

**REIMAGINING TITLE IX TEAM TRAINING:**  
**MAXIMIZING INSTITUTIONAL RESOURCES AND IMPROVING EFFECTIVENESS,**  
**COMPLIANCE, FAIRNESS, AND RISK MITIGATION**

**Select Commentary on Training from the Title IX Final Rule Preamble**

Under the final regulations, recipients and States remain free to consider alternate investigation and adjudication models, including regional centers that outsource the investigation and adjudication responsibilities of recipients to highly **trained**, interdisciplinary experts. (85 Fed. Reg. 30,063 (May 19, 2020)).

The Department declines to specify that **training** of Title IX personnel must include implicit bias **training**; the nature of the **training** required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such **training** provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such **training** avoid sex stereotypes. (85 Fed. Reg. 30,084).

The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally **trained** investigators and adjudicators outside the recipient's own operations. (85 Fed. Reg. 30,105).

A recipient also may choose to **train** employees and other individuals, such as parent or alumni volunteers, on how to report or respond to sexual harassment, even if these employees and individuals do not have the authority to take corrective measures on the recipient's behalf. The Department will not penalize recipients for such **training** by declaring that having **trained** people results in notice to those people charging the recipient with actual knowledge. (85 Fed. Reg. 30,113).

Like the 2001 Guidance, these final regulations incentivize recipients to **train** their employees; however, rather than mandate **training** of all employees, these final regulations require robust, specific **training** of every recipient's Title IX Coordinator and place specific response obligations on Title IX Coordinators. (85 Fed. Reg. 30,114).

The Department believes that this approach most effectively ensures that recipients meet their Title IX obligations: the Department will hold recipients accountable for meeting Title IX obligations, the Department requires Title IX Coordinators to be well **trained**, and the Department leaves recipients discretion to determine the kind of **training** to other employees that will best enable the recipient, and its Title IX Coordinator, to meet Title IX obligations. (85 Fed. Reg. 30,114).

Regardless of the **training** a recipient gives to employees, the Department will hold the recipient accountable for meeting the recipient's response obligations under § 106.44(a) and for designating and authorizing a Title IX Coordinator who has been **trained** to serve free from bias. (85 Fed. Reg. 30,114).

Additionally, if a postsecondary institution would like to **train** all employees or require all employees to report sexual harassment to the Title IX Coordinator through policies that these final regulations do not require, then the postsecondary institution may do so without fearing that the Department will hold the postsecondary institution responsible for responding to sexual harassment allegations unless the recipient's employee actually did give notice to the recipient's Title IX Coordinator (or to an official with authority). (85 Fed. Reg. 30,115).

A postsecondary institution's decisions regarding employee **training** and mandatory reporting for employees may, for example, take into account that students at postsecondary institutions may benefit from knowing they can discuss sexual harassment experiences with a trusted professor, resident advisor, or other recipient employee without such a discussion automatically triggering a report to the Title IX office, or may take into account whether the postsecondary institution has Clery Act obligations that require **training** on reporting obligations for CSAs, or whether the institution is expected to adhere to NCAA guidelines. (85 Fed. Reg. 30,115).

The Department revised § 106.30 to expressly state that the mere ability or obligation to inform a student about how to report sexual harassment or having been **trained** to do so will not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. (85 Fed. Reg. 30,116).

[T]he Department declines to recommend certain **training** practices or techniques aside from the requirements of § 106.45(b)(1)(iii), leaving flexibility to recipients to determine how to meet **training** requirements in a manner that best fits the recipient's unique educational community. (85 Fed. Reg. 30,120).

The Title IX Coordinator is **trained** with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. (85 Fed. Reg. 30,134).

These final regulations require that all policies, information, education, **training**, reporting options, and adjudication processes be accessible and fair for all students. (85 Fed. Reg. 30,179).

The final regulations follow the *Gebser/Davis* approach to Title IX's statutory reference to discrimination in an education program or activity; sexual harassment by a teacher as opposed to harassment by a fellow student may, as indicated in *Gebser* and *Davis*, affect whether the sexual harassment occurred “under any education program or activity.” This is a matter that recipients must consider when **training** Title IX personnel on the “scope of the recipient's education program or activity” pursuant to § 106.45(b)(1)(iii). (85 Fed. Reg. 30,201).

Recipients may choose to provide specialized **training** to employees or convene interdisciplinary threat assessment teams, or be required to take such actions under other laws, and § 106.44(c) leaves recipients flexibility to decide how to conduct an individualized safety and risk analysis, as well as who will conduct the analysis. (85 Fed. Reg. 30,233).

Thus, these final regulations require Title IX personnel to be well **trained** in how to conduct a grievance process; within the requirements stated in § 106.45(b)(1)(iii) recipients have flexibility to adopt additional **training** requirements concerning evidence collection or evaluation. (85 Fed. Reg. 30,247).

Furthermore, § 106.45(b)(1)(iii) requires the recipient's investigator and decision-maker to be well-**trained** to conduct a grievance process compliant with § 106.45 including determining “relevance” within the parameters of the final regulations. (85 Fed. Reg. 30,249).

Commenters correctly noted that the final regulations do not impose an annual or other frequency condition on the mandatory **training** required in § 106.45(b)(1)(iii). The Department interprets this provision as requiring that any Title IX Coordinator, investigator, decision-maker, or person who facilitates an informal resolution process will, when serving in such a role, be **trained** to serve in that role. (85 Fed. Reg. 30,253-54).

Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes 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. Rather, § 106.45(b)(1)(iii) cautions recipients not to use **training** materials that “rely” on sex stereotypes in **training** Title IX personnel on how to serve in those roles impartially and without prejudgment of the facts at issue, meaning 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. (85 Fed. Reg. 30,254).

[B]ut a fact-specific evaluation of the **training** materials and their use by the recipient would be needed to reach a conclusion regarding whether such materials comply with § 106.45(b)(1)(iii). (85 Fed. Reg. 30,254).

Thus, the Department declines to require recipients to adopt the “Start by Believing” approach promoted by End Violence Against Women, and cautions that a **training** approach that encourages Title IX personnel to “believe” one party or the other would fail to comply with the requirement that Title IX personnel be **trained** to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party's status as a complainant or respondent. (85 Fed. Reg. 30,254).

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; for this reason, the Department cautions against **training** materials that promote the application of “profiles” or “predictive behaviors” to particular cases. (85 Fed. Reg. 30,254).

For the reasons explained above, the Department has determined that § 106.45(b)(1)(iii) in the final regulations strikes the appropriate balance between mandating **training** topics the Department believe are necessary to promote a recipient's compliance with these final regulations while leaving as much flexibility as possible to recipients to choose the content and substance of **training** topics in addition to the topics mandated by this provision. (85 Fed. Reg. 30,255).

The Department declines to require that Title IX personnel be “mentored” before working with parties, or to create an aspirational list of **training** components. The Department's intent with respect to this provision is to provide flexibility for each recipient to design or select **training** components that best serve the recipient's unique needs and educational environment, while prescribing those **training** topics necessary for a recipient to comply with these final regulations. (85 Fed. Reg. 30,255).

In order to reasonably gauge compliance with the final regulations, the Department instead reserves the right to examine **training** materials whether or not a recipient has not specifically designated the material as essential to performing a Title IX role. (85 Fed. Reg. 30,255).

For similar reasons, the Department declines to prescribe whether **training** presenters must possess certain qualifications and will enforce § 106.45(b)(1)(iii) based on whether a recipient **trains** Title IX personnel in conformity with this provision rather than on the qualifications or expertise of the **trainers**. . . Whether or

not a recipient has complied with § 106.45(b)(1)(iii) is not determined by the source of the **training** materials or **training** presentations utilized by a recipient. (85 Fed. Reg. 30,257).

Section 106.45(b)(1)(iii) continues to require **training** on how to conduct an investigation and grievance process, such that each aspect of a recipient's procedural rules (including evidentiary rules) that a recipient must adopt in order to comply with these regulations, and any additional rules that are consistent with these final regulations, must be included in the **training** for a recipient's Title IX personnel. (85 Fed. Reg. 30,293).

The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal **training** and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense. (85 Fed. Reg. 30,320).

The Department expects that decision-makers will be well-**trained** in how to serve impartially, including how to avoid prejudgment of the facts at issue and avoid bias, and the Department notes that judging credibility is traditionally left in the hands of non-lawyers without specialized **training**, in the form of jurors who serve as fact-finders in civil and criminal jury trials, because assessing credibility based on factors such as witness demeanor, plausibility, and consistency are functions of common sense rather than legal expertise. (85 Fed. Reg. 30,322).

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. (85 Fed. Reg. 30,323).

Further, as noted above, nothing in the final regulations precludes a recipient from including in that **training** information about the impact of trauma on victims or other aspects of sexual violence dynamics, so long as any such **training** promotes impartiality and avoidance of prejudgment of the facts at issue, bias, conflicts of interest, and sex stereotypes. (85 Fed. Reg. 30,325).

[Y]et a party's ability to rely on assistance from an advisor should not be limited by imposing **training** requirements on advisors, who by definition need not be impartial because their function is to assist one particular party. (85 Fed. Reg. 30,333).

[A]nd the **training** required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive **training** about how to assign weight or credibility to certain types or categories of evidence, so long as any such **training** promotes impartiality and treats complainants and respondents equally. (85 Fed. Reg. 30,337).

[R]ecipients may not impose **training** or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from **training** and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors. (85 Fed. Reg. 30,342).

Nothing in the final regulations precludes a recipient from including in its **training** of decision-makers information about the purpose and scope of rape shield language in Fed. R. Evid. 412, including the Advisory Committee Notes, so long as the **training** remains focused on applying the rape shield protections as formulated in these final regulations. (85 Fed. Reg. 30,352).

We have revised § 106.45(b)(8) to provide equal appeal rights to both parties and include robust protections such as anti-bias and **training** requirements for appeal decision-makers, strict separation of the appeal

decision-makers from the individuals who investigated and adjudicated the underlying case to reinforce independence and neutrality, and retain the proposed provision's requirements allowing both parties equal opportunity to participate in the appeals process through submitting written statements, and requiring reasoned written decisions describing the appeal results to be provided to both parties. (85 Fed. Reg. 30,397).

The Department also notes that appeal decision-makers must be free from bias and conflicts of interest, and be **trained** to serve impartially, as required under § 106.45(b)(1)(iii). (85 Fed. Reg. 30,399).

The Department believes the seven-year requirement will not significantly burden recipients, for whom keeping and publishing materials relevant to **training** its employees is good practice in light of the numerous lawsuits recipients have faced over handling of Title IX allegations. Regarding the request to clarify that recipients need only update published **training** materials when the recipient makes material changes to the materials, this provision requires the recipient to publish **training** materials which are up to date and reflect the latest **training** provided to Title IX personnel. (85 Fed. Reg. 30,411-12).

To the extent that commenters' concerns that a recipient may be unable to publicize its **training** materials because some recipients hire outside consultants to provide **training**, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the **training** materials, or alternatively, the recipient could create its own **training** materials over which the recipient has ownership and control. (85 Fed. Reg. 30,412).

The Department is aware that many postsecondary institutions require faculty-governance, and these final regulations do not preclude participation of a faculty-governance committee for reports of sexual harassment against faculty members. Indeed, the hearing officers may be faculty members as long as these hearing officers are **trained**, do not have any conflict of interest, do not have bias for or against complainants or respondents generally or for an individual complainant or respondent, and comply with the other requirements in § 106.45(b)(1)(iii). (85 Fed. Reg. 30,448).

These final regulations do not prevent a postsecondary institution from engaging in ongoing or year-round **training** (of employees, or students), conducting campus climate assessments, or adopting a particular definition of consent. (85 Fed. Reg. 30,455).

The Department declines to impose new requirements through these final regulations that recipients **train** employees on how to meet the needs of students with disabilities or **training** on recognizing the way students with invisible disabilities may behave as a complainant or respondent in a Title IX proceeding, or on the intersection of Title IX, the ADA, and the IDEA, or to provide resource guides that include specialized resources for students with invisible disabilities. Nothing in these final regulations precludes a recipient from providing employee **training** with respect to students with disabilities. (85 Fed. Reg. 30,499).

We have increased the duration and frequency of **training** activities for Title IX Coordinators, investigators, decision-makers, and any person designated by a recipient to facilitate an informal resolution process. We now assume eight hours of **training** for each staff member with additional **training** each subsequent year. (85 Fed. Reg. 30,560).

Furthermore, the final regulations do not require **training** to be conducted in-person such that travel to and from **training** sessions is required; the final regulations also do not preclude **training** of Title IX Coordinators to be conducted online or virtually. (85 Fed. Reg. 30,560).