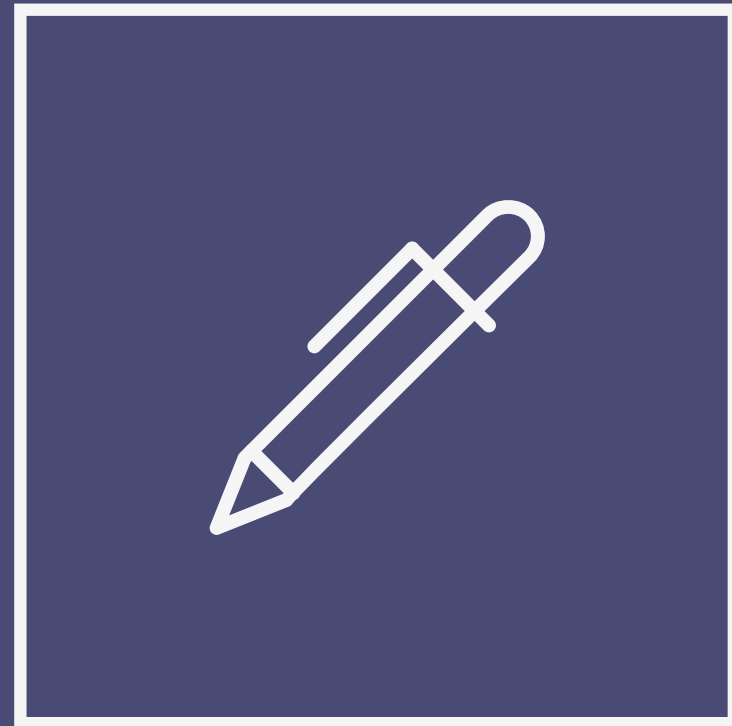
A black and white photograph of a hand holding a pen, writing on a document. The hand is in the foreground, and the pen is positioned over the text on the page. The background is blurred, showing more of the document and possibly other papers.

Drafting the Written Determination Regarding Responsibility

IN THIS CHAPTER



KEY ELEMENTS OF THE
DETERMINATION REGARDING
RESPONSIBILITY



BEST PRACTICES FOR MAKING A
DETERMINATION REGARDING
RESPONSIBILITY

Key Elements of the Written Determination Regarding Responsibility



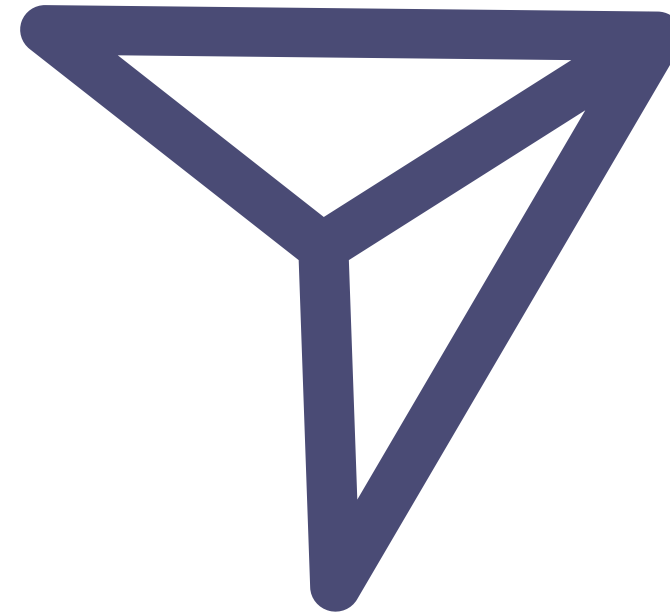
What is a Determination Regarding Responsibility?

- Drafted and issued by the Decision-Maker after the live hearing or K-12 decision-making process
- Based upon relevant evidence and testimony obtained during the grievance process applied to the school's standard of proof
- Contains various sections, notably a statement of, and rationale for, the result of each alleged policy violation (i.e., "responsible" or "not responsible" for violating the policy)
- Also referred to as the "Written Determination"

Introduction to the Written Determination



Includes six (6) key elements, as described under Title IX.



Must be shared with the parties simultaneously.



Specific timeline and procedures for issuing the Written Determination can be found in the school's Sexual Harassment Policy ("School Policy").

Key Elements of the Written Determination

Title IX states that the written determination must include:

- 1** Identification of the allegations potentially constituting sexual harassment as defined under Title IX;
- 2** Description of the procedural steps taken from receipt of formal complaint through the determination;
- 3** Findings of fact supporting the determination;
- 4** Conclusions regarding the application of school's code of conduct to the facts;

Key Elements of the Written Determination

Title IX states that the written determination must include:

- 5 A statement of, and rationale for, the result as to each allegation, including:
 - A determination regarding responsibility;
 - Any disciplinary sanctions the school imposes on the Respondent;
 - Whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the Complainant; and
- 6 The school's procedures and permissible bases for the Complainant and Respondent to appeal.

Let's dive into each element of the Written
Determination.

1

Identification of
the allegations
potentially
constituting sexual
harassment as
defined under Title
IX

- Allegations may be found in the Notice of Allegations or Investigative Report and inserted directly into the Written Determination
- Allegations contained in the Written Determination must be consistent with the allegations provided to the Parties in prior notices
- If the allegations are unclear, confirm with the Title IX Coordinator
- Determination includes:
 - Information about the alleged incident(s)
 - Definitions of the alleged policy violations

Allegations

The Allegations made by Complainant to Scenario College's Title IX Office were made via Scenario College's online report form on September 1, 2022, giving rise to potential violations of Scenario College's Sexual Harassment and Sexual Misconduct Policy by Respondent, which prohibits sexual harassment. The Allegations are as follows:

- A. On the night of August 25, 2022, Complainant alleges that Respondent touched her breasts in the kitchen of the Delta Tau Chi fraternity house without her consent.
- B. On the morning of August 26, 2022, Complainant alleges that Respondent digitally penetrated her vagina in the bathroom of the Delta Tau Chi fraternity house while Complainant was "blacked out" after consuming alcohol.

OR

- C. Respondent touched Complainant's breasts in the kitchen of the Delta Tau Chi fraternity house after she told him to stop and stay away from her.
- D. Respondent put his fingers inside of the Complainant's vagina while she was "blacked out" in the bathroom of the Delta Tau Chi fraternity house.

Forcible Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will in instances where the victim is incapable of giving consent.

Non-Consensual Sexual Penetration: Any form of sexual penetration or intercourse (vaginal, anal, or oral), however slight, with any object by an individual upon another individual without consent and/or by force. Intercourse means: vaginal or anal penetration by a penis, object, tongue, or finger; and oral copulation (mouth to genital contact or genital to mouth contact).

2

Description of the procedural steps taken from receipt of formal complaint through the determination

- Documents the entire grievance process
- Includes notifications to the Parties, interviews with Parties and Witnesses, site visits, methods used to gather evidence, and hearings held
- Procedural steps may be found in the investigative report and/or provided to the Decision-Maker by the Title IX Coordinator and Investigator because many procedural steps occur prior to the Decision-Maker's involvement in the process
- Decision-Makers must add procedural steps related to the decision-making portion of the grievance process (i.e., pre-hearing meeting and hearing)

On September 2, 2022, the Title IX Coordinator met with the Complainant to review the relevant policies and procedures and discuss resources and supportive measures and answer any questions. Complainant did not have an advisor present.

On September 5, 2022, Complainant submitted a formal complaint to the Title IX Coordinator via email.

On September 10, 2022, the Title IX Coordinator sent a Notice of Allegations to the Complainant and Respondent, advising the parties that a formal complaint had been filed by Complainant against Respondent alleging violations of Scenario College's policies and procedures. The Notice stated that a Title IX investigator would be assigned to the case to investigate the allegations in accordance with Scenario College's Sexual Harassment and Sexual Misconduct Policy ("Policy"). The specific allegations were included, and the parties were directed to the relevant sections of the Policy. The Notice specifically stated:

[INSERT ALLEGATIONS & ALLEGED POLICY VIOLATIONS]

On September 11, 2022, the Title IX Coordinator met with Respondent to review the relevant policies and procedures and discuss resources and supportive measures and answer any questions. No advisor was present.

On September 17, 2022, Title IX Investigator Singh interviewed Complainant about the allegations with Complainant's advisor present.

On September 18, 2022, Title IX Investigator Singh interviewed Respondent about the allegations. Respondent did not have an advisor present.

3

Findings of fact supporting the determination

- Includes relevant facts provided in the Investigative Report and facts established during the live hearing or the K-12 decision-making process
- Includes statements provided by the Parties and Witnesses during the investigation and live hearing or K-12 decision-making process*
- Includes an analysis of inculpatory and exculpatory evidence
- Includes an analysis of disputed and undisputed facts

*Reference your school's policy to determine if the Decision-Maker may or may not rely upon any statements provided by a Party or Witness who does not submit to cross-examination in reaching the final determination regarding responsibility.

The following facts are undisputed by the parties and by the evidence:

- Complainant is a freshman at Scenario College and lives in Apple Residence Hall.
- Respondent is a junior at Scenario College and lives in the Delta Tau Chi fraternity house.
- Respondent met Complainant in their “Introduction to Buddhism” course on the morning of August 25, 2022. After class Respondent invited Complainant to a party hosted by the Delta Tau Chi fraternity that same evening.
- On August 25, 2022, Members of the Delta Tau Chi Fraternity hosted a “Welcome to the Jungle” party at the Delta Tau Chi fraternity house. The party started at 10:00 pm.
- Complainant, Witness 3, and Witness 5 consumed Coors Light Beer prior to arriving at the Delta Tau Chi fraternity house.
- Complainant, Witness 3, Witness 5, and Witness 8 arrived at the Delta Tau Chi fraternity party at approximately 11:00 pm.

4

Conclusions regarding the application of school's code of conduct to the facts

- Decision-Maker “matches up” conduct that allegedly constituted Title IX sexual harassment with the relevant portions of the school's Code of Conduct that the conduct also violates
- Nests the policy violations within the Code of Conduct to help the Parties better understand how rules unique to the school’s Code of Conduct affect the determination and/or consequences of the written determination
- Explicitly states the names of the institutional policies that are being applied to the alleged policy violation

Applicable Scenario College Policy

The alleged conduct may potentially violate the following sections of the College's Sexual Harassment and Sexual Misconduct Policy:

Forcible Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will in instances where the victim is incapable of giving consent.

Non-Consensual Sexual Penetration: Any form of sexual penetration or intercourse (vaginal, anal, or oral), however slight, with any object by an individual upon another individual without consent and/or by force. Intercourse means: vaginal or anal penetration by a penis, object, tongue, or finger; and oral copulation (mouth to genital contact or genital to mouth contact).

Additional definitions contained in the College's Sexual Harassment and Sexual Misconduct Policy relevant to the allegations are as follows:

Consent: "Consent" must be informed, voluntary, and mutual, and can be withdrawn at any time. There is no consent when there is force, expressed or implied, or when coercion, intimidation, threats, or duress is used. Whether a person has taken advantage of a position of influence over another person may be a factor in determining consent. Consent can be expressed verbally or nonverbally. Consent must be active, not passive. Silence or absence of resistance does not imply consent...

Incapacitation: Incapacitation can occur through excessive alcohol or drug use or for other reasons such as unconsciousness, being asleep, or being otherwise physically unable to respond fully and effectively to the environment, such that they cannot make a knowing agreement to sexual activity.

5

A statement of, and rationale for, the result as to each allegation, including:

1. A determination regarding responsibility;

- Apply the standard of proof outlined in the school's policy to the evidence to make a determination
 - Preponderance of the evidence standard vs. clear and convincing standard
- Be explicit about the rationale for the result as to each allegation
 - Cite the Parties' statements, Witness statements, evidentiary findings, etc.
 - Outline conflicting statements and indicate why or why not specific statements or evidence is credible and supports or does not support a finding of responsibility.
- Include a statement of, and rationale for, the result of each allegation

- **Allegation #1. On the night of August 25, 2022, Complainant alleges that Respondent touched her breasts in the kitchen of the Delta Tau Chi fraternity house without her consent.**

The Complainant and the Respondent agree on some facts related to the allegation of forcible fondling but fundamentally disagree on whether it was consensual. The Complainant stated that the fondling of her breasts occurred in the Delta Tau Chi fraternity house at the “Welcome to the Jungle” party while she was alone with the Respondent. Respondent stated that he was mixing alcoholic drinks called “jungle juice” with Witness 4 when Complainant came into the kitchen and pressed her breasts, stomach, pelvis, and front of her thighs against his back. Respondent then stated that when he turned around to talk to Complainant, he was holding up two red solo cups of jungle juice in front of his chest and his hands brushed against the Complainant’s breasts. Witness 4 testified that he was with Respondent in the kitchen making jungle juice and saw Respondent’s face blush after turning around and touching Complainant’s breasts with his [Respondent’s] hands full with cups of juice. Witness 4 stated that he heard Respondent immediately apologize to Complainant. Witness 8 stated that she saw Complainant leave the kitchen and that Complainant told her that Respondent just “tried to feel her up.”

[ADDITIONAL CONTEXT]

Based upon the evidence and statements provided during the investigation and live hearing, the Decision-Maker is able to determine that, by a preponderance of the evidence standard, the Respondent touched Complainant’s breasts in the Delta Tau Chi fraternity house kitchen. However, the evidence and statements pertaining to the purpose of the Respondent’s actions (which is a key element of the Policy’s definition of forcible fondling) does not reach the threshold of proof by a preponderance of the evidence that the Respondent’s conduct constituted forcible fondling and consequently violated the school’s Sexual Harassment and Sexual Misconduct Policy, based on the credibility of the following:

- [PROVIDE ADDITIONAL STATEMENTS AND RATIONALE FOR THE DETERMINATION BASED UPON CASE-SPECIFIC FACTS]

Therefore, the Decision-Maker determines that the Respondent is not responsible for violating the school’s Sexual Harassment and Sexual Misconduct Policy.

5

A statement of, and rationale for, the result as to each allegation, including:

2. Any disciplinary sanctions the school imposes on the Respondent; and

- Disciplinary sanctions are punitive measures implemented for the Respondent following a determination of responsibility
- Refer to the school policy for a list or range of possible disciplinary sanctions
- Title IX does not prescribe specific sanctions for each type of conduct
 - Discretion is left to schools to determine sanctions on a case by case basis
 - Some schools may have specific guidelines or matrices for sanctioning according to each policy violation

5

A statement of, and rationale for, the result as to each allegation, including:

2. (cont'd.) Any disciplinary sanctions the school imposes on the Respondent; and

- Confirm with the Title IX Coordinator if the Decision-Maker is responsible for determining sanctions
 - Some institutions require the Decision-Maker to determine sanctions, while other institutions have a separate Sanctioning Officer or Body to determine sanctions.
- Student and employee cases may have different sanctioning process
- Regardless of who determines the sanction(s), all sanctions must be included in and issued with the final written determination

Examples of Sanctions

- Verbal or written warning
- Mandatory education or counseling
- Community service
- Removal from campus housing
- Removal from extracurricular activity or sports team
- Disciplinary probation
- Withholding of diploma
- Expulsion
- Termination from employment
- Loss of faculty tenure

Sanctions

In accordance with Section X. of Scenario College's Sexual Harassment and Sexual Misconduct Policy, upon making a determination that the Respondent is responsible for the alleged policy violation, the Decision-Maker is required to determine a disciplinary sanction that is appropriate to the violation. In this case the Respondent has been found responsible for a very serious form of sexual harassment, nonconsensual sexual penetration, as he digitally penetrated an individual who he reasonably should have known was incapacitated.

[INSERT CONSULTS WITH DISCIPLINARY ADMINISTRATORS, RATIONALE FOR DETERMINATION OF SANCTION, AND ANY OTHER INFORMATION RELEVANT TO THE SANCTIONING PROCESS.]

Therefore, I have determined the Respondent shall serve a period of suspension from Scenario College, effective the November 1, 2020, and continue through the last day of the Spring 2023 semester. Enclosed with alongside this Determination in a separate document are the terms of the suspension, including guidelines for seeking reenrollment following the termination of the suspension.

**The names, locations, and events referenced in this slide are fictional and do not depict any actual person or event.*

Although the Respondent has not been found responsible for violating the Scenario College's Sexual Harassment and Sexual Misconduct Policy and is therefore not subject to sanctioning, the Adjudicator recommends Scenario College provide supportive measures to the Complainant in order for her to feel safe on campus and obtain equal access to her education.

**The names, locations, and events referenced in this slide are fictional and do not depict any actual person or event.*

5

A statement of, and rationale for, the result as to each allegation, including:

3. Whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the Complainant.

- Remedies are defined as the actions taken to preserve or restore the Complainant's access to the recipient's educational program or activity
- Remedies may look similar to supportive measures already instituted during the grievance process, however, with a finding of responsibility, remedies may be punitive and/or burden the Respondent
- The Written Determination does not outline the remedies; it simply states whether remedies will be provided to the Complainant

5

A statement of, and rationale for, the result as to each allegation, including:

3. (con't.d) Whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the Complainant.

- Remedies will look different for every Complainant as they must be appropriate to the individual facts and circumstances of each case
 - Keep in mind that the purpose of remedies is to restore or preserve the Complainant's equal access to education
- The Title IX Coordinator is responsible for effective implementation of the remedies
- If a Respondent is not found responsible, the school may offer supportive measures to the Complainant at its discretion

Examples of Remedies

- Academic accommodations/adjustments
- Housing adjustments
- Increased security or safety measures
- Education and prevention efforts
- Changes in work assignment or role
- No-contact orders
- Medical or counseling services

Remedies

In accord, the Decision-Maker recommends Scenario College provide the Complainant with remedies designed to restore or preserve equal access to the College's educational programs or activities in order to return Complainant to an employment environment free of Respondent's sexual harassment.

6

The school's procedures and permissible bases for the Complainant and Respondent to appeal

- Information about appeals can be copied directly from the school's policy
- Both parties have the right to appeal
- The Appellate Officer cannot be the same person as the Decision-Maker
- The determination regarding responsibility becomes final either on the date that the school provides the Parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely

Appeals

In accordance with the Scenario College Sexual Harassment and Sexual Misconduct Policy, either complainant or respondent may file a written notice of appeal of a determination or dismissal of a formal complaint within seven days after receiving the written determination or notice of dismissal. The notice of appeal must be delivered to the Title IX Coordinator within such seven-day period by email, personal delivery, certified mail or overnight delivery service.

A party may appeal from a) determination regarding responsibility, and b) the College's dismissal of a formal complaint or any allegations therein, on the following bases:

- A. Procedural irregularity that affected the outcome of the process;
- B. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the process; and
- C. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the process.

The appeal decision-maker will be free of bias as well as conflict of interest and will not be the Title IX Coordinator, investigator involved in the investigation, or decision-maker who reached the determination regarding responsibility or dismissal. The appeal decision-maker will have received required training under Title IX.

[CONTINUED...INSERT FULL "APPEALS" SECTION FROM THE POLICY]

Best Practices for Making a Determination Regarding Responsibility



Preparing to Draft the Written Determination

Before drafting a written determination, Decision-Makers may ask themselves the following questions:

- Has the institution prepared a template for Decision-Makers to utilize?
- Do Decision-Makers have access to sample or previous Written Determinations for review?
- Has the Decision-Maker accessed and thoroughly reviewed all information gathered during the investigation and live hearing/K-12 decision-making process?

Preparing to Draft the Written Determination

Additional considerations for Decision-Makers:

- Has the Decision-Maker thoroughly reviewed the school's Sexual Harassment Policy and Title IX Regulations?
- When must the written determination be sent to the Parties?
 - Title IX requires the grievance process to be reasonably prompt, and many school policies provide explicit timelines.

Understanding the Audience

A clear determination is important because many individuals will have access to it. The intended audience includes:

- Complainant, Respondent, and Advisors
- Appellate Officer (if an appeal is filed)
- Title IX Coordinator
- School's General Counsel (possibly)
- Parties' parents or guardians (if applicable)
- Part of the school's record of the Title IX grievance process and may be reviewed by external parties should litigation arise

Getting Started: Drafting a Written Determination

A white blank page can be intimidating. Consider starting your written determination by inserting the following information:

- **Title:** Identify the Decision-Maker, Complainant, Respondent, and school by name.
- **Introduction:** State the names of the Decision-Maker, Complainant, and Respondent. Then provide information about the live hearing, such as the date and location of the hearing as well as the hearing attendees. (Parties, Advisors, Witnesses, school administrators, etc.)

Getting Started: Drafting a Written Determination

Compliance with Title IX and the School's Policy are critical. Set yourself up for success by noting required information.

- **Section Headers:** Title IX and (likely) the school's policy outline the six sections that must be included in the written determination. Create a section header with a brief description of the required information to help you create a compliant written determination.
- **School Policy:** Note the page number of the school policy outlining the requirements for the written determination to reference throughout the writing process.

Applying Facts to the Standard of Proof and Making a Determination

Decision-Makers must remain objective and clearly explain their rationale as to the result of each allegation. What does this mean?

Reviewing the Determination

Recall that the Decision-Maker ultimately applies evidence to the standard of proof to objectively answer two key questions:

- 1** Did the alleged incident(s) occur?
- 2** Does the alleged conduct violate the school's policy?

Does the written determination address these questions in some manner?

Lifelong Impact of Written Determinations

Regardless of the outcome, the Decision-Maker's decision will impact the parties' futures. How does this affect Decision-Makers?

- The importance of the role of the Decision-Maker cannot be overstated
- Written determinations must be clear, concise, and contain articulated conclusions
- If one or both Parties appeals your determination, it does not mean that your determination was "bad" or "wrong"