

Bias - Preamble

“Treating a party differently on the basis of the party’s sex or stereotypes about how men or women behave with respect to sexual violence constitutes impermissible bias.” 85 FR 30238-40

- Ex. Assuming the respondent is male.

A “recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations[.]” 85 FR 30496

- Ex. Finding a party not credible because English is not their first language.

“The Department’s conception of bias is broad and includes bias against an individual’s sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other characteristic.” 85 FR 30084

Understanding bias is particularly important in Title IX cases because:

- Lack of direct evidence;
- Social stigmas related to sex, drugs & alcohol, gender;
- Influence of stereotypes on outcomes, including sex stereotypes and bias, but also related to race, ethnicity, sexual orientation, class, academic standing, religion, ability, and so much more.

Bias

“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[.]” 85 FR 30248.

- Bias can be perceived and/or actual (NOTE: On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter.”)
- Objective evaluation cannot be based on stereotypes (such as "assuming that all self-professed feminists, or self-described survivors, are biased against men..." *Id.* At 30252)

Not bias *per se*:

Self-disclosure and transparency are key!

- Status as an employee at the institution
- Outcome of a grievance procedure or number of similar outcomes
- Title IX Coordinator's signature on a formal complaint
- Professional experiences or affiliations (e.g. advocacy work)
- Personal experiences or affiliations (e.g. a person's own gender)

Bias in your personal or professional background

Conflict of Interest

A situation or relationship that prevents one from acting impartially.

- Can be a personal or professional interest, such as family, friendships, faculty member relationships, financial investments, or other social factors.
- Remember – the regulations do not define conflict of interest and instead, leaves it in the discretion of the recipient.

A conflict of interest which prevents impartial participation = disqualified from the Title IX process

Conflict of Interest

Regulations require an objective evaluation of whether a conflict exists.

- Actual
- Perceived
- Potential

Self-disclosure and transparency are key!

Not a conflict of interest *per se*:

- Title IX positions staffed by institution's own employees
- Hearing officer and investigator work together

Ask yourself

- ✓ Do I have anything to gain / lose from the outcome?
- ✓ Would you like it if others became aware of the conflict? Of it the conflict was reported in the media?
- ✓ If you saw someone else with the conflict, would you think they would be barred from participation? What if you were one of the parties?

Prejudgment

Passing judgment prematurely or without sufficient reflection or investigation.

→ Allegations involving sexual history, drugs, and / or alcohol use.

→ Stereotypes

No party should be met with prejudgment throughout the Title IX process.

Trauma-informed practices must be applied fairly to all involved parties and without a presumption that a person is being truthful or not based on their gender or status as a reporting party/respondent.

✓ Cannot make credibility determinations until all relevant evidence is reviewed.

Regulations state that it is possible, “albeit challenging,” to apply trauma informed practices in an impartial, non-biased manner

Remaining Impartial

Know yourself!

- Be aware of any and all stereotypes that you may hold so that you can leave them at the door.
- Take the implicit association test.
- Frequently review your past practices and decisions for evidence of implicit bias.
- Leave behind your prior experiences, including past Title IX proceedings.

Follow the procedures laid out on the regulations, including the presumptions and equitable evaluation of evidence.

Avoid prejudgment of the facts - keep an open mind.

Give all parties an equal opportunity to present facts, witnesses, and their versions of the story.

Evaluate all the facts presented fairly and approach each allegation of all parties neutrally. Wait to hear all facts before making a conclusion.

Be particularly cautious about checking your assumptions in situations involving sexual assault, drugs, or alcohol use.

Remember to disclose any potential bias or conflict of interest

Hypothetical – Bias

Molly conducts Title IX investigations and is also responsible for reporting students' academic performance for accreditation purposes. Poor academic performance can have a negative impact on accreditation. A student with a low GPA made a formal complaint against a student with a high GPA. The two elect informal resolution.

Would you be concerned about Molly's ability to remain impartial?

POTENTIALLY. Molly's affiliation/concern with the school's academic reputation may create an explicit bias in favor of the higher achieving student. Her affiliation may also create an implicit bias of which she is not aware or it may not be present.

Hypothetical – Conflict of Interest

Ryan has a mentoring relationship with the complainant.

Would you be concerned about Ryan's ability to remain impartial?

YES. The relationship may be a perceived conflict of interest, if not an actual conflict of interest.

Hypothetical - Prejudgment

Louise is a decision maker who makes Title IX determinations. Louise's Twitter account shows that she regularly comments on high profile sexual assault and domestic violence cases. She often comments that everyone should "believe women," without exception, and that she believes that there can never be a fair process when a survivor is subject to scrutiny because of the way trauma affects the brain. A case comes in where a female student accuses a male student of sexual assault, but cannot remember the details of the incident.

Would you be concerned about Louise's ability to avoid prejudgment of the facts?

POTENTIALLY. Louise's statements could unfairly impact (or could be perceived to unfairly impact) how she evaluates the facts in that case.



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