

Helpful Hints About Bias

- A. A key to maintaining impartiality throughout the Title IX formal grievance process is to avoid bias.
- B. A "bias" is a tendency, inclination or prejudice toward or against someone. Biases are often based on stereotypes, and can result in prejudgments and discriminatory practices.

Example: When talking with female Title IX complainants, the Title IX Coordinator begins each initial meeting by asking "are you sure that this was non-consensual?" (assuming that the complainants simply regret their sexual experiences and are lying about sexual harassment).

- C. What is difficult about biases is that we may or may not be aware of them. In other words, biases can be explicit or implicit:
 - 1. Explicit biases: Attitudes and stereotypes that affect understanding, actions and decisions in a conscious manner, which can be identified through reflection.
 - 2. Implicit biases: Attitudes and stereotypes that affect understanding, actions and decisions in an unconscious manner, which cannot be identified through reflection.

Potential for Bias in the Title IX Context

Biases are often based on stereotypes related to a person's gender, sexual orientation, race, economic status/social standing. In the context of the Title IX formal grievance process it is easy for biases to emerge.

- A. Biases related to gender - *Example:* The Title IX Coordinator initially refers to all respondents as "he" without knowing any additional facts, assuming that sexual harassment is always perpetrated by a male against a female.
- B. Biases related to sexual orientation - *Example:* The investigator assumes that a female complainant's claims that her female professor sexually assaulted her were likely not credible, because women are rarely sexually aggressive against other women.
- C. Biases related to race - *Example:* The mediator finds the respondent more credible than the complainant because the mediator and respondent are the same race.
- D. Biases related to economic status/social standing - *Example:* The decision-maker assumes that a respondent student previously found guilty of academic misconduct likely did engage in sexual harassment because the student does not respect school rules.

How to Avoid Bias

You can combat bias using the following practices:

- A. Monitor your language by being mindful of what you say and how you say it;
- B. Avoid using generalizations (e.g., referring to all complainants as victims);
- C. Question your thinking and challenge your assumptions by considering whether you would draw the same conclusions if the scenario involved other people (of a different sex, race, socio-economic status, etc.); and,
- D. Listen to the entire story and gather all relevant facts before making any conclusions.

Helpful Hints About Conflicts of Interest

- A. A major aspect of maintaining impartiality in the Title IX formal grievance process is avoiding conflicts of interest.
- B. A conflict of interest exists when personal or private interests (e.g., family, friendships, financial, social, etc.) compromise one's judgment, decisions or actions.
 - 1. *Example:* The complainant is the Title IX investigator's nephew.
 - 2. *Example:* The respondent (a faculty member) is a close family friend of the Title IX Coordinator, who is also an academic dean for the Collegé.
- C. The Title IX regulations do not identify any per se conflicts of interest (e.g., an affiliation with a rape survivor's rights organization does not automatically bar a Title IX official from serving in the formal grievance process). However, any conflict of interest that prevents an official from serving impartially is one that disqualifies him or her from the formal grievance process.
- D. Conflicts of interest can be "actual," "perceived," or "potential."
 - 1. An actual conflict of interest is a direct conflict between one's official duties and responsibilities and a competing personal interest or obligation, and is disqualifying.
 - 2. A perceived conflict of interest arises where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities. If a perceived conflict exists, you (in connection with the Title IX team) should collectively decide whether you can impartially serve and, if the conflict was public, whether a perception problem would exist due to your participation.
 - 3. A potential conflict of interest arises where a personal interest or obligation could conflict with one's official duties and responsibilities in the future, but is not in and of itself disqualifying.

Conflicts of Interest in the Title IX Context

- A. Actual conflict of interest - *Example:* The Respondent is a daughter of the investigator. This conflict would be disqualifying, as the investigator could not maintain impartiality when a child is involved in the matter.
- B. Perceived conflict of interest - *Example:* The decision-maker is a former prosecutor of sex crimes, and sits on the Board of Directors for the Victim Rights Law Center. Many could perceive this decision-maker as biased in favor of complainants. As a result, the decision-maker and other Title IX personnel will have to determine whether the decision-maker can serve impartially, as well as whether there will be a perception problem if the decision-maker is not recused.
- C. Potential conflict of interest - *Example:* The Title IX Coordinator's new administrative assistant alleges that a faculty member she previously supported sexually harassed her. Although there may not be a conflict of interest currently, the Title IX Coordinator's professional relationship with the complainant may deepen as they continue to work together, and render the Title IX Coordinator unable to serve impartially.

How to Avoid Conflicts of Interest?

In order to determine whether an actual, perceived or potential conflict of interest exists that would disqualify you from serving impartially in the Title IX formal grievance process, you should ask yourself the following questions:

- A. Would I be happy if my colleagues became aware of the alleged conflict?
- B. Would I be happy if the alleged conflict appeared in the media?
- C. If I saw someone else in the same situation, would I feel that person has a disqualifying conflict of interest?

Helpful Hints About Prejudging Facts

- A. One of the most important ways to uphold impartiality in the Title IX formal grievance process is to avoid prejudging the facts at issue. Prejudgment refers to passing judgment prematurely or without sufficient reflection or investigation.

Example: An investigator assumes that because the complainant and respondent were previously in a consensual, sexual relationship that the complainant consented to the sexual activity he now alleges is sexual harassment.

- B. A major area where prejudgment occurs in the Title IX context are ingrained sex stereotypes of men and women. The formal grievance process requires a broad prohibition on sex stereotypes so that decisions are made on the basis of individual facts and not stereotypical notions of what “men” or “women” do or do not do.
1. *Example:* A mediator believes that women who complain about sex harassment are just jumping on the “#MeToo” bandwagon.
 2. *Example:* Decision-maker believes that men cannot be sexually assaulted.
- C. No complainant or respondent should be met with prejudgment in the Title IX grievance process. Every complainant and respondent must be treated fairly and equally, which includes not prejudging either of their version of events without sufficient investigation.

Potential for Prejudgment in the Title IX Context

Prejudgment regularly occurs when allegations involve sexual conduct, sexual history, drugs, and/or alcohol use.

- A. Prejudgment related to sexual conduct - *Example:* The investigator, in an interview with a male respondent, discovers that the respondent identifies as homosexual and typically engages in sexual activity with men. The investigator assumes that the female complainant must be lying about the alleged sexual harassment because the respondent would not be interested in a woman.
- B. Prejudgment related to sexual history - *Example:* The decision-maker assumes that a faculty member did not engage in quid pro quo harassment with her secretary because the two used to have a romantic relationship.
- C. Prejudgment related to use of drugs and/or alcohol - *Example:* The Title IX Coordinator assumes that the respondent could not possibly know whether or not he sexually assaulted the complainant because he was drinking and taking drugs when the alleged sexual assault occurred.

How to Avoid Prejudgment

The following practices will help you avoid prejudging facts:

- A. Keep an open mind throughout the entire process, and listen to the multiple perspectives of those with whom you speak;
- B. Wait to hear all of sides to every story before drawing any conclusions;
- C. If you do not have a fact to support a certain belief, or if you feel yourself jumping to conclusions, seek out additional facts; and,
- D. Be particularly cautious about your thinking in situations involving sexual assault, drugs, or alcohol use.

Helpful Hints About Rape Shield Protections

- A. Title IX personnel must keep in mind rape shield protections when assessing evidence. Every relevance analysis in the Title IX formal grievance process must include a consideration of rape shield protections.
- B. Title IX's rape shield protections relate to a complainant's sexual history and provide that questions and/or evidence about the complainant's sexual predisposition or prior sexual behavior are presumptively not relevant and should not be considered.
- C. However, there are two, narrow exceptions to this rule. Questions and/or evidence about a complainant's sexual predisposition or prior sexual history may be considered when:
 - 1. The questions and/or evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; **or**
 - 2. The questions and/or evidence relate to specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Common Scenarios that Require Analysis of Rape Shield Protections

- A. When evidence of a complainant's "reputation" is offered: Evidence of a complainant's "reputation" as sexually promiscuous, prude, or anything in between is not relevant.

Example:
A respondent cannot present evidence that a complainant is "easy" or frequently "sleeps around" to prove that the respondent and complainant had a consensual sexual encounter.
- B. When evidence of a complainant's relationship with respondent is offered: Evidence relating to the complainant and respondent's prior sexual relationship may be considered.

Example:
A respondent can offer her previous, sexually-explicit text messages with the complainant to prove that the complainant consented to the sexually explicit text messages that he alleges to be sexual harassment.
- C. When evidence of a complainant's relationship with another person is offered: Evidence of a complainant's sexual relationship with another person is generally not relevant.

Example:
Evidence that the complainant engaged in certain sexual acts with other people cannot be offered to show to that the complainant consented to these same sexual acts with the respondent.
- D. When evidence is offered to show someone other than the respondent committed the conduct: Evidence that someone other than the complainant committed the alleged sexual harassment may be considered.

Example:
A respondent can offer evidence that an ex-boyfriend of the complainant, who had stalked the complainant and left sexually-graphic notes in the complainant's locker, was the perpetrator of alleged stalking and harassment, not the respondent.

Helpful Hints About Relevance

- A. The most basic rule of evidence is that the information must be relevant to the case. Irrelevant evidence should be excluded because it often times confuses the real issues.

For example: If we are trying to adjudicate an issue of quid pro quo harassment, the witnesses should shed light on the facts around the allegations of quid pro quo harassment and not whether the faculty member who is alleged to have engaged in the offering of the quid pro quo is part of a group of faculty members who regularly grade harshly and fail male and female students alike.

- B. Think of relevance as having a two-part test definition. To be relevant, the information must have the tendency to:
1. prove or disprove a fact, and that fact
 2. must be of consequence in determining the action.

- C. All relevancy arguments boil down to logic and common sense.

Ask yourself: Will the evidence help in some way (no matter how small) to reach a good decision, either by itself or in conjunction with other evidence?

Some Common Relevancy Issues

- A. Remoteness in Time or Place

Remoteness in time or place reduces the relevancy of information. Events taking place at times or locations distant from the event at issue are of little or no relevancy.

1. *For example:* A photo of the Complainant showing her smiling with a group of people, one of them (four people away from the Complainant) is the Respondent is more relevant to show they had a cordial relationship if the picture was taken one week before the conduct that is the center of the allegations than if it was taken two years ago.
2. *Another Example:* An act of stalking between the Complainant and the Respondent is more relevant if two weeks before she reported an act of domestic violence than if the incident of stalking took place three years before.

- B. Prior similar events

The similarity of a prior event affects relevancy. Prior events involving different people or objects are of little or no relevancy.

1. *For Example:* Prior acts of domestic violence between the Complainant and Respondent are more relevant than prior violence between the Respondent and another person.
2. *Another Example:* Previous times when the Respondent threatened the Complainant are more relevant to show the need for supportive measures than incidents when the Complainant threatened other people. On the other hand, it may be very relevant to provide instances where the Respondent has threatened other people, if the possibility of an emergency removal is being discussed.

- C. Backgrounds and Relationships Among Parties

It may be relevant to point out the background and relationship among the parties and the events leading up to the party's or witness's involvement in the case at hand. It is also generally permissible to describe the prior relationship between the parties.

- D. Evidence That Someone Else Committed the Offense

One area where it is permissible to discuss the Complainant's prior sexual behavior is when it is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent. Other than these instances, prior sexual behavior is irrelevant.