

Serving Impartially- Avoiding Bias and Conflicts of Interest and Relevance of Evidence for OIE Staff

November 23, 2020

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Impartiality

Perform duties based solely on the facts and evidence gathered during the investigation

- No bias
- No conflict of interest
- No prejudgment of parties or evidence

Bias

- Dictionary Definition -an inclination of temperament or outlook; bent or tendency
 - See <https://www.merriam-webster.com/dictionary/bias>
- Investigators must not have a bias for or against complainants or respondents generally or an individual complainant or respondent
- Must objectively evaluate all relevant evidence—including both inculpatory and exculpatory evidence

Avoiding Bias

- Avoid prejudgment of facts at issue
- Avoid inferences based on party status – athlete, high ranking administrator, student government representative, fraternity member
- Avoid sex stereotypes
- Avoid making assumptions

DOE Guidance

- Whether bias exists requires examination of the particular facts of a situation
- 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, exercising caution not to apply generalizations that might unreasonably conclude that bias exists

- pps. 827-28

Evaluating Bias

- Should not apply generalizations that might unreasonably conclude that bias exists
 - all self-professed feminists, or self-described survivors, are biased against men, or
 - a male is incapable of being sensitive to women, or
 - prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents.
- Training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias

What about Advisors

From the Preamble:

The final regulations impose no prohibition of conflict of interest or bias for . . . advisors, nor any training requirement for such advisors, in order to leave recipients as much flexibility as possible to comply with the requirement to provide those advisors. The Department believes that advisors in such a role do not need to be unbiased or lack conflicts of interest precisely because the role of such advisor is to conduct cross-examination on behalf of one party, and [universities] can determine to what extent a [university] wishes to provide training for advisors whom a [university] may need to provide to a party to conduct cross-examination

Signing Formal Complaint

- Title IX Coordinator's signing of a formal complaint does not place the Title IX Coordinator in a position adverse to the respondent
- Does not prevent the Title IX Coordinator from being free from bias or conflict of interest
- Deciding that allegations warrant investigation does not necessarily show bias

Statistics Not Determinative of Bias

[T]he 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

Court Rulings on Bias

- Crediting female accuser "on her accusation alone" and taking "no other evidence into account" – plausible inference of bias
 - When the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer . . . that the evaluator has been influenced by bias
 - Allegations of a slanted investigative report, a drastic change in position by one investigator, and a possibility that male respondents are invariably found guilty at the university "plausibly establishes a causal connection between gender bias and the outcome of disciplinary proceeding
 - Investigators' omissions in witness summaries and failure to consider evidence of plaintiff and accuser's post-incident consensual sexual encounter "plausibly established a causal link between student's expulsion and gender bias
- [Rossley v. Drake Univ., 2020 U.S. App. LEXIS 35025, *23-24](#)

Conflict of Interest

Dictionary Definition: a conflict between the private interests and the official or professional responsibilities of a person in a position of trust or a conflict between competing duties

See <https://www.merriam-webster.com/dictionary/conflict%20of%20interest>.

MSU Policy Definition: A conflict of interest may exist when an employee has a financial or personal interest in the outcome of an endeavor such that the employee's actions or decisions could be perceived as subject to influence in favor of the employee's interest

Conflict of Interest

Matters to consider:

Personal interests – friendship, relatives, business partners, clubs and groups

University activities – relationship related to person's involvement in other university activities

Consider consultation with Office of Research Compliance and Legal Counsel

Relevance

Rule 401. Montana Rules of Evidence Definition

- Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- In other words: Evidence that assists in determining whether the material facts of the allegations under investigation are more or less likely to be true

Determining Relevance

Factors to be considered:

- Does the evidence pertain to the allegations and the elements necessary to prove or disprove the Respondent engaged in Prohibited Conduct as defined by MSU policy?
- Does the evidence assist in proving or disproving the allegations?

Complainant's Sexual Behavior

- Evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
 - such questions and evidence about the complainant's prior sexual behavior are 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.

Questions