

**STUDY GUIDE:
CONFLICTS OF INTEREST**

20-Minutes-to...
Trained

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20-Minutes-to...*Trained*: Conflicts of Interest Learning Outcomes

- Participants will be able to define a conflict of interest.
- Participants will be able to identify different types of conflicts of interest.
- Participants will appreciate how conflicts of interest undermine parties' right to a fair, neutral resolution process.
- Participants will be able to manage conflicts and perceived conflicts in the context of internal resolution procedures.



20-Minutes-to...*Trained*: Conflicts of Interest Discussion Questions

- What is a conflict of interest, generally? What are potential conflicts of interest at your institution?
- What does a perceived conflict of interest look like?
- When do perceived conflicts create a substantial barrier to a fair, neutral process?
- How do institutional policies address perceived conflicts? What is the process for making adjustments to the process based on a perceived conflict?
- If an investigator or hearing officer knows of a potential conflict, how do they communicate that? Is the individual always excluded from the process? If not, what other alternative exists?



20-Minutes-to...*Trained*: Conflicts of Interest Case Studies

Hank

Hank is a clinical director at a very small private medical school. As a supervisor for the majority of the clinical faculty, Hank is often involved when one of his faculty is accused of any type of policy violation, work-related issue, etc. A student has accused one of the faculty of inappropriately touching the student during lab. The accused faculty member has been with the institution for six years and has had no prior work-related incidents. His performance evaluations have always been positive. Hank wants to be involved in the investigation because normally he would deal with misconduct by one of his employees.

Harriet

Harriet is the dean of the college. Her son, Bob, just took a job as a maintenance technician for the boiler room. Bob works the night shift and rarely sees Harriet at work. Most people don't even know the two are related. A month after Bob started, Harriet was accused of sexually harassing an employee in her office. Bob happened to be in the outer office working on ventilation at the time the incident allegedly occurred. Harriet vehemently denies the allegation, and Bob is a critical witness. Bob can testify to the demeanor of the reporting party before and after the meeting, and to what he did or did not overhear during their meeting.



20-Minutes-to...*Trained*: Conflicts of Interest Case Studies Question & Answer

Hank

For Discussion:

- Are there real/perceived conflicts of interest?
 - Hank is a supervising faculty member, so misconduct by one of his subordinates could reflect poorly on his leadership.
 - There is potential that the allegation could indicate the clinical faculty are unsafe or the learning environment needs change, both of which threaten to circumvent Hank's authority.
 - Hank may be inclined to downplay the seriousness of the accusation as a result of this potential.
- What options could the institution consider?
 - The conflict of interest is more perceived than substantiated, so the institution could choose to:
 - Allow the parties to submit written comments on the suitability of Hank as an investigator or hearing officer.
 - Remove Hank from the process to avoid any inference of unfairness.
 - Acknowledge the reporting relationship in writing and have Hank attest that he can conduct the investigation fairly and independently.
 - Investigate independently but apprise Hank of the situation as it evolves to keep him in the loop.
- What do you think is the best course of action? What considerations would help shape your opinion?
 - Because the conflict is perceived merely by organizational structure, and without any other elements, Hank's attestation to ensure independence and neutrality should be sufficient.
 - If there were additional elements indicating a relationship beyond supervisor-employee, that assessment might change.
 - The faculty brings a lot of research dollars or other financial incentives to the employment relationship.
 - Hank and the faculty member have a personal relationship.
 - If there is a larger pool of available investigators, the assessment might change.

- If Hank has made any statements downplaying the allegations or supporting the faculty member, he would most likely not be allowed to participate in the investigation.

Harriet

For Discussion:

- What potential conflicts do you see?
 - Bob is Harriet's son.
 - The institution may have difficulty conducting a neutral investigation with internal resources.
- What issues do these potential conflicts present?
 - Bob's credibility is likely to be diminished by the fact that he is related to the responding party.
 - Conducting an internal investigation with such a visible and influential part of the college's administration presents perceived conflict that will cast doubt on the institution's commitment to neutrality.
- How could the institution resolve the perceived conflicts?
 - Bob should still be permitted to participate as a witness in the investigation. The investigator's credibility assessment should reflect and appropriately weigh his connection to the responding party.
 - The college should strongly consider hiring an outside investigator to convey to the parties and observers that they are committed to neutrality and fairness in the process.



**ATIXA Tip of the Week
Newsletter
April 30th, 2015**

OCR Guidance: Key Takeaways on the Title IX Coordinator Role

Tip of the Week authored by Brett A. Sokolow, Esq., Executive Director, ATIXA

On April 24th, the Office for Civil Rights (OCR) issued new guidance to Title IX Coordinators, College Presidents and School Superintendents. While this new guidance provides detailed resource information to educators, OCR is not issuing new requirements. ATIXA Executive Director, Brett Sokolow, provides his thoughts on major key takeaways from Friday's guidance.

What I take from the latest guidance from OCR about Coordinator roles (in translation) is:

1. The Coordinator needs to have the authority to effectuate compliance, regardless of org structure;
2. The Coordinator will likely need to be a full-time (preferably stand alone) position on many campuses or there will need to be multiple coordinators/deputies;
3. The Coordinator should report by direct or dotted line to the COO (whomever that is: VPAA, Provost, President, Special Asst. to the President, etc.) to assure there are no conflicts of interest;
4. The Coordinator can be a final decision-maker in the process as long as they have not played that role previously in the process;
5. The Coordinator needs to be the centralized hub through whom all cases funnel, who tracks patterns, promptness and remedies and who is responsible to monitor and address climate via surveys and other means.

Conflict of interest – they use the somewhat confusing term independence – in this context means two things. One, you don't vote and two, you don't control the decisions of others. There is no mandate that the Coordinator be a full-time position, but OCR has let us know that compliance cannot fail as a result of understaffing, and that we need to dedicate the personnel (either through full-time Coordinators or an effective Deputy model) to assure compliance. Multiple professionals across difference areas on campuses are particularly well prepared to address sexual violence cases, such as student conduct and human resources.

ATIXA believes an Equity/Inclusion location to house the Coordinator is better than either student conduct or HR (even if it pulls in people from those areas for staffing). As to conflicted roles, such as a Dean of Students, OCR does a disservice by assigning the conflict to a title rather than a role. The conflict is not title-based; it is based on whether you vote and/or control the decisions of others. A Dean of Students who oversees a conduct process but does not vote or control those within it is not conflicted, to my way of thinking.

To take it a step further, extrapolating what OCR has said in this DCL about a Coordinator being a final decision-maker, I think a Dean of Students who is the appeals officer can also serve as Coordinator because it is not a conflict for the Coordinator to be the final decision-maker, assuming neither the Dean nor the Coordinator role is a voting role until the end. I doubt faculty members who are accused will submit to a Dean

of Students as final appeals officer, so another coordinator or Deputy will be necessary on the academic side of the house to accommodate those cases. I will add a sixth role here, below the others, because OCR did not say it, but ATIXA believes it is accurate:

6. The Coordinator is responsible for convening a strategic prevention committee (task force, working group, etc.) and assuring compliance with the mandates of VAWA Section 304 and Title IX for: Paper disclosures, education, training, awareness, risk reduction, and prevention (primary, secondary and tertiary).

As ATIXA remains a part of the discussion with OCR, I will happily continue to advance ATIXA prerogatives and priorities before OCR and other key DC officials.



ATIXA Listserv Posting Anonymous Question

Title IX Oversight

Answered by Brett A. Sokolow, J.D., President, ATIXA

Should the Title IX Coordinator have oversight of the Hearing Committee (Sexual Misconduct Board) that receives the appeals for TIX findings?

I think the Title IX Coordinator could have such oversight, but some level of independence for the Appeals Panel is also of value. The Title IX Coordinator could have a role in selecting such a panel, and/or training them. They could also have a liaison function to the panel (to assure Title IX is satisfied by a Proposed Resolution) without having direct oversight.

Should the TIX Coordinator role just be limited to training the board members or should the oversight come from the Judicial Affairs Officer, Dean of Students, etc. in order to remove a potential conflict of interest?

There is no inherent conflict, but the Title IX Coordinator as a decision-maker is clearly disfavored by the Trump Administrations' OCR. Oversight is really a function of where the panel lives. Is it a stand-alone body, or is it housed within student conduct? Depending on where it lives, it should be overseen the same way as other panels that live in the same place.

What the best practice? Model?

If you are public (especially), I would have the Title IX Coordinator involved in every aspect of the panel except oversight and decision-making, but would create a liaison function where the panel and the Title IX Coordinator consult at the end of the process to be sure that Title IX is satisfied by the Proposed Resolution.



ATIXA Listserv Posting Anonymous Question

Title IX Coordinator and General Counsel

Answered by Brett A. Sokolow, J.D., President, ATIXA

If the proposed Title IX regulations are finalized as-is, do you think the Title IX Coordinator can be general counsel or work in a general counsel's office? It appears that although the Title IX Coordinator needs to be impartial toward complainants/respondents, the Title IX Coordinator is now clearly aligned with the Institute of Higher Education (IHE) and has an interest in protecting the interests of the IHE. What do others think?

Regardless of what regulations are in place, I think such placement is an inherent conflict (and potentially an unethical practice for a general counsel to be the TIXC under the rules of professional ethics).



ATIXA Listserv Posting Anonymous Question

Hearing Board Member Conflict of Interest

Answered by Brett A. Sokolow, J.D., President, ATIXA

For those of you who use faculty, staff and/or students for hearing board members or investigators, how do you decide when they have a conflict of interest based on their background, area of study or outside interests?

I look to direct conflicts that indicate bias or lack of impartiality, but also look to the perception of bias, as I want to risk-insulate my process from collateral attack.

For example, are members of your peer sexual assault support hotline allowed to be on your hearing board?

Students should not be on these panels at all, in my opinion. That said, peer advocates should never be panelists.

What about people who do work with domestic violence victims in the community?

Not a great idea.

What if they are studying sexual assault and domestic violence in classes?

Maybe. Again, students should not be on panels. The issue is not what they are studying, but their politics behind how they view these issues.

Do you peruse the social media postings of your board members to determine whether they're postings about their personal feelings about sexual or domestic violence, such that their might be a perceived conflict of interest?

No, but I ask them self-vetting questions for this kind of concern, as well as any history or skeletons in their own closets they do not want brought out by private investigators or the discovery process.

Not sure where to draw these lines and still have a robust group of board members with values that represent our community.

This worries me. Surely you can find plenty of neutral, objective panelists. If not, maybe a panel is not your best resolution format?



ATIXA Playbook Excerpt Due Process

Due Process Commitment

We've been thinking about ways to advance the commitment of the field to due process, and since administrators are always asking students to sign pledges as a symbol of prevention, we came up the idea for this oath or commitment statement as a pledge you can make to prevent due process violations in your conduct or resolution process.

Maybe you'll frame it and hang it on your wall?

The NCHERM Group Statement of Commitment to Due Process Protections

As a college administrator, you have my commitment to your due process rights.
Specifically, I commit to the following ten assurances...

1. I promise to provide you with a neutral, unbiased, impartial, and objective decision on whether your behavior(s) violates college policy.
2. I commit to understanding and owning my own biases and to check them at the door.
3. I promise to recuse myself from the process should I identify a conflict-of-interest, or should a conflict be brought to my attention.
4. I promise to follow college procedures without material deviation.
5. I promise to honor your humanity and the equal dignity of all participants in the conduct process, and to conduct the process with as much transparency as I can.
6. I commit that I will not find you in violation of college policy unless a preponderance of the evidence establishes that a violation occurred.
7. I promise that the college has the burden of proving whether you violated policy or not; that burden is not on either party.
8. I commit to afford equitable procedural protections to all parties to an allegation of misconduct.
9. I promise not to prejudge the allegations that have been made, and to reserve judgment until all evidence has been gathered.
10. I commit to sufficient annual training and professional development to assure the competence of my role.

Due Process Checklist

Below, we've crafted a practical checklist of due process protections that should be afforded by every college. If you are intrigued by this content, please attend one of our upcoming due process trainings⁹⁵ to learn more about how to operationalize these ideas.

- Right to notice of investigation that includes a reasonable description of the allegations
- Right to access to an advisor of your choice throughout the process
- Right to the least restrictive terms necessary if interim suspension is implemented, and a right to challenge the imposition of the interim suspension

- Right to uninfringed due process rights, as detailed in the college's procedures, if subject to interim actions
- Right to clear notice of the policies allegedly violated if and when the formal allegation is to be made
- Right to clear notice of any hearing in advance, if there is to be a hearing
- Right to receive COPIES of all reports and access to other documents/evidence that will be used in the determination, reasonably prior to the determination (these may be provided in redacted form)
- Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses)
- Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be)
- Right to clear policies and well-defined procedures that comply with state and federal mandates
- Right to a process free of (sex/gender/protected class etc.) discrimination
- Right to an investigation interview conducted with the same procedural protections as a hearing would be (because the interview is an administrative hearing)
- Right to a fundamentally fair process (essential fairness)
- Right to know, fully and fairly defend all of the allegations, and respond to all evidence, on the record
- Right to a copy of the investigation report prior to its finalization or prior to the hearing (if there is one)
- Right to know the identity of the reporting party and all witnesses (unless there is a significant safety concern or the identity of witnesses is irrelevant)
- Right to regular updates on the status of the investigation/resolution process
- Right to clear timelines for resolution
- Right to have procedures followed without material deviation
- Right to a process that conforms to all pertinent legal mandates and applicable industry standards
- Right to have only relevant past history/record considered as evidence
- The right to have the burden of proving a violation of policy borne by the college
- Right to the privacy of the resolution/conduct process to the extent of and in line with the protections and exceptions provided under state and federal law
- Right to a finding that is based on the preponderance of the evidence
- Right to a finding that is neither arbitrary nor capricious
- Right to be timely informed of meetings with each party, either before or reasonably soon thereafter (unless doing so would fundamentally alter or hamper the investigation strategy)
- Right to sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the responding party
- Right to the outcome/final determination of the process in writing as per VAWA §304
- Right to a detailed rationale for the finding/sanctions
- Right to an appeal on limited, clearly identified grounds
- Right to competent and trained investigators and decision-makers
- Right to a written enumeration of these rights