



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45(b)(1)(vii): Standard of Evidence

June 12, 2020

Note: This document focuses on a summary analysis of Section 106.45(b)(1)(vii) of the 2020 Final Title IX Regulations,¹ specifically discussing the standard 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

§ 106.45(b)(1)(vii): Standard of Evidence

A Brief History

Prior to the issuance of the Final Rule, the Title IX regulations did not address the standard of evidence used to resolve formal Title IX grievances, but a series of guidance letters issued by the Department of Education’s Office for Civil Rights (“OCR”) did. The April 2011 Dear Colleague Letter, withdrawn in 2017, required recipients to use the “preponderance of the evidence” standard to determine if sexual misconduct had occurred. The September 2017 Q&A Document, which provided interim guidance after withdrawal of the April 2011 Dear Colleague Letter and April 2014 Q&A Document, loosened that requirement, permitting recipients to use either a “preponderance of the evidence” or “clear and convincing” standard. Footnote 19 of the September 2017 Q&A Document provided:

The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied “basic fairness” to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (“[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of 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.

accused.”). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution’s annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).

Expanding that approach, the November 2018 Notice of Proposed Rulemaking (“NPRM”) permitted the use of the preponderance standard, but only if the recipient also used that standard for code of conduct violations that did not involve sexual harassment but carried the same maximum disciplinary sanctions, and also for complaints against both students and employees (including faculty).

A more in-depth analysis of the evolution of the standard of evidence in OCR Guidance and the Notice of Proposed Rulemaking, as well as a comparison of the two standards of evidence, can be found in [William C. Kidder’s “\(En\)Forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration’s Proposed Standard of Evidence Regulation for Campus Title IX Proceedings,”](#) which was published in the *Journal of College and University Law* in January 2020.

The Final Rule

The text of the Final Rule regarding the standard of evidence is relatively short. It provides that a recipient’s grievance process must:

State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment[.]

The Department of Education’s discussion of this regulation, contained in the Preamble, defines each standard of evidence in footnote 1409:

A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. ... A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probably to be true.

85 Fed. Reg. 30026, 30373 (May 19, 2020).

Neither standard, the Department notes, requires corroborating evidence. *Id.* at 30381. Selecting a standard of evidence represents the “degree of confidence” needed by decision-makers to reach a determination of responsibility. *Id.* at 30382. This burden of proof rests on the recipient, not either party. *Id.* Recipients are not required to explain why they choose one standard or the other, nor are they precluded from doing so. *Id.* at 30388.

The commentary makes clear that the Department considered, but rejected, the notion of allowing recipients to use a “beyond a reasonable doubt” standard, finding that recipients were not operating a criminal proceeding, did not have the power to impose criminal punishments, and did not have subpoena powers. *Id.* at 30373. Similarly, the Department rejected standards lower than the preponderance standard, such as “substantial evidence,” “reasonable cause,” or “probable cause,” as they would not result in a fair process or reliable outcomes. *Id.* at 30385.

Notably, the Department removed the proposed requirement in this section that recipients only apply the preponderance of the evidence standard to reach determinations regarding responsibility in Title IX proceedings if they use the same standard to address non-sexual misconduct cases that carry the same maximum punishment. *Id.* at 30388.

The Department referenced the standard of evidence again in §106.45(b)(7)(i), Determination regarding responsibility. This section states that to reach a determination of responsibility, the recipient must apply the standard of evidence described in §106.45(b)(1)(vii).

The Department emphasized that it is not requiring recipients to use any particular disciplinary sanction. *Id.* at 30377. Thus, the final regulations do not require that recipients use any particular evidentiary standard for determining the appropriate disciplinary sanction in a particular case.

Same Standard for Students and Employees

The Department noted that a standard of evidence may be required by some other authority—collective bargaining agreements or state law, for example—in certain situations involving students, employees, or faculty members. 85 Fed. Reg. at 30376. Despite potentially competing obligations, the Department determined that it was appropriate for recipients to use the same burden of proof for all cases of sexual harassment, regardless of whether the respondent was a student or employee. The Department stated that it believed that discipline against students and employees was equally serious, and that it would offer certainty to complainants by defining one standard of evidence that would apply in any situation. *Id.* at 30377. This single standard is required despite the different nature of the relationship of the recipient to students versus employees. *Id.* Where competing provisions in a collective bargaining agreement exist, the Department noted that such provisions can be renegotiated. *Id.* at 30378.

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