Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.45: Investigative Report
May 21, 2020

Note: This document focuses on a summary analysis of Section 106.45(b)(5)(vii) of the 2020 Final Title IX Regulations,[1] specifically the requirements related to investigative reports. 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

§106.45(b)(5)(vii): Investigative Report

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 second of a two-step pre-hearing evidence inspection process: the required creation and sharing of an investigative report that summarizes the evidence. Step one is discussed in the Joint Guidance *Inspection and Review of Evidence* document.

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

> Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

This section is nearly identical to its originating provision in the Notice of Proposed Rulemaking ("NPRM"), except that it adds that to the extent that a party has an advisor, the report must be sent to that advisor for their review and comment as well. The creation of such a report is likely quite similar to the model that many schools that utilize a hearing model already have. For those using a single investigator model, the report will still be substantially similar, but without findings or determinations.

[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.

Importance of this Provision

In the Preamble to the Final Rule, the Department describes in detail its reasons for including this provision, stating:

> We believe that a standardized provision regarding an investigative report is important in the context of Title IX proceedings even though such a step may not be required in civil litigation or criminal proceedings and even though specific parts of this provision may differ from recipients' current practices (i.e., ensuring that parties are sent a copy of the investigative report ten days prior to the time that a determination regarding responsibility will be made). The Department believes that the purpose of §106.45(b)(5)(vii) and the specific requirements in this provision are appropriate because a Title IX grievance process occurs in an educational institution (not in a court of law) and because a recipient of Federal funds agrees, under Title IX, to operate education programs or activities free from sex discrimination. It is thus appropriate to obligate the recipient (and not the parties to disputed sexual harassment allegations) to take reasonable steps calculated to ensure that the burden of gathering evidence remains on the recipient, yet to also ensure that the recipient gives the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker. A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided. Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.

See 85 Fed. Reg. 30309 (May 19, 2020).

This provision is noteworthy because the Department appears to be openly acknowledging that it is imposing a procedural step upon recipients that goes above and beyond anything that even courts require.

What Should be Included in the Report?

The Report's purpose, plainly stated, is to convey relevant information about the allegations to the parties and their advisors. The Department "takes no position…on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence." *Id.* at 30310.

While it may be a best practice for the Report to include the procedural steps taken in the investigation, it is not mandated. The Department notes that because the "decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation)," a recipient may "wish to instruct the investigator to include such matters in the investigative

report," but the final regulations "do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence." *Id*.

Relevance Standard

Regarding the inclusion of relevant evidence in the report, the Department explains that the evidence summarized in the investigative report "may be relevant whether it is inculpatory or exculpatory." *Id*. at 30307. In order to address possible privacy concerns regarding the inclusion of irrelevant evidence, the Department explains that "[a] recipient may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant." *Id*. at 30304.

Regarding the rape shield provisions included in the Final Regulations and the relevance of evidence that may be protected by the same, the Department explains:

> All evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) (deeming all questions and evidence about a complainant's sexual predisposition "not relevant"' and all questions and evidence about a complainant's prior sexual behavior "not relevant" with two limited exceptions [(1) unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or (2) if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent]).

Id. Investigators must be trained in the rape shield provisions of the Final Rules and other exclusions for medical records and privileged information so they can draft an investigative report that properly accounts for such "irrelevant" information as defined in these regulations.

Concerns of Bias

According to the Preamble to the regulations, one purpose of sharing the investigative report before the hearing is to prevent a biased outcome in the determination. The Department rejects concerns raised during the public notice and comment process that sharing the investigative report prior to its finalization "would lead to errors, dissatisfaction, and the appearance of bias." In response, the Department states, "[i]n fact, those are the very potential problems that sharing the report with the parties seeks to avoid. The parties' responses may address perceived errors that may be corrected, so that the parties have an opportunity to express and note their contentions for or against the investigative report, and sharing the investigative report at the same time, to both parties, helps avoid any appearance of bias." *Id*. at 30307.

Concerns of Burden and Capacity

While the Department contends that it appreciates that investigatory report writing and review process may impose costs and burden on institutions, it feels strongly that such concerns "should be weighed, not only against fundamental fairness and due process, but in the context of the phase of an investigation when this requirement is in place: during the period when the investigative report should be compiled anyway (that is, after evidence has been gathered and before a determination will be made)." *Id*. at 30309.

One place where the Final Rule purports to streamline these burdens is through the consolidated handling of multiple complaints arising from the same incident. The Department indicates that "[i]n the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report." *Id*.
