LET'S SHINE A LIGHT ON

TITLE IX

Serving Impartially in the Title IX Sexual Harassment Formal Grievance Process
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On-Demand
LET'S SHINE A LIGHT ON

TITLE IX

Serving Impartially in the Title IX Sexual Harassment Formal Grievance Process

TITLE IX COORDINATOR
TITLE IX INVESTIGATOR
TITLE IX DECISION-MAKERS
TITLE IX FACILITATORS OF INFORMAL RESOLUTIONS PROCESSES
LET'S SHINE A LIGHT ON

TITLE IX

Serving Impartially in the Title IX Sexual Harassment Formal Grievance Process

NOT LEGAL ADVICE
CONSULT A LICENSED ATTORNEY
Serving Impartially

Topics to be Covered

Title IX Statute and Preamble
What is Impartiality?
What Influences Impartiality?
Examples and Reflection of Impartiality
How to Serve Impartially
Consequences for Not being Impartial
Title IX References of Impartiality

Title IX provisions are rooted in the importance of an impartial process before unbiased officials to ...

(1) Improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably,

(2) Avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and

(3) Promote accurate, reliable outcomes
Title IX References to Impartiality

"Section 106.45[b][1][iii]

Require that any individual designated by a recipient as a Title IX Coordinator, Investigator, Decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias**
Title IX References to Impartiality

Title IX’s separation of the Decision-Maker role from the Title IX Coordinator role & Investigator role to:

Prevent influence on a decision by bias or non-relevant information gleaned in the coordination or investigation process.

Not separating the roles, risks the person(s) involved improperly relying on information gleaned during one role to affect decisions made while performing a different role.
A Title IX Coordinator may have a history of communications with the complainant before any formal complaint has been filed (for instance, due to implementing supportive measures for the complainant), which may influence the Title IX Coordinator's perspective about the complainant's situation before the Title IX Coordinator (if allowed to be the “decision-maker”) has even spoken with the respondent.
An Investigator may obtain information from a party that is not related to the allegations under investigation during an interview with a party, and if the investigator also serves as the decision-maker, such unrelated information may influence that person's decision making.
Title IX References to Impartiality

“Separating the roles of investigation from adjudication therefore protects both parties by making a fact-based determination regarding responsibility based on objective evaluation of relevant evidence more likely.”
What is Impartiality?

- **NEUTRAL**
- **EQUITABLE**
- **FAIR IN ACTIONS**
- **OBJECTIVE CRITERIA**

“This approach reflects the reality that recipients are not courts, yet do need to apply a **fair, truth-seeking process** to resolve factual allegations of Title IX sexual harassment.”

Preamble 30226
What Influences Impartiality?

- Neutral
- Equitable
- Fair in Actions
- Objective Criteria
What Influences Impartiality?

- Neutral
- Equitable
- Fair in actions
- Objective criteria

Consequences:
- Prejudgment of the facts at issue
- Conflict of interest
- Bias
What Influences Impartiality?

- NEUTRAL
- EQUITABLE
- FAIR IN ACTIONS
- OBJECTIVE CRITERIA
- CONFLICT OF INTEREST
- PREJUDGMENT OF THE FACTS AT ISSUE
- BIAS
Definition

**CONFLICT OF INTEREST**

An actual or perceived clash between our professional duties and our personal interest

Preferences for one person/group over another

Direct or indirect impact on ourselves

Perceived by a reasonable person

Present even if we do not gain from the conflict
CONFLICT OF INTEREST

Examples

- Title IX Investigator’s child is close friends with the respondent
- A personal or professional relationship with a colleague
- A sense of loyalty to the school

The Department declines to define certain employment relationships or administrative hierarchy arrangements as per se prohibited conflicts of interest.... The Department will hold a recipient accountable for the end result of using Title IX personnel free from conflicts of interest and bias, regardless of the employment or supervisory relationships among various Title IX personnel.
CONFLICT OF INTEREST

Examples

- **Title IX Coordinator called as a witness (allowable)**

  Even where the Title IX Coordinator testifies as a witness, the Title IX Coordinator is still expected to serve impartially without prejudgment of the facts at issue.

- **Title IX Coordinator signs a formal complaint on the school’s behalf (allowable)**

  Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient’s behalf.
Reflection

- “Would I be comfortable if this conflict appeared publically/media in regards to this complaint?”

- “Would a reasonable person perceive this as a conflict of interest?”

- “If I saw someone else in a similar situation – would I think there was a conflict of interest?”

- Consider if there is any overlap between any of our personal interests and our Title IX duties
What Influences Impartiality?

PREJUDGMENT OF THE FACTS AT ISSUE

NEUTRAL
EQUITABLE
FAIR IN ACTIONS
OBJECTIVE CRITERIA

CONFLICT OF INTEREST
BIAS
PREJUDGMENT OF THE FACTS AT ISSUE

To pass judgment too early without adequate consideration on a fact that is at the center of a dispute

Premature judgment

Insufficient gathering and evaluation of evidence

“Title IX personnel to maintain impartiality and avoid bias and conflicts of interest, so that no complainant or respondent is automatically believed or not believed.

No complainant reporting Title IX sexual harassment should be ignored or met with judgment or disbelief...
PREJUDGMENT OF THE FACTS AT ISSUE

Definition

To pass judgment too early without adequate consideration on a fact that is at the center of a dispute

Presumption of non-responsibility

“A presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”

§106.45 (b)(2)(B)
Definition

Treating the respondent as not responsible until the conclusion of the grievance process does not mean considering the respondent truthful or credible;
PREJUDGMENT OF THE FACTS AT ISSUE

Examples

- Video or audio recording evidence
- When interviewing the complainant we refer to
  - the respondent as the “perpetrator” rather than “alleged perpetrator”
  - The complainant as “victim” rather than “alleged victim”
PREJUDGMENT OF THE FACTS AT ISSUE

- Keep an open mind
- Remain in investigation mode
  - Seek out all facts
  - Continually ask questions
  - Dig deep in the details
  - Stay engaged when listening
  - Gain a deep understanding
  - Capture their words/perspectives (not self)
- Do not
  - Jump to conclusions
  - Offer advice
- Know that there is a determination stage
Reflection

PREJUDGMENT OF THE FACTS AT ISSUE

• “Why did I gather the evidence in that way?”

• “Was the gathering and interview process equitable to both parties?”

• “Why did I reach the decision that I did?”
What Influences Impartiality?

- Prejudgment of the facts at issue
- Conflict of interest
- Bias
- Neutrality
- Equitability
- Fairness in actions
- Objective criteria
BIAS

Definition

Tendencies to think a certain way – that can result in prejudgments.

- Personal feelings or attitudes
- Often based on stereotypes
- Can be held without the individual’s full awareness
- Impact actions, interpretations, conversations, and decisions – in an unconscious manner
- Varying types of bias
BIAS

Varying types of biases

- Confirmation Bias
- Anchoring Bias
- Blind Spot Bias
- Halo Effect Bias
- Attribution Bias
- Outcome Bias

Neutral
Equitable
Fair in Actions
Objective
CONFIRMATION BIAS

Tendency to seek out/interpret information that confirms our thinking

Strongest in emotionally charged issues

Status in the allegations, Gender, Race, Sexual Orientation, English as a Second Language status, Disability status, Immigration status, Economic status, Community status, Prior discipline status, Academic status, etc.

Treating all parties impartially without ... bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic. Any person can be a complainant, and any person can be a respondent, and every individual is entitled to impartial, unbiased treatment regardless of personal characteristics.
CONFIRMATION BIAS

Definition

Tendency to seek out/interpret information that confirms our thinking

To confirm what we already “know”

Discounts evidence that does not reaffirm what we “know”

Studies show that brain pleasure centers respond when beliefs are confirmed

CONFIRMATION BIAS

- Title IX Investigator seeks out only information that shows the respondent as responsible

- Title IX Investigator only interviews witnesses suggested by the respondent because they feel that individual is being railroaded

Require an objective evaluation of all relevant evidence — including both inculpatory and exculpatory evidence

§106.45 (b)(1)(ii)
CONFIRMATION BIAS

- Believing that women recent allegations are because of the "#MeToo movement" and not because of an actual experience

- Feeling that men are more sexually aggressive then women

- Title IX Decision-Maker finds a respondent as more credible than the complainant because the complainant speaks English as a second language
CONFIRMATION BIAS

- Gather information from varied sources
- Focus on the facts and not our personal opinions
- Don’t rely on cultural stereotypes about how men or women supposedly behave
- “Am I assuming things or am I relying on the facts?”
- Consider a different perspective and determine if actions would remain unchanged
- Do not disregard evidence that is opposite your expectations
ANCHORING BIAS

Definition

Tendency to rely on the 1st received information

Feeling or attitude is set based on initial interactions or evidence

Actions or decisions are made based or anchored on how we feeling about that information

Evidence is given more importance than other evidence
Bias Examples

Title IX Investigator after reading the submitted formal complaint poses no questions—believing that the complainant listed all information in the formal complaint.

Title IX Decision-Maker reviewing the investigative report and the order the evidence is listed allows this to determine the weight and relevance each evidence will receive.

Title IX Investigator after viewing video footage, ignores witnesses statements.
Reflection

- “Have I sought out evidence that differed from the initial evidence collected?”

- “Was evidence collection impacted by my initial experience in working on the complaint?”

- “Why did I place so much value (or no value) on a particular piece of evidence?”

- Slow down if you are feeling rushed – feeling hurried may cause you to rely on the 1st piece of information.
Tendency to think that we are least likely to be bias

Monitor our bias less when we feel like we are less bias than others

Studies show that this has detrimental consequences on judgments and behaviors

BLIND SPOT BIAS

Reflection

• Recognize that even the most objective one of us has a bias
• Actively listen and review information
• Stay out of the bias “comfort zone”
• Be mindful of any feelings/attitudes that might keep us from being neutral
HALO EFFECT BIAS

Definition

Tendency to allow positive impressions of an individual, influence our beliefs of the individual in other areas

Positive impressions in one area might influence overall impression

Unrelated impressions of the individual might impact credibility determinations

Impressions can be unfounded or not based on fact
- We perceive that a person performing very well in spelling, will automatically perform well at writing.

- A photograph may show an attractive, well groomed individual. This leads to the assumption that the individual in the picture is an honest person.

- We discover that a complainant or respondent earned high marks on the ACT exam, and prejudge their credibility based on their academic merit.

- Because the complainant or respondent’s family are well-respected in the community, the Title IX Investigator relies on leading questions during the interview.
The Title IX Coordinator states, while comforting a complainant with zero discipline referrals:

- “He/she will be punished for doing that.”

**AS OPPOSE TO**

- “If he/she did that, then he/she will be punished.”

__Being sensitive to the trauma a complainant may have experienced does not violate....so long as ‘being sensitive’ does not lead [them] to lose impartiality__
HALO EFFECT

BIAS

Reflection

• Consider the facts without the gleaming attribute

• “How might the facts appear if they had a lower ACT score?”

• “Would my questions be posed differently if they were from a different family?”
**ATTRIBUTION BIAS**

**Definition**

Tendency to assume why an individual acts in a certain way

- Credibility is weakly based on our observations or interactions rather than objective facts
- Observations or interactions can be misinterpreted
- Attributions do not always accurately reflect reality
- Impressions can be unfounded or not based on fact
- Perceptions based on how we expect individuals to behave
Bias Examples

- Title IX Investigator believes that an individual is untruthful during an interview because they were late for the interview.

- Title IX Decision-Maker felt that the person was not being honest in the hearing because they fidgeted.

- Interviewee who initially had a calm demeanor, grows frustrated following a particular question. We automatically judge the response to be a false statement.

- When a student is crying during questioning, we prematurely conclude in our thoughts that they are telling the truth.
Bias Example

"the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."
Bias Examples

- Title IX Decision-Maker judges a party's statements as not credible due to not remembering the specific time an incident occurred.

"The final regulations protect against a party being unfairly judged due to 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."
ATRIBUTION BIAS

Reflection

- Be objective observers
- Recognize that perceptions are prone to errors
- Ask about what you are seeing, rather than assuming and attributing behavior to a particular reason
- Avoid generalizations about the individual because of outside non-related (external) behaviors
- Keep non-related exchanges separate from the collected facts and evidence
- “Am I basing this on the evidence collected or presented or on my observed interactions with the individual?”
Reflection

• Title IX Decision-Makers should assess demeanor along with consistency, plausibility and reliability.

"For the same reasons that judging credibility solely on demeanor presents risks of inaccuracy, the Dept. cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is 'evidence of trauma' presents similar risks of inaccuracy...while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability."
OUTCOME BIAS

Definition

Tendency to evaluate a decision based on the results of that decision rather than an objective process.

Accuracy is determined by a previous end result.

Places too much value on how things turned out in a situation.

Weighs the past outcome heavier than other pieces of information.

Occurs most often when the effects are negative.
- Title IX Appeal Decision-Maker determines that the initial decision was appropriate because most people appeared to agree with it.

- It is implied that Title IX Personnel are biased because a large number of decisions find the respondent as not responsible.

> the mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, *does not necessarily indicate or imply bias* on the part of Title IX personnel.
Reflection

• "Am I depending on the determination made by the previous Title IX Decision-Maker?"

• As an Appeal Title IX Decision-Maker do not be driven by the results of the previous decision

• As an Appeal Title IX Decision-Maker focus on examining the facts and merits of each formal complaint

• Acknowledge the distinction between a good outcome and a good decision based on fairness, the objective standard, and in accordance with §106.45(b)(8) and the school board approved Title IX policy
What Influences Impartiality?

- Neutral
- Equitable
- Fair in actions
- Objective criteria
- Prejudgment of the facts at issue
- Conflict of interest
- Bias
DESIGNATED INDIVIDUALS MUST

be trained "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias"

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.
DESIGNATED INDIVIDUALS MUST

be trained "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias"

DESIGNATED INDIVIDUALS SHOULD

Be self-aware

• Assess actual or perceived conflicts of interest
• Acknowledge possible biases
• Private experiences and understanding
• Mindfulness – increased awareness of our emotions and thoughts

34 CFR 106.45(B)(1)(III)
DESIGNATED INDIVIDUALS MUST

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DESIGNATED INDIVIDUALS MUST be trained "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

DESIGNATED INDIVIDUALS SHOULD Be self-aware
State when we cannot be impartial
• “I know this person personally.”
• ”I know the respondent has had similar allegations in the past and I can’t be impartial.”
• Notify Title IX Coordinator

34 CFR 106.45(B)(1)(III)
DESIGNATED INDIVIDUALS MUST be trained "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

DESIGNATED INDIVIDUALS SHOULD Be self-aware

State when we cannot be impartial

- Not have an unfettered duty when they cannot be impartial

34 CFR 106.45(B)(1)(III)
DESIGNATED INDIVIDUALS MUST

be trained "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias"

DESIGNATED INDIVIDUALS SHOULD

Be self-aware

State when we cannot be impartial

Recipients should have objective rules for determining when [Title IX Coordinator Personnel are] biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias....
Serving Impartially

DESIGNATED INDIVIDUALS MUST

be trained "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias".

DESIGNATED INDIVIDUALS SHOULD

Be self-aware

State when we cannot be impartial

Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased.

34 CFR 106.45(B)(1)(III)
Preamble 30252
Consequences for Not being Impartial
Confidence held by others

Failure to be impartial may negatively affect the confidence held by others in the institution’s Title IX processes or the district or school as a whole.

Ethical expectations

Taking advantage of a conflict of interest might be viewed as poor professional conduct - in violation of ethical expectations.

AR CODE OF ETHICS Standard 5 - An educator maintains integrity regarding the acceptance of any gratuity, gift, compensation or favor that might impair, or appear to influence professional decisions or actions and shall refrain from using the educator’s position for personal gain.

Grounds for appeal

Issues related to conflict of interest or bias may be grounds for appeal.

34 CFR 106.45(b)(8)(i)(C)