



**Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.45: Notice of Allegations
May 20, 2020**

Note: This document focuses on a summary analysis of Section 106.45(b)(2)(i)(B) of the 2020 Final Title IX Regulations,¹ specifically the requirements related to notice of allegations. 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

Section 106.45(b)(2)(i)(B): Notice of Allegations

The Department’s requirements for the notice of allegations provided to the parties following receipt of the formal complaint largely conform with both its [Notice of Proposed Rulemaking](#) (“NPRM”) and the existing practice of postsecondary institutions. Institutions should note some critical requirements that have raised questions in the past, such as the scope of information that must be provided to the respondent prior to any initial interview, the identities of the parties and witnesses, the presumption of non-responsibility, and the right to be free of retaliation.

Overview

Final Rule §106.45(b)(2)(i)(B) states as follows:

Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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.

These notice requirements are nearly identical to the NPRM language. The only substantive change is removal of the requirement listed in the NPRM that the notice must include the specific section of the recipient's code of conduct allegedly violated. This was replaced with the narrower and more specific "conduct allegedly constituting sexual harassment under § 106.30" of the Final Rule, without reference to the recipient's code of conduct.

According to the Department, this change is meant "to remove confusing references to the recipient's code of conduct and focus this provision on the need to send notice of allegations that could constitute sexual harassment as defined in § 106.30," when a formal complaint contains allegations of conduct that could also violate "other codes of conduct." 85 Fed. Reg. 30,284 (May 19, 2020).

The majority of these requirements, other than (i) the affirmative statement that the respondent is presumed not responsible and (ii) the admonition about knowingly false statements (only required if recipient's code of conduct prohibits such conduct), have been included in notice letters as a standard practice or as suggested by Department guidance for many years. As a result, an institution's form notice letter may not change significantly, other than as described in this paragraph, and in amending information related to how the process will proceed. Nonetheless, the Department expounded upon several aspects of this section of the Final Rule:

Overall Fairness and Reasons for Notice

The Department explains that the purpose of this written notice is to "help ensure that the nature and scope of the investigation, and the recipient's procedures, are clearly understood by the parties at the commencement of an investigation." *Id.* at 30,571.

The Department discusses the benefits of providing written notice prior to any initial interview to all parties. It notes that it "believes that providing written notice of the allegations to both parties equally benefits complainants; after a recipient receives a formal complaint, a complainant benefits from seeing and understanding how the recipient has framed the allegations so that the complainant can prepare to participate in the grievance process in ways that best advance the complainant's interests in the case." *Id.* at 30,278. It also states that "without knowing the scope and purpose of an interview a respondent will not have a fair opportunity to seek assistance from an advisor of choice and think through the respondent's view of the alleged facts." *Id.* at 30,280. Importantly, the Department cautions that "the recipient may not impose discipline on a respondent without first complying with a grievance process that complies with § 106.45, which includes providing a party with written notice of the date, time, location, participants, and purpose of all investigative interviews with a party with sufficient time for the party to prepare to participate." *Id.* at 30,281.

Addressing comments related to potential nefarious intents and actions of respondents following notification, the Department asserts that it "disagrees that providing written notice of allegations increases the risk that a respondent will destroy evidence or concoct alibis, and even if such a risk existed the Department believes that benefit of providing detailed notice of the allegations outweighs such a risk because a party cannot be fairly expected to respond to allegations without

the allegations being described prior to the expected response.” *Id.* at 30,278. The Department states that in the event of such destruction of evidence or fabrication of alibis, “nothing in the final regulations prevents the recipient from taking such inappropriate conduct into account when reaching a determination regarding responsibility,” and further contends that “numerous provisions in § 106.45 provide sufficient ways for the recipient (and complainant) to identify ways in which a respondent has fabricated (or invented, or concocted) untrue information, and such actions may also violate non-Title IX provisions of a recipient’s code of conduct.” *Id.*

Sufficient Details Known at the Time

The Department acknowledges that complainants, especially young students who are part of K-12 programs, may not always remember or choose to divulge all the details of an incident of sexual harassment. Because of this acknowledgment, the Department allows that in the event that subsequent information is revealed giving further information about the alleged incident, a subsequent notice may be provided without the first notice falling out of compliance with 106.45(b)(2)(i)(B). *See id.* at 30,284.

Sufficient Time to Prepare a Response

The Regulations note that “sometimes preparing a written notice of the allegations requires time for the recipient to intake a formal complaint and then compile the details required for a written notice.” *Id.* at 30,288. As a result, the Department definitively states that it will not interpret this provision to “require notice to be provided ‘immediately’ ... but rather notice must be provided early enough to allow the respondent ‘sufficient time to prepare a response.’” *Id.* The Department adds that “[w]hether the recipient provided the respondent ‘sufficient time’ under § 106.45(b)(2) is a fact-specific determination,” but also emphasizes that “[c]onsequences for failing to comply with the final regulations include enforcement action by the Department requiring the recipient to come into compliance by taking remedial actions the Department deems necessary, consistent with 20 U.S.C. 1682, and potentially placing the recipient’s Federal funding at risk.” *Id.*

Statement of Policy Regarding False Allegations

As discussed above, the Department states that when the recipient’s code of conduct prohibits knowingly making false statements or submitting false information, such prohibition must be referenced in the recipient’s written notice of allegations under § 106.45(b)(2). The Department clarifies that if the recipient’s code of conduct is silent regarding the provision of false statements or information, recipients are not obliged to include a warning about such conduct in the written notice. As the purported justification for this requirement, the Department asserts that it “believes that both parties deserve to know that their school, college, or university has such a provision that could subject either party to potential school discipline as a result of participation in the Title IX grievance process.” *Id.* at 30,279. In commentary accompanying the Final Rules, the Department rejects comments received in the NPRM process that such a statement is unfairly directed at complainants and intended to chill complaints, asserting that this “‘warning’ about making false statements applies equally to respondents, as to complainants. Respondents should

understand how a recipient intends to handle false statements (e.g., in the form of a respondent’s denials of allegations) made during the grievance process.” *Id.*; *see also id.* at 30,084.

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