



## Joint Guidance on Federal Title IX Regulations: Focus on Trauma-Informed Training

June 18, 2020

*Note:* This document focuses on discussion of issues raised by the Final Rule relating to the Notice of Proposed Rulemaking’s (NPRM), specifically on training regarding trauma and trauma-informed practices. 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](http://system.suny.edu/sci/tix2020)

### **I. Required Training**

As discussed in the Joint Guidance memorandum on [Training of Officials](#), section 106.45(b)(1)(iii) of the Final Rule requires that recipients must, among other things: “ensure 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 prejudgment of the facts at issue, conflicts of interest, and bias.”

That subsection also requires that: “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.”

### **II. Avoiding Sex Stereotypes, Promoting Impartial Investigations, and Trauma-Informed Training Issues**

As part of its discussion of avoiding sex stereotypes, promoting impartiality, and related training requirements, the Department noted in the preamble to the regulations that “[m]any commenters expressed views about whether § 106.45(b)(1)(iii) should be applied to include or exclude training materials promoting ‘trauma-informed’ practices, techniques, and approaches.” 85 Fed. Reg. 30,255 (May 19, 2020).

In terms of commenters who supported the use of trauma-informed practices and related training, one commenter for example “requested clarification as to whether § 106.45(b)(1)(iii) would prohibit reliance on peer-reviewed journal articles that state, for example, that trauma victims often recall only some vivid details from their ordeal and that memories may be impaired with amnesia or gaps or contain false details following extreme cases of negative emotions, such as rape trauma.” *Id.* at 30,253. As another example, “[a]t least one commenter urged the

Department to adopt the training language from the withdrawn 2014 Q&A,” which suggested that recipients provide training on “the effects of trauma, including neurobiological change.” The preamble also noted that “[w]ithout referencing the 2014 Q&A a few commenters suggested that training address similar topics such as: the neurobiology of trauma, counterintuitive responses to sexual violence, . . . [and] assessing credibility in the context of trauma.” *Id.* at 30,255, 30,255 n. 1043. One commenter believed that training must require trauma-informed best practices, *id.* at 30,256, another suggested that FETI (forensic experimental trauma interview) techniques should be required, *id.*, and one commenter stated that “several states including New York, California, and Illinois mandate trauma-informed training for campus officials who respond to sexual assault and asserted that the proposed rules are unclear about whether the Department’s position is that trauma-informed practices constitute a form of sex discrimination, thus inviting further litigation on this issue.” *Id.*

In terms of commenters who expressed opposition to trauma-informed practices and related training, a “few commenters believed that the provision should address the use of trauma-informed theories by cautioning against misuse of victim-centered approaches for any purpose other than interviewing or counseling,” and “[s]everal commenters asserted that trauma-informed and believe-the-victim approaches must be prohibited in the interview process because those approaches compromise objectivity, create presumptions of guilt, and result in exclusion of relevant (often exculpatory) evidence.” *Id.*

The Department purported to take a balanced approach in response to these comments. The Department first noted, as it had at several points in the preamble, that it “is aware that the neurobiology of trauma and the impact of trauma on a survivor’s neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings.” *Id.* at 30,069.

The Department then noted that it appreciates the views of commenters urging that trauma-informed practices be mandatory, and those urging that such practices be forbidden, and the commenters noting that trauma-informed practices are required in some States, and noting there is a difference between applying such practices in different contexts (i.e., interview and questioning techniques, providing counseling services, or when making investigatory decisions about relevant evidence and credibility or adjudicatory decisions about responsibility). For reasons explained above, the Department believes that § 106.45(b)(1)(iii) “appropriately forbids conflicts of interest and bias, mandates training on topics necessary to promote recipients’ compliance with these final regulations (including how to serve impartially), and precludes training materials that rely on sex stereotypes.” *Id.* at 30,256..

The Department emphasized: Recipients have flexibility to choose how to meet those requirements in a way that best serves the needs, and reflects the values, of a recipient’s community including selecting best practices that exceed (though must be consistent with) the legal requirements imposed by these final regulations. The Department notes that although there is no fixed definition of “trauma-informed” practices with respect to all the contexts to which such practices may apply in an educational setting, practitioners and experts believe that application of such practices is possible – albeit challenging – to apply in a truly impartial, nonbiased manner. *Id.*

Further elaborating on this point in a discussion of cross-examination at hearings and related training later in the preamble, the Department stated that: Under these final regulations, recipients have discretion to include trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions so long as the training complies with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45, and nothing in the final regulations impedes a recipient’s ability to disseminate educational information about trauma to students and employees. *Id.* at 30,323. As attorneys and consultants with expertise in Title IX grievance proceedings have noted, trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases. *Id.*

Finally on these points, the Department emphasized again later in the preamble that:

Recipients have discretion to train Title IX personnel in trauma-informed approaches or practices, so long as all requirements of these final regulations are met. A trauma-informed approach or training on trauma-informed practices may be appropriate as long as such an approach or training is consistent with § 106.45(b)(1)(iii), which requires recipients to train Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, appeals officers, persons who facilitate informal resolutions) to serve impartially, without prejudging the facts at issue, using materials free from reliance on sex stereotypes, and requires Title IX personnel to avoid conflicts of interest and bias for or against complainants or respondents generally or an individual complainant or respondent.

*Id.* at 30,527.

Thus, the Department did not make changes to the proposed regulations in response to comments that criticized trauma-informed approaches and training, *id.* at 30,256. It noted that such approaches may actually “exceed (though must be consistent with) the legal requirements imposed by the [ ] final regulations,” and it emphasized that trauma-informed approaches and training may be appropriate so long as they are applied and presented in a fair, impartial manner as described in the preamble and the resources cited therein. *Id.*

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