



Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.45(b)(1)(iii): Conflicts of Interest & Bias

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Note: This document focuses on a summary analysis of Section 106.45(b)(iii) of the 2020 Final Title IX Regulations,¹ specifically the discussion regarding conflicts of interest and bias. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§106.45(b)(1)(iii) – No conflicts of interest or bias of coordinators, investigators and decision-makers

The Final Rule requires that individuals with roles in the grievance process be free from conflicts of interest or bias. Specifically, a recipient must 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, [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.” Final Rule §106.45(b)(1)(iii).

The Final Rule’s prohibition against bias and conflict of interest is intended to minimize premature judgment of the facts related to the grievance throughout the Title IX grievance process. This regulation also is intended to minimize partiality in the decision-making process. To that end, the training requirement of the Final Regulations includes mandatory training on the topics of bias, conflict of interest, and impartial service as a Title IX Coordinator, investigator, decision-maker, and/or facilitator. The Department added a “...person designated by a recipient to facilitate an informal resolution process” to this regulation following the notice and comment period. Final Rule §106.45(b)(1)(iii).

What is a conflict of interest or bias?

In defining what constitutes a conflict of interest or bias, the Final Rule simply indicates that Title IX Coordinators, investigators, decision-makers, and/or facilitators must not be biased against a particular class of parties in the grievance process. They must not harbor biases against complainants or against respondents. As such, an individual’s status as a respondent must not be considered a negative factor during consideration of the grievance. This point reinforces the Final Rule’s separate presumption of non-responsibility for a respondent until a decision is rendered in the grievance process. *See* Final Rule §106.45(b)(1)(iv). Similarly, this regulation is

¹ The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

intended to minimize the impact of sex stereotypes as a factor in consideration of a Title IX grievance. *See* 85 Fed. Reg. 30026, 30368 (May 19, 2020).

Employees of the institution

Notably, the Department elected not to include other types of potential biases or conflicts of interest in the Final Rule which commenters had identified during the comment period. The Department discusses these other proposed areas of potential bias in the Preamble. For example, some commenters stated that a recipient's employees should not be allowed to serve as investigators or decision-makers. 85 Fed. Reg. at 30250. These commenters suggested that a recipient's employees have an inherent conflict of interest and would be biased in favor of the recipient as an institution. Commenters also suggested that a recipient, through its employees, possesses a conflict of interest because it could face financial losses as a result of a Title IX grievance. These commenters asked the Department to require recipients to obtain insurance policies for Title IX matters to minimize a recipient's potential incentive not to treat a Title IX grievance fully and fairly. The Department declined to incorporate these proposals into the Final Rule, or otherwise deem a recipient's employees as *per se* biased for purposes of the Title IX grievance process. The Department stated that a recipient's employees may serve in the roles of Title IX Coordinator, investigator, and/or decision-maker, and could fulfill those responsibilities without bias.

Research or advocacy background

The Department also declined to adopt language in the Final Rule which would designate individuals biased and therefore ineligible to serve as Title IX Coordinators, investigators, and/or decision-makers based on their past activities or work in the sexual violence field. *Id.* at 30251. Some commenters had asked the Department to exclude individuals who had shown support for survivor advocacy organizations from the grievance process. *Id.*

In response, the Department stated that it would not consider past advocacy activity as *per se* grounds for excluding an individual from serving a role in the grievance process, indicating that any determination regarding an individual's conflict of interest or bias depends on an "objective" evaluation of the circumstances. *Id.* at 30252. Such an objective evaluation could not rest on stereotypes, such as "assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents." *Id.*

Title IX Coordinator as investigator

Other commenters asked the Department to prohibit Title IX Coordinators from having the authority to hire investigators due to a potential conflict of interest. The Department did not incorporate this comment into the Final Rule.

To the contrary, the Department indicated that no *per se* rule prohibits the Title IX Coordinator from serving as the Title IX investigator. *Id.* at 30252 fn. 1035.

What matters is whether these arrangements create a conflict of interest or bias. The Department concedes that it has oversight over the “recipients themselves, and not to the individual personnel serving as Title IX Coordinators, investigators, decision-makers, or persons who facilitate an informal resolution process.” *Id.* Thus, regardless of how the institution structures its investigative process, “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.” *Id.*

How do the parties raise conflicts of interest or bias challenges?

The Final Rule gives a recipient discretion to decide how to implement the prohibition on bias and conflict of interest in the grievance process. For example, the Final Rule does not specifically indicate how the parties should be able to raise conflict of interest or bias before or during the live hearing, but providing such an opportunity to parties already is common among institutions and is advised.

What standards govern a conflict of interest or bias challenge?

The Department “encourages” the adoption of objective standards for determining potential biases and/or conflicts of interest. An “objective” standard, according to the Department “is whether a reasonable person would believe bias exists.” 85 Fed. Reg. at 30252. The Department describes this standard as a “common sense approach to evaluating whether a particular person serving in a Title IX role is biased,” which will be case-specific and avoid generalizations by which a bias is unreasonably assumed, such as based on the person’s research or advocacy background. *Id.*

Importantly, the Department’s “objective” standard does not distinguish between “actual” and “perceived” bias, categories which are commonly raised in civil litigation arising from Title IX or breach of contract claims. *Id.* Yet implicitly, any objective evaluation of bias will likely have to consider whether the bias has an impact on the process itself. As described in the Joint Guidance section on Appeals, even where a conflict of interest or bias is alleged, the appeal will not be granted unless the party can demonstrate that the conflict of interest or bias materially affected the outcome.

Training will be a primary area for implementing these standards. As conflict of interest or bias is a mandatory ground for appeal, it will be vital for institutions to set objective standards for determining if a conflict or bias exists, and to thoroughly train Title IX Coordinators, investigators, decision-makers, and appellate boards on these rules.

Supportive measures

Finally, the Final Rule includes other provisions which are designed to minimize bias against complainants or respondents. For example, the Final Rule specifically requires that supportive measures must be provided to complainants and to respondents. *See* Final Rule §106.30(a)

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