

Fair, Equitable Trauma-Informed Investigation Training

University of Vermont

Legal Issues in Higher Education Conference 2018

Jeffrey J. Nolan, J.D.¹

Updated December, 2018

Introduction

Many colleges and universities have recognized that the quality of their sexual assault and intimate partner violence (“IPV”) investigations can be enhanced if they take into account the potential neurobiological effects of trauma. Institutions have sought and received training for their investigators and adjudicators on these issues, consistent with promising practices, general training requirements imposed by the 2013 Violence Against Women Reauthorization Act Amendments to the Clery Act, and certain state laws. Recent court decisions, a 2017 OCR Q&A document regarding Title IX, proposed regulations posted in November, 2018, and media commentary have all emphasized, however, that the content of training will be analyzed closely, and that training for investigators and adjudicators, including trauma-informed training, should be presented in a manner that is fully balanced, does not rely on sex stereotypes, and promotes fairness and equity for both complainants and respondents.

This paper summarizes the state of the law and some of the public and scholarly discourse on these issues, and offers suggestions for college and university administrators and counsel who are designing and/or selecting investigation training programs.

¹ Jeffrey J. Nolan, J.D. is an attorney with Dinse, www.dinse.com, where he is Chair of the firm’s Education Practice Group. Mr. Nolan has participated in curriculum development and presentation of trauma-informed sexual assault investigation training in federal and state government-sponsored programs, and for client institutions, throughout the United States. Mr. Nolan advises, trains and represents clients and conducts investigations nationally on matters that involve Title IX, the Clery Act, threat assessment and management, the ADA, FERPA, applicable employment laws, and/or other laws that apply in the higher education context. The views expressed in this paper are the author’s, and do not necessarily represent the views of any client or entity for or through which the author has provided training.

Discussion

1. Current Federal Pronouncements and State Laws Regarding Training-Related Issues

As background, it is noteworthy that the Preamble to the 2013 Violence Against Women Reauthorization Act regulations mentions trauma-related training. According to the Preamble, “commenters believed that proper training will minimize reliance on stereotypes about victims’ behavior and will ensure that officials are educated on the effects of trauma.”² In response, the Department of Education noted that it “appreciate[d] the support of commenters and agree[d] that ensuring that officials are properly trained will greatly assist in protecting the safety of victims and in promoting accountability.”³

It should also be noted that a Q&A document issued on September 22, 2017 by the Department of Education’s Office for Civil Rights contained the following statement regarding training: “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.”⁴

Training-related issues are addressed similarly in proposed Title IX regulations posted by OCR on November 16, 2018. The proposed regulations include the following language:

A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability. Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment.⁵

² Department of Education; Violence Against Women Act, Final Rule, 79 Fed. Reg. 62773 (Oct. 20, 2014) (codified at 34 C.F.R. Pt. 668).

³ *Id.*

⁴ See U.S. Dep’t of Educ. Office for Civil Rights, “Q&A on Campus Sexual Misconduct” (Sept. 2017) at Answer 6 (available at: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>) (Q&A). See also *id.* at Answer 8 (“Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.”).

⁵ See Notice of Proposed Rulemaking, Department of Education (Docket ID ED-2018-OCR-0064), proposed 34 C.F.R. § 106.45(b)(1)(iii) (posted Nov. 16, 2018 at:

The proposed regulations also provide as follows that training materials must be maintained and would be subject to disclosure to the parties in sexual harassment cases: “(i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of-- . . . (D) All materials used to train coordinators, investigators, and decision-makers.”⁶

Obviously, if this proposed language or similar language remains in the Title IX regulations throughout the formal rulemaking process and becomes part of the final regulations, institutions will have to re-double their efforts to promote fairness and equity for all parties when designing Title IX-related training programs, and will have to take care to document those efforts.

Finally, several states (for example, California, Illinois and New York) have mandated trauma-informed training through their state higher education sexual assault response laws,⁷ and it would not be surprising if other states adopted similar requirements in the future. Institutions in those states will obviously have to be particularly attentive to the need to strike the appropriate balance between providing trauma-informed training as required by state law, while promoting fairness to all parties, to avoid plausible claims that their procedures are biased based on gender in violation of Title IX. The suggestions in Section 5 below should assist such institutions in meeting both of these goals simultaneously.

2. Theories Typically Covered in Trauma-Informed Training

<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>). The Preamble to the proposed regulations elaborates on these points, as follows: “Recipients would also be required to use training materials that promote impartial investigations and adjudications and that do not rely on sex stereotypes, so as to avoid training that would cause the grievance process to favor one side or the other or bias outcomes in favor of complainants or respondents.” *Id.* at 42.

⁶ *Id.*, proposed 34 C.F.R. § 106.45(b)(7)(i)(D).

⁷ See Cal. Educ. Code § 67386(b)(12) (West 2014) (requiring institutions that participate in state student financial aid programs to provide a “comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases.”); 110 ILCS 155 (West 2015) (requiring higher education institutions to provide trauma-informed response training annually to campus officials involved in the receipt of sexual assault reports and provision of related resources; the law defines “trauma-informed response” as “a response involving an understanding of the complexities of sexual violence, domestic violence, dating violence, or stalking through training centered on the neurobiological impact of trauma, the influence of societal myths and stereotypes surrounding sexual violence, domestic violence, dating violence, or stalking, and understanding the behavior of perpetrators”); New York Education Law § 6444(5)(c)(ii) (2015) (providing that students have the right to have complaints “investigated and adjudicated in an impartial, timely, and thorough manner by individuals who receive annual training in conducting investigations of sexual violence, the effects of trauma, . . .”).

Trauma-informed investigation and adjudication training programs usually include discussion of theories regarding the potential neurobiological effects of trauma.⁸ Typically, there is discussion of how chemicals such as catecholamines, corticosteroids, oxytocin and endogenous opioids may be released into the bloodstream as a result of trauma, and that these substances can interfere with the functioning of those portions of the brain (e.g., the hippocampus and amygdala) that are involved with the encoding of memory. The theory is that individuals who have experienced a traumatic event, therefore, may not be able to recall details of the event in a chronological manner; that they may not be able to recall some details at all; that their ability to recall details may improve over time; and that their affect when describing the event may initially seem evasive or counterintuitive (e.g., laughing, smiling, or seeming emotionless). Presenters may also discuss how hormone-driven responses to traumatic situations may include fighting, fleeing, or freezing (which may or may not be equated with a less-instantaneous state known as “tonic immobility”).⁹

Presentations regarding these issues may also address how traditional law enforcement interview approaches have been unsupportive and skeptical of individuals who may have experienced a traumatic event, and have failed to account for these potential neurobiological effects of trauma. Such presentations also often describe how the potential effects of trauma were sometimes misperceived by police officers as attempts at evasion or falsification, which caused some officers to unfairly doubt the veracity of reporting parties.¹⁰

⁸ The *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., DSM–5, American Psychiatric Association, 2013), at page 271, defines “trauma” as follows: “Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: directly experiencing the traumatic event(s); witnessing, in person, the traumatic event(s) as it occurred to others; learning that the traumatic event(s) occurred to a close family member or close friend (in case of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental); or experiencing repeated or extreme exposure to aversive details of the traumatic event(s).”

⁹ Presentations and interviews of Rebecca Campbell, Ph.D., a Professor of Psychology at Michigan State University (whose Ph.D. is in economic-community psychology), are cited routinely on these topics. See, e.g., Rebecca Campbell, Ph.D., “The Neurobiology of Sexual Assault” (National Institute for Justice Research for the Real World Seminar, Dec. 3, 2012) (available at: <https://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx>).

¹⁰ See “Interview with Dr. Rebecca Campbell on the Neurobiology of Sexual Assault, Part I: Telling the Difference Between Trauma Versus Lying” (National Institute of Justice) (available at: <https://www.nij.gov/multimedia/Pages/playlist-campbell-neurobiology-of-sexual-assault-transcript.aspx#trauma>). See also Armstrong, K. and Miller, T.C., “When Sexual Assault Victims Are Charged With Lying,” *New York Times Sunday Review* (Nov. 24, 2017) (providing anecdotal accounts of victims who were charged with lying about sexual assaults which were later proven by independent evidence to have occurred, and discussing trauma-informed approaches that some law enforcement agencies are adopting to help prevent such occurrences) (available at: <https://www.nytimes.com/2017/11/24/opinion/sunday/sexual-assault-victims-lying.html? r=0>).

Trauma-informed training program participants also often learn that interview approaches such as the Forensic Experiential Trauma Interview (“FETI”) technique have been developed to account for the potential effects of trauma on memory, by focusing on what a witness is able to recall about their experience and related sensory details, rather than demanding that the witness “start at the beginning” and recount all of the details of the event in a complete, linear manner.¹¹ Training often includes examples of how trauma-informed interview techniques have resulted in better outcomes and more thorough investigations in the criminal justice context, because reporting parties are encouraged to attempt to provide the information that they are able to provide, rather than abandoning the process in frustration because they cannot immediately convince a skeptical police officer by providing a seamless narrative of the relevant events.

Complementary topics that are often addressed in trauma-informed training programs include: that a delay between the time of an event and when it is reported is common; that “counterintuitive” behaviors such as a reporting party’s continuing to have contact with the alleged perpetrator after a reported sexual assault or intimate partner violence incident is also common; that investigators should avoid phrasing questions in a victim-blaming manner (e.g., “why didn’t you call for help, fight back or run away?”); and that interviewing complainants in a respectful, professional, non-judgmental manner can result in their engaging more effectively in the investigation and adjudication process.

3. Media and Scholarly Critique of These Theories

In September 2017, the second story of a three-part series regarding campus sexual assault adjudications, “The Bad Science Behind Campus Response to Sexual

¹¹ The FETI technique was developed by Russell W. Strand (Retired Senior Special Agent and Retired Chief, Behavioral Sciences Education & Training Division, United States Army Military Police School). See, e.g., Russell W. Strand, “The Forensic Experiential Trauma Interview (FETI)” (available at: <http://www.mncasa.org/assets/PDFs/FETI%20-%20Public%20Description.pdf>). In sum, the FETI technique involves: the interviewer’s first asking the witness “what are you able to tell me about your experience?”; listening patiently and allowing the witness to share whatever they are able to share initially; asking the witness to “tell the investigator more” about a topic area without aggressively cross-examining the witness or demanding a chronological account; asking about the witness’s feelings and thought process during the experience; asking the witness what sensory information they are able to recall; asking about the witness’s physical and emotional reaction to the experience; asking what was the most difficult part of the experience and what the witness cannot forget about the experience; then circling back to seek clarification of important or potentially contradictory points, after the witness has been encouraged to share their experience as completely as they are able to through the open-ended interview approach described here. See *id.* at 3. See also <https://www.certifiedfeti.com>.

Assault,” was published in *The Atlantic*.¹² The premise of the article is that the trauma-informed, neurobiology-focused approach described above is grounded in “bad science.”

Specifically, the *Atlantic* story cited presentations by Rebecca Campbell, Ph.D. that are summarized above. The story’s author, Emily Yoffe, took particular issue with Dr. Campbell’s assertion in those presentations that while hormones released during trauma may impair an individual’s ability to remember traumatic events in a chronological manner, “[w]hat we know from the research is that the laying-down of that memory is accurate and the recall of it is accurate.” Ms. Yoffe also critiques Dr. Campbell’s conflating of a human’s momentary “freeze” response to danger with “tonic immobility,” that is, the “playing dead” mechanism of prey animals. Ms. Yoffe quoted psychology professors and a psychiatrist who disagreed with those assertions.¹³

Ms. Yoffe also interviewed Dr. Campbell, and reported that Dr. Campbell said that the goal of her work on neurobiology was to give law enforcement officers a more nuanced understanding of how a sexual-trauma victim might behave. Ms. Yoffe reported further that Dr. Campbell said that using her work generally “as a guide for campus investigations and adjudications—and particularly to support the idea that no matter how a complainant behaves, she is almost certainly telling the truth—was unintended . . . and ‘would be an overreach.’”¹⁴

The *Atlantic* article also quoted Richard McNally, Ph.D., and his book *Remembering Trauma*.¹⁵ Relying upon a broad review and interpretation of hundreds of psychology and neuroscience research papers and other resources, Dr. McNally makes many relevant arguments in *Remembering Trauma*. For example, in Dr. McNally’s view: “[a]s with all extremely negative emotional events, stress hormones interacting with an activated amygdala enhance the hippocampus’s capacity to establish vivid, relatively durable memories of the experience—or at least its salient, central features [such that] [h]igh levels of emotional stress enhance explicit, declarative memory for the trauma itself; they do not impair it.”¹⁶ Dr.

¹² See Emily Yoffe, “The Bad Science Behind Campus Response to Sexual Assault,” *The Atlantic* (Sept. 8, 2017) (available at: <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/>) (“Atlantic Article”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ McNally, Richard J., *Remembering Trauma* (Belknap Press, 2005).

¹⁶ *Id.* at 276. See also *id.* at 77, 180.

McNally also argues that theories suggesting that “manifestations of traumatic memory ‘are invariable and do not change over time’” are “plagued by conceptual and empirical problems.”¹⁷ Dr. McNally’s book pre-dates Dr. Campbell’s popular presentations on these issues, so it of course does not comment directly on the Campbell presentations. Ms. Yoffe did quote Dr. McNally as stating in response to Dr. Campbell’s assertions that “because assaults do not occur in the laboratory, ‘there is no direct evidence’ of any precise or particular cascade of physiological effects during one, ‘nor is there going to be.’”¹⁸

The *Atlantic* article should, of course, be placed in context as a media critique, not as a peer-reviewed research paper. It is noteworthy that Jim Hopper, Ph.D., a psychologist who presents regularly regarding trauma-related issues, posted a direct response to the *Atlantic* article on *Psychology Today*’s web site.¹⁹ In the post, Dr. Hopper cited research papers that he argued demonstrate that trauma can cause reflexive behaviors (such as “tonic immobility”) and habit-based behaviors in humans, and that trauma (whether caused by sexual assault, combat, or a police-involved shooting) can also cause fragmentation of memory.²⁰ He notes astutely, however, that gaps and inconsistencies in memory “are never, on their own, proof of *anyone*’s credibility, innocence, or guilt.”²¹

Different audiences may find the *Atlantic* article to be either persuasive, neutral, or result-oriented, but at the very least, the conversation it prompted demonstrates that there are grounds for difference of opinion regarding the potential neurobiological effects of trauma. Title IX and Clery Act-related training programs should acknowledge this, as discussed below.

4. Trauma and Training-Related Issues in the Courts

A few relatively recent court decisions have addressed trauma and training-related issues. Where there was no plausible connection between the alleged inadequacy of

¹⁷ *Id.* at 179.

¹⁸ *Atlantic Article*.

¹⁹ See Jim Hopper, “Sexual Assault and Neuroscience: Alarmist Claims vs. Facts,” *Psychology Today* (posted January 22, 2018) (available at: <https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuroscience-alarmist-claims-vs-facts>).

²⁰ *Id.*

²¹ *Id.* (emphasis in original).

training programs and alleged gender bias, courts have rejected challenges to training programs.²²

On the other hand, where plausible training-related gender-bias or fairness arguments have been raised, courts have shown a greater willingness to scrutinize the content of training programs. The court's decision in *Doe v. Brown University*²³ provides one example. Following a bench trial, the court in that case held that the male plaintiff-respondent was entitled to a new disciplinary hearing because the University's process did not comport with contractual "reasonable expectation" requirements for several reasons. The court focused primarily on the University's use of a consent standard that was not yet in effect at the time of the incident in question,²⁴ but it also cited a trauma-related training issue. Specifically, the court noted that a Title IX panel member essentially refused to consider exculpatory text messages sent and statements made by the complainant after the incident. The panel member testified at trial that she did so in part because of training she received from a sexual harassment and assault resources and education advocate, who had informed panelists that survivors of sexual assault sometimes exhibit "counterintuitive" behaviors (e.g., "not being able to recount a consistent set of facts," or communicating or interacting with someone who has assaulted them after

²² See, e.g., *Doe v. Colgate Univ.*, 2017 WL 4990629, **14-15 (N.D.N.Y. Oct. 31, 2017) (slip copy) (granting summary judgment to University on male plaintiff-respondent's training-related Title IX claims, because allegedly biased strategies advocated by outside training provider were not implemented by the University, and because University's internal training program did not support inference of anti-male bias) (appeal pending); *Mancini v. Rollins College*, 2017 WL 3088102, *6 (M.D. Fla. Jul. 20, 2017) (slip copy) (while allowing male plaintiff-respondent's Title IX erroneous outcome allegations to move forward on other grounds at the motion to dismiss stage, court held that plaintiff's allegations of inadequate training failed "to support an inference of gender bias by [the college] because there is no logical connection between an inadequately trained investigator and gender bias. Logically, an untrained investigator would pose similar problems and risks to both parties—regardless of sex. Thus, the Training Allegations are entitled to no weight in the gender bias analysis."); *Doe v. Trustees of Boston College*, 2016 WL 5799297, **12, 17-18 (D. Mass. Oct. 4, 2016) (ruling on cross-motions for summary judgment, court rejected male plaintiff-respondent's contract-based argument that hearing board members had to have investigation training equivalent to that of police officers, because contract language did not support that claim; court also rejected expert witness's arguments that training was inadequate because it did not cover all topics that the expert claimed it should have, while noting that the college had "ramped up" training in response to an internal report that it needed to do so, and had thereafter provided training that included, among other things, information on "understanding rape trauma"), *affirmed in pertinent part*, 892 F.3d 67 (1st Cir. 2018).

²³ 210 F.Supp.3d 310 (D.R.I. 2016).

²⁴ *Id.* at 331.

the assault).²⁵ The panel member testified that she therefore concluded that “it was beyond [her] degree of expertise to assess [the complainant’s] post-encounter conduct . . . because of a possibility that it was a response to trauma.”²⁶ The court stated: “It appears that what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence,” which the court viewed as “clearly com[ing] close to” the level of arbitrary and capricious conduct.²⁷ The court emphasized that while it was not suggesting that the University could not train fact-finders on the effects of trauma, it should remind them that all evidence presented had been deemed relevant, and that as fact-finders, they were capable of and obligated to consider all evidence.²⁸ These observations are not surprising, particularly given the exculpatory nature of the complainant’s text messages and statements, and the panel member’s apparent complete disregard of them.

A more surprising and more generally concerning ruling was issued in *Doe v. University of Pennsylvania*.²⁹ In that case, the court denied the University’s motion to dismiss the male plaintiff-respondent’s contract-based claim, reasoning that hearing panel members had not been trained “appropriately” because, accepting all of the plaintiff’s allegations of bias as true, they had been trained with, among other materials, a document called *Sexual Misconduct Complaints: 17 Tips for Student Discipline Adjudicators*.³⁰ The court accepted as true for purposes of the motion to dismiss the plaintiff’s allegations that the *17 Tips* document “encourage[s] investigators and adjudicators to believe the accuser, disregard weaknesses and

²⁵ *Id.* at 318. According to the court, the University stated that it provided such training to comply with OCR guidance to the effect that “decision-makers in Title IX processes should understand the potential impacts of trauma.” *Id.*

²⁶ *Id.* at 327.

²⁷ *Id.* at 342.

²⁸ *Id.* The court also suggested that “if certain evidence could be considered counterintuitive such that expertise may be helpful in order for the fact-finder to properly consider it, this could be presented through the investigator, which in turn would give both parties the notice and opportunity to deal with it.” *Id.*

²⁹ --- F.Supp.3d ---, 2017 WL 4049033 (E.D. Pa. Sept. 13, 2017).

³⁰ *Id.* at *10. The court’s opinion noted that the “*17 Tips*” document can be found at the following URL: <https://www.legalmomentum.org/resources/guide-university-discipline-panels-sexual-violence> (*Sexual Misconduct Complaint: 17 Tips for Student Discipline Adjudicators* (2012) (“*17 Tips*”). Given the court’s ruling, it is noteworthy that the *17 Tips* document is framed as a suggested resource that was designed to be adapted for use at other campuses. *17 Tips* at 1. Therefore, institutions that have adapted it for use in their programs should note the decision in the *University of Pennsylvania* case.

contradictions in the accuser's story, and presume the accused's guilt." While it must be emphasized that this was only a ruling on a motion to dismiss, it is nonetheless surprising because the *17 Tips* document discusses how trauma may affect survivors of sexual violence; it does not assert that all survivors of trauma experience all of the referenced effects, nor does it assert that contradictions in a complainant's account should be ignored, or that memories of trauma are infallibly accurate.³¹

*Doe v. The Ohio State University*³² is another case that demonstrates the reluctance of some courts to dismiss claims by plaintiff-respondents that target trauma-informed training programs. In *Doe*, the male plaintiff-respondent alleged that hearing panel members "received training on sexual misconduct and how to prevent sexual assault but did not receive any training on the due process rights of students accused of sexual misconduct," and that the University's training included "presentations and videos that had the effect of biasing the panel members in favor of victims and prejudicing the panel members against men accused of sexual misconduct."³³ Emphasizing that it was required to accept all of the plaintiff's allegations regarding a "one-sided training process" as true under the motion to dismiss standard, the court held that these allegations plausibly stated a claim that the panel members were unconstitutionally biased. The court's related comments suggested that if the University were to produce evidence at a later stage in the case that it had also trained panel members on the importance of due process and otherwise addressed the relevant issues in a balanced manner, the court's

³¹ *17 Tips* at 11-12. See also *Doe v. Univ. of Pennsylvania*, 2017 WL 4049033, *10 (noting that the *17 Tips* document "warns against victim blaming; advises of the potential for profound, long-lasting, psychological injury to victims; explains that major trauma to victims may result in fragmented recall, which may result in victims "recount[ing] a sexual assault somewhat differently from one retelling to the next"; warns that a victim's "flat affect [at a hearing] does not, by itself, show that no assault occurred"; and cites studies suggesting that false accusations of rape are not common."). The *17 Tips* document's summary of research findings regarding "typical" rapists is relatively more direct. *Id.* at **13-14 (noting that the *17 Tips* document "advises that the alleged perpetrator may have many 'apparent positive attributes such as talent, charm, and maturity' but that these attributes 'are generally irrelevant to whether the respondent engaged in nonconsensual sexual activity,'" and "also warns that a 'typical rapist operates within ordinary social conventions to identify and groom victims' and states that 'strategically isolating potential victims[] can show the premeditation commonly exhibited by serial offenders.'").

³² 219 F.Supp.3d 645 (S.D. Ohio 2016).

³³ *Id.* at 658. The court cited the plaintiff's allegations that "the panel members were presented statistical evidence that '22–57% of college men report perpetrating a form of sexual aggressive behavior,' that '[c]ollege men view verbal coercion and administration of alcohol or drugs as permissible means to obtain sex play or sexual intercourse,' that '[r]epeat perpetrators are aware of myths and how to present [as] empathic,' and that '[s]ex offenders are experts in rationalizing behavior.'" *Id.*

assessment of the appropriateness of the training would be considerably different.³⁴ Other relatively recent cases illustrate that the content of training programs may be consequential, particularly at the motion to dismiss stage where all of the plaintiff's allegations must be accepted as true.³⁵

Finally, a case that does not involve a challenge to training programs, but that does involve trauma-related issues, is worth noting. In a December 2016 decision in a case related to a lawsuit mentioned in the *Atlantic* story, a state court judge vacated the University of Oregon's finding that a male student was responsible for sexual assault, in part because the University's investigator allegedly relied, inappropriately, upon an undisclosed expert opinion to the effect that inconsistencies in the complainant's account were attributable to the effects of trauma. It was significant to the court that the plaintiff was given no opportunity to challenge the veracity or applicability of that expert opinion during the disciplinary process.³⁶ A federal court lawsuit involving the same parties (in which the complaint makes allegations about the "trauma expert"-related issue and many

³⁴ *Id.* Specifically, the court emphasized that it did "not mean to say that any of [the University's] training is untrue or not worthwhile or that the university's alleged goal of aiding victims and creating a safer campus community should not be lauded. Indeed, '[t]here is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.'" *Id.* (quoting *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 31–32 (D. Me. 2005)). *But see Doe v. Univ. of Cincinnati*, 173 F.Supp.3d 586, 602 (S.D. Ohio 2016) (quoting the *Gomes* language quoted immediately above in the *Ohio State* case, the court dismissed plaintiff-respondent's constitutional claim regarding training and observed: "It should be a laudable goal for a university to raise the awareness of its faculty and staff to sexual assault and to increase their sensitivity to the particular problems that victims of sexual violence experience in coming forward to make complaints. Plaintiffs do not cite any authority for the repeated implication in their complaint that a university must balance its sexual assault training with training on the due process rights of the accused in order to avoid a claim that its disciplinary procedures are biased."). *See also Neal v. Colorado State Univ.-Pueblo*, 2017 WL 633045, *13 (D. Colo. Feb. 16, 2017) (criticizing the *Doe v. Univ. of Cincinnati* analysis for drawing inferences against the plaintiff that should not be drawn under the motion to dismiss standard).

³⁵ *See, e.g., Doe v. Washington and Lee Univ.*, 2015 WL 4647996, *10 (W.D. Va. Aug. 5, 2015) (court denied University's motion to dismiss male plaintiff-respondent's Title IX claim because, among other things, the University's Title IX Coordinator had allegedly endorsed during a presentation a web-published article that "posited that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express.").

³⁶ *Doe v. University of Oregon*, Lane County Circuit Court, 16CV30413 (Conover, J., Dec. 13, 2016) (official audio recording of court's ruling from the bench obtained from court clerk's office).

other issues) was also filed.³⁷ Ruling on the University’s motion to dismiss, the court in the federal court case held that for purposes of the lenient motion to dismiss standard, the plaintiff had stated a sex discrimination claim plausibly enough to justify discovery by alleging that the decision-maker utilized a trauma-based “method for evaluating credibility that guaranteed that [the complainant’s] testimony would be believed; no matter how glaring the inconsistencies between her statements and the evidence, plaintiff alleges [the decision-maker] would interpret those inconsistencies as proof that [the complainant] had, in fact, been assaulted.”³⁸

5. Promoting Fairness to All Parties Through Trauma-Informed Investigation Training

Trauma-informed concepts can promote fairness to all parties if presented and applied appropriately, but institutions of higher education should take critical court decisions and media commentaries seriously in order to avoid the real or perceived unfairness that may result from a misapplication of those concepts in campus sexual assault/IPV investigations and disciplinary proceedings. Fortunately, institutions can train investigators to use trauma-informed techniques, in accordance with promising practice and applicable state laws, while demonstrably promoting fairness to all parties and avoiding “sex stereotypes or generalizations” consistent with the 2017 OCR Q&A, and avoiding reliance on “sex stereotypes” as may be required in language found in the November, 2018 Notice of Proposed Rulemaking, if that language is retained in the final Title IX regulations. So how can colleges and universities integrate trauma-informed approaches into investigation and adjudication training in a way that promotes fairness? Some recommendations follow.

A. Emphasize how institutions should—and should not—apply information about the potential effects of trauma

First, colleges and universities should be precise about exactly how information about the potential effects of trauma should—and should not—be applied. While there are differences of opinion among scientists regarding the ways in which trauma may affect memory, colleges and universities should recognize that campus investigators and adjudicators do not need to determine scientifically whether a witness was traumatized or by what, or precisely what effects trauma may or may not have in a particular case. Rather, they need to understand the potential effects of trauma so that they can check their personal biases and avoid the uncritical assumption that individuals who report sexual assault are necessarily “lying” if

³⁷ *Doe v. Univ. of Oregon et al.*, Case No. 6:17-cv-01103-AA (D. Or.).

³⁸ *Doe v. Univ. of Oregon et al.*, 2018 WL 1474531, *15 (D. Or. Mar. 26, 2018).

they cannot remember every detail of the incident in a chronological manner. If investigators and adjudicators understand that non-linear or partial recall may be related to potential trauma, they can avoid biased, snap judgments, move forward objectively, and gather information about what the reporting party is able to recall. However, if an investigation yields evidence of behaviors that may be related to trauma, that should not be understood as establishing that institutional policy was necessarily violated, nor should the presence of such issues cause fact-finders to accept everything a complainant is able to recall as absolutely “true,” or to fail to seek clarification of inconsistencies.

Through this approach, fact-finders should not substitute scientific theories for evidence, and they must not abdicate their fact-finding responsibility, when determining whether a policy violation occurred in a particular case. If information about the potential effects of trauma is applied only to this limited extent, decisions will ultimately be based on an objective assessment of the facts of each case, rather than presumptions derived from familiarity, or lack of familiarity, with scientific theories.

B. Emphasize the neutral role played by college and university investigators and adjudicators

Some trauma-informed training draws from interview techniques and approaches used in the criminal justice system. While that is not necessarily inappropriate, training for college and university investigators and adjudicators should emphasize that police officers and prosecutors work to establish probable cause and advocate for criminal convictions, but they do not determine as ultimate fact-finders whether the law was violated. By contrast, campus fact-finders and decision-makers must maintain complete neutrality at all times in evaluating reported violations of institutional policies. Colleges and universities are not responsible for correcting any actual or perceived historical failings in the criminal justice system’s response to sexual assault, and if campus training program participants learn how trauma-informed principles have been applied by law enforcement to correct those failings, without also learning how such principles need to be adapted to the distinct context of campus disciplinary proceedings, then unfairness to respondents, real or perceived, could result.

For example, it should be emphasized in training that while it would not be appropriate for a neutral fact-finder to be actively “supportive” of either a complainant or a respondent in a campus disciplinary proceeding (that role can be played by counselors and advocates, on or off campus), fact-finders can learn from the trauma-informed approach yet maintain impartiality by treating all parties and witnesses in a professional, respectful, non-judgmental manner. If any materials or information drawn from the criminal justice context are used in campus training, they should be vetted to determine if they employ “victim”, “survivor” and “suspect”

terms that are often used in that context. If they do, the campus training materials should explicitly make a point about the importance of language, note the differences between the criminal justice and higher education contexts, and emphasize that more neutral “complainant and respondent” or “reporting and responding party” terms should be used in the higher education context. Finally, colleges and universities should be very cautious about adopting as institutional policy the branding or curricula of trauma-informed programs developed for police officers given, again, the distinctly different objectives of law enforcement, on the one hand, and campus sexual misconduct investigators and adjudicators, on the other.³⁹

C. Emphasize how to apply a trauma-informed interview approach in an even-handed, fair manner

Probably the single most important practical reason why investigators need to learn about the potential effects of trauma is so they can understand the basis for employing trauma-informed interview approaches that encourage witnesses to share what they are able to recall about their experience, including any available sensory impressions, without demanding that they recall every aspect in a chronological manner. These techniques can result in the creation of a fuller portrait of what occurred, while avoiding the frustration and withdrawal from the process that might occur if the complainant is initially asked to provide a seamless, richly detailed, chronological narrative. Approaching interviews in this manner initially would not prejudice respondents in any way, so long as investigators and adjudicators also follow up as necessary and seek appropriate clarification, as discussed below.

Further, training programs should emphasize that it is both equitable and appropriate to use the same basic initial interview approach with complainants and respondents. While the open-ended FETI technique described in footnote 11 above was developed primarily to gather a more robust evidentiary portrait of how individuals experienced a potentially traumatic event, respondents (who are likely experiencing significant stress during an interview, if not the effects of trauma) can also be given the same opportunity to describe what they are able to remember about the experience, to describe their thought process and sensory perceptions, and

³⁹ See, e.g., Armstrong, K. and Miller, T.C., “When Sexual Assault Victims Are Charged With Lying,” *New York Times Sunday Review* (Nov. 24, 2017) (noting the utilization of and controversy surrounding the “Start By Believing” campaign in the law enforcement context, which could be viewed as potentially biased if adopted as college or university policy).

to respond to respectfully-phrased clarifying questions regarding any inconsistencies.⁴⁰

D. Emphasize that interviewing for clarification is crucial

Training should emphasize that investigators and adjudicators must be vigilant to seek clarification of inconsistencies and “counterintuitive” behaviors from both parties. At the outset, discussion of inconsistencies and counterintuitive behaviors should begin with a qualification that not all inconsistencies and counterintuitive behaviors are necessarily driven by trauma-related hormones, or trauma-related memory issues; indeed, some inconsistencies and counterintuitive behaviors may bear on a witness’s credibility. While such behaviors may present in circumstances involving sexual assault or IPV, the existence of these behaviors neither warrants categorical dismissal of a complainant’s account nor an automatic finding of a policy violation.

For example, a complainant’s delay in reporting may or may not be probative of whether a policy violation occurred, but if the issue seems potentially relevant to an investigator or a respondent, a complainant can certainly be asked respectfully about their thought process with regard to reporting the incident when they chose to do so. As another example, if a complainant has engaged in apparently “normal” communications with a respondent after a reported assault, it is perfectly appropriate for an investigator, in a non-judgmental way, to ask the complainant to “help the investigator understand” the complainant’s thought process in doing so. This approach can also be used to inquire about differences in how a complainant has described the incident on different occasions, or about differences between a complainant’s account and the observations of other witnesses. Fact-finders can then consider the evidence of potentially inconsistent accounts or counterintuitive behavior, and the complainant’s explanation of that behavior, along with all of the other evidence gathered in the investigation. The most important point to be made in training regarding these issues is that general statements about how some complainants may behave as a result of trauma or related issues should not be substituted for a fact-finder’s assessment of the specific evidence in a particular case.

E. Model a gender-neutral approach in trauma-informed training

⁴⁰ Indeed, Russell Strand, developer of the FETI technique, suggests that the technique can be used effectively in suspect interviews even in the criminal justice context. See Russell Strand, “Turning the Case Upside Down—Rethinking the Art and Science of Suspect Interviews—Suspect FETI” (webinar) (Battered Women’s Justice Project, January 2017) (available at: <http://www.bwjp.org/resource-center/resource-results/turning-the-case-upside-down.html>).

While much of the public discourse regarding campus adjudications in this area presumes that every case involves the reported assault of a cisgender heterosexual female complainant by a cisgender heterosexual male respondent, we know from our experience in higher education that that is not an accurate presumption. Obviously, any person of any sexual orientation or gender identity can be a victim or a perpetrator of sexual assault, IPV or stalking, and anyone can be affected negatively by trauma.⁴¹ Demonstrating an institutional understanding of this fact in trauma-informed training has several benefits.

First, helping investigators and adjudicators understand how sexual violence impacts LGBTQIA individuals statistically will better prepare them for the range of cases they are likely to work on, and should help them identify and address any personal biases they have that may undermine their ability to serve impartially.⁴² From a more individual perspective, there are many videos available on YouTube that address the experiences of male victims of sexual assault, IPV and stalking; these can also help to better prepare training participants to handle all cases in a fair, balanced manner.

Second, using gender-neutral terminology throughout training (i.e., either using gender-neutral pronouns and/or alternating which gender-specific pronouns are used for complainants and respondents in examples and case studies) can further reinforce that anyone can be a victim or perpetrator. Doing so can also further

⁴¹ See *Nungesser v. Columbia Univ.*, 169 F.Supp.3d 353, 365 n.8 (S.D.N.Y. 2016) (court rejected as a matter of law and logic the argument that “falsely accusing a male of being a ‘rapist’ is inherently gender based” because “[p]ersons of any gender may be perpetrators, or victims, of sexual assault.” (citing *Haley v. Virginia Commonwealth Univ.*, 948 F.Supp. 573, 579 (E.D. Va. 1996) (“allegations [that] at best reflect a bias against people accused of sexual harassment and in favor of victims [] indicate nothing about gender discrimination.”); Lara Stemple and Ilan H. Meyer, “The Sexual Victimization of Men in America: New Data Challenge Old Assumptions,” 104 *Am. J. Of Public Health*, e19 (June 2014) (“noting that although the idea of female perpetrators sexually assaulting male victims is ‘politically unpalatable,’ studies have found that up to 46% of male victims report a female perpetrator”)) (parenthetical notes in *Nungesser*). See also Jessica A. Turchik, *Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors*, *Psych. of Men & Masculinity*, Vol. 13, No. 3, 243-255 (2012) *Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors*, *Psych. of Men & Masculinity*, Vol. 13, No. 3, 243-255 (2012) (available at: <https://www.apa.org/pubs/journals/features/men-13-3-243.pdf>) (describing survey of 299 male college students who were asked whether they had experienced at least one sexual victimization experience since age 16; 48.8% reported no such experiences, 21.7% reported unwanted sexual contact, 12.4% reported sexual coercion, and 17.1% reported completed rape; 48.4% of these experiences involved female perpetrators, 5.6% involved male perpetrators, and 3% involved perpetrators of both sexes).

⁴² The 2010 Findings on Victimization by Sexual Orientation, a sub-report on data gathered through the CDC’s National Intimate Partner Sexual Violence Survey, (available at: https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf), is, for example, an excellent resource from a large data sample that addresses sexual violence among LGBT individuals.

reinforce that the institution does not view sexual assault, IPV or stalking as gender-binary issues, and endeavors to treat all parties fairly, without bias on the basis of gender.

Third, related to the previous point, while higher education cannot control the binary assumptions that dominate so much of the current public discourse about institutional responses to sexual assault, modeling a gender-neutral approach in training that we do control can emphasize that colleges and universities are not “anti-male” when it comes to these cases; instead, they are, of course, “anti-sexual assault,” “anti-IPV”, and “anti-stalking.” As noted above, an analogous point was made convincingly in *Gomes v. Univ. of Maine Sys.*,⁴³ in which the court observed in rejecting a plaintiff-respondent’s bias claim that “[t]here is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.”

A similar rationale has been adopted in several recent court decisions that rejected the claims of plaintiff-respondents who were found not responsible for sexual assault, but nonetheless filed suit against their school, claiming that the school’s alleged lack of response to post-adjudication harassment by the complainant violated Title IX. In several such cases, the courts held that the alleged harassment was based on the perception that the respondent committed sexual assault, not *per se* because the respondent was male.⁴⁴ The rationale of such cases also supports the point that an institution’s taking a trauma-informed approach towards complainants should not in any way be seen as evidence of gender bias against

⁴³ 365 F.Supp.2d at 31–32.

⁴⁴ See *Nungesser v. Columbia Univ.*, 169 F.Supp.3d at 364-67 (finding that harassment based on being perceived as a rapist was not “sex-based” for Title IX purposes, because the assumption that everything that follows from a sexual act is necessarily “sex-based” “rests on a logical fallacy”); *Nungesser v. Columbia Univ.*, 244 F.Supp.3d 345, 366-67 (S.D.N.Y. 2017) (dismissing amended complaint on similar rationale); *Doe v. Univ. of Chicago*, 2017 WL 4163960, *7 (N.D. Ill. Sep. 20, 2017) (male plaintiff-respondent claimed that university was deliberately indifferent to harassment he suffered due to perception that he committed sexual assault; court granted motion to dismiss that Title IX claim because “a false accusation of sexual assault is not, without more, harassment based on sex, notwithstanding the sexual content of the accusation.” (citing *Nungesser*, 169 F.Supp.3d at 365; *Doe v. Univ. of Massachusetts-Amherst*, 2015 WL 4306521, at *9 (D. Mass. Jul. 14, 2015)); *Doe v. Columbia College Chicago*, 2017 WL 4804982, *7 (N.D. Ill. Oct. 25, 2017) (dismissing Title IX claim that college was “deliberately indifferent” to harassment of male plaintiff-respondent by other students who considered him to be a “rapist”, based on rationale of *Nungesser* and *Univ. of Chicago*). See also *Doe v. Columbia College Chicago*, 2018 WL 497284, *9 (N.D. Ill. Jan. 22, 2018) (dismissing plaintiff’s related breach of contract claims) (appeal pending).

males, because, again, not all complainants are female, not all respondents are male, and a trauma-informed approach facilitates the gathering of information in a balanced manner from all individuals, not just from women, who report sexual assault or IPV.⁴⁵ Further reinforcing such points by modeling gender-neutrality in training can only help the larger effort to establish that institutions are opposed to sexual and other violence, but are not “opposed to” a substantial portion of their students simply because they are male.

F. Emphasize the need for procedural fairness

Trauma-informed interview and investigation approaches should be presented as one important part of a larger system, which includes robust procedural protections for both parties provided pursuant to constitutional, Title IX regulation, Clery Act, state common law, and self-imposed contractual requirements, as applicable. Investigators and adjudicators who participate in training regarding trauma and related issues should also participate in training regarding institutional procedural requirements, which should emphasize as a matter of equity and legal mandate that all of the institution’s students are entitled to the level of fair process provided for in institutional policies. Institutions should be able to demonstrate that their training programs reflect their simultaneous commitment to trauma-informed approaches and procedural fairness.⁴⁶ Documentation regarding the substance of each training (e.g., PowerPoint slides, instruction manuals, distributed policies, etc.) should be maintained accordingly. As noted above, if finally promulgated as proposed in November, 2018, Title IX regulations would require that training materials be maintained, and that they be disclosed to the parties in sexual harassment cases.⁴⁷

G. If any information is provided regarding “perpetrator behavior”, emphasize the difference between convicted criminal defendants or admitted perpetrators, and respondents in individual cases

⁴⁵ See also *Doe v. Univ. of Colorado, Boulder*, 255 F.Supp.3d 1064, 1074-75 (D. Colo. 2017) (listing cases that rejected male plaintiff-respondents’ Title IX claims, because those allegations “largely tend to show, if anything, pro-victim bias, which does not equate to anti-male bias”).

⁴⁶ See *Doe v. Ohio State Univ.*, 219 F.Supp.3d at 658 (as noted above, court did not question the substantive appropriateness of information about sexual assault and perpetrator behavior in university’s training program, but denied motion to dismiss because it had to assume at the motion to dismiss stage that “the panel members received only the training Doe alleges and no training or direction on their role as fair and neutral judges.”).

⁴⁷ *Id.*, proposed 34 C.F.R. § 106.45(b)(7)(i)(D).

As noted above, providing information about “typical perpetrator behaviors” in campus training programs can be controversial, and carries a risk that respondents and courts will conclude that an institution’s doing so may have engendered bias against respondents in particular cases.⁴⁸ If an institution concludes that it must include such information or it has done so in the past, it would be best to emphasize that information about general characteristics of “perpetrators of sexual violence” is drawn from research based on convicted criminal defendants or admitted perpetrators of sexual assault, and that participants should never presume that statistics about or general characteristics of such individuals are necessarily representative of the behavior of a respondent in a particular case, or of the behavior of any predictable percentage of the respondents who will be involved in the institution’s cases. Instead, participants should be encouraged to decide each case based on the evidence gathered, not on any inference from general statistics.

H. Ensure that all institutional publications convey a consistent message

Once an institution has honed its training programs so that they promote a fair, trauma-informed approach, it should ensure that all of its publications convey a consistent message about that approach. A chain is only as strong as its weakest link, and if an outdated institutional publication or web page conveys a message that may be perceived as biased, it is fair to assume that it will be cited in opposition to a motion to dismiss a plaintiff-respondent’s Title IX- or fairness-based contract or other claims. The institution may ultimately be able to demonstrate the overall fairness of its training program and publications, but it is advisable to proactively eliminate outliers that would lend any support to a claim of unfairness or bias.

I. If an institution’s overall training program could benefit from the suggestions offered here, enhance the program accordingly

If upon review it appears that not all aspects of an institution’s past training efforts have placed trauma-informed concepts in context and promoted fairness to all parties as discussed above, the institution could consider enhancing its program to incorporate some or all of the suggestions made here. Courts should reasonably review an institution’s training program as a whole, rather than focusing exclusively on past presentations or dated, individual PowerPoint slides when

⁴⁸ See, e.g., *Doe v. Univ. of Pennsylvania*, 2017 WL 4049033, **13-14 (cited in footnote 41 above regarding discussion of “typical rapist” characteristics in *17 Tips* document); *Doe v. Ohio State Univ.*, 219 F.Supp.3d at 658 (court denied motion to dismiss in part because of allegations that training contained generalizations regarding manipulative characteristics of “repeat perpetrators” and “sex offenders”).

assessing the fairness of the program. There is no reason why subsequent presentations cannot correct any misperceptions arguably created by earlier presentations, so that the institution's overall program is ultimately, and demonstrably, fair and balanced.

Conclusion

Applying the lessons learned from scientific research on the neurobiological effects of trauma can enhance the quality of college and university investigations and adjudications of sexual assault, IPV and stalking cases. All parties can benefit if trauma-informed training is provided in a manner that is fair, equitable, nuanced, and adapted appropriately to the context of college and university investigations and disciplinary proceedings, and that does "not rely on sex stereotypes." Given the complexity of these issues and the importance of training as a matter of substance and potential litigation risk, institutions should strive to ensure that their training programs are truly fair and trauma-informed.