

# **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

## 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



- 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.”

- “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 nondiscrimination 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.”





# BIAS, DEFINED

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# REQUIRED TRAINING TO ELIMINATE RACIAL BIAS

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# 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

# 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
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# 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



“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**



# 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



# BASIS FOR ALLEGATIONS OF BIAS IN TITLE IX

- Generally, to state a claim for racial discrimination, the plaintiff

# HOW IS RACE DISCRIMINATION DETERMINED?

- The Comparator = a person of another race who is similarly situated to the party in all relevant respects



# 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)
  - School suspension



- 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](http://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](http://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

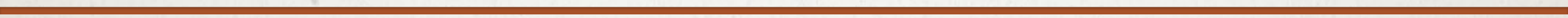
- 4-step approach to addressing public health problems in sexual violence investigations

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# 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 Law59 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**



# BIAS MEASUREMENT: IMPLICIT ASSOCIATION

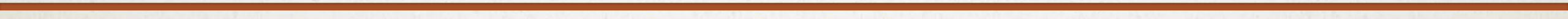


## IAT EXAMPLE

“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).





# 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







# EFFECT OF SEXUAL VIOLENCE COMPLAINT ON DIFFERENT RACES

- Melissa Kagle - former assistant professor of Educational Studies at Colgate University



- 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.”

# STRATEGIES FOR CONSCIOUS COMPLIANCE TO ELIMINATE RACIAL BIAS IN TITLE IX PROCESSES

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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 counterstereotypes.
- Enhance diversity in the workplace and operating environment.
- Participate in and encourage dialogue about implicit bias and its effects.

# STRATEGIES FOR CONSCIOUS COMPLIANCE

- Understand popular culture— film, TV, music- that students

# STRATEGIES FOR CONSCIOUS COMPLIANCE

- Contact and communication with different social groups can have a positive effect on implicit bias
- Exposure to countertypical (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
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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?

# CASES WITH IMPLICIT/EXPLICIT BIAS

## IMPLICATIONS

- Goal: to identify and eliminate racial bias in Title IX processes, which is required

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# 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.

# DOE V. AMHERST COLLEGE

- Doe v. Amherst College

# COLLICK V. WILLIAM PATERSON UNIVERSITY

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