Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.6(h): Preemption

June 4, 2020

Note: This document focuses on a summary analysis of Section 106.6(h)) of the 2020 Final Title IX Regulations,[1] specifically the discussion of preemption. 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

§ 106.6(h): Preemption

Section 106.6(h) of the Final Rules provides:

> To the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

Section 106.6(h) was not included in the proposed regulations. Through this provision, the Department of Education asserts its authority to preempt any State or local law that conflicts with §§ 106.30, 106.44, and 106.45 of the Final Rule. Those sections are the core components of the regulation, including relevant definitions, institutional response obligations and when those obligations are triggered, and the grievance process for addressing formal complaints of sexual harassment.

Department's theory of "conflict preemption"

According to the Preamble discussion of this section, the Department received comments to the Notice of Proposed Rulemaking ("NPRM") requesting clarity as to whether the Final Rule would be a "floor" upon which states could build supplementary rules to protect survivors of sexual violence, or whether the Final Rule would "supersede enforcement" of State non-discrimination laws concerning sexual harassment. 85 Fed. Reg. 30036, 30454 (May 19, 2020). Commenters noted that at least ten states had laws that could potentially conflict with the NPRM, including California, Colorado, Illinois, New York, and Virginia, and that clarity was needed because the Federal government did not "occupy the entire field." *Id*. at 30454-30455.

In response, the Department stated that nothing in the Final Rule would prevent a recipient from complying with State or local laws within this field, and stated that the referenced State laws did not conflict with the Final Rule's requirements. *Id*. at 30454. While the Department conceded that the Final Rules might impose costs in addition to those State mandates, it reasoned that, "the

[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.

benefits of ensuring that every student, in every school, college, and university that receives Federal funds, can rely on predictable, transparent, legally binding rules for how a recipient responds to sexual harassment, outweigh the costs to recipients of altering procedures to come into compliance with the requirements in these final regulations." *Id.*

The Department asserts that recipients may continue to comply with existing State laws so long as they do not conflict with the requirements in the Final Rules.

Whether, and to what extent, the Department has the power to preempt State and local law in this area is beyond the scope of this memorandum. The Department insists it retains this authority under the theory of "conflict preemption," by which a federal statute "implicitly" overrides state law when a "private party" cannot comply with both state and federal requirements and the state law presents an "obstacle" to fulfilling Congress' objectives. *Id*., citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks and citations omitted.) A federal regulation, in turn, may preempt state law where it lies within the scope of the agency's congressionally delegated authority. *Id.* at 30455, citing *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (''state laws can be pre-empted by federal regulations as well as federal statutes''). The Department also engages (and dispenses) with various federalism and constitutional law concerns raised by commenters related to preemption, including Spending Clause analysis, on pages 30457-30460 of the Preamble.

Identifying conflicts of law

The Department declines to describe its Final Rule as a "floor" in all cases because, at times, the rules "may require more protections with respect to sexual harassment as a form of sex discrimination than what State law may require." *Id.* at 30455. State laws may also require additional protections for the parties that exceed the Final Rules. *Id.* Ultimately, whether a recipient may continue to comply with State or local laws governing this area will depend on whether the Final Rules have "occupied the field" related to a specific topic.

Certainly, where the Final Rules are silent on a matter that otherwise comports with the Final Rule, there is unlikely to be a conflict. The Department identifies numerous examples of laws and practices that it believes are unaddressed by the Final Rules and thus may continue despite the Rules in this portion of the Preamble, including laws:

- Requiring the annual training of employees and students. *Id.* at 30455
- Requiring training in trauma-informed practice. *Id*.
- Mandating the placement of transcript notations. *Id*. at 30454
- Adopting a particular definition of consent, including affirmative consent. *Id.* at 30455;
- Requiring the conducting of campus climate surveys. *Id*.
- Providing for temporary delays of ten days for concurrent law enforcement investigations. *Id*.
- Providing a union representative as a party's "advisor of choice" in the grievance process, as long as that advisor can perform cross-examination or another advisor is provided who can. *Id*. at 30456;
- Mandating more robust supportive measures for complainants. *Id*. at 30460;
- Mandating the use of the preponderance of the evidence standard. *Id.* at 30461;

- Mandating that postsecondary institutions adopt certain policies regarding sexual misconduct, as long as they are consistent with federal law. *Id.* at 30461;
- Mandating that cross-examination not be conducted directly by the parties, as long as the law does not prohibit cross-examination by a party's advisor in cases addressing sexual harassment as defined under the Final Rules. *Id*. at 30461;
- Requiring compliance with state administrative procedures acts that otherwise comply with the § 106.45 grievance process. *Id*. at 30462;
- Prohibiting the use of an informal resolution process, as the Final Rules do not require recipients to provide an informal resolution process. *Id*. at 30463.

Moreover, the Department notes institutions may address other forms of misconduct not otherwise covered by the Final Rules through procedures defined in State law and campus codes of conduct, including by responding to a broader scope of sexual harassment than that defined under § 106.30. *Id*. at 30460. Likewise, a recipient could extend its jurisdiction to adjudicate sexual misconduct "outside the recipient's education program or activity," including on a study abroad program. *Id*. at 30456-30457.

Of course, misconduct falling outside the scope of Title IX has to be addressed through a process outside of the Title IX regulations, as the Final Rule would otherwise mandate dismissal of the formal complaint. *Id*. *See*, § 106.45(b)(3)(i) (grounds for mandatory dismissal).

Despite this list of permissible additions, much gray area remains. Several State law protections may prove more problematic to reconcile with the Final Rules. For example, the Final Rules exclude any questions and evidence about the complainant's sexual disposition or prior sexual history, defining them as "irrelevant" in most circumstances. *See*, § 106.45(b)(6)(i)–(ii). This broad exclusion may conflict with State laws that permit the complainant to "waive" the rape shield. E.g., N.Y. Educ. L. § 6444 (5) (c) (vi). It is unclear whether a State law permitting a party to voluntarily waive a protection provided by federal regulation would face a preemption challenge.

In sum, § 106.6(h) purports to carve out a wide territory for federal oversight in the field of response to sexual harassment. Particularly in the states that have passed legislation related to campus sexual assault, institutions must be cautious in determining whether they will be able to continue enforcing existing policies that may conflict with the Final Rules. In many cases, institutions will be able to supplement the Title IX grievance process defined in the Final Rules, but they cannot apply policies unequally to the parties, and they cannot apply policies that conflict with the processes mandated under the regulations. But institutions remain free to develop policies governing misconduct falling outside the definition of sexual harassment in the regulations, including misconduct occurring outside the Title IX geography.