

CONSCIOUS COMPLIANCE TO ELIMINATE RACIAL BIAS IN TITLE IX PROCESSES

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WHAT IS CONSCIOUS COMPLIANCE?

- Being thoughtful at all times while engaging in compliance measures
 - Thinking, not just doing (following rote, mechanical procedures)
 - Thorough, looking at all appropriate variables
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WHAT IS CONSCIOUS COMPLIANCE: TITLE IX?

- You must make a conscious effort to understand your institution—students, staff, culture—at every level
 - You must be conscious of multiple factors in undertaking effective preventive and responsive measures
 - You must be conscious of what works at your institution depending on a number of factors, race being one of them.
 - Conscious compliance: Title IX is individualized, understanding that every case is different and fact-specific
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- Goal: to identify and eliminate racial bias in Title IX processes, which is required under the new Title IX regulations , 34 CFR Part 106, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; amending the regulations implementing Title IX of the Education Amendments of 1972

US DEPT. OF EDUCATION OFFICE FOR CIVIL RIGHTS (OCR) ISSUED NEW TITLE IX REGULATIONS ON 5/6/2020

- Trump administration OCR desired to change the approach to Title IX regulation and oversight of Obama administration, with one of its stated goals to improve due process protections for respondents and make institutional Title IX processes more transparent.
- Secty. DeVos issued Notice of Proposed Rulemaking in 2018, and received about 124,000 comments from various sectors of interested persons, institutions and organizations
- New regulations issued May 6, 2020 with an August 14, 2020 effective date.
- 34 CFR Part 106; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; amending the regulations implementing Title IX of the Education Amendments of 1972 (Title IX).
 - Preamble, pp. 30026 – 30572; Regulations/Amendments, pp. 30572 - 30579

OCR'S STATED GOALS & PURPOSES OF THE NEW REGULATIONS

- “The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions [recipients or schools] must respond to allegations of sexual harassment consistent with Title IX’s prohibition against sex discrimination.”
 - “These regulations are intended to effectuate Title IX’s prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.”
 - “The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.”
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- “The final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment, the dissemination of a recipient’s non-discrimination policy and contact information for a Title IX Coordinator, the adoption by recipients of grievance procedures and a grievance process, how a recipient may claim a religions exemption, and prohibition of retaliation for exercise of rights under Title IX.”
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- The Preamble addresses comments received after the Notice of Proposed Rulemaking (NPRM), ED's discussion of selected comments, and any changes ED made to the final regulations based on the comments received.
 - Due to the length of the Preamble, many have not read it in full.
 - Many people have overlooked the very significant comments, discussions, changes and comments in the new regulations regarding race.
 - The Preamble includes hundreds of references to race and bias.
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BIAS, DEFINED

- *noun.* “a particular tendency, trend, inclination, feeling, or opinion, especially one that is preconceived or unreasoned”
- *noun.* “unreasonably hostile feelings or opinions about a social group”
- *verb.* “to cause to hold or exhibit a particular bias; to influence, especially unfairly”

Source: Dictionary.com

REQUIRED TRAINING TO ELIMINATE RACIAL BIAS

- One significant new requirement is in 106.45(1)(iii) that educational institutions provide training to eliminate racial bias for Title IX Coordinators, investigators, decision-makers, and any person who facilitates a resolution process.
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REQUIREMENT TO ESTABLISH MECHANISMS TO IDENTIFY BIAS

- ED states in Preamble, p. 30250, in the same paragraph where it discusses 106.45(b)(1)(iii): The Department agrees with commenters who noted that prohibiting conflicts of interest for bias, including racial bias, on the part of people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes.”
- “The Department agrees with a commenter who asserted that recipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution process) is biased, and the Department leaves recipient’s discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest of bias during the investigation.”

IMPLICIT BIAS TRAINING PER SE NOT REQUIRED

- ED noted that some commenters argued that educational institutions should require all officials involved in Title IX proceedings to attend implicit bias trainings.
- “The Department declines to specify that training of Title IX personnel must include implicit bias training: the nature of the training required under 106.45(b)(1)(iii) is left to the recipient’s discretion so long as it achieves the provision’s directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.” -- 30084

IMPLICIT BIAS

- What is implicit bias?
 - Attitudes and/or stereotypes that affect one's understanding, actions, or decisions in an unconscious way
 - Not explicit bias (operates consciously)
 - Implicit bias operates subconsciously or unconsciously
 - Can affect Title IX coordinators' perception of reporting party and of responding party
 - Learn to recognize behavior that may indicate bias or differential treatment
 - Part of Implicit Social Cognition (ISC) – field focusing on “mental processes that affect social judgments but operate without conscious awareness or conscious control.” (Kang, Jerry and Lane, Kristin, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465-520 (2010)).



IMPLICIT BIAS – SCHEMAS AND SOCIAL COGNITION

- **Schemas** – sets of knowledge/information that help us organize particular examples into broader categories
 - Allow us to operate without using excessive mental space
 - Thoughts can happen automatically that we are not aware of
 - **Implicit social cognitions** - guide our thinking about social categories.
 - Experiences with other people (real-life encounters)
 - Vicarious/fictional experiences – movies, music, television, popular culture, media
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“These implicit thoughts and feelings leak into everyday behaviors such as whom we befriend, whose work we value and whom we favor – notwithstanding our obliviousness to any such influence.”

-Prof. Jerry Kang and Kristin Lane

Kang, Jerry and Lane, Kristin, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 467-468 (2010).

TYPES OF BIAS

- Attitude and stereotypes can determine our thoughts about certain social categories, including gender and race
- **Attitude**
 - Association between some concept (often a social group) and an overall evaluative feeling/belief, either positive and negative.
 - Ex: A negative association with Hispanic Americans.
- **Stereotype**
 - Association between a concept and a trait
 - Ex: A stereotype that African Americans are good athletes.

Source: Kang, Jerry and Lane, Kristin, Seeing Through Colorblindness: Implicit Bias and the Law, 59 UCLA L.Rev. 1128 (2010).

EXAMPLES OF IMPLICIT BIAS

- **Situation 1:** A person may have a generally positive *attitude* toward African Americans and still associate them with weapons, violence, or crime as part of a *stereotype*.
 - **Situation 2:** A person may have a positive *stereotype* of Asian Americans as mathematically inclined, but could still have an overall negative *attitude* towards them.
 - In both situations, the person has made a determination about a person due to their race or gender prior to interacting with the person
 - Big effect on reporting and responding parties in Title IX investigations
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BASIS FOR ALLEGATIONS OF BIAS IN TITLE IX

- Generally, to state a claim for racial discrimination, the plaintiff must allege:
 - He/she is a member of a protected class.
 - He/she was treated differently from similarly situated individuals.
 - The disparate treatment was intentional and based on his/her membership in the protected class.
 - There may be racial discrimination in Title IX cases if the institution brings a disproportionate number of cases against parties of a particular race (selective enforcement) or enacts harsher penalties against members of that race (erroneous outcome).
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HOW IS RACE DISCRIMINATION DETERMINED?

- The Comparator = a person of another race who is similarly situated to the party in all relevant respects
 - Generally, a party proves discrimination if a comparator who was accused of similar conduct was treated differently
 - Fact-based and exacting
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OCR RACE INFORMATION COLLECTION AND REPORTING K-12

- Civil Rights Data Collection (CRDC) - survey of public K-12 schools required by OCR since 1968.
 - Tracks and maintains records on race for:
 - Discipline (in-school and out-of-school suspension)
 - Offenses
 - Harassment and bullying
 - [although suspect because harassment based on sex often woefully underreported and inaccurate; i.e. no reports of harassment based on sex in Philadelphia City schools (133,000 students) in 2015]
 - Restraint and seclusion
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- According to CRDC's March 2015 Data Snapshot, African American male students represented 8 % of enrolled students and were 25% of students who received out of school suspensions. African American females represented 8% of the student enrollment and were 14% of students who received out-of-school suspensions.

Source: www.2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf,
2015 Civil Rights Data Collection, School Climate and Safety (2018);
www.ocrdata.ed.gov

LACK OF OCR RACE DATA ON TITLE IX IN HIGHER EDUCATION

- OCR does not require colleges/universities to record/maintain data on race of the reporting party nor race of responding party in Title IX sexual assault complaints, but noted in new regulations that while it was not mandating it, nothing prohibits institutions from collecting such data in campus climate surveys,
- Many schools use race as a data demographic in these reports
- Therefore, schools can access race data in campus climate surveys

CENTER FOR DISEASE CONTROL AND PREVENTION (CDC) APPROACH TO SEXUAL VIOLENCE

- 4-step approach to addressing public health problems in sexual violence investigations
 - 1) Define and monitor the problem
 - 2) Identify risk and protective factors (www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactor.html)
 - Risk factor = characteristic that increases likelihood of a person becoming a perpetrator of violence
 - Protective factor = characteristic that decreases likelihood of becoming a perpetrator of violence b/c it provides a buffer against risk
 - 3) Develop and Test Prevention Strategies
 - 4) Assure widespread adoption
- ~~Prevention strategies can lead to stereotypes~~

CENTER FOR DISEASE CONTROL AND PREVENTION (CDC) APPROACH TO SEXUAL VIOLENCE

The CDC has identified 5 community risk factors, that increase the likelihood of a person becoming a perpetrator of sexual assault:

- 3 of the 5--lack of employment, poverty, lack of support from police/judicial system--are disproportionately found in people of color.
 - Does this mean that poor, unemployed people of color who are not supported by the police/judicial system are more likely to be perpetrators of sexual violence?
 - CDC advises institutions to create prevention strategies based on risk factors, also identifying individual, relationship, and societal factors
 - Query: stereotyping impact on campus sexual violence prevention efforts?
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STEREOTYPES OF RISK FACTOR GROUPS

- According to a study by University of Pennsylvania's Center for the Study of Race and Equity in Education, during the 2014-2015 academic year:
 - 2.5% of undergraduate students were black men
 - 56.3% of college/university football teams were black men
 - 60.8% of college/university basketball teams were black men
- Athletes are a known risk group for Title IX cases.
- Therefore, a disproportionate number of African American athletes could be stereotyped as perpetrators of sexual violence.

Source: Shaun R. Harper, Ph.D., *Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports*. University of Pennsylvania Graduate School of Education Center for the Study of Race and Equity in Education (2016 Edition)

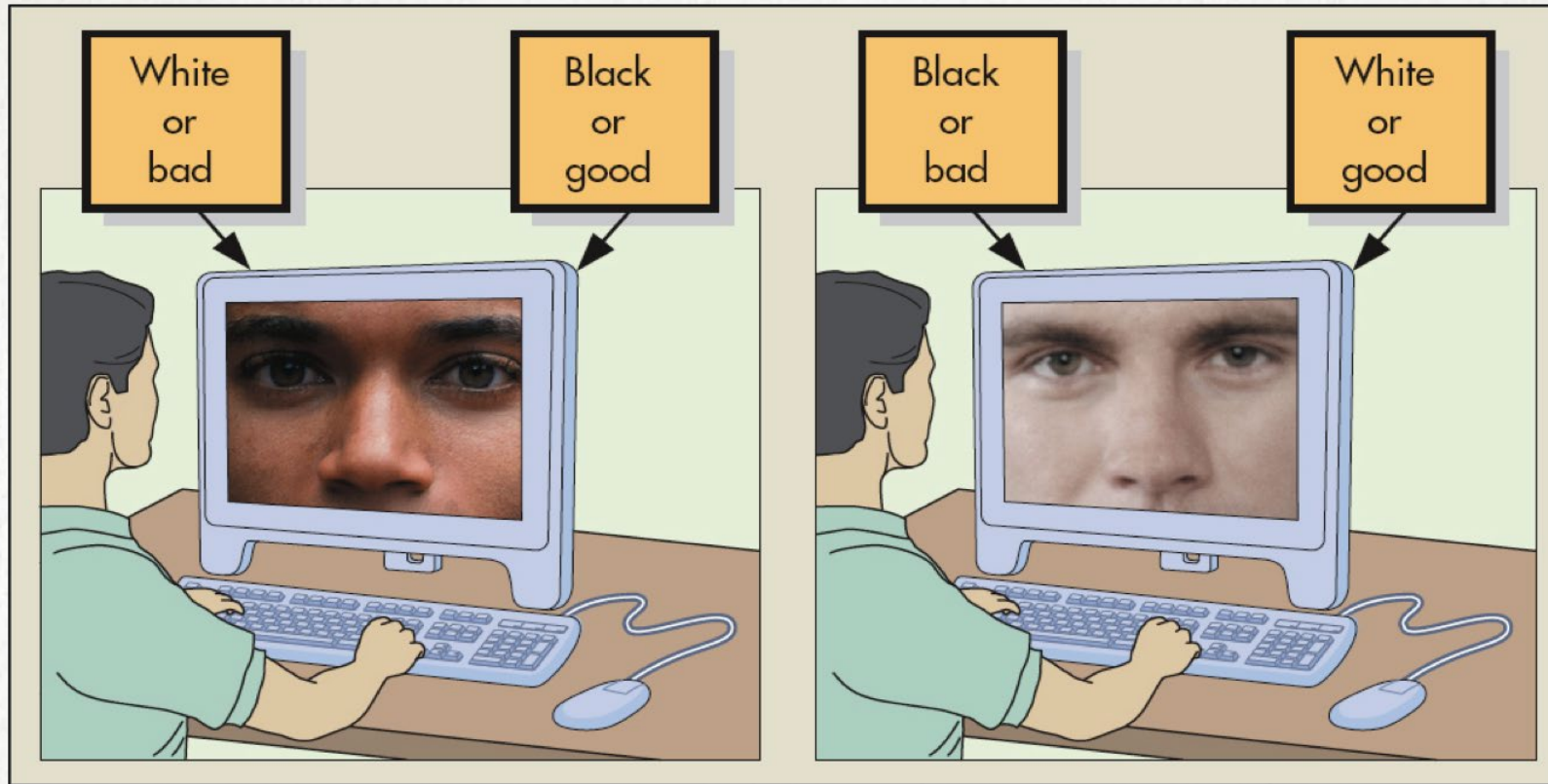
IMPLICIT BIAS IN TITLE IX INVESTIGATIONS

- Issue of implicit bias in sexual violence adjudications on college campuses
 - Even a coordinator with the best intentions is “almost certainly biased in some way” *Kang, Jerry and Lane, Kristin, Seeing Through Colorblindness: Implicit Bias and the Law*⁵⁹ *UCLA L.Rev.* 1124 (2012).
 - Poses an issue when the investigation is run by only one person
 - Biases include **race, gender, sexual orientation, ethnicity, nationality, social status, and weight**
 - UCLA Law Review article written by law professors, psychology experts, and a judge
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BIAS MEASUREMENT: IMPLICIT ASSOCIATION TEST (IAT): [HTTPS://IMPLICIT.HARVARD.EDU/IMPLICIT/](https://implicit.harvard.edu/implicit/)

- Harvard University test used to measure implicit bias
 - Test takers are shown various images of people, objects, and words, then asked to associate certain words with images
 - The test states it reveals bias through participants' association of positive and negative words or objects with certain people and/or traits
 - Example: An image of a black person, an image of a white person, and a photo of a gun – with which photo does the participant associate the gun photo?
 - Broader purpose is self-awareness and learning biases
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IAT BIAS MEASUREMENT



Source: Medium.com <https://medium.com/psyc-406-2016/the-implicit-association-test-and-the-catch-22-of-developing-striking-tests-3150a4631d7f>

IAT EXAMPLE

“In one study, participants watched a video of computer-generated faces that **morphed slowly from a frown to a smile** and were instructed to hit a key when they thought the expression changed. In general, **people saw hostility ‘linger’ on the Black face for a longer period of time** than on the White face. Moreover, the extent that hostility was perceived as lingering was predicted by **implicit bias (as measured by the IAT) against Blacks.**”

Kang, Jerry and Lane, Kristin, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 481 (2010).

WHAT ARE THE EFFECTS OF IMPLICIT BIAS?

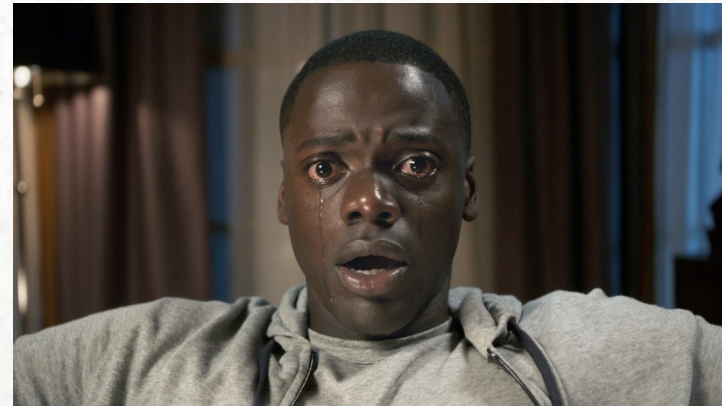
- Psychology Professor John Jost, NYU compiled a literature review of ten studies indicating implicit bias. *Jost, John T. The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore, 29 Res. Org. Behav. 39, 41 (2009).*
 - Studies have shown implicit bias affects everyday situations, such as:
 - Callback interviews (Rooth, 2007)
 - Awkward body language influencing whether people feel they are being treated politely (McConnell & Leibold, 2001)
 - How people read and rate the friendliness of facial expressions (Hugenberg & Bodenhausen, 2003)
 - Negative evaluations of ambiguous actions by black people (Rudman & Lee, 2002)
 - Negative evaluations of women characterized as confident and aggressive in certain hiring environments (Rudman & Glick, 2001)
 - "Shooter bias" – easier to shoot blacks than white in video game simulation (Glaser & Knowles, 2008)
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HOW CAN IMPLICIT RACIAL BIAS AFFECT TITLE IX INVESTIGATIONS?

- Implicit bias can affect perception of reporting party, of responding party, of witnesses, of social groups to which either are members
 - Can create confirmation bias – concept that people seek information/evidence that confirms their beliefs and preconceived notions
 - Can affect how the investigators and adjudicators perceive witness credibility due to witness's race
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UNDERSTANDING BIAS AGAINST INTERRACIAL RELATIONSHIPS

- “Get Out” (2017) directed by Jordan Peele
 - Oscar-nominated psychological fictional horror/thriller film
 - Examines frightening and disturbing aspects of interracial relationships and racism
 - Storyline follows deep-rooted prejudice toward (and obsession with) black men in modern day America by seemingly “liberal” and “educated” groups of white people
 - Led to public debate over whether the film should be considered a dramatic thriller or a comedy
 - Generated dialogue on experiences of bias and prejudice in interracial relationships in real life



“...as related stories emerge, the worry is that unfair procedures combined with overly broad definitions of nonconsent may have a disproportionate impact on black men in a way that is consistent with both our country's specific history of false accusations and unfair convictions of black men for rape and the more general racially disproportionate impact of criminal law enforcement. Unfortunately, those most likely to be affected by unfair policies and procedures and broad prohibitions that leave all at the mercy of ambivalence may also be the least likely to be able to afford attorneys in campus discipline processes or to file subsequent lawsuits that could hold their schools accountable.”

Jacob E, Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881 (2016)

EFFECT OF SEXUAL VIOLENCE COMPLAINT ON DIFFERENT RACES

- Melissa Kagle – former assistant professor of Educational Studies at Colgate University
- Served as a mentor to students of color and became outspoken critic of Colgate’s handling of Title IX issues
- “Men of color, especially foreign men of color ‘uniquely defenseless’ when charged with sexual assault -- lack of money and network of support and understanding of their rights.”

Source: <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/>

- Many people of color will never report instances of sexual assault, dating violence, domestic violence, or stalking (the Clery Act/VAWA crimes) to the police because of distrust.
- The new regulations acknowledge that several commenters noted this. – p. 30081, Reporting Data

COMMENTS -- REPORTING DATA -- 30081

- “Some students—especially students of color, undocumented students, LGBT students, and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence or deportation. [fn. 416] Survivors of color may not want to report to the police and add to the criminalization of men and boys of color; for these students, schools are often the only avenue for relief. Many LGBTQ students and students of color may feel mistrustful, unwelcomed, invisible, or discriminated against, which makes reporting their experience of sexual assault even more difficult [fn. 417].” -- 30082

- “Sixty-nine percent of sexual abuse survivors said that police officers discouraged them from filing a report and one-third of survivors had police refuse to take their report; 80 percent of sexual assault survivors are reluctant to seek help and 91 percent report feeling depressed after their interaction with law enforcement. [fn. 419]”
 - “Native American women are reluctant to report crimes because of the belief that nothing will be done; according to a 2010 study, the government declined to prosecute 67 percent of sexual abuse, homicide, and other violent crimes against Native American women.”
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STRATEGIES FOR CONSCIOUS COMPLIANCE TO ELIMINATE RACIAL BIAS IN TITLE IX PROCESSES

- Participate in the many discussions in and programming involving educational institutions today on eliminating racial bias in the institutions specifically and society generally.
 - Read about race, bias and racism. There are numerous reading lists everywhere. Highly recommended places to start—*White Fragility: Why It's So Hard for White People to Talk About Racism* by Robin DiAngelo, and *How to Be an Antiracist* by Ibram X. Kendi.
 - Discuss and adopt conscious compliance in all aspects of Title IX administration—training of all constituent groups, prevention efforts, investigations, hearings/adjudications.
 - Gather race data in campus climate surveys.
 - Recognize implicit bias and cognitive biases in yourself and in others.
 - Know that people can override their biases.
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STRATEGIES FOR CONSCIOUS COMPLIANCE

TITLE IX

- Get to know who individuals are, not a perception of who the individual should be based on a stereotype of their race, gender, socioeconomic status, age, etc.
 - Understand and envision mental images of counter-stereotypes.
 - Enhance diversity in the workplace and operating environment.
 - Participate in and encourage dialogue about implicit bias and its effects.
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STRATEGIES FOR CONSCIOUS COMPLIANCE

- Understand popular culture – film, TV, music - that students consume and its influence.
 - Understand the general influence of hip hop on global youth culture, and understand the language of hip hop – the language that you may find in emails, texts, group chats, Snapchat, etc.
 - Understand the "no snitch" culture among students
 - Recognize that immigration status may chill reporting and witness participation.
 - Train coordinators, staff, investigators, team members, and hearing officers to understand language rather than stereotype; understand that some racial groups engage in "code switching."
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STRATEGIES FOR CONSCIOUS COMPLIANCE

- Contact and communication with different social groups can have a positive effect on implicit bias
 - Exposure to counter-typical (opposite of stereotypical) people within certain social groups (race, gender, age, etc.)
 - Procedural changes can reduce the impact of implicit bias; have more than one investigator and adjudicator
 - Consciously ask yourself whether bias is influencing your thoughts and decisions
 - Know that many people do not see the court system as an unbiased, impartial, fair and just institution and realize that this may account for non-participation in campus or criminal processes; address this and consider alternatives in training and programming
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CONSCIOUS COMPLIANCE FOR EXTERNAL ADJUDICATORS AND INVESTIGATORS

- The new regulations require your institution to train your external investigators, adjudicators, hearing officers, decisionmakers, and those who conduct informal resolution processes. Train them in conscious compliance.
 - Issues with lack of diversity in the legal profession
 - Minorities at law firm generally
 - Minorities at partnership ranks
 - Issues with lack of diversity in the judiciary
 - Issues with judicial bias
 - Will campus constituencies have faith that adjudicators, especially those coming out of the criminal justice system, are not biased?
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CASES WITH IMPLICIT/EXPLICIT BIAS IMPLICATIONS

- Goal: to identify and eliminate racial bias in Title IX processes, which is required under the new Title IX regulations , 34 CFR Part 106, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; amending the regulations implementing Title IX of the Education Amendments of 1972

- *Noabes v. Syracuse University*, 369 F. Supp. 3d (ND NY) (2019); plaintiff's racial bias claim dismissed; plaintiff failed to provide sufficient facts; his claim about racial discrimination was conclusory
- *Williams v. Pennridge School District*; 2018 WL 6415314, (ED PA) (2018); no racial bias; plaintiff cannot prove racial bias with just subjective feelings of discrimination
- *Edwards v. Indiana University*, 2020 WL 2062338 (SD Indiana, Indianapolis Div.) (2020), motion to dismiss granted where plaintiff only had a subjective belief that race was a factor

DOE V. HARVARD UNIVERSITY, 2020 WL 2769945, US DISTRICT CT., D. MASS., 5/28/2020

- Plaintiff alleged race discrimination in violation of 42 USC Section 1981 in his complaint alleging defendants' violations of Title IX
 - Court granted Harvard's Motion to Dismiss against the individual defendant, but not Harvard
 - Plaintiff alleged that Harvard allowed informal resolution in cases involving white students but not him (opinion does not identify plaintiff's race). Plaintiff said that his request for informal resolution was treated differently. Plaintiff identified a comparator.
 - Court held that plaintiff met the Iqbal plausibility standard (sufficient pleading and plausible allegations of misconduct or malfeasance), which was enough to overcome a Motion to Dismiss.
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DOE V. AMHERST COLLEGE

- Doe v. Amherst College, 237 F. Supp.3d 195 (D. Mass. 2017)
 - Asian-American male student filed Title IX and breach of contract claims against university after school expelled him due to sexual misconduct allegation against him
 - Court granted part of a motion for judgment on the pleadings in favor of Defendant – holding that Plaintiff failed to state a breach of contract claim based on disproportionate punishment because of his race; court held that while Doe argued that “only members of a disfavored group, male students of color, were subjected to a particular type of punishment, he has not alleged that other male students have been accused of similar conduct and received less severe punishments.”
 - Plaintiff alleged the university’s disciplinary process failed to take into account evidence that would have shown consent:
 - Text messages complainant sent immediately after the sexual encounter describing herself as the one initiating the sexual activity
 - Court held that plaintiff sufficiently alleged procedural errors in this case were motivated by gender-based bias
 - Including that the university knew the complainant was part of a student-led movement aimed at changing the handling of sexual assault complaints

COLLICK V. WILLIAM PATERSON UNIVERSITY

- Collick v. William Paterson University, (2016 WL 6824374)
 - William Paterson University (Wayne, New Jersey)
 - 5 black male students arrested after being accused of locking white female student in a room and forcing her to engage in sexual conduct
 - **A grand jury declined to indict the students** – despite exoneration, the university expelled the students
 - Two of the accused students sued the university
 - On motion to dismiss, the court granted motion to dismiss on all counts of racial discrimination and denied motion to dismiss for counts related to due process violations by the university (defendants).
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THANK YOU

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