

OCR Title IX Webinar: Bias, Conflicts of Interest, and Trauma-Informed Practices

January 15, 2021

<https://youtu.be/vHppcOdrzCg>

The U.S. Department of Education’s Office for Civil Rights, or OCR, is a federal law enforcement agency tasked with enforcing certain laws that protect the civil rights of students in schools that receive federal funding. One of these laws is Title IX of the Education Amendments of 1972, which we commonly refer to as Title IX.

Schools, school districts, colleges and universities, along with certain other entities that receive federal funds, must comply with Title IX. Title IX prohibits these recipients of federal funds—which we’ll refer to as *recipients* in this video—from discriminating on the basis of sex. That includes the requirement that recipients appropriately receive and respond to allegations of sexual harassment, and adjudicate those allegations before deciding whether to discipline students.

On May 6, 2020, the Department announced new Title IX regulations that create a consistent, reliable, and effective framework for responding to sexual harassment allegations in education settings, while also protecting due process and free speech rights. This came after more than 124,000 public comments, which the Department reviewed and considered. The regulations became effective on August 14, 2020. This is the first time in history that protections against sexual harassment have been enshrined into federal education regulations.

The purpose of this video is to discuss how recipients must maintain and follow appropriate policies regarding investigating and adjudicating allegations of sexual harassment. That includes requirements to adopt and publish policies to ensure that sexual harassment allegations are fairly adjudicated, how they must train their Title IX personnel to avoid bias and conflicts of interest, and how they can effectively administer a grievance process that avoids bias and conflicts of interest. In particular, we will discuss these requirements in the context of what many commenters referred to as a “trauma-informed” approach to investigation and adjudication of sexual harassment allegations.

Let’s first discuss a recipient’s grievance process in response to a formal complaint of sexual harassment. Recipients must adopt and publish grievance procedures that meet the requirements of Title IX. These include provisions that require the objective evaluation of all relevant evidence—including inculpatory and exculpatory evidence—related to an allegation of sexual harassment. The recipient’s published grievance process must also require that credibility determinations will not be based on a person’s status as a complainant (that is, a person who is allegedly victimized by sexual harassment), a respondent (a person who is accused of sexual harassment), or a witness.

In addition to requiring that all relevant evidence be objectively evaluated, Title IX precludes a Title IX Coordinator, an investigator, or a decision-maker, from having a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or

respondent. The same is true for any individual who facilitates an informal resolution of sexual harassment allegations.

How can recipients help ensure that their Title IX Coordinators, investigators, and decision-makers do not have a conflict of interest or bias? Partly through the use of effective training required by the Title IX regulations. A recipient must ensure that its Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process on behalf of the recipient, receive training on the following: the definition of sexual harassment, 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.

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. These training materials must also be posted on the recipient's website, if it maintains one.

Additionally, the Title IX regulations contain added safeguards to ensure that conflicts of interest or bias do not affect the ultimate outcome of a grievance process. The Title IX regulations require that recipients offer the parties appeals of any finding of responsibility or non-responsibility regarding a formal complaint of sexual harassment, on certain grounds, one of which is that there was a conflict of interest or bias. Specifically, a recipient must offer both parties an equal opportunity to appeal from a determination regarding responsibility—or from a recipient's dismissal of a formal complaint or any allegations therein—on the basis that a Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally (or with respect to the individual complainant or respondent), which affected the outcome of the matter.

Now let's discuss what many commenters refer to as a trauma-informed approach to investigating and adjudicating sexual harassment complaints. As mentioned, during the regulatory process prior to the announcement of the Title IX regulations in May 2020, the Department invited the public to comment on its proposed regulatory changes. The Department reviewed and considered more than 124,000 comments, many of which addressed this topic. Some commenters argued that the Department ought to explicitly reject or adopt what is commonly called a trauma-informed approach to allegations of sexual harassment.

The Department declined to include any reference to trauma-informed techniques in the final Title IX regulations themselves. However, the Department discussed trauma-informed practices throughout the Preamble to the regulations. The Preamble notes that there is no consensus on precisely what it means for a school to engage in a trauma-informed approach, but the Department made several points in the Preamble which are highlighted next.

Notably, the Department expressly stated that it understands that sexual violence is a traumatic experience for survivors. The Department also stated 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 campus sexual misconduct proceedings.

In that regard, the Department included provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, the regulations require that recipients promptly offer supportive measures in response to each complainant, and inform each complainant of the availability of supportive measures with or without filing a formal complaint. If a formal complaint is filed, the grievance process protects traumatized complainants from facing the respondent in person, since cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.

With respect to trauma-informed techniques generally, the Preamble noted that trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes and otherwise complies with the Title IX regulations, but that 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.

In that vein, schools have the discretion to train Title IX personnel in trauma-informed approaches or practices, so long as all of requirements of the Title IX regulations discussed above are met. In other words, a trauma-informed approach or training on trauma-informed techniques are not impermissible, as long as such an approach or training is consistent with the regulations. But the approach or training has to be consistent with the regulations, which require recipients to train Title IX personnel to serve impartially, without prejudging the facts at issue, and using materials free from reliance on sex stereotypes. The regulations additionally require Title IX personnel to avoid conflicts of interest and bias for or against complainants or respondents generally, or an individual complainant or respondent, in all contexts, regardless of whether a recipient adopts a trauma-informed approach. As a reminder, Title IX personnel include Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions.

Thus, for example, a recipient may not provide training that instructs Title IX personnel to assume that complainants are always truthful when filing formal complaints, while respondents are always responsible for sexual harassment once accused. Nor may a recipient train Title IX personnel to scrutinize factual inconsistencies or errors more closely when offered by a respondent than by a complainant. Either of these types of training would be inconsistent with the Title IX regulations' prohibitions on prejudging the facts, conflicts of interest, and bias.

Many commenters expressed concern about cross-examination being traumatic for survivors of sexual harassment. As a reminder, cross-examination is only required for postsecondary institutions. But even in the context of cross-examination at a hearing, allowing the parties to test evidence through cross-examination is not a license to inflict trauma on any party, whether it be the complainant or respondent. A party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress or trauma while trying to answer questions. Moreover, precisely because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final

regulations protect against any party being unfairly judged due to an inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.

The Title IX regulations also build in a pause to the cross-examination process; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant. This helps ensure that content of the cross-examination remains focused on only relevant questions, and that the pace of cross-examination does not place undue pressure on a party or witness to answer immediately.

Additionally, we reiterate that schools retain the discretion under Title IX to control the live hearing environment to ensure that no party or witness is asked questions in an abusive or intimidating manner. We also note that cross-examination is just as valuable of a tool for complainants to challenge a respondent's version of events as it is for a respondent to challenge a complainant's narrative. Because cross-examination is conducted only through party advisors, the cross-examination procedure helps to equalize power and control. Both parties have an equal opportunity to ask questions from the party's own perspectives and beliefs about the underlying incident regardless of any power, control, or authority differential that exists between the parties.

All that said, a decision-maker who disallows *relevant* questions from being answered, out of a belief that such questions may be inconsistent with a trauma-informed approach, would run afoul of the Title IX regulations. Similarly, a decision-maker who discounts inconsistencies or errors made by a complainant, while relying on equally significant inconsistencies or errors when made by a respondent, in order to reach a finding of responsibility, would potentially run afoul of the Title IX regulations.

In sum, while the final regulations themselves do not use the term trauma-informed, nothing in the Title IX regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches, so long as such practices are consistent with the requirements of the regulations that we outlined above, relating to an objective evaluation of all evidence, impartiality, and the need to avoid prejudging the facts at issue, conflicts of interest, and bias.

As stated in the Preamble to the Title IX regulations, the Department notes that while there is no uniform list of trauma-informed techniques, many practitioners and experts believe that application of trauma-informed techniques is possible – albeit challenging – to apply in a truly impartial, nonbiased manner.

Finally, we reiterate that the Title IX regulations require impartiality in investigations and are designed to further the truth-seeking function of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

We hope this video has been helpful. The Department is prepared to provide additional technical assistance for recipients with questions. If you have questions or would like additional information or technical assistance, you may contact OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at T9questions@ed.gov or visit www.ed.gov/OCR/OPEN.

Anyone that believes a recipient has violated Title IX or other federal civil rights law enforced by OCR may file a complaint online at [o-c-r-c-a-s-dot-ed-dot-gov](https://ocr-cas.ed.gov).

Thank you for your help in ensuring that our educational system is safe for all students.