



**Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.45(b)(1)(ii): Objective evaluation of all relevant evidence; provide that credibility determinations are not based on a person’s status as complainant, respondent or witness**

June 4, 2020

Note: This document focuses on a summary analysis of Section 106.45(b)(ii) of the 2020 Final Title IX Regulations.¹ 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)(1)(ii) - Require an objective evaluation of all relevant evidence; provide that credibility determinations are not based on a person’s status as complainant, respondent or witness

The Final Rule for this section is unchanged from the draft regulation but several other sections were changed with impacts for this section. This section states that a recipient’s grievance procedures must require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

The Department notes that some commenters expressed that campus adjudicators as well as courts, law enforcement, and other investigators have “always” considered a party’s status as defendant or plaintiff for weighing evidence and determining factors such as what interests a party may have when determining credibility. 85 Fed. Reg. 30026, 30246 (May 19, 2020). Yet the Department remains committed to a categorical bar on judging a person’s credibility based on their status, even for those who wanted to use those factors to partially judge credibility.

The Department states that any difficulties that recipients may have with gathering evidence will be outweighed by the “due process benefits” this provision brings to parties, and that the investigation and adjudication “must be based on an objective evaluation of the evidence available in a particular case.” *Id.* at 30247.

Objective evaluation

What is an “objective evaluation” of the evidence? The Department does not necessarily require reliance on “objective evidence (as in, corroborating evidence)” in reaching determinations of responsibility, but rather an objective evaluation of the “relevant” evidence that is available. 85

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.

Fed. Reg. at 30247. The meaning of the word “relevant” is elaborated in greater detail in other portions of the Preamble and regulations, but effectively it means any evidence that tends to make the allegations at issue more or less likely to be true.

“All” evidence

When explaining what it conceived of as “all” evidence, the Preamble refers to 106.45(b)(1)(v) and states that “‘all’ the evidence is tempered by what a thorough investigation effort can gather within a reasonably prompt time frame.” *Id.* The Department states that it “does not believe it is necessary to require investigators to identify data gaps in the investigative report, because the parties’ right to inspect and review evidence, and review and respond to the investigative report, adequately provide opportunity to identify any perceived data gaps and challenge such deficiencies.” *Id.* at 30248. Note also that, while the requirement is for the decision-maker to “consider” all relevant evidence, 106.45(b)(1)(vi) requires that both parties be provided an equal opportunity to inspect and review any evidence obtained during the investigation that is “directly related” to allegations.

Relevant, exculpatory, and inculpatory evidence

The Department intentionally does not define “relevance,” “exculpatory,” or “inculpatory,” but notes that relevant evidence includes “both inculpatory and exculpatory” evidence and that questions and evidence about a complainant’s (but not a respondent’s) prior sexual behavior are irrelevant with two exceptions, and precludes use of any information protected by a legally recognized privilege. *Id.* at 30247-30248; see also footnote 1018, at 30247. To this point, the Department added § 106.45(b)(1)(x) precluding a recipient from using evidence that would result in disclosure of information protected by a legally recognized privilege.

The Department declined to provide additional oversight on how a recipient might define or take into account exculpatory evidence, stating that the Final Rule adequately addresses this concern by specifying that relevant evidence includes both exculpatory and inculpatory evidence, providing opportunities for parties to challenge relevance, and requiring Title IX personnel to be trained on issues of relevance. *Id.* at 30249.

Exclusionary rules set by institution

The Department states that recipients retain the flexibility to adopt rules on how to evaluate evidence and conduct the grievance process, but that to “respect this standard of relevance” the recipient may not, for example, adopt a rule excluding relevant evidence because such evidence “may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” The Final Rule adds § 106.45(b)(5)(vi), stating evidence subject to review must include inculpatory and exculpatory evidence whether obtained from a part or another source, and the Department states that it revised § 106.45(b)(1)(iii) specifically to require training on issues of relevance. *Id.* at 30249.

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