



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

Note: This document focuses on a summary analysis of Section 106.45(b)(1)(iii) of the 2020 Final Title IX Regulations,¹ specifically the requirements related to the training of officials. 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)(iii): Training

The Final Rule expands the topics of mandated training for certain institutional employees from both the Notice of Proposed Rulemaking (“NPRM”) and the [2001 Revised Sexual Harassment Guidance](#), and clarifies the specific employees (including students, if they are involved in a decision-making process) who must receive this training. It does not indicate a specific number of hours of training, nor does it require an annual certification.

Notably, these training mandates build on (but do not fully overlap) with requirements already in place under the [2013 reauthorization of VAWA and its regulations](#), meaning that institutions covered under the Clery Act will have to monitor both sets of training requirements, along with any applicable requirements under state law.

Institutions appear to retain discretion to apply trauma-informed approaches in their training as long as these lessons do not enforce sex stereotypes or otherwise encourage biased decision-making.

Overview

Final Rule §106.45(b)(1)(iii) states that an institution must:

[E]nsure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding

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.

prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

This section reflects a significant expansion from the original version in the NPRM. Most notably, institutions are now additionally required to provide training on:

- A. The scope of the institution's education program or activity (i.e., its Title IX "jurisdiction")
- B. The technology to be used at a live hearing
- C. Issues of relevance of questions and evidence
- D. Rape shield protections; and,
- E. Issues of relevance in creating an investigative report.

These specific additions in the Final Rules replace language in the NPRM that required training on conducting processes that "protect the safety of students, ensure due process protections for all parties, and promote accountability." Note that even with this language omitted in the Final Rule, these requirements echo or mirror ongoing training obligations in the Clery Act applicable to institutions covered under its requirements.

Mandatory Training Subjects

The Final Rules make clear that certain subjects must be included in any training program, including:

- A. The scope of the institution's education program or activity, so that institutions can accurately identify situations that require a response under Title IX. *See* 85 Fed. Reg. 30,093 (May 19, 2020).
- B. Issues of relevance, including how to apply rape shield provisions. *See Id.* at 30,125.
- C. How to conduct a grievance process. *See Id.* at 30,247.

Prohibited Training Subjects

The Final Rules are also clear that training programs must not contain:

Any training that "relies" on sex stereotypes in training Title IX personnel on how to serve in those roles impartially and without prejudice, so that decisions are made on

the basis of the individualized facts at issue and not on stereotypical notions of what “men” or “women” do or do not do. *Id.* at 30,254

In other words, the Department draws a line between offering general research and statistics on sexual violence with encouraging the belief that those dynamics will control any particular case. The Department observes that research and data concerning sexual violence dynamics may be valuable and useful but cannot be relied on to apply generalizations to particular allegations of sexual harassment. *See Id.* at 30,243. Notwithstanding the prohibition against training based on sex stereotypes, the Department states that it does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims. *See Id.*

“Status” based judgments about credibility are expressly prohibited. The Department specifically declines to require recipients to adopt the “Start by Believing” approach promoted by End Violence Against Women International. It explicitly cautions that a training approach that encourages Title IX personnel to “believe” one party or the other would (i) fail to comply with the requirement that Title IX personnel be trained to serve impartially, and (ii) violate the preclusion in § 106.45(b)(1)(ii) against making credibility determinations based on a party’s status as a complainant or respondent. In support of this position, the Department emphasizes while both parties should be treated with equal dignity and respect by Title IX personnel, doing so does not mean that either party is automatically “believed.” The Department further states that the credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case. As such, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases. *Id.* at 30,253. The Department takes no position on whether “Start By Believing” should be an approach adopted by recipient’s non-Title IX personnel, such as counselors who provide services to complainants or respondents.

Institutional Flexibility Regarding Training

Consistently throughout the Final Regulations, the Department insists that institutions are left with the flexibility to decide what training programs fit best with their communities. *See Id.* at 30,120, 30,167, 30,249, 30,254-30,255.

Thus, the Department declines to specify what specific training programs are permissible or how often training should be provided. *See Id.* at 30,084 (declining to specify that training of Title IX personnel must include implicit bias training); 30,120 (declining to recommend certain training practices or techniques, leaving flexibility to recipients to determine how to meet training requirements in a manner that best fits the recipient’s unique educational community); 30,253 (final regulations do not impose an annual or other frequency condition on the mandatory training); 30,243 (the Department declines to list or define what notions do or do not constitute sex stereotypes on which training materials must not rely); 830,253(declining to predetermine whether particular studies or reports do or do not violate § 106.45(b)(1)(iii) or opine on the validity of particular reports).

Separately, the Department stated in a May 18, 2020 blog post of the Office for Civil Rights that, “The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to schools.”
<https://www2.ed.gov/about/offices/list/ocr/blog/index.html>.

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