



**LEVEL FIVE – BIAS & CULTURAL COMPETENCIES
TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING &
CERTIFICATION COURSE**

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TRAINING OUTLINE



Day One

- I Understanding Bias
- II Microaggressions
- III Leading Efforts to Mitigate Bias in Title IX Systems
- IV Opportunities to Address Bias and Cultural Competency in our Title IX Systems

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TRAINING OUTLINE



Day Two

- I Building an Effective Training Program
- II Policy Development & Process Design Considerations
- III Strategies to Mitigate Bias
- IV Other Tips for an Inclusive Title IX Office
- V Free Speech Tensions

WELCOME AND SETTING THE STAGE



- Introductions.
- Setting Norms.
- Learning Outcomes.
 - Defining personal strategies for bias-reduction.
 - Identifying campus needs for training and bias-reduction.
 - Reducing microaggressions in Title IX processes.

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WHY THIS WORK MATTERS



- Central to ATIXA's mission is the need to ensure that our trainings and programs include a focus on inclusive practices. This should also be central to the mission of your individual institutions.
- Our Title IX programs are stronger when we broaden our outlook and develop greater awareness of how our systems can better address the diverse needs of our students, faculty, and staff.
- This is an important topic to mitigate potential risk and legal liability in our institutions and schools.

ACTIVITY – PART 1

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TRUSTED TEN

- Think of the first names or initials of people you trust (not your family members), and write them down.

1. Most trusted advisors
2. Friends
3. Acquaintances



INTRODUCTORY CONCEPTS

- What is bias?
- Sources/causes of bias
- Common types of bias
- Acknowledging privilege



WHERE DOES BIAS
COME FROM?

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WHAT IS BIAS?



- A preference or tendency to like or dislike.
- A cognitive process.
- “Systematic error” in our thinking process.
- Mental shortcut.
- A habit learned over time through repeated personal experience.
- Implicit or expressed.
- Can be intentional, but generally unintentional.
- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you.
- Can affect our perceptions of reporting *and* responding parties.

WHERE DOES BIAS COME FROM?



- Past experience.
- Family and early childhood experiences.
- Biology.
- Institutional pressures.
- Stereotypes, societal norms.
- Politics and religion.
- Our own identity/affinity groups.

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SOURCES OF BIAS (OR PRIVILEGE)



- Age
- Citizenship Status
- Ethnicity
- Gender
- Gender Identity/Expression
- Marital Status
- Mental Health
- National Origin
- Parental Status
- Physical Abilities
- Race
- Religion
- Sexual Orientation
- Socioeconomic Status (can include finances, education, housing, etc.)

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INFORMATION OVERLOAD?



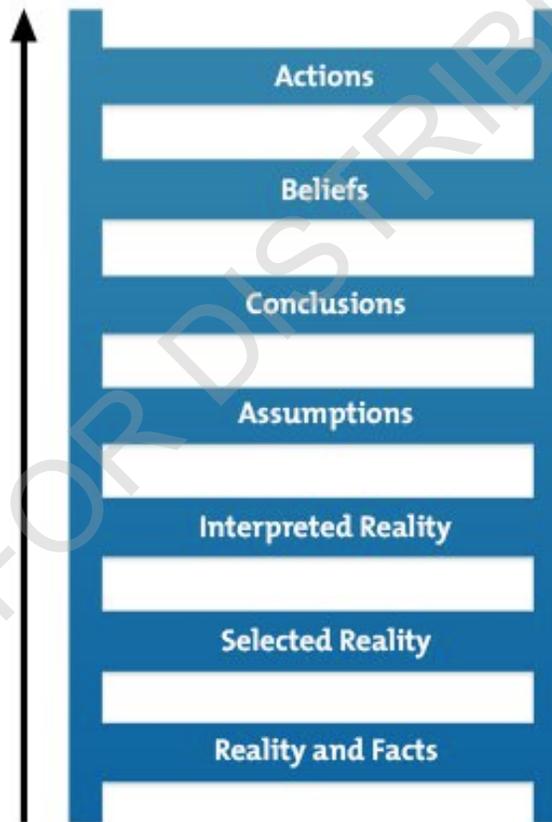
- Researcher Timothy Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* describes the neuroscience behind unconscious bias:
 - Our senses gather approximately 11 million bits of information every moment.
 - We can only consciously process 40-50 bits per second.
 - This means that 99.999996% of our information processing is unconscious!

- From Mindbridge's Implicit Bias Project:
 - “Our day-to-day experience lies at the intersection point between the brain and the mind. The mind: our conscious perception, thoughtful consideration, and focused attention. The brain: our extraordinarily complex neurocircuitry, driving a range of unconscious beliefs and behaviors.”
- The Rider and the Elephant
 - 40-90% of our behaviors are unconscious.
 - It takes 50 milliseconds to register someone's gender when we first see them.
 - It takes only 100 milliseconds to register someone's race.



LADDERS OF INFERENCE

- Developed by Chris Argyris.
- Describes our customary thinking process to get from a fact to a decision.



- Question your assumptions and conclusions.
 - Think about the data or information selected to come to that conclusion and test to see if any other data that you did not select may lead to a different judgment/conclusion.
- Seek contrary data.
 - Try to identify (and validate) additional information or rationales that could lead to a different judgment/conclusion.

TYPES OF BIAS

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UNCONSCIOUS AND IMPLICIT BIAS



- Unconscious bias:
 - Prejudice or unsupported judgments in favor of or against one thing, person, or group as compared to another, in a way that is usually considered unfair.
 - Often happens automatically in our brains.
- Implicit bias:
 - Refers to the attitudes or stereotypes that affect our understanding, actions, and decisions.
 - Can be pervasive.
 - Does not necessarily align with our declared beliefs.

COMMON TYPES OF BIAS



- Confirmation Bias.
- Correspondence Bias.
- Experience Bias.
- Availability/Recency Bias.
- Affinity Bias.
- In Group, Out Group Bias.
- Bias Blind Spot.
- Bandwagon Effect.
- Stereotype Threat.

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CONFIRMATION BIAS



- Favoring ideas that confirm our existing beliefs and what we think we know.
- Most common form in resolution processes.
 - Impact on investigations and adjudications.
- Form early hypothesis and tend to seek or overvalue evidence that fits it or confirms it.

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CONFIRMATION BIAS (cont.)



- Tendency to search for, interpret, favor, and recall information in a way that confirms one's pre-existing beliefs or hypotheses.
- Interpreting ambiguous evidence to support our hypothesis or existing position.

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CORRESPONDENCE BIAS



- Tendency to make inferences about a person's disposition from behaviors that can be explained by the situation and context in which they occur.
- *Example:* witnessing someone kicking a vending machine and assuming they are “an angry person.”
- Source of this bias?
 - Lack of awareness.
 - Unrealistic expectations.
 - Inflated categorization.
 - Incomplete corrections.

- The tendency to see the world from your experience.
- *Dunning-Kruger Effect* – individuals with a low level of knowledge in a particular subject mistakenly assess their knowledge or ability as greater than it is.
 - “Overconfidence bias.”
 - Can increase the more “expert” we get at something.

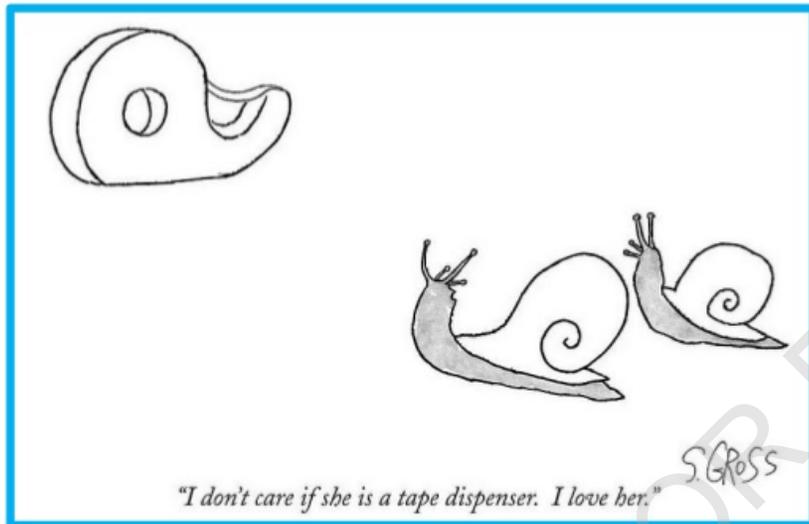
AVAILABILITY BIAS/RECENCY BIAS



- Tendency to weigh the latest information more heavily than older data.
- Example: Investors tend to base their market expectations on how the market has been performing recently, whether good or bad.

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AFFINITY BIAS



- Tendency to warm up to people like ourselves.
- Inclination to prefer people who are a “good fit.”

IN GROUP, OUT GROUP BIAS



- We have a tendency to be kinder and gentler to ourselves when making judgments about our successes and failures.
- Extends to:
 - People we care about/feel close to.
 - People who we perceive as similar to us.
 - People who we perceive to be “in” our own group.
- Tendency to be more favorable toward “in” group.

BIAS BLIND SPOT



- Failure to recognize our own cognitive biases is a bias in and of itself!
- We are better able to see the existence and effects of cognitive biases in others' thinking than we are able to see in our own thinking.

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BANDWAGON EFFECT



- “Herd” mentality.
- Probability of one person adopting a belief increases based on the number of people who hold that belief.
- Powerful and sometimes harmful form of “groupthink.”

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- Being in a situation or doing something where there are typically negative stereotypes about some dimension of one's identity.
 - Academic performance.
 - Expectations about one's behavior.
- Individuals experience diminished performance due to the expectation they will “meet” the stereotype:
 - Anxiety, mental stress, underperformance.
 - Example: Task or exam becomes more difficult.
- Claude Steele, *Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do*

First Impressions

- You have been assigned to investigate a case of non-consensual sexual intercourse, including issues of incapacitation due to alcohol, between one female and one male student. Yesterday you interviewed the reporting party, who seemed very nervous, and had a difficult time telling her story.
- Today, you meet with the responding party, a fraternity member, who arrives to your office a few minutes early and dressed as if for a job interview. He is arrogant, evasive, and hypermasculine.
- How do think about the demeanor of each student?

IMPACT OF BIAS IN TITLE IX SYSTEMS



- Feeling disempowered.
- Power/position of the harasser/discriminator.
- Belief that nothing will come of it.
- Concerns about confidentiality/privacy.
- Not knowing to whom to disclose.
- Not knowing how to disclose.
- Nature of institutional policies and prohibitions.
- Fear of getting in trouble.
 - E.g.: concerns if alcohol/drugs were used concurrent with incident(s).

IMPACT OF BIAS ON TITLE IX SYSTEMS



- Not defining what happened as sexual violence, harassment, or discrimination.
- Feel it is not serious enough.
- Negative associations with institutional, medical, law enforcement, or legal establishments.
- Nature of trauma and re-traumatization.
- Mental illness.
- Others?

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ACTIVITY – PART 2

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TRUSTED TEN



- Return to the names or initials of people you wrote down earlier.
- Who are the people who you trust the most?



- Observations about your own trusted ten?
- What was your experience with this exercise?
- Application to your Title IX work?

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SMALL GROUP DISCUSSION



- Overall, with this framework in mind, how does it affect your thinking about your Title IX work on your campus?
- At this stage, what are you thinking about as “takeaways” for the needs of your particular campus?
- What personal goals do you have to apply these concepts to your particular campus’s needs?

MICROAGGRESSIONS

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EXPERIENCING MICROAGGRESSIONS



- Not all biased language or behavior is direct.
- Microaggressions are defined as “brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership.”
- Often unintentional.
- Can be described in three categories:
 - microassaults,
 - microinsults,
 - microinvalidations

Sue, D. (2010). *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation*. Hoboken, NJ: John Wiley & Sons.

Sue, D., Bucceri, J., Kin, A., Nadal, K. & Torino, G. (2007b). “Racial microaggressions and the Asian American experience” *Cultural Diversity and Ethnic Minority Psychology* 13: 72–81.

EXPERIENCING MICROAGGRESSIONS



Examples

- Generational diversity.
- Geographic differences.
- Gender.
- Language or culture.
- Mental health disabilities.
- Physical disabilities.
- Political ideology.
- Race and ethnicity.
- Religious beliefs.
- Sexual orientation.

EXPERIENCING MICROAGGRESSIONS



Microinsults

- **Microinsults** are actions that disrespect or demean a person based on their group status.
- An example of this could be a student who selects an Asian-American student as a tutor based on the generalization that Asian-Americans do well in math.
- These comments may come out of ignorance, poor access to teaching, information about ethnicity and culture, or stereotyping.

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Sue, D., Bucceri, J., Kin, A., Nadal, K. & Torino, G. (2007b). "Racial microaggressions and the Asian American experience." *Cultural Diversity and Ethnic Minority Psychology* 13: 72–81.

EXPERIENCING MICROAGGRESSIONS



Microinvalidations

- A student in a public speaking class who congratulates an African-American student on a presentation by saying, “I’m really surprised at how well that went. You were very well-spoken today” is an example of a **microinvalidation**.
- This kind of comment sends the message to the African-American student that “I didn’t expect you to be so well-spoken today in class.”

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CASE STUDY



Reese is a responding party in a Title IX investigation. Upon meeting with the investigator, Reese is asked for any material evidence supporting Reese's version of events: text messages, social media posts, screenshots, phone photos, etc. Reese is on campus on a full scholarship and doesn't own a cell phone or personal computer.

- How could the investigator reframe questioning to be more inclusive of parties at all socioeconomic levels?
- How can the process account for variable access to technology, attorneys, etc.?
- How might socioeconomic issues impact the process at a range of institutions: rural, two-year, tribal, other?

IMPACT OF MICROAGGRESSIONS ON REPORTING



- Fear of not being believed.
- Fear of being blamed.
- Fear of retaliation by:
 - Friends/peers
 - Institution/administration
 - Faculty
 - Family
- Guilt/shame.
- Cultural norms.
- Religious concerns.
- Familial concerns.

ADDRESSING MICROAGGRESSIONS



- Constant vigilance of your own biases and fears.
- Experiential reality; interacting with those different from you in terms of race, culture, and ethnicity, etc.
- Don't be defensive.
- Be open to discussing your own attitudes and biases.
- Be an ally, stand personally against all forms of biases and discrimination.

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PREVENTING MICROAGGRESSIONS



- Pronounce names correctly, and especially after being corrected.
- Don't assume gender.
- Use correct pronouns.
- Avoid scheduling interviews or hearings on religious or cultural holidays.
- Avoid always using heterosexual examples in Title IX trainings, especially in describing “word against word” cases.
- Acknowledge socioeconomic differences; don't assume all students have access to technology (such as iPhones).
- Don't change your way of speaking or acting to a way in which you perceive may be more aligned to the person with who you are interacting (e.g. use of slang)

LEADING EFFORTS TO MITIGATE BIAS IN OUR SYSTEMS

—
Title IX Coordinator/Administrators as
Leaders in Bias Mitigation Work

LEADING EFFORTS TO MITIGATE BIAS



- Why does bias create problems for Title IX Administrators and in Title IX systems?
 - Impacts the ability to build rapport, connect, and create safe/neutral spaces for all parties to seek our assistance and/or participate in our processes.
 - Leads us to ignore valuable evidence.
 - Leads us to make assumptions not based on evidence.
 - Impacts what we remember and what witnesses remember.
 - Impacts how we evaluate and value witnesses, parties, and narratives.
 - Creates “blindness” in our decision-making.

DO WE UNDERSTAND HOW BIAS AFFECTS OUR TITLE IX SYSTEMS?



- Lack of data regarding the impact of Title IX systems on various identity groups/protected classes.
- Implicit bias affects perceptions of reporting **and** responding parties, witnesses, and campus community.
- Definitions of offenses may be perceived to have different meanings depending on one's background and experiences.
- Difficult to conduct oversight of Title IX processes, which are inherently secretive/closed to public scrutiny.

IDENTIFYING SPECIFIC TRAINING NEEDS/POPULATIONS



- Title IX officers
 - Deputy Coordinators
 - Investigators
 - Hearing Officers/Decision-makers
 - Appeals Officers/Decision-makers
 - Advisors
- Campus police/security/school resource officers
- Employees
 - Faculty
 - Staff
 - “Responsible Employees”

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IDENTIFYING SPECIFIC TRAINING NEEDS/POPULATIONS



- Students
 - Training for new students
 - Effective prevention work
 - Reporting parties
 - Responding parties
 - Witnesses
 - Student subgroups
 - Greek life/student organizations
 - Athletic teams

- Parents/Families

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CAMPUS PARTNERS



- President/senior leadership/superintendent/board
- EEO Office leadership
- Human Resources
- Chief Diversity Officer/Diversity & Inclusion staff
- Student Affairs staff/Dean of Students
- Principals/Vice or Asst. Principals
- Provost/Academic Affairs
- Institutional Research
- General Counsel's office
- Community Partners
- Professional Development opportunities on- and off-campus

OPPORTUNITIES TO ADDRESS BIAS AND CULTURAL COMPETENCY IN OUR TITLE IX PROCESSES

—
Intake Issues

Investigations/Adjudications

Litigation Trends

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BIAS & REPORTING: WORKING WITH REPORTING PARTIES



- Reputation/perception of office by campus community.
- Lack of diversity of those involved in the process.
- Unsupportive responses.
 - Avoid:
 - Taking control any more than you have to.
 - Escalating the situation.
 - Defining or labeling their experience.
 - Asking why questions.
 - “Why did you . . . ?”
 - Verbalizing judgment in the moment.
 - Telling them they must press charges.
- Perceptions about involvement of law enforcement.

BIAS & REPORTING: WORKING WITH RESPONDING PARTIES



- Reputation/perception of office by campus community.
- Lack of diversity of those involved in the process.
- Trauma-informed processes can create actual or perceived bias in favor of reporting parties and against responding parties.
 - “Believe first” mindset.
- Have printed materials specific to the common questions and concerns of responding parties.
- Acknowledge and plan for their need for support.
 - Counseling.
 - Advisors.

BARRIERS TO REPORTING GENDER-BASED VIOLENCE



- Cultural issues of appropriateness.
- Shame of being outed, losing control.
- Family judgment.
- Loss of friends, support group.
- Personal safety around campus.
- Religious persecution.
- Fear of having one part of your life take over your entire life.

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UNIQUE CONSIDERATIONS



- Populations:
 - Male reporting parties.
 - Reporting parties from historically marginalized groups/communities.
 - LGBTQI reporting parties.
 - International parties.
 - Parties with disabilities.
 - Parties with histories of mental health issues.
 - Reporting parties of drug-facilitated assaults.
 - Reporting parties of repeat assaults.
- Underreporting.
- Stereotyping.
- Internalized and/or institutionalized bias/prejudice.
- Lack of informed, available services.

INTAKE ISSUES FOR RESPONDING PARTIES



- Emphasize the institution's focus on the fairness of the process, not the outcome of the case.
- Be exceedingly transparent about process and timelines.
 - Notice of allegations/investigations.
- Interim measures must be tailored to the specific circumstances.
 - The era of blanket “interim suspensions” is (and should be) over.
- Ensure that the process considers both exculpatory and inculpatory evidence.
 - Investigator/adjudicator work product should reflect this consideration.

MALE REPORTING PARTIES



- Perpetrators of any sex.
 - Power and control.
 - Within the context of relationships.
- Gender norms.
 - Fear.
 - Embarrassment.
 - Self-defense.
 - Perceptions about sexual orientation.
- Physiology.

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IMPACT OF CULTURAL DIMENSIONS ON WILLINGNESS TO REPORT



- Reporting parties of color (especially women) may also have cultural forces impacting their willingness to report. Examples:
 - Taboos in discussing sexual matters.
 - Submissiveness in response to machismo and male authority.
 - Concerns about community response and attitudes.
 - Impulses to deny harassment when the harasser is a member of the same community of color, so as to preserve cohesion in the community.
 - Cultural norms for sexual harassment may be different in home/family belief systems.

RACIAL BIAS IN INVESTIGATIONS/ADJUDICATIONS



- Allegations of disparate racial treatment in campus Title IX processes:
 - Overrepresentation of responding parties who are male students of color (and especially black male students).
 - “spotlighting” and “dimming”
 - Failure to provide due process protections alleged to be motivated by implicit or explicit racial bias.
 - Concerns that administrators take more seriously concerns/reports brought forward by white reporting parties than by reporting parties of color.

RACIAL BIAS IN INVESTIGATIONS/ADJUDICATIONS



- Allegations of disparate treatment for students of color in Title IX cases.
 - Emily Yoffe, “The Question of Race in Campus Sexual-Assault Cases,” *The Atlantic*, Sept. 11, 2017.
- Consider the effect of Clery’s timely warning requirement?
 - How can we prevent racial profiling or the perception of racial profiling?

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SIMILAR OBSERVATIONS FROM PREK-12 RESEARCH



- Large body of scholarly research documenting disproportionate disciplinary exclusion (suspension/expulsion) of minority children in public school settings.
- OCR's data documents that black students are suspended and expelled at a rate three times greater than white students.
- Pattern is especially pronounced when punishing ambiguously-defined conduct.
 - For example: disrespect, excessive noise.

Source: 2013-2014 Civil Rights Data Collection

INTERNATIONAL PARTIES



- Students, faculty, and staff.
- Language barriers.
- Cultural variance and differentiation.
 - Religious considerations.
 - Interaction between men and women.
 - LGBT barriers.
 - Use of alcohol and drugs.
- Pride, shaming, and disowning.
- Unfamiliarity with or trust in counseling and medical services and support.

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PARTIES WITH DISABILITIES



- Often subject to higher levels of sexual assault than other populations.
- Ability to consent may be impacted.
- Lack of prevention education.
- Taboo.
- Accommodations often an afterthought in Title IX processes.

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- National Council on Disability, *Not on the Radar: Sexual Assault of College Students with Disabilities* (Jan. 2018).
 - 31.6% of undergraduate women with disabilities reported nonconsensual sexual contact involving physical force or incapacitation compared to 18.4% of undergraduate women without disabilities.
 - Absence of policies and procedures to ensure disability-related supports are readily available to students who need assistance communicating with first responders.
 - Prevention and education programs are not inclusive of students with disabilities.
 - Accommodations are often an overlooked part of Title IX processes.

LGBTQI OR SAME-SEX PARTIES



- Heterosexual or LGBTQI responding parties.
- Rates of sexual violence within the LGBTQI community.
- Targeting based on (perceived) identity.
- Reporting or responding may force “outing.”
- Fear of betraying community.
- Unique health concerns.
- Gender-neutral language.
- Religious overlay.
- Familial tensions.

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TERMINOLOGY



- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

TERMINOLOGY (CONT.)



- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

TERMINOLOGY (CONT.)



- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

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TITLE IX & TRANSGENDER STUDENTS



- Common Concerns and Current Challenges
 - State-based legislation.
 - Waffling OCR.
 - Conflict between Title VII (EEOC) and Title IX (OCR).
 - Possible federal legislation.
 - Discomfort and the claim of reverse discrimination.
 - Educating campus communities and constituencies.
 - Religious concerns.
 - Religious institutions, club or group membership and/or leadership, sharing of restrooms etc.

TITLE IX & TRANSGENDER STUDENTS



- Transgender students are disproportionately subjected to harassment and discrimination.
- Sexual violence statistics from the AAU's 2015 Climate Survey of 150,000 students:
 - Those identifying as TGQN (transgender, genderqueer, nonconforming, questioning, or something not listed on the survey) have rates comparable, or in many cases slightly higher, than female-identifying students.
 - Sexual misconduct involving penetration by force or incapacitation.
 - Undergraduates identifying as TGQN had the highest rates (12.4%), followed by undergraduate female-identifying (10.8%) and graduate TGQN students (8.3%).

TITLE IX & TRANSGENDER STUDENTS



- In May 2016, OCR released a Dear Colleague Letter specifically addressing Title IX's protections for transgender students.
- In February 2017, OCR revoked the DCL.
- In February 2017, ATIXA updated and re-released its position statement on Title IX, Gender Identity, and Gender Expression.
 - ATIXA believes that Title IX does protect students on the basis of gender identity.
- EEOC and numerous courts have determined gender identity is protected under Title VII.
- *SCOTUS has granted cert on three cases for the October 2019 term to review whether Title VII includes gender and transgender.*

LITIGATION TRENDS: ERRONEOUS OUTCOME/GENDER BIAS



- Erroneous outcome = School made an incorrect finding or a finding in error.
- Asks the court to re-evaluate the decision of the institution (courts are reluctant to do so).
- Title IX erroneous outcome claims are increasingly used by responding parties as basis for litigation.
- For Title IX EO claims, **courts must find causation, i.e. that gender bias caused the incorrect outcome.**

LITIGATION TRENDS: ERRONEOUS OUTCOME/GENDER BIAS



- Much of the spate of Title IX litigation involves claims of gender bias.
 - Reverse discrimination claims. Male responding parties claiming:
 - Investigation and/or the adjudication was flawed.
 - Flaws were a result of the gender bias.
 - The institution reached an erroneous outcome.
 - Plaintiffs allege facts such as:
 - Substantial public criticism/pressure of the institution’s handling of Title IX matters.
 - Statements that the institution was “getting serious” about Title IX.
 - Statements made by investigators/adjudicators that support an inference of gender bias.

LITIGATION TRENDS: ERRONEOUS OUTCOME/GENDER BIAS



- Courts examine the following for evidence of **gender bias**:
 - Institutional policies & procedures.
 - Training materials for: Coordinators, investigators, hearing officers, appellate officers, students, employees, etc.
 - Pressure from Public Affairs issues.
 - Notes, emails, reports of investigators and hearing officers.
 - Support provided to reporting and responding parties.
 - Conflicts-of-interest.
- Examples:
 - *Yu v. Vassar (2015)*
 - *John Doe v. Washington & Lee (2015)*
 - *John Doe v. Columbia Univ. (2015)*
 - *John Doe v. Univ. of Cincinnati (2015)*
 - *John Doe v. Cornell (2016)*
 - *John Doe v. George Mason Univ. (2016)*
 - *John Doe v. Brown Univ. (2016)*
 - *John Doe v. Amherst (2017)*

LITIGATION TRENDS: SELECTIVE ENFORCEMENT/GENDER BIAS



- **Selective enforcement** = Institution treats one sex differently than the other for purposes of discipline.
- Increasingly used by responding parties as basis for litigation (often in-tandem with EO claims).
- For Title IX selective enforcement claims, **courts must find intentionality, i.e. that gender bias caused the differential.**
- Examples
 - *Yu v. Vassar (2015)*
 - *John Doe v. Washington & Lee (2015)*
 - *John Doe v. Univ. of Cincinnati (2015)*
 - *John Doe v. Columbia Univ. (2015)*
 - *John Doe v. Amherst (2017)*

FREE SPEECH TENSIONS

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INTERSECTION WITH FREE SPEECH ISSUES



- Title IX teams often operate in tandem with Bias Response Teams, designed to document, review, and respond to reports of bias and discrimination.
- There is an inherent tension between addressing biased speech on campus and promoting free speech and academic freedom.

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INTERSECTION WITH FREE SPEECH ISSUES



- Limitations:
 - Actions/conduct/speech protected by **academic freedom**.
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research.
 - Actions/conduct/speech protected by the **First Amendment**.
 - Merely offensive conduct cannot be disciplined at a public (or CA) university.
 - Must be **severe, pervasive (persistent), and objectively offensive**.
 - Subjectively offensive conduct cannot be disciplined at a public (or CA) university unless it is also objectively offensive.
- May still provide support and resources to the responding party and the community as appropriate.

- Frank, an openly gay student, comes to you to complain that Professor Jones, his (tenured) English faculty professor, has made comments in class that Frank feel unsafe.
- Specifically, he alleges that Prof. Jones made the following comments:
 - After the transgender letter was repealed by the Trump administration, Prof. Jones brought it up in class and said, “Finally, some common sense from Washington – you are either a man or a woman. Period.”
 - When a student wore a gay pride shirt to class, Prof, Jones said, “I get not being ashamed of who you are having sex with, but is ‘proud’ really the word you should use?”
 - He assigned all the students in the class to write their persuasive essays on “trying to convince me that people should be able to use whatever bathroom they want to.”

CASE STUDY



- There are about 26 students in the class, and Frank brought with him Georgina, Haley, Isaiah, Jeremy, and Ken. He tells you that all the students will back him up and that he has heard that Prof. Jones is not liked in the department as well.
- Frank also tells you that he knows a student who is a transgender woman. He says she is not comfortable even going to the English department offices because she also feels “unsafe.”

CASE STUDY: DISCUSSION



- Do Prof. Jones's statements and actions constitute a policy violation? Why or why not?
- If you start to look into the allegation(s), can Frank remain anonymous?
- What interim measures might be taken?
- Would they be different if Jones was tenure-track or adjunct?
- Frank requests that you assist him in withdrawing from Jones's class, as do the other five students.
 - What considerations come into play here?

TRAINING AND TOOLS

- Current Requirements
- Group Activities
- Other Training Tools

BUILDING AN EFFECTIVE TRAINING PROGRAM



- Current legal requirements.
- Sample training activities to use with your Title IX team.
- Identifying the specific training needs on your campus.
 - Who to train?
 - What are the most necessary training elements needed right now?
 - How can you dovetail with other implicit bias training on your campus?

BARRIERS/RESISTANCE TO EFFECTIVE TRAINING



- Common to resist assessing/critiquing oneself.
- Implicit bias is everywhere and commonplace.
 - Unintended message of “normalizing” it rather than addressing it.
 - Can seem overwhelming to mitigate.
- Can I be effective if I am the only one out there trying?

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CURRENT TRAINING REQUIREMENTS



- Clery/VAWA impliedly acknowledges value of bias-informed trainings for community at large and individuals in the process:
 - Prevention programming must be “culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome . . .”
 - Training for officials involved in process who receive annual training.
 - Officials must not have a conflict of interest or bias for/or against the “accuser or accused.”
 - 34 C.F.R. § 668.46.

- No specific training requirement, but a directive to avoid “[a]ny training materials or investigative techniques and approaches that apply sex stereotypes . . .”
- Ensure that adjudications proceed without any conflicts of interest or biases:
 - Institutional interests.
 - Application of sex stereotypes or generalizations.

OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
 - Provided 60 days for public comment – open until January 28th.
 - OCR will then review comments and finalize the regulations.
 - OCR has to respond materially to comments.
 - Will amend the Code of Federal Regulations.
 - **Will have the force of law once adopted.**
 - Proposed amendments are significant, legalistic, and very due process-heavy.
 - Will likely go into effect 30 days after final regulations published in Federal Register.

PROPOSED REGS: CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures.
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party.
- Training mandates apply to PreK-12 as well as higher ed.
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority.
- Due process mandate does not distinguish public v. private.

PROPOSED REGS: TRAINING MANDATES



- Also call for training on how to conduct impartial investigations and adjudications and avoid relying on sex stereotypes.
 - Coordinators.
 - Investigators.
 - Decision-makers.
 - Appellate decision-makers.

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GROUP ACTIVITY: ATTITUDE SURVEY



- Please indicate whether or not you agree with the statements below by jotting down the appropriate answer:
- 1. Texting while driving is dangerous. a. Yes b. No
- 2. It is important to stay informed about proposed legislation that affects the community. a. Yes. b. No.
- 3. Soft drinks/sodas are unhealthy beverages. a. Yes. b. No.
- 4. Poverty is a serious problem that must be addressed. a. Yes b. No
- 5. Smoking is an unhealthy behavior. a. Yes b. No

BEHAVIOR SURVEY



COGNITIVE DISSONANCE



- Conflicting thoughts.
- Causes anxiety and discomfort.
- Natural reaction is to move out of dissonance.
- Coping:
 - Rationalization, Denial, Minimization.
- Recognize and challenge the anxiety and discomfort.

From "Breaking the Prejudice Habit, Virginia Ball Center for Creative Inquiry, Ball State University

GROUP DISCUSSION



- Did you experience cognitive dissonance? Why or why not?
- What thoughts were going through your head as you completed the second survey and had answered incongruent with the first?
- What was your emotional reaction to experiencing dissonance?
- What strategies did you use to try and lessen your experience of dissonance?
- Can you imagine using this activity (or some version of it) in training constituencies on your campus? How?

IMPLICIT ASSOCIATION TEST



- Harvard University's *Project Implicit*
 - [Implicit.Harvard.edu](https://implicit.harvard.edu)

- Offers several Implicit Association Tests
 - Race IAT
 - Skin-tone IAT
 - Weight IAT
 - Age IAT
 - Religion IAT
 - Sexuality IAT
 - Disability IAT

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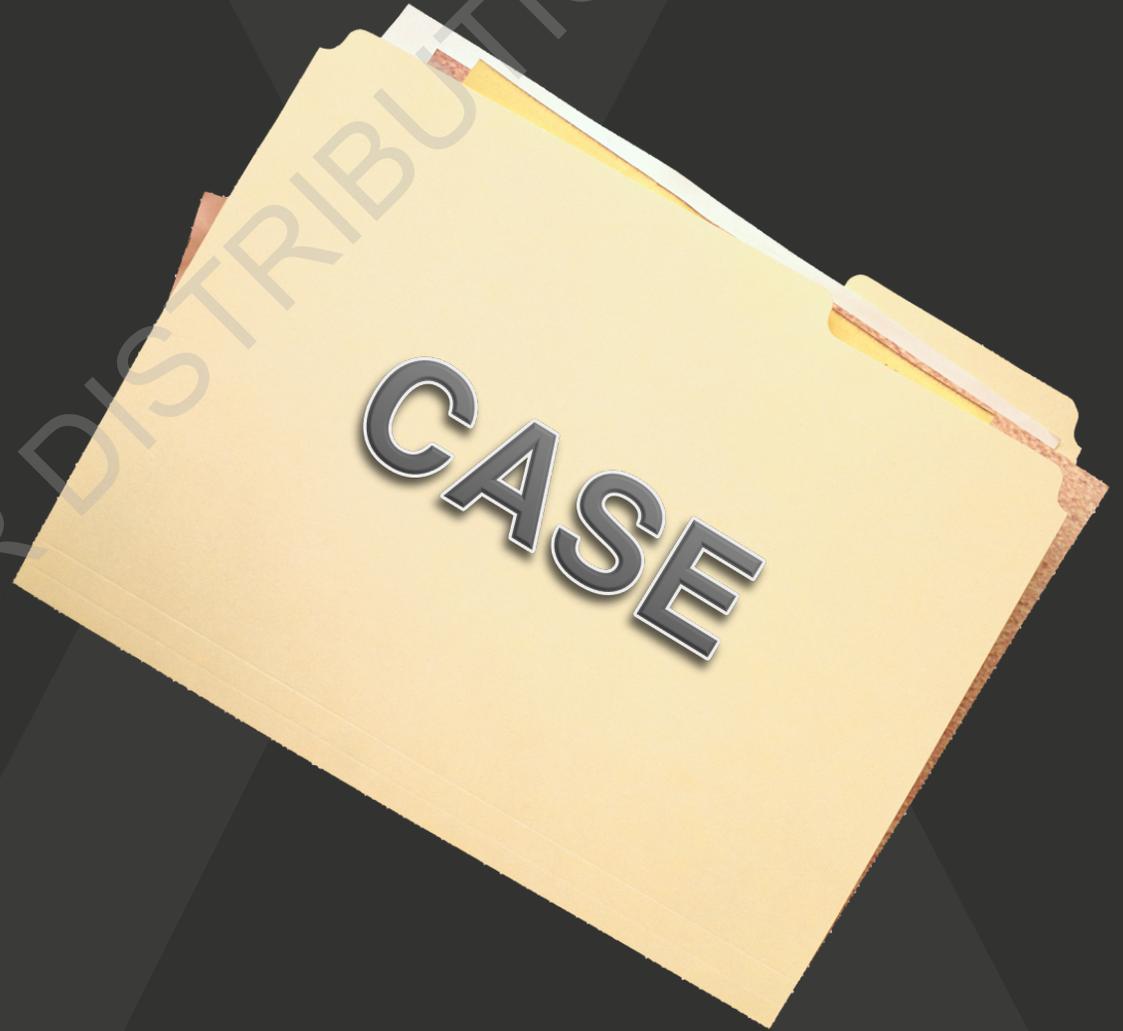
IMPLICIT ASSOCIATION TEST



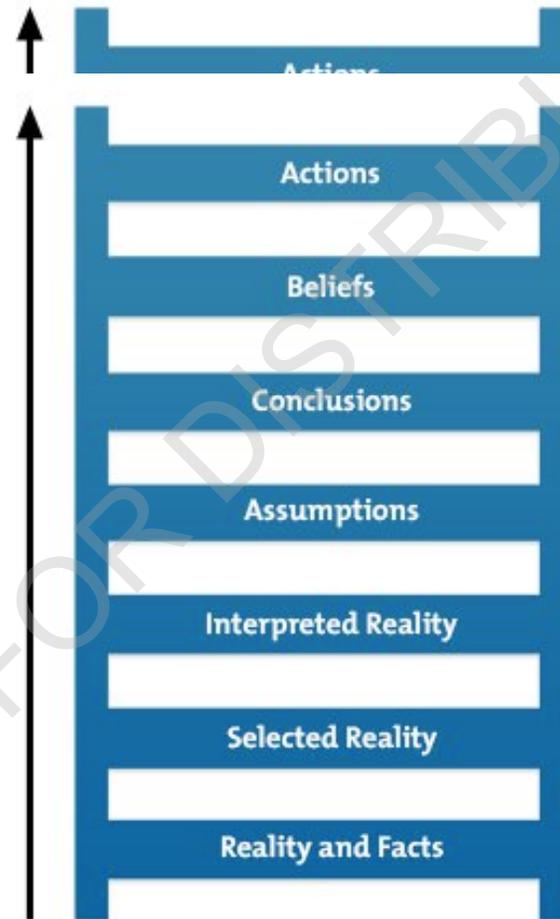
- Association activity.
- Often reveals automatic preferences.
- Compares participant to community at large.
- Use with care.

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CASE STUDY



LADDERS OF INFERENCE



- Working down the ladder of inference, rung by rung:
 - Why did the panel choose this course of action? Were there other actions to consider?
 - What belief led to the action? Was it well-founded?
 - Why did the panel draw that conclusion? Was it sound?
 - What were assumptions, and why? Were they valid?
 - What data was selected?
 - Other facts to consider?

BIAS & CULTURAL COMPETENCY TRAINING BY TASK



- Relationship/Rapport Building/Microaggressions.
 - Deputy Coordinators
 - Other intake staff.
 - Support/first responders.
 - Advisors.
 - Investigators.
 - Hearing Panel Chairs.
- Questioning.
 - Investigators.
 - Decision-makers.

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BIAS & CULTURAL COMPETENCY TRAINING BY TASK



- Conflicts of Interest.
 - Investigators.
 - Decision-makers.
 - Appeals officers.
- Bias-reduction in decision-making.
 - Investigators.
 - Decision-makers.
 - Appeals officers.
- Bias-reduction in writing.
 - Investigators.
 - Decision-makers.
 - Appeals officers.

TRAINING NEEDS RE: DISABILITY ACCESS



- Ensure that Title IX professionals are trained on how to provide disability accommodations, in collaboration with accessibility professionals/coordinators on campus.
 - In reporting processes.
 - In utilizing supportive services
 - In disciplinary processes.
 - In accessing information about the policy, process, resources, options, etc.
- Provide training to Security, Residential Life, and other “first responder” staff regarding disability accommodations in crisis settings.

OTHER TRAINING CONSIDERATIONS



- Train carefully on trauma-informed practices.
 - Important skill for investigators specifically.
 - If used too broadly, raises risk of inappropriate reliance on “sex stereotypes” as a substitute to credibility analysis.
- Dovetail with other bias training occurring on your campus for faculty and staff generally.
 - Consider offering opportunities for your decision-makers, panel members, or investigators to gather separately to consider the impact of other training on your Title IX processes.

GROUP DISCUSSION



- Does your campus currently integrate bias-awareness training into your Title IX training efforts?
- What have you tried that has been successful?
- How do you train your investigators/adjudicators regarding identifying conflicts of interest?
- Do you screen your investigators/adjudicators regarding the “perception of bias?” If so, how?

POLICY/DUE PROCESS CONSIDERATIONS

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PROPOSED TITLE IX REGS ADDRESS “BIAS” IN TITLE IX PROCEDURES



- Separating roles is, in part, an effort to prevent bias.
 - Title IX Coordinator.
 - Investigator.
 - Decision-maker.
 - Appeals officer/decision-maker.
- Require that any person designated as a Title IX Coordinator, investigator, decision-maker, or appellate officer be free from:
 - Conflict of interest in the case.
 - Bias against any party in the case.
 - Free from any bias “for or against complainants or respondents generally.”
 - Note existing language in Clery/VAWA: “officials who do not have a conflict of interest or bias for or against the accuser or the accused.”

PROPOSED TITLE IX REGS ADDRESS “BIAS” IN TITLE IX PROCEDURES



- Any materials used to train coordinators, investigators, or decision-makers not rely on “sex stereotypes and instead promote impartial investigations and adjudications.”
- Implication regarding training on trauma-informed practices not serving as replacements for credibility analyses.
- Goal is to avoid a grievance process that would “favor one side or the other or bias outcomes in favor of complainants or respondents.”
 - Discretion to use internal or external investigators or adjudicators.

PROCESS DESIGN CHECKLIST



- One-person decision-maker model.
 - Separate from investigator.
 - Separate from Title IX Coordinator.
 - Selection.
 - Training.
- Hearing panels.
 - Have multiple panel members to hopefully afford diversity without being too large to be unwieldy.
 - Three members might be ideal balance.

PROCESS DESIGN CHECKLIST (cont.)



- Offer opportunity to challenge decision-makers or hearing panel members for bias.
- Offering an appeal process will provide an internal check against bias concerns.

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LANGUAGE MATTERS REGARDING GENDER



- Use gender-neutral terms in your policies and avoid using gender-normative scenarios.
 - For example: “by a person upon another person . . .”
- Ensure that resource websites, brochures, and intake forms are gender-inclusive, gender-neutral, or all-gender.
 - For example: use terms like “person,” “student,” “their” v. “he/she”

STRATEGIES TO MITIGATE BIAS

—
Investigations
Adjudications

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ADDRESSING MICROAGGRESSIONS



Cross-cultural issues related to investigations or adjudications

- How culture may impact bias and blindspots.
- How culture may impact an interview with someone in authority.
- How gender may impact how an individual approaches an interview.
- Language as a barrier to understanding questions.
- Pre-existing, rival explanations for behavior (homesickness/culture shock, negative past experiences) can influence perceptions.

Addressing Bias

- Investigators should aspire for an attitude of understanding, and move away from an attitude of arrogance and privilege.
 - Consider the professional background and training of your investigators; have they worked in professional settings where trainings on cultural competency and bias mitigation have been priorities?
 - Practical tip: observe and listen rather than talk and explain.
- Nurture an openness and willingness to comprehend cultures, experiences, and ideas that are different from our own. The deeper our understanding of the participants in the investigation, the better our investigation will be.

Addressing Bias

- Investigators should understand and avoid microaggressions, how they impact the participants in our investigations, and reduce the ways they can harm our rapport and investigation success.
 - Avoid shutting down a witness or party.
 - Increases distrust in investigators and the resolution process as a whole.

PREPARE YOUR QUESTIONS



- Intentionally review prepared questions in advance (ideally with a co-investigator or other person) to screen for any possible microaggressions.
- If you realize that you ask a question that is poorly framed, or came off wrong, take it back and ask it again in a better way.

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- Demonstrating care and cultural competency regarding identity can help to build rapport and gain the trust of individuals, and ultimately make investigating and resolving reports of gender-based discrimination or misconduct a little less challenging.
- Use inclusive language, regardless of with whom you may be communicating.
- Ask: “How do you identify?” That includes individuals’ names, pronouns, relationship status, and gender and sexual orientation of their partners.
- Reflect an individual’s correct name and pronoun in all communication.

MITIGATING BIAS IN INVESTIGATIONS



Reducing Bias

- Your only side is on that of the PROCESS.
- Avoid “in your gut” decision making, search for evidence that contradicts your gut.
- Reducing cognitive load – time, attention.
- Noticing when we are uncomfortable.
- Questioning yourself and your hypothesis.
- Use checklists and investigation guides.
- Pair with investigators who approach things differently.
- An active process, truly deliberative.

- Credibility is largely a function of corroboration and consistency.
- To assess credibility is to assess the extent to which you can rely on a witness testimony to be accurate and helpful in your understanding of the case.
 - Credible is not synonymous with truthful.
 - Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...

FACTORS TO CONSIDER FOR CREDIBILITY



- Non-cooperation.
 - Look for short, abrupt answers or refusal to answer.
- Logic.
 - E.g.: “I’m struggling to develop a timeline based on your statements. Could you clarify...?”
- Consistency.
 - Consistency of accounts over time.
- Corroborating evidence.
 - Is evidence supported by other evidence?
- Demeanor.
 - Demeanor issues should be your cue to ask more questions.
 - Rarely should be relied upon to draw any conclusions.

MAKING CREDIBILITY DETERMINATIONS



- Look at consistency of story — substance and chronology of statements.
- Consider inherent plausibility of all the information given.
- Look for the amount of detail (facts) provided. Factual details should be assessed against general allegations, accusations, excuses, or denials that have no supporting details.
- Pay attention to non-verbal behavior, but don't read too much into it. This isn't "Lie to Me."

MINIMIZING BIAS IN ADJUDICATIONS



- To challenge bias in decision-making, recognize the challenges even *after* effective training: inattention and time.
 - Spontaneous judgments are more likely to yield to stereotypes or bias.
 - Regard each person as an individual, not part of a group.
 - Focus on the identity of each person.
 - Ensure sufficient time and sufficient focus: when we are too busy and overloaded, we are less effective at mitigating our own biases.

MITIGATING BIAS FOR STUDENTS WITH DISABILITIES



- Consider accessibility challenges for students in prevention training programs.
 - Online programs
 - In person education.
- Consider accessibility in sexual assault information, policies, and reporting options.
- Consider accessibility in access to trauma or support services.
 - Physical accessibility
 - Availability of accommodations/aids when accessing supports
 - Effective policies and procedures for crisis situations.

MITIGATING BIAS FOR STUDENTS WITH DISABILITIES



- Improve coordination and integration of supports provided by Title IX staff and Accessibility/Disability Services staff.
- Provide disability training for all members of Title IX team.
- Help raise awareness about the prevalence of sexual assault for students who self-identify as having a disability.
- Consistently make reasonable accommodations in Title IX processes.
 - Standardize language regarding process for making requests in notice documents and on website.

OTHER TIPS FOR AN INCLUSIVE TITLE IX OFFICE

- Bias-free Writing Tips
- Philosophy Signaled in Policy/Statements
- Visibility/Invisibility

BIAS FREE WRITING



- Words communicate ideas, but also reflect power, status, and privilege.
- Language can reflect social capital.
- Conscious and purposeful use of language can promote equity, justice, and inclusion.

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TIPS FOR BIAS-FREE WRITING



- Describe identities and group connections as the individuals have described them.
 - Names, gender, sexual orientation, pronouns.
- Use nouns, objectives, and adjectives properly.
 - Avoid using language that refers to people in objectifying ways.
- Specificity is preferred over generalization.
 - For example, avoid using “students of color” generally when you are really referring to a specific racial group.

TIPS FOR BIAS-FREE WRITING (cont.)



- Use parallel construction when discussing multiple groups.
 - Avoid capitalizing one racial group but not others.
- Alphabetize lists to avoid privileging any dominant group or categories.

• *American College Personnel Association*

PHILOSOPHY/VALUES SIGNALLED IN POLICY STATEMENTS



- Do your policies, mission statements, or other policy statements emphasize **equity**, including a focus and emphasis on **fairness of outcomes**?
 - University Mission Statement.
 - Title IX Office Mission Statement.
 - Written policies.
 - Written procedures.

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EXAMPLE OF VALUES-BASED POLICY STATEMENT



- Berklee College of Music's Title IX site:

... Berklee is committed not only to compliance with this and other federal mandates, but also to promoting a culture that is in line with the values our civil rights laws envision. The Equity Policy and Process was designed to further Berklee's goal of inclusion, respect, and equality for all community members, and affirms Berklee's commitment to promote fairness and equity in all aspects of the institution. . . .”

- <https://www.berklee.edu/equity>

VISIBILITY/INVISIBILITY



- Do we consistently and regularly present materials that depict different races/cultures/genders?
- Do we provide opportunities for members of our community to learn about other peoples' experiences with respect to sex- or gender-based harassment or violence?
- Are the professionals and community members who serve in our processes (and especially as decision-makers) representative of our community demographics broadly?

QUESTIONS?

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