



## Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45: Inspection & Review of Evidence

May 20, 2020

*Note:* This document focuses on a summary analysis of Section 106.45(b)(5)(vi) of the 2020 Final Title IX Regulations,<sup>1</sup> specifically the requirements related to inspection and review of evidence. 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](http://system.suny.edu/sci/tix2020)

### **Section 106.45(b)(5)(vi): Inspection and Review of Evidence**

The Final Rule adds significant changes to the process institutions use to share evidence with the parties during a sexual harassment investigation. This document describes the first of a two-step pre-hearing evidence review process, through which the parties have an initial opportunity to review and offer a written response to evidence gathered by campus investigators. The second pre-hearing evidence review step (the sharing of an investigative report that summarizes the evidence) is discussed in the Joint Guidance *Investigative Report* document.

Most significantly, before the investigator issues their report, the parties must have at least ten days to review “any” relevant information “directly related to the allegations raised in a formal complaint” gathered by the investigators, including both inculpatory and exculpatory evidence. At the end of that ten day period, the parties have the right to submit a written response, which the investigator “will consider” before completing their investigative report.

While the institution has “some discretion” in deciding what evidence is relevant and must be shared (especially where the evidence is subject to a privilege), the Department offers a strong warning to institutions that fail to maintain records of their decisions. Institutions are advised to maintain a “privilege log” should they decide not to share certain evidence among the parties.

### **Overview of §106.45(b)(5)(vi)**

Final Rule §106.45(b)(5)(vi) states that an institution must:

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

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<sup>1</sup> 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.

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. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

This section is largely the same as its originating provision in the Notice of Proposed Rulemaking ("NPRM"), except that the final regulations add language stating that the evidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source, and institutions may share the evidence in electronic or hard copy (versus the proposed regulations' requirement that evidence be shared only via an electronic file-sharing platform).

### **How must institutions share information with the parties?**

The Department does not require or recommend a particular means of sharing this information, although many institutions have already developed electronic file-sharing protocols in the wake of the Coronavirus/COVID-19 Pandemic to facilitate remote investigations and hearings.

Prior to these Final Regulations, many institutions chose to share a summary of the evidence with the parties for review and response prior to making a determination. These Final Regulations now codify this practice and break it into two separate steps: first, the sharing of the actual evidence, and second, the sharing of an investigative report that summarizes the evidence (discussed in the Joint Guidance *Investigative Report* document).

Other institutions commonly provide pre-hearing access to the evidence, but not actual copies of the documents. This practice apparently cannot continue under the Final Rule: The Department is critical of policies requiring parties "to sit in a certain room in the recipient's facility, for only a certain length of time, with or without the ability to take notes while reviewing the evidence, and perhaps while supervised by a recipient administrator"; such practices "have reduced the meaningfulness of the party's opportunity to review evidence and use that review to further the party's interests." 85 Fed. Reg. 30,026, 30,307 (May 19, 2020).

Instead, the parties must have "a copy" of the evidence in hard copy or digital form, and have to be provided this evidence in a manner compliant with any reasonable request for disability accommodations under applicable law. *Id.* at 30,435. The institution may "choose to share records in a manner that will prevent either party from copying, saving, or disseminating the records," but does not have to, which reflects a change from the NPRM. *Id.*

## What information must be shared?

With respect to the first step of sharing the actual evidence with parties and their advisors, this provision requires institutions to share evidence that is “directly related to the allegations,” even if that evidence will not be relied upon in reaching a determination. This evidence may include material gathered by law enforcement in the course of a concurrent criminal investigation.

Notably, the Preamble distinguishes between information that is “directly related” to the allegations--which must be shared with the parties at this stage in the investigation--and information that is “relevant.” As discussed in the sections of this Guidance that address the investigation report, only “relevant” information need be summarized in the investigation report; “relevant” evidence is defined as more narrow in scope than evidence that is “directly related” to the allegations.

In the Preamble, the Department emphasizes the broad scope of the information to be shared with the parties, without any curation by investigator discretion about relevance, explaining that parties should have the opportunity to argue relevance of all the information collected, and that such an opportunity is only possible if the parties first view the entire corpus of information that is directly related to the allegations.

The Department notes that it is

important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator. For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party’s friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant.

*See* 85 Fed. Reg. at 30,304.

Put another way, the Department indicates that the institution “should not obtain as part of an investigation any evidence, directly relating to the allegations in a formal complaint, that cannot be legally shared with the parties.” 85 Fed. Reg. at 30,435.

In defining the inspection and review process, the Department indicates that evidence about “a party’s sexual behavior or predisposition that is directly related to the allegations raised in a formal complaint” should be offered for review to all parties for consideration of inclusion in the investigative report. 85 Fed. Reg. at 30,432. Although *the complainant’s* prior sexual behavior is

“irrelevant” under the Final Rule, the institution nevertheless must share prior sexual history if such evidence is directly related to the allegations because it may be “offered to prove that someone other than the respondent committed the conduct alleged by the complainant or to prove consent.” *Id.*

Also note that the Department identifies specific types of “education records,” as defined under FERPA, that it has indicated may be shared if directly related to the allegations raised in the formal complaint, such as attendance records showing that a respondent was or was not in class on the date of an incident. *Id.*

### **Scope of the investigation**

In terms of the adequacy and thoroughness of the investigation itself, the Department acknowledges that institutions do not have the subpoena authority of a court, or the ability to depose witnesses, and declines to create “the same rights to discovery afforded to civil litigation parties or criminal defendants.” 85 Fed. Reg. at 30,306. While this section does not address the scope of this investigatory obligation under such constraints, earlier in the Preamble, the Department acknowledged commenters that sought clarification on the extent of the institution’s effort to collect relevant evidence. 85 Fed. Reg. at 30,292. The Department declined to narrow this provision (e.g., by stating that the burden is to gather evidence “reasonably available”) or to broaden it (e.g., to require investigation of “all” leads or interviews of all witnesses), or to further specify steps an institution must take to gather evidence. In declining to provide such specificity regarding the institution’s obligation to collect evidence, the Department stated that this provision, as written, “appropriately obligates a recipient to undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.” *Id.* The Department recognized that “such conditions limit the extensiveness or comprehensiveness of a recipient’s efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available. *Id.*

### **Redactions and the “Privilege Log”**

The Department does permit investigators to redact information that is not directly related to the allegations or that is otherwise barred from use, such as because of a legally-recognized and unwaived privilege. E.g., § 106.45(b)(5)(i). Additionally, institutions may impose upon parties and their advisors restrictions or require non-disclosure agreements not to disseminate any of the evidence subject to inspection and review or use such evidence for any purpose unrelated to the Title IX grievance process, and indicates that an institution may require the parties to agree not to photograph or otherwise copy the evidence, including “sensitive” material such as nude images. *Id.* at 30,435.

But the Department warns that while an institution has “some discretion” as to what evidence is directly related to allegations raised in a formal complaint, the Department “may determine that a recipient violated § 106.45(b)(vi) if a recipient does not provide evidence that is directly related to allegations raised in a formal complaint to the parties for review and inspection.” 85 Fed. Reg. at 30,423. Further on in the Preamble, the Department acknowledges that personally identifiable

information may be redacted from student records if the information is not directly related to the allegations in the formal complaint, but cautions institutions to be “judicious” and “not redact more information than necessary under the circumstances so as to fully comply with its obligations under § 106.45(b).” *Id.* at 30,429.

As a method to protect against such a finding, the Department suggests that the institution compile a document, akin to a privilege log in litigation, in which it “log[s] information that it does not produce and allow the parties to dispute whether the information is directly related to the allegations.” The Department is careful to note that while it “does not impose a requirement to produce such a log during an investigation,” institutions may choose to do so, and “may use such a log to demonstrate that both parties agreed certain evidence is not directly related to the allegations raised in a formal complaint.” *See* 85 Fed. Reg. at 30,438.

Note that the Department’s position throughout the Preamble is that if a conflict arises between Title IX and FERPA, Title IX governs. 85 Fed. Reg. at 30,426. As such, it indicates that FERPA does not require an institution to redact student “education records” shared among the parties in the course of the investigation that directly relate to the allegations raised in the formal complaint “because the evidence directly relates to allegations by a complainant against a respondent and, thus, constitutes an education record of both the complainant and a respondent.” *Id.* at 30,427.

### **Review and Inspection Process**

The regulations provide that the parties shall have ten (business or calendar, in the institution’s discretion) days to review the evidence shared and to provide a response. This ten-day timeframe, especially when combined with the second ten-day timeframe for reviewing and responding to the investigation report, could add to the length of investigations. If the parties seek to offer additional evidence after reviewing an initial round of shared evidence and/or the investigation report, the length of the investigation could be extended even further due to an additional round of sharing evidence/investigation reports for party review and response.

Perhaps acknowledging how these repeated cycles of evidence collection, sharing, review and response can significantly extend investigation times, the Preamble provides as follows:

A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to when the parties’ time to inspect and review evidence begins. Alternatively, a recipient may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence under § 106.45(b)(5)(vi) and also an opportunity to respond to the other party’s additional evidence. Similarly, a recipient has discretion to choose whether to provide a copy of each party’s written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process.

85 Fed. Reg. at 30,307. Thus, balancing against the two ten-day review and response periods are institutions’ rights to place limits on the timeframes for parties to proffer evidence and

institutions' discretion whether to share parties' responses to evidence and to investigation reports.

## **Clery Act**

Finally, the Department purports to address concerns that the Clery Act regulations requiring an institution to exclude irrelevant or prejudicial evidence<sup>2</sup> ran counter to Final Rule §106.45(b)(3)(vi), stating that “there is no conflict between this provision [of the Clery Act] and the provision in § 106.45(b)(5)(vi).” 85 Fed. Reg. at 30518.

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<sup>2</sup> Pursuant to § 668.46(k)(3)(i)(B)(3), an institution must “provide[] timely and equal access to the accuser, the accused, and appropriate officials to any information that *will be used* during informal and formal disciplinary meetings and hearings.” (emphasis added).