Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.45: Written Determinations Regarding Responsibility
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Note: This document focuses on a summary analysis of Section 106.45(b)(7) of the 2020 Final Title IX Regulations,[1] specifically the requirements related to written determinations regarding responsibility. 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)(7): Determinations Regarding Responsibility

When a decision-maker (or group of decision-makers, depending on the institution's process) reaches its determination of responsibility or non-responsibility, the Final Rule requires that it issue a written determination. The Rule mandates a list of six items that must be included in any determination to ensure that it is "adequate for the purposes of an appeal or judicial proceeding reviewing the determination regarding responsibility." 85 Fed. Reg. 30,389 (May 19, 2020).

Particularly for postsecondary institutions, this requirement is not new, and will build on existing practices mandated under federal and state law and best practices. Still, some of the specific items that must be included in the written determination may be unfamiliar to practitioners, including the mandate to include a procedural timeline describing the investigative history of the case. Also notable is what is not required, but up to the institution's discretion: the Department declines to require that "all" evidence presented at the hearing be considered in the finding, or prescribe that the decision-maker outline its basis for reaching credibility determinations. *Id*.

Standard of Evidence

According to Final Rule §106.45(b)(7)(i), the decision-maker must issue a written determination on responsibility after the hearing that applies the standard of evidence chosen by the institution for adjudicating claims of "sexual harassment." This portion of the Final Rule has been modified from the Notice of Proposed Rulemaking ("NPRM") to better align with the Final Rule's framework by which the institution selects and applies its standard of evidence. *See* Final Rule §106.45(b)(1)(vii).

Required Analysis

[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.

Then, in §106.45(b)(7)(ii), the Department describes six items that must be included in the written determination.

> (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
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> (B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
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> (C) Findings of fact supporting the determination;
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> (D) Conclusions regarding the application of the recipient's code of conduct to the facts;
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> (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
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> (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

Identification of the Allegations. While these items largely mirror the text of the NPRM, the Final Rule eliminates a requirement that the written determination reference the sections of the institution's code of conduct allegedly violated because the finding of responsibility concerns "sexual harassment" covered under §106.30. However, it does not preclude an institution from also referencing a specific code of conduct section alleged to have been violated, and then making a determination regarding whether the facts demonstrate a violation of that section.

Procedural Steps Taken. The Department requires that the written determination provide an administrative and investigative history of the case, beginning with the filing of the formal complaint. It admits this requirement may have no equivalent in criminal or civil practice. 85 Fed. Reg. at 30,390. To some extent, this timeline is an accountability measure, as it ensures that the institution is meeting the complicated procedural requirements underlying a sexual harassment investigation, including the inspection and review process, and the sharing of the investigative report. Or, as the Department puts it, this timeline "gives the parties equal opportunity to raise any procedural irregularities on appeal." *Id*. at 30,390-30,391.

Under this requirement, decision-makers should indicate when the respondent received the notice of allegations; who performed the investigation; which witnesses and parties were interviewed and when; what locations, if any, were visited during the investigation; and what type of evidence was reviewed. The written determination should also describe the process undertaken to inspect and review the evidence and disseminate the investigative report, including the adherence to mandated procedural timelines.

In describing the investigative process, the written determination should account for any actual or perceived procedural issues. For example, if a process was delayed for good cause, that delay should be explained in the written determination. Likewise, if the parties requested that the investigators follow certain "leads" that the investigators were not reasonably able to pursue based on a lack of time, resources, or the unavailability of witnesses, that should be addressed in the timeline. *See, Id.* at 30,292 (in searching for facts and evidence, investigators are constrained by "prompt" timeframe and lack of subpoena authority, which "limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.").

Ultimately, these details will assist the Title IX Coordinator in understanding whether the institution's response was not clearly unreasonable in the manner it investigated the allegations and not performed in a way that violated the respondent's right to a fair process. This step is also critical for such recordkeeping purposes because the investigative report itself need not include an investigative timeline. *Id.* at 30,391.

Findings of Fact Supporting the Determination. The Final Rule does not require the decision-maker's written determination to include "all" evidence presented at the hearing, or even to grapple with facts *not* supporting the determination. *Id.* at 30,389. Rather, it requires an analysis of what findings of fact support the determination of responsibility or non-responsibility. This qualification may be a significant change for institutions that have chosen to evaluate all evidence presented at the hearing, including irrelevant material, in their written determinations. Under the investigative "funnel" designed under the Final Rule, such irrelevant material has already been set aside prior to the hearing and determination.

Conclusions Regarding the Code of Conduct. Where the institution "exercises its discretion" to apply policies and procedures not otherwise required under Title IX, those must be indicated in the written determination. *Id.* at 30,391. For example, the Department requires that the written determination "match up" with the language of the code of conduct itself, particularly where issues of consent are central to the determination. Because the Final Rule offers no definition of consent, the written determination should identify that definition, as indicated within the institutional code of conduct. *Id*.

Rationale and Sanction. The decision-maker must make a finding of responsibility or non-responsibility for each allegation, and describe the rationale for the finding based on an "objective" evaluation of the evidence presented at the hearing. Notably, the Department "decline[s] to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, 'all evidence' presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person's status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii)." *Id.* at 30,389. Yet as a practical matter, it may be difficult to present an "objective" evaluation of the evidence without addressing competing narratives, possibly exculpatory facts, and the credibility of the parties and witnesses based on factors outside their status.

The written determination must also indicate what disciplinary sanctions, if any, will be applied to the respondent if that party is found responsible for the allegations. The institution has

discretion in applying sanctions, and the Department does not mandate a "proportionality standard"; rather, it expects that institutions will "make disciplinary decisions that each recipient believes are in the best interest of the recipient's educational environment." *Id.* at 30,274.

While the types of possible sanctions for each violation may be described in a "range" or a "list," the Department indicates that these ranges or lists do not have to be "exclusive" in determining the appropriate remedy. *Id.* at 30,275. Nevertheless, institutions may wish to consider whether applying a sanction not indicated in their code of conduct (or statement of policy in their Annual Security Report for Clery Act-reporting purposes) comports with the due process or fair process rights of students. Note also that the Clery Act requires a "list" for sanctions available for domestic violence, dating violence, sexual assault, and stalking, not a range.

Finally, institutions must indicate "whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant." §106.45(b)(7)(ii)(E). This language is meant to balance the right of the parties to know whether a disciplinary sanction has been imposed on the respondent, with the right of the complainant to maintain confidentiality in any remedies outside a disciplinary sanction resulting from the finding of responsibility. *Id*. at 30,425.

Remedies that do not impact the respondent should not be disclosed in the written determination; rather, the determination should simply indicate that "remedies will be provided to the complainant." *Id*. But the complainant should be informed of the sanctions imposed "because knowledge of the sanctions may impact the complainant's equal access to the recipient's education program and activity." *Id* at 30,428.

For example, the Department notes that if the respondent is subject to a no-contact order along with a disciplinary sanction, "the written determination should list the one-way no-contact order as a sanction against the respondent and state that the recipient will provide remedies to the complainant. Thus, even where the no-contact order constitutes both a sanction and a remedy, the written determination would only list the measure insofar as it constitutes a sanction, preserving as much confidentiality as possible around the particular nature of a complainant's remedies." *Id*.

But if the institution, as part of a remedy, changes a complainant's housing arrangement, that remedy should not be disclosed to the respondent; it should not be specifically detailed in the written determination and shared with the respondent. Instead, "the written determination should simply state that remedies will be provided to the complainant." *Id.*

Appeal Rights. The written determination must indicate the right to appeal, the grounds for appeal (including any grounds not mandated under the Final Rule but included under the institution's discretion), and the deadlines for bringing an appeal.

Notice of Outcome

After describing what must be included in the determination, the Final Rule mandates that the parties receive simultaneous notification of the outcome. §106.45(b)(7)(iii). While it does not prescribe a method of delivering the written determination, a best practice is to send the determination electronically to the parties' institutional e-mail accounts; this ensures the "simultaneous" delivery and receipt of the determination and generates metadata affirming compliance with this requirement.

When the Determination Becomes "Final"

The Final Rule also sets forth when the determination is "final," meaning either:

- The date when the parties receive written notification of the results of any appeal, or
- If no appeal is filed, the date on which the appeal would no longer be considered timely under the institution's procedures

§106.45(b)(7)(iii). Because a right to appeal is now mandatory and to be provided on an equal basis to all parties, the language of the Final Rule has been adjusted from the NPRM to reflect this change.

Implementation of Remedies

Finally, this section reinforces that the Title IX Coordinator is responsible for "effective implementation of any remedies" set forth in the written determination. §106.45(b)(7)(iv).
