Association of Title IX Administrators

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Title IX Training: Roles, Responsibilities and Regulations

Stockton University

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INTRODUCTORY CONCEPTS

What is bias?

Sources/ causes of bias

Common types of bias

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WHAT IS BIAS?

- Apreference or tendency to like or dislike
- Acognitive process
- Can be a systematic error in our thinking process
- Mental shortcuts
- Athought process developed over time through repeated personal experience
- Implicit or explicit
- Can be intentional, but generally unintentional

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WHAT IS BIAS (CONT.)?

- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you
- Can affect our perceptions of Complainants *and* Respondents
- Can affect our perceptions of others within the process or associated with the process
  - Example: parents/guardians
  - Example: witnesses, advisors

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COMMON BASIS FOR POTENTIAL BIAS

- Ability
- Age
- Citizenship status
- Ethnicity
- Gender
- Gender Identity/Expression
- Health status
- Marital status
- Mental health status
- National origin
- Parental status
- Physical attributes
- Race
- Religion
- Sexual orientation
- Socioeconomic status (can include finances, education, housing, etc.)

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BIAS AND TITLE IX

- Impact of Bias on Title IXsystems
- Types of Bias

IMPACT OF BIAS IN TITLE IX SYSTEMS

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 assistance and/or participate in the processes
- Creates opportunities for valuable, relevant evidence to be missed or ignored
- Presents moments for assumptions not based on evidence to be made during the process
- Impacts the memory of parties involved
- Impacts how witnesses, parties, and narratives are evaluated and weighted
- Creates *blinders* in our decision-making

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UNDERSTANDING HOW BIAS IMPACTS TITLE IX SYSTEMS

- Increases the likelihood that data specific to the impact of Title IXsystems on various identity groups/protected classes are not being collected or considered
- Implicit biases can impact perceptions of Complainants, Respondents, witnesses, and community members
- Prohibited conduct may carry different meanings and perceptions dependent on one's background and experiences
- Ability to assess Title IXresolution processes, which are private, becomes difficult
- Closes avenues for intentionality between Title IXand its intersections with Title VI, Title VII, and the ADA/Section 504

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TWO TYPES OF BIAS

Explicit

- Conscious bias
- Clear feelings and attitudes
- Behaviors are conducted with intent
- In its extreme, it is characterized by overt negative behaviors that can be expressed through physical and verbal harassment or through exclusion

Implicit

- Unconscious bias
- Operates outside of the person's awareness
- Can be in direct contradiction to a person's espoused beliefs and values
- Can be pervasive

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COMMON FORMS OF IMPLICIT BIAS

- Confirmation Bias
- Attribution Bias
- Beauty Bias
- Conformity
- Affinity Bias
- Halo Effect
- Contrast Effect
- Gender Bias
- Racial Bias

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CONFIRMATION BIAS

- Making judgements about a person while subconsciously seeking evidence to support our opinion of that person
- Most common form in resolution processes
  - Impacts investigations and decision-making
- Interpreting ambiguous evidence to support one's own opinions or existing position
- Our own judgments have high potential of being very wrong

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ATTRIBUTION BIAS

- When individuals make attributions to their or others' behavior
- Often does not reflect reality
- When we do something well, we tend to attribute that to our own merits and personality traits
- When we do something wrong or poorly, we tend to attribute that to external factors such as other's faults
- When it comes to other people, we think the opposite
  - When a person does something well, we tend to attribute that to luck or other external factors
  - When a person does something wrong or poorly, we tend to attribute that to their personality or level of intelligence

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BEAUTY BIAS

- We unconsciously always notice people's appearances and often connect that with their personality
- We make decisions based upon how we have unconsciously determined whether a person is attractive or not
- Most common form of bias used in hiring decisions

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CONFORMITY

- Defined as the force behind our desire to fit in with the dominant group
- Also known as **group think**
- The tendency to take **cues** from others when making decisions on how to act or what to say
- Most common in panel deliberations

Everyone has a voice and their own interpretations of the facts

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AFFINITY BIAS

- The unconscious tendency to get along with others who are like us
- Our unconscious tendency to gravitate towards those who have similar identities as us
- Most likely to occur in decision-making

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GENDER BIAS

- Defined as: behaviors that show favoritism towards one gender over another
- Linked with sexism which is defined as: prejudice or discrimination based on a person's sex or gender
- Second common form of implicit bias next to racial bias
- Historically favors males over females
  - Example: Males are paid more than females when performing the same job
  - Example: Males occupy senior leaderships roles in higher proportions than females

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GENDER BIAS (CONT.)

- Can manifest in sexual harassment cases
  - Example: Males are found responsible for policy violations in higher proportions than females
  - Example: Males are more severely sanctioned for policy violations than females

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RACIAL BIAS

- Data collected on race with respects to sexual harassment allegations is rarely tracked by Recipients
- Interracial assault allegations:
  - *Harvard Law Review* article "American racial history is laced with vendettalike scandals in which black men are accused of sexually assaulting white women, followed by the revelation that the accused men were not wrongdoers at all."
    – Emmett Till: August 28, 1955
- Social disadvantages of minority males historically can translate to harsher sanctions for minority male Respondents contextually

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OTHER FORMS OF BIAS

- **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"

- **Experience Bias**
  - The tendency to see the world from your own experience
  - Taking your perception as the objective truth
  - Experience bias occurs when we fail to realize that other people view things differently based upon their own experiences and perceptions

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OTHER FORMS OF BIAS

- **Availability Bias**
  - Defined as a mental shortcut that relies on immediate examples that come to a given person's mind when evaluating a specific topic, concept, method, or decision
  - Tendency to weigh the latest information more heavily than older data

- **Bias Blind spot**
  - A failure to recognize our own cognitive biases
  - Our ability to recognize the existence and effects of cognitive biases in others' thinking is easier than our ability to recognize this within ourselves

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MITIGATING BIAS IN THE TITLEIX RESOLUTION PROCESS

- Your only side is that of the **PROCESS**
- Avoid *gut* decision-making, seek evidence that contradicts your gut
- Reduce cognitive load – time, attention
- Notice when parties are uncomfortable
- Self-reflect
- Utilize checklists and investigation guides
- Partner with Title IX team members who have different backgrounds, if applicable
- Maintain an active, deliberative process

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THE INVESTIGATION REPORT

G.A.S. Framework

Sharing the Evidence &Report

THE INVESTIGATION REPORT

- Under the 2020 Title IXregulations, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where Decision-makers should look for information critical to a determination
  - ATIXAadvises that Investigators make credibility assessments instead of credibility determinations
- The regulations also allow Investigators to include a recommended finding of responsibility in the investigation report
  - ATIXAadvises against Investigators including a recommended finding in the investigation report

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THE INVESTIGATION REPORT

- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses
  - Results of interviews with experts (if any)
  - Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.)
- G.A.S. framework
- The supplemental "bucket" to the report

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G.A.S. FRAMEWORK

To draw a clear line between investigation and decision-making functions, Investigators should follow the G.A.S. Framework for investigations and reports:

- **Gather** evidence
- **Assess** credibility and evidence
- **Synthesize** areas of dispute/agreement and all questions asked

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GATHER THE EVIDENCE

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
  - Chronology
  - Geography
  - Policy prohibitions
  - Alleged violations
- Summarize evidence in a written report
- This the fact-gathering function. It's a function all investigators have performed since at least 2011, and it's not new or different as a result of regulations.

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ASSESS CREDIBILITY

- Accuracy and reliability of information
- "Credible" is not synonymous with "truthful"
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Indicate where the Decision-maker should look without rendering conclusions or making findings related to credibility
- NOT GOOD
  ~~"The Decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons..."~~
- GOOD
  "Mark's testimony about X contrasts with Mariana's testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana's testimony, not Mark's, during the investigation."

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SYNTHESIZE AREAS OF DISPUTE

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Narrow the scope to areas in dispute or disagreement between the parties
  - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the Decision-maker's work in making a determination

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IMPORTANCE OF THE REPORT

- Decision process:
  - Investigator refers the investigation report to the Decision-maker(s) **without** determination
  - Investigator ≠ Decision-maker
- Importance of investigation report
  - Highlight the relationships between different pieces of evidence
    - Contradictory, corroborating, (in)consistencies, etc.
  - The Investigator's opinion is not controlling, but they want to point the Decision-makers toward decisive or corroborating evidence without telling them how to interpret it

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SHARING EVIDENCE & THE INVESTIGATION REPORT

PARTY ACCESS TO EVIDENCE/REPORT

- Regulations mandate creation of an investigation report
  - Report fairly summarizes all relevant evidence
- Two 10-day review and comment periods

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EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
  - Be sent to each party and Advisor
  - Be in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
  - Be made available at any hearing
- **Best practice:** Provide the draft investigation report at the same time.
- After sending the evidence, the investigator must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

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EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

At least 10 days prior to making a determination regarding responsibility:

- The final Investigation Report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
- **Best Practice:** Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools, with or without a hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by a Decision-maker

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DECISION-MAKERS: LIVE HEARINGS & CROSS-EXAMINATION

LIVE HEARING

- Regulations mandate live hearing for higher education
  - Virtual hearings are permitted
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review.
- Parties must attend hearing, otherwise **all statements** made by absent (or non-testifying) party must be excluded.
  - What are considered "statements" and what effect will this rule have?
- Will there be a facilitator role? Who? What do they do?

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LIVE HEARING (CONT.)

- Must allow live cross-examination to be conducted exclusively by each party's Advisor (separate rooms still allowed)
- Questions come from Advisors, panel (if any), and Chair

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WRITTEN DETERMINATIONS

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following:

- Policies alleged to have been violated
- Adescription of the procedural steps taken from the receipt of the formal complaint through the determination including:
  - Any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Statement of and rationale for the result as to each specific allegation.
  - Should include findings of fact and conclusions

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WRITTEN DETERMINATIONS

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following (cont.):

- Sanctions imposed on Respondent (if any)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant
- Procedures and bases for any appeal

The Decision-maker should author the written determination.

- May follow a template provided by the Title IX Coordinator

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DECISION-MAKERS: APPEALS

THE APPEAL PROCESS

- Appeals are mandatory under the Title IXregulations
- Equitable
- Clearly communicated to parties
- One level of appeal is best practice
- Defined window of time to request appeal
- Three clear grounds for appeal (though Recipients may add others)
- Committee versus individual determination preferred
- Deference to original hearing authority
- Remand

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FINALITY OF DETERMINATION

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the Recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.

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CASE STUDY: CHE

CASE STUDY: CHE

- Che, Jack, Franco, and Sam are working together on a group project for their art history class. In a Snap Chat, the guys (Jack, Franco, and Sam) told Che they were going to the professor to have her removed from the group because she wasn't pulling her weight. Che begged them not to drop her because she needed to pass the class in order to graduate.
- Jack snapped, "Send us a panty pic and you can stay." Che sent a picture of herself in her underwear, from the waist down.
- Franco snapped back, "Full body pic." Che sent a picture of her full body, with her shirt on and showing her underwear.
- Sam snapped back, "Breasts too. We see tits or you are out." Che removed her shirt and bra and snapped a pic to the group.

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CASE STUDY: CHE

- They completed the project together as a group. On the day the project was submitted, Sam snapped to the group, "Meet at the gallery, 11:30"
- All four met at the are gallery on campus at 11:30. Though it was locked, Jack propped open a door somehow. Che entered the dark gallery to find Jack, Franco and Sam there.
- Sam said, "Time for a BJ." Che asked, "What?", not understanding the slang. Jack said, "Ablowjob," but Che refused.
- Sam then pulled up the screenshots of Che undressed and told her that she needed to do what they said, or he would Snap the pictures to everyone in the art department.
- Che started to perform oral sex on Sam. As soon as this happened, Jack left. As Che was performing oral sex on Sam, Franco went up Che and rubbed on her breast a few times. Franco then stayed to guard the door and make sure no one came in.

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CASE STUDY: CHE

- Over the next few weeks, Che's roommate noticed a change in Che's behavior. Che eventually told her roommate what happened, and her roommate notified the Title IX Coordinator.

Notice, Formal Complaint, and Initial Assessment

- Is this a report or a formal complaint?
- Che demands that you remove Jack, Franco, and Sam from their art history class. How do you respond?
- Che is not sure if she wants to file a formal complaint. Does the Title IX Coordinator need to sign/initiate a formal complaint?
- Does jurisdiction exist?
- Should the complaint be dismissed? If dismissed, should an alternate policy/process be used?
- Is an emergency removal needed? If so, for whom?
- Is informal resolution appropriate?

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CASE STUDY: CHE

The Investigation

- What are the Title IX-related allegations being investigated for each Respondent?
- Who will conduct the investigation?
- What relevant evidence do you want to gather as part of the investigation?
- During your initial interview with Sam, his advisor, who is an attorney, requests to see the evidence against Sam. How do you respond?
- Before his interview, Jack told you that his friend Tre would be his advisor and attend the interview with him. However, when Jack shows up for the interview, he brings Franco with him and tells you this is his new advisor. How do you respond?
- Franco requests that you interview his aunt Rachel because she knows a lot about computers and can tell you that he did not send the alleged Snap Chat messages to Che. How do you respond?

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CASE STUDY: CHE

The Hearing

- In preparing for the hearing, you see that it is noted in the investigation report that the investigator was able to obtain the security footage from the hallway and saw that another student, Reva, exited the gallery soon after Che, Sam and Franco left. The investigation report also notes that when interviewed, Reva admitted that she was in the back of the gallery but said she did not see anything. Che and her advisor have questions they would like Reva to answer during the hearing. However, Reva indicated she no longer wanted to participate in the process and did not show up for the hearing.
  - How do you address the information from Reva?

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CASE STUDY: THE

The Hearing

- In reviewing the prior disciplinary history for each of the Respondents, the hearing panel discovers the following:
  - Jack was previously accused of making his girlfriend, who is also a student at the institution, send him nudes, but no investigation occurred because his girlfriend did not want to file a complaint.
  - Over the past 3 years, Franco was involved in a number of student conduct proceedings related to plagiarism, fighting, and marijuana possession. The most serious disciplinary measure taken against Franco included a semester of probation for fighting his roommate. Also, Franco was accused of marijuana possession, but found not responsible.
  - What, if any, impact does this information have on your decision?

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CASE STUDY: CHE

The Appeal

- Che, Jack, Franco, and Sam each file an appeal.
  - What are the next steps for the appeal decision-maker?
- In support of her appeal request, Che noted that she talked to Reva and she is now willing to participate in the process. Che wants the appeals decision-maker to speak to Reva.
  - Is this a permissible ground for appeal?
  - How will you respond?

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CASE STUDY: THE

The Appeal

- Jack files an appeal arguing that he was not in the gallery when any misconduct occurred, and he doesn't believe the decision-maker took this into consideration when determining his discipline.
  - Is this a permissible ground for appeal?
  - How will you respond?
- In their appeals, Franco and Sam both allege bias by the investigator noting that the same investigator investigated of a case they were involved in two years ago. In that case, Franco was the Respondent and Sam was a witness.
  - Is this a permissible ground for appeal?
  - How will you respond?

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Questions?

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