department desires to leave elementary and secondary schools as much flexibility as possible to apply procedures that fit the needs of the recipient's educational environment. The Department notes that § 106.45(b) requires any rules adopted by a recipient for use in a Title IX grievance process, other than those required under § 106.45, must apply equally to both parties. Within that restriction, elementary and secondary school recipients retain discretion to decide how to conduct hearings if a recipient selects that option.

Thus, if a non-postsecondary institution chooses to provide for a hearing, it appears that they are not required to follow the hearing requirements of section (i) in designing that process (such as requiring advisor-led cross-examination) provided that the institution includes the procedural protections in section (ii).

While the commentary is clear on the exclusion of elementary and secondary schools from the hearing requirement and the intentions for that exclusion, the commentary is not explicit in its reasoning to apply this provision to other (non-postsecondary) recipients. However, it does note

that those "other recipients" may want to take advantage of the flexibility to adopt a hearing model. 85 Fed. Reg. at 30365.

Submission of Written Questions

According to the commentary at page 85 Fed. Reg. 30364 of the final regulations, the Department believes that, in lieu of requiring a live hearing, the submission of written questions "translate[s] those due process principles into meaningful rights for parties and increase[s] the likelihood of reliable outcomes." The Department then immediately asserts that its regulations "do not preclude a recipient from providing training to an investigator concerning effective interview techniques applicable to children or to individuals with disabilities," which leaves open the question of whether the written questions can be presented orally to the parties by an investigator, rather than simply presenting the written list in writing and expecting written answers in response. (However, note that any exclusion of questions on the basis of relevancy must be done by the decision-maker, not the investigator, as discussed further below.)

After written questions have been asked and answered, "limited follow-up questions" may be asked and answered. The Department notes in its commentary at 85 Fed. Reg. 30364-65 that recipients have "discretion to set reasonable limits in that regard," but does not expound further on what such limits might be. However, the Department notes that the written question phase of the process may overlap with the ten-day period to respond to the investigative report, thus putting a practical time limit on the process.

Commenters raised concerns that if written comments were exchanged, parents might prepare the questions or answers on behalf of their child. The Department acknowledged this concern in the commentary at 85 Fed. Reg. 30365, but declined to specify whether parents must consult their child under these circumstances, instead choosing to rely on other unspecified laws regarding parental rights. The Department suggests that any concerns about the process devolving to a fight between parents should be addressed by "rules of decorum" that are within the discretion of the recipient to adopt, such as requiring "questions to be posed in a respectful manner (*e.g.*, without using profanity or irrelevant *ad hominem* attacks)" and limiting questions to those that are relevant. 85 Fed. Reg. at 30365. The Department notes that if a decision-maker excludes a question, they must explain to the party that the question was not relevant. *Id.*

Limits on Questions regarding Complainant's Sexual Behavior

The "rape shield" protection provided in Section 106.45(b)(6)(ii) applies regardless of whether a hearing is held. It is identical to the protection provided in the case of hearings held in postsecondary institutions, and the Department referred to the same reasoning in its commentary. *See* 85 Fed. Reg. at 30366. Please refer to the Joint Guidance "Live Hearing" Memorandum for more information.

Relevancy Determinations

Section 106.45(b)(6)(ii) provides that, regardless of whether a hearing is held, "the decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant." The decision-maker must therefore become involved in the exchange of questions between the parties after the submission of the investigative report in order to make relevancy

decisions about the questions posed. Nonetheless, the decision-maker may not be the person best suited to communicate with the parties and witnesses to facilitate the exchange of such questions, answers, and follow-up questions. Recipients should carefully consider whether this role is best handled by the Title IX Coordinator, investigator, or decision-maker to allow for the most efficient process in their situation.

Interaction with State Laws

In 1975, the U.S. Supreme Court decided *Goss v. Lopez*, 419 U.S. 565, finding that students facing temporary suspension from school were entitled to notice and an opportunity to be heard. The extension of due process to students facing suspension or expulsion in public school districts has been codified into laws which differ from state to state. On page 85 Fed. Reg. 30364 of the final regulations, the Department recognized this patchwork of state requirements governing elementary and secondary disciplinary proceedings, noting that "to the extent that a recipient cannot comply with both State law and these final regulations, these final regulations, as Federal law, would control." Entities are encouraged to consult with legal counsel on how best to reconcile state law requirements with federal requirements.
