



441 G St. N.W.
Washington, DC 20548

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June 2, 2020

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Robert C. "Bobby" Scott
Chairman
The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Education: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Education (Education) entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" (RIN: 1870-AA14). We received the rule on May 13, 2020. It was published in the *Federal Register* as a final rule on May 19, 2020. 85 Fed. Reg. 30026. The effective date of the rule is August 14, 2020.

According to Education, the final rule amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). 20 U.S.C. §§ 1681-1688. Education stated the final regulations specify how recipients of federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. According to Education, these regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities. Education further stated the final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims. Finally, Education also stated the final regulations also clarify and modify Title IX regulatory requirements regarding remedies Education may impose on recipients for Title IX violations; the intersection between Title IX, Constitutional protections, and other laws; the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment; the dissemination of a recipient's non-discrimination policy and contact information for a Title IX

Coordinator; the adoption by recipients of grievance procedures and a grievance process; how a recipient may claim a religious exemption; and prohibition of retaliation for exercise of rights under Title IX.

Enclosed is our assessment of Education's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink, reading "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Hilary Malawer
Deputy General Counsel
Office of General Counsel
Department of Education

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF EDUCATION
ENTITLED
“NONDISCRIMINATION ON THE BASIS OF
SEX IN EDUCATION PROGRAMS OR
ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE”
(RIN: 1870-AA14)

(i) Cost-benefit analysis

The Department of Education (Education) assessed the potential benefits and costs of this final rule by establishing a baseline for current practice based on the current number of Title IX investigations occurring in local educational agencies and institutions of higher education. According to Education, benefits of the rule include: (1) clarity, specificity, and permanence with respect to recipient schools and colleges knowing their legal obligations under Title IX with respect to sexual harassment; (2) a legal framework for schools' and colleges' responses to sexual harassment that ensures all reports of sexual harassment are treated seriously and alleged victims are offered supportive measures, all persons accused are treated fairly, and both parties to any grievance process resolving sexual harassment allegations are given due process protections; and (3) preservation of constitutional rights and recognition of religious exemptions in the absence of written request.

According to Education, the costs include: (1) an estimated cost for reading and understanding the rule of \$3.45 million (at a 3 percent discount rate) or \$4.04 million (at a 7 percent discount rate); (2) an estimated cost for revision of grievance procedures of \$9.38 million (at a 3 percent discount rate) or \$10.97 million (at a 7 percent discount rate); (3) an estimated cost for posting of nondiscrimination statement of \$170,044 (at a 3 percent discount rate) or \$198,799 (at a 7 percent discount rate); (4) an estimated cost for training of Title IX coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process of \$29 million (at a 3 percent discount rate) or \$29.5 million (at a 7 percent discount rate); (5) an estimated cost for response to informal reports of \$70.3 million (at both 3 and 7 percent discount rates); (6) an estimated cost for increased investigation requirements of \$21.9 million (at both 3 and 7 percent discount rates); (7) an estimated cost for the appeal process of \$62 million (at both 3 and 7 percent discount rates); (8) an estimated cost for the creation and maintenance of documentation of \$17.9 million (at a 3 percent discount rate) or \$18.4 million (at a 7 percent discount rate). Education also estimated cost reductions associated with a reduction in the number of investigations, which were estimated to be \$179 million (at both 3 and 7 percent discount rates), and in informal resolution of complaints, estimated to be \$25.7 million (at both 3 and 7 percent discount rates). In total, Education estimates these final rules to generate a net cost of between \$48.6 and \$62.2 million over 10 years.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

Education certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

Education did not address the Unfunded Mandates Reform Act in the rule. In its submission to us, Education indicated that it did not prepare a written statement under section 202 of the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On November 29, 2018, Education published a proposed rule. 83 Fed. Reg. 61462. Education received over 124,000 comments in response to the proposed rule. This final rule contains an analysis of the comments received and any changes in the regulation since publication of the proposed rule. The agency discussed the comments by grouping substantive issues according to topic and by the sections of the rule to which they pertain.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

Education determined that this final rule contains information collection requirements (ICRs) under the Act. Education identified three sections of the rule to contain ICRs and estimated the burden of each ICR over the first 7 years as follows: section 106.45(b)(2), Written Notice of Allegations, at \$2,650,654 and 35,958 hours; section 106.45(b)(9), Informal Resolution, at \$2,650,654 and 35,958 hours; and section 106.45(b)(10), Recordkeeping, at \$130,250,090 and 3,640,544 hours. Education determined the total burden of these ICRs associated with the Office of Management and Budget (OMB) Control Number (1870-NEW) to be \$135,551,398 and 3,712,460 hours.

Statutory authorization for the rule

Education promulgated this final rule pursuant to section 1681 *et seq.* of title 20, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

Education determined that this final rule is economically significant under the Order and stated that the rule is subject to review by OMB.

Executive Order No. 13,132 (Federalism)

Education determined that this final rule does not unduly interfere with state, local, or tribal governments in the exercise of their governmental functions.