

## Conflicts of Interest, Bias, and Prejudging

### Draft Compliance Training

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).

#### What is a conflict of Interest?

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).

#### What is not an automatic conflict of interest?

- Professional experience
  - “[T]he very 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 such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.” *Id.* at 30,252.
  - Any determination regarding an individual’s conflict of interest or bias depends on an “objective (whether a reasonable person would believe bias exists)” evaluation of the circumstances. 84 Fed. Reg. 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.*
- Employment with the institution? No
  - “[R]ecipients can comply with the final regulations by using the recipient’s own employees” Title IX 85 Fed. Reg. 30,026, 30,252 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). “[T]he final regulations do not prescribe any particular administrative ‘chain of reporting’ restrictions or declare any such administrative arrangements to be per se conflicts of interest prohibited under § 106.45(b)(1)(iii).” *Id.* at 30,252 n.1035. \
- Affiliated with the institution? No

- “The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations” *Id.* at 30,252.

### **What is prejudging?**

The Final Rule’s prohibition against bias and conflict of interest is intended to minimize premature judgment (prejudging) of the facts related to the grievance throughout the Title IX grievance process.

“While the Department acknowledges that Title IX proceedings are not criminal in nature and do not require application of constitutional protections granted to criminal defendants, the Department believes that a presumption of non-responsibility is critical to ensuring a fair proceeding in the Title IX sexual harassment context, rooted in the same principle that underlies the constitutional presumption of innocence afforded to criminal defendants.<sup>1052</sup> In the noncriminal context of a Title IX grievance process, the presumption reinforces the final regulations’ prohibition against a recipient treating a respondent as responsible until conclusion of a grievance process<sup>1053</sup> and reinforces correct application of the standard of evidence selected by the recipient for use in the recipient’s Title IX sexual harassment grievance process. These aspects of the presumption improve the fairness of the process and increase party and public confidence in such outcomes.” *Id.* at 30,258. You may want to pay attention to Footnotes 1052-1054, which cite to a wealth of articles on the criminal concept of presumption of innocence (including a 2002 *Oklahoma Law Review* article) on this exact issue.

### **Additional Training Materials**

- End Violence Against Women International developed a free four-part series on Gender Bias in Sexual Assault Response and Investigations.<sup>1</sup> –at <https://vawnet.org/material/gender-bias-sexual-assault-response-and-investigation>
  - Gender bias in sexual assault response and investigation Part 1 at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=934>
  - Part 2 at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=934>
  - Part 3 at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=940>
  - Part 4 at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=948>
- Review the webinar and materials from the joint DOJ and EVAWI training at

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<sup>1</sup> An archives version of the DOJ OVM notes these training materials at <https://www.justice.gov/archives/ovw/identifying-and-preventing-gender-bias>.

- <https://www.theiacp.org/resources/document/addressing-and-preventing-gender-bias-infographic>
- <https://www.justice.gov/opa/file/799366/download>