



Hearing Officer Training

Sarah E. Harebo, J.D., M.Ed.

Overview

- **Title IX Regulations related to Hearing Officers, Advisors, and Live Hearings**
- **UWS Code and Policy**
- **Model Decorum Guidance**
- **Hearing Notes**
- **SV and DV – Statistics and Notes**
- **Unconscious/Implicit Bias**

Title IX Regulations

- Released on May 9, 2020 and effective August 14, 2020
- Currently, UW System has Emergency Rules and Interim RPD 14-2 in place and is currently going through the Permanent Rulemaking process
- This training will not cover all aspects of the new regulations, but is highlighting those regulations that are related to the role of Advisor, Hearing Officer/Committee, and the Hearing Process
- New Regulations can be found at:
<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

** UW Policies are based on the rules – look to the policies

Title IX Regulations

ADVISOR:

- Universities must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice
- Advisor may be, but is not required to be, an attorney
- Universities may not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance proceeding
- Universities can establish advisor – Rules of Decorum
- Universities must provide an advisor at no cost for purposes of cross-examination

§106.45(b)(5)(v)

Title IX Regulations

LIVE HEARING:

- Decision-maker cannot be the investigator or Title IX Coordinator - **§106.45(b)(7)**
- Hearing Officers may not be decision makers in all cases
- Either party may request that the parties be in separate rooms, but the university must provide technology allowing the decision-maker and parties to simultaneously see and hear the part or the witness providing the information – MUST record or create a transcript **§106.45(b)(6)**



Title IX Regulations

CROSS-EXAMINATION:

- Cross-examination must be conducted by each party's advisor directly, orally and in real time.
- Allow all relevant questions and follow-up questions, including those challenging credibility.
- Cross-examination *cannot* be conducted by a party – if the party does not have an advisor, the UW System/institution must provide one at no cost.
- UW System/institution can establish rules of decorum governing hearing, including cross-examination.

§106.45(b)(6)

Title IX Regulations

*****Federal Rules of Evidence do NOT apply*****

- **RELEVANCY DETERMINATION:**
- Before a party or witness answers a question, the decision-maker must determine whether it is relevant and explain any decision to exclude the question as not relevant.
- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.
- **§106.45(b)(6)(i)**

Title IX Regulations

RELEVANCY DETERMINATION (con.):

- Preamble:
 - It is enough for the decision-maker to say the question is not probative of any material fact.
 - The decision-maker may not require questions in writing in advance of hearing.
 - University may have rules precluding the parties (or advisors) from challenging relevancy decisions during the hearing.
 - May only exclude questions based on relevance.
 - Not because they are unduly prejudicial, concern prior bad acts or seek character evidence.
 - Questions may be deemed not relevant when they are duplicative of other evidence already in the record.
 - But, the decision-maker must exclude (a) medical, etc. records if the party has not consented in writing; and (b) statements when the party/witness is not subject to cross.

Title IX Regulations

STATEMENTS:

- If a party or witness is not subject to cross-examination, the decisionmaker may not rely on their statement in determining responsibility.
 - The decision-maker may not draw any inferences as to responsibility as a result of individuals not subjecting themselves to cross-examination.

§106.45(b)(6)

Title IX Regulations

Role of Decisionmaker:

- Determine relevance of questions before complainant, respondent, or witness answers a cross-examination or other question
- Decide and explain to the party proposing the questions any decision to exclude a question as not relevant
- To reach a determination use the preponderance of evidence standard
- Issue Written Determinations
- Independent obligation to evaluate evidence and credibility
 - Would not constitute Title IX sexual harassment even if proved,
 - Did not occur in the institution's education program or activity, or
 - Did not occur in the United States.

§106.45(b)(6) and (7)

Title IX Regulations

MANDATORY DISMISSAL:

- If the conduct alleged:
 - Would not constitute Title IX sexual harassment even if proved,
 - Did not occur in the institution's education program or activity, or
 - Did not occur in the United States.

§106.45(b)(3)(i)

Title IX Regulations

DISCRETIONARY DISMISSAL:

- If:
 - Complainant notifies the Title IX Coordinator in writing of their wish to withdraw the complaint or any allegations in it,
 - Respondent is no longer enrolled or employed by the IHE, *or*
 - Specific circumstances prevent sufficient gathering of evidence to reach a determination.

§106.45(b)(3)(ii)

Issuing of Written Determinations

- Decisionmaker must issue a simultaneous written determination regarding responsibility, including:
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of UWS Code of Conduct or relevant policies to the facts
 - Rationale
 - Appeal procedures
- **Please note, due to your unique role as outside hearing officers, the campus may choose to have an administrator adopt your finding
- **§106.45(b)(7)**

Conflicts of Interest

- Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. **§106.45(b)(1)(iii)**
- Hearing examiner/Committee member should recuse themselves if:
 - They have personal knowledge of the charges independent of their role as examiner or committee member
 - They have anything to gain personally from the outcome
 - They have personal knowledge of the parties such that it would prevent them from being impartial
 - Other reasons that would prevent the individual from being impartial or if others might reasonably question the individual's objectivity
- Obligation to disclose the *existence* of a potential conflict, not necessarily the specifics

UWS Code and Policy

- **UWS Chapter 4 – academic staff**
 - **UWS Chapter 11 – faculty**
 - **UWS Chapter 17- students**
 - **RPD 14-2 – Appendix C – Non-academic staff and faculty**
- **Title IX Sexual Misconduct versus
Non-Title IX Sexual Misconduct**

UWS Code and Policy

Title IX Sexual Misconduct

- 1) There is a formal complaint alleging Title IX misconduct on the basis of sex.
- 2) The conduct occurred in the United States.
- 3) The conduct occurred within a university education program or activity.
- 4) The complainant shall be participating in or attempting to participate in the education program or activity of the university at the time of filing the complaint.
- 5) The complainant or Title IX coordinator have submitted a formal complaint.

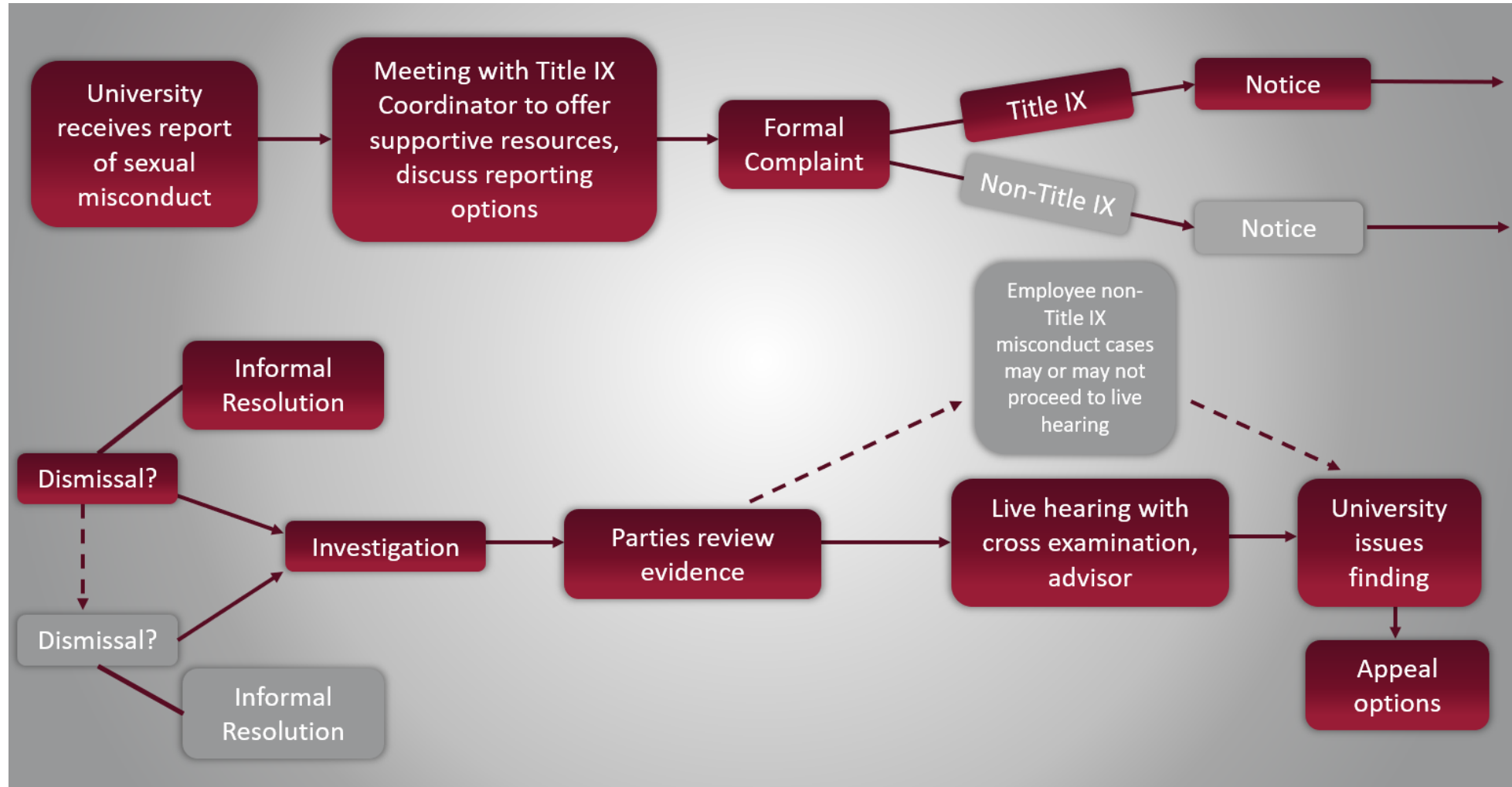
UWS Code and Policy

Title IX Sexual Misconduct –

Education Program or Activity:

- for purposes of Title IX misconduct only, locations, events, or circumstances at which the university exercised substantial control over both the faculty member and the context in which the misconduct occurred, and also includes any building owned or controlled by a student organization that is officially recognized by the university.

UWS Code and Policy



Definitions

Sexual Harassment:

- conduct on the basis of sex that satisfies any of the following:
 - Quid Pro Quo (Employee, Staff, and Faculty)
 - An employee of the institution conditions the provision of an aid, benefit, or service of the institution directly or indirectly on an individual's participation in unwelcome sexual conduct; or
 - An employee of the institution either explicitly or implicitly conditions the provision of an academic, professional, or employment-related opportunity, aid, benefit, or service on an individual's participation in unwelcome sexual conduct
 - Hostile Environment (Title IX vs. Non-Title IX)
 - Unwelcome conduct of a sexual nature directed towards a student, an employee, or a person participating in a program or activity of the university that, when using the legal "reasonable person" standard is so severe, pervasive, and objectively offensive that it effectively denies the person equal access to the institution's education program or activity; or
 - Unwelcome conduct of a sexual nature directed towards an individual that, when using the legal "reasonable person" standard is so severe or pervasive and objectively offensive that it has the purpose or effect unreasonably interfering with an individual's academic or work performance or participation in an university sponsored or supported activity.

****Intent versus Impact**

Definitions

Sexual Assault:

- an offense that meets any of the following definitions found in 20 U.S.C. 1092(f)(6)(A)(v), 34 CFR 668.46(a):
 - (a) “Rape” means the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of the complainant, without the consent of the complainant.
 - (b) “Fondling” means the touching of the private body parts of the complainant for the purpose of sexual gratification, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.
 - (c) “Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law (See s. 944.06, Stats.)
 - (d) “Statutory Rape” means sexual intercourse with a complainant who is under the statutory age of consent
Note: ss. 944.06 and 948.02, Stats.

Definitions

Stalking:

- engaging in a course of conduct directed at the complainant that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Consent:

- means words or overt actions by a person who is competent to give informed consent, indicating a freely given agreement to engage in sexual activity or other activity referenced in the definitions of sexual assault and sexual exploitation in this section. A person is unable to give consent if the person is *incapacitated** (in a state of incapacitation) because of drugs, alcohol, physical or intellectual disability, or unconsciousness.

**PR changes to language in parenthesis*

Definitions

Incapacitation:

- means the state of being unable to physically or mentally make informed rational judgments and effectively communicate, and may include unconsciousness, sleep, or blackouts, and may result from the use of alcohol or other drugs. Where alcohol or other drugs are involved, evaluation of incapacitation requires an assessment of how the consumption of alcohol or drugs affects a person's decision-making ability; awareness of consequences; ability to make informed, rational judgments; capacity to appreciate the nature and quality of the act; or level of consciousness. The assessment is based on objectively and reasonably apparent indications of incapacitation when viewed from the perspective of a sober, reasonable person.

Definitions

Domestic Violence:

- felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the complainant, by a person with whom the complainant shares a child in common, by a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, by a person similarly situated to a spouse of the complainant under the domestic or family violence laws of Wisconsin, or by any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of Wisconsin.

Definitions

Dating Violence:

- violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant; and where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - a) The length of the relationship.
 - b) The type of relationship.
 - c) The frequency of interaction between the persons involved in the relationship.

Definitions

Sexual Exploitation:

- means when an individual attempts, takes or threatens to take, nonconsensual sexual advantage of another person. Examples include
 - a) Engaging in the following conduct without the knowledge and consent of all participants:
 1. Observing, recording, or photographing private body parts or sexual activity of the complainant .
 2. Allowing another person to observe, record, or photograph sexual activity or private body parts of the complainant,
 3. Otherwise distributing recordings, photographs, or other images of the sexual activity or private body parts of the complainant.
 - b) Masturbating, touching one's genitals, or exposing one's genitals in the complainant's presence without the consent of the complainant, or inducing the complainant to do the same.
 - c) Dishonesty or deception regarding the use of contraceptives or condoms during the course of sexual activity.
 - d) Inducing incapacitation through deception for the purpose of making the complainant vulnerable to non-consensual sexual activity.
 - e) Coercing the complainant to engage in sexual activity for money or anything of value.
 - f) Threatening distribution of any of the following, to coerce someone into sexual activity or providing money or anything of value:
 1. Photos, videos, or recordings depicting private body parts or sexual activity of the complainant.
 2. Other information of a sexual nature involving the complainant, including sexual history or sexual orientation.

Burden of Proof

- **Preponderance of the evidence**

- means information that would persuade a reasonable person that a proposition is more probably true than not. It is a lower standard of proof than “clear and convincing evidence.”

- ✓ More likely to be true than not
- ✓ 50% plus a feather
- ✓ Quality of evidence not quantity

UWS Code and Policy

- **Review of Evidence - Prehearing**

- 4.16*
- 11.18*
- 17.17(4)
- Appendix C

- **Hearing Process**

- 4.19*
- 11.21*
- 17.18
- Appendix C

* Title IX Sexual Misconduct Process



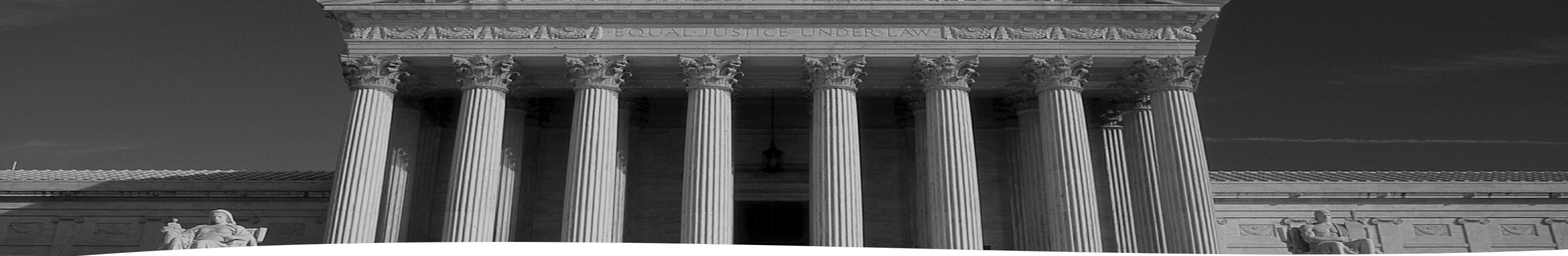


Model Decorum Guidance

** Model Decorum Guidance is forthcoming**

- **Generally:**

- Questions must be conveyed in a neutral tone
- Must use preferred names and pronouns
- No party may be disrespectful
- Advisor may not yell, scream, or badger
- Advisor may not use profanity or make irrelevant ad hominin attacks to a party or witness
- Advisor may not ask repetitive questions



Hearing Notes

- Cross-examination questions will be asked by Advisor – Hearing Officer/Committee will review the question – allowing or not allowing – reason will be given
 - Relevancy Determinations – see Title IX Regulations and UWS Hearing Processes
- Each campus may have a slightly different hearing script
 - Some campuses may allow an opening statement, and some may not
 - Some hearing officer/committee may ask the majority of the direct
- This is NOT a courtroom – no subpoena power – no opportunity for motions – cannot compel witnesses – no “legal” oath administered (most campuses will ask individuals to state the truth for the record)
- Hearing Officers/Committees will be following a hearing script
- Advisor does not = Attorney

Hearing Notes

- Be aware of:
 - Non-verbal communications
 - Tone of voice
 - Not cross-examining – open questions w/o accusations
- Avoid:
 - Victim-blaming
 - Putting yourself in the situation
 - Preconceived notions of SV and DV
- Things to keep in mind:
 - Objectivity
 - Implicit/Unconscious Bias
 - Assumptions
 - Boundaries
 - Listening

Hearing Notes



- Be mindful:
 - Language
 - Cultural differences
 - Potential barriers around reporting
 - Communication issues
 - Identities
 - Disability
 - LGBTQ

**Remember we are educational institutions



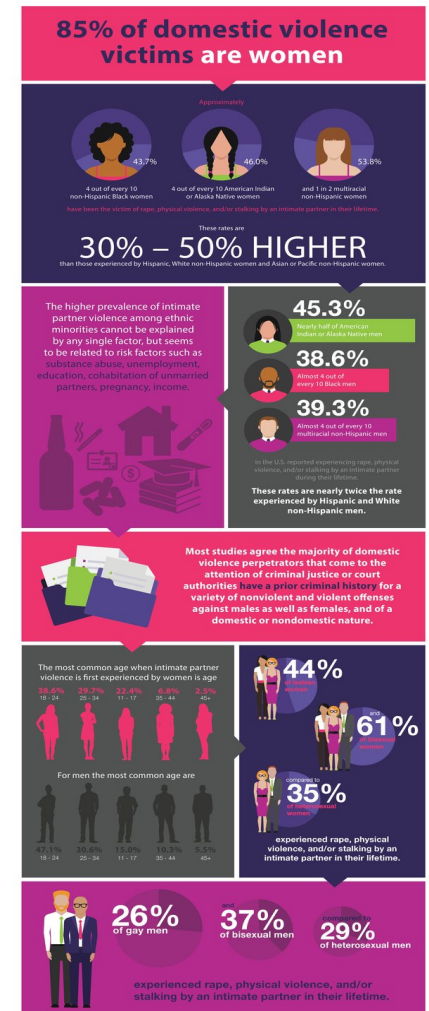
Credit: www.hercampus.com,
www.preventconnect.org,
www.lhup.edu/students/campus_safety/hope_center/stalking_information.html



Demographics & Domestic Violence

from DomesticShelters.org

The likelihood of domestic violence varies widely depending on gender, race, education and income, as well as a series of psychographic characteristics such as sexual preference, substance abuse, history of family violence, and history of criminal activity.



DomesticShelters.org
 A service of Theresa's Fund

Sexual Violence - Notes

- Delayed reporting or not reporting at all
- Committed by a known person
- Lack of physical evidence
- Underreported
- Alcohol
- False Reports – 2-8% (NSVRC)



Special Aspects of Sexual Assault Cases

- Addressing myths and assumptions and biases
 - A victim will recognize immediately that the assault occurred and will likewise report it immediately
 - Sexual assault most often occurs between strangers
 - Sexual assault is fundamentally about sex
 - False reports are common
 - Only heterosexual women are victims of sexual assault
 - Previous consent to sexual intercourse implies later consent
 - Victims are responsible for sexual assault due to inappropriate clothing or use of alcohol or drugs
 - Individuals in relationships cannot be sexually assaulted
 - Victims of sexual assault will respond, heal, or tell their story in a particular way

Special Aspects of Sexual Assault Cases

- Challenges of talking about “what happened” for all involved
- Impact of trauma
- Few or no witnesses other than individuals involved
- Little to no physical evidence
- Potential impact of drugs/alcohol
- Terminology

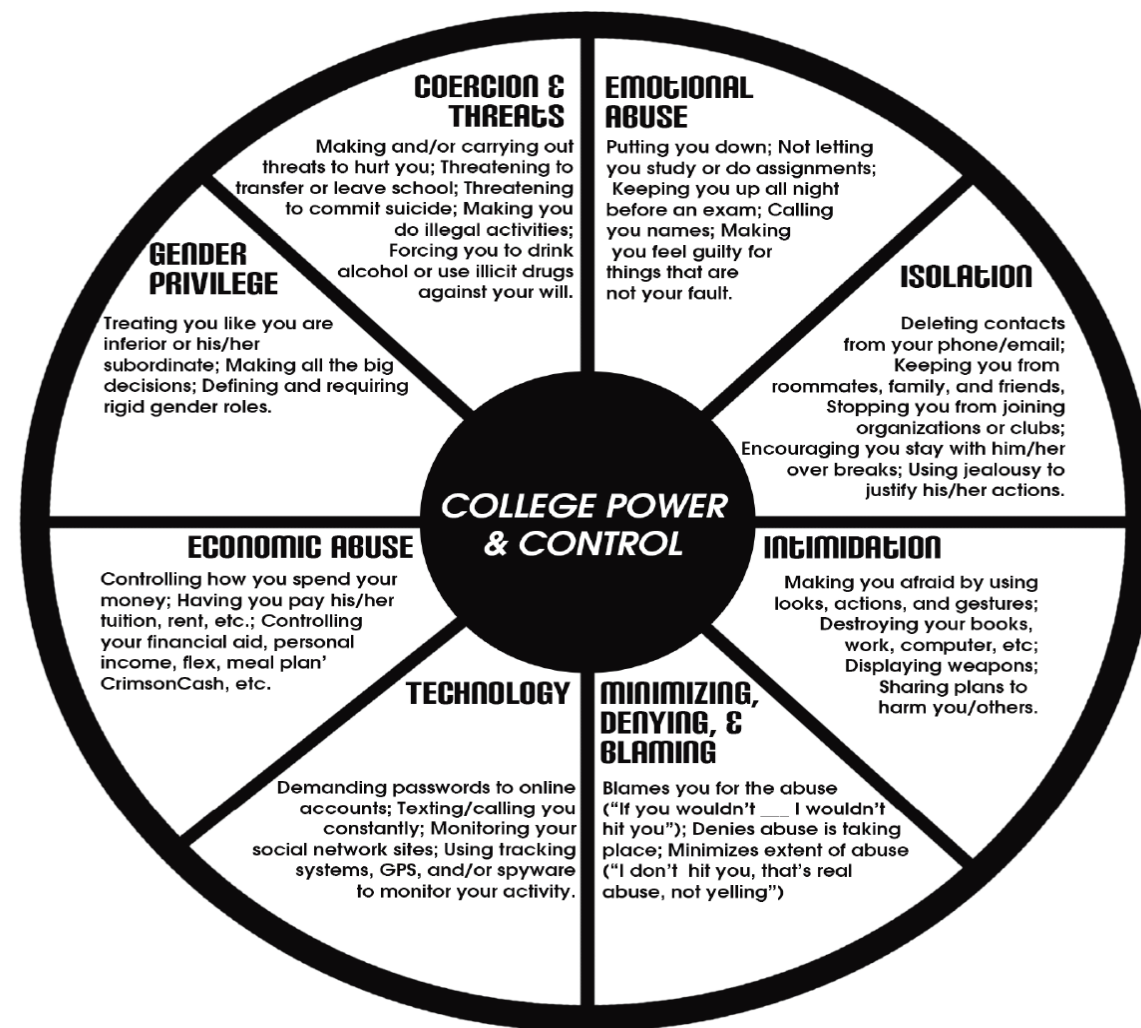
Domestic Violence - Notes



Credit: blogs.mcall.com



Domestic Violence - Notes



Credit: Haven Project & DAIP

Impact of Trauma

- Understanding the effects of trauma can inform how a survivor may respond
 - Symptoms can include flashbacks, fear, anger, change in appetite, concentration problems, changes in sleep patterns, memory loss

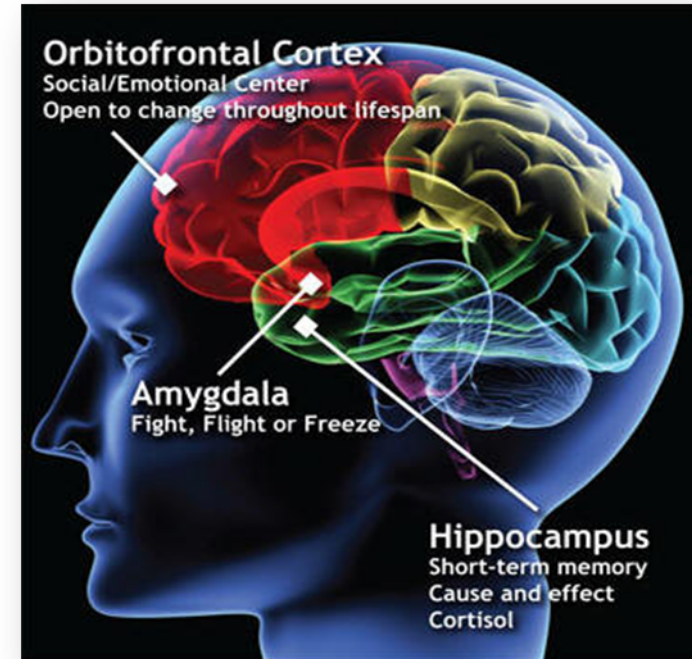
** There is no “typical” response during or following an assault; some behavior may seem counterintuitive



Credit: mindful.org

Impact of Trauma

- Prefrontal Cortex = complex cognition and decision-making
 - Shuts off during trauma
- Amygdala = process emotion reactions
 - constantly scanning for things that could harm you
- Hippocampus = memory



Credit: <http://www.slvtucasa.net/>

Impact of Trauma

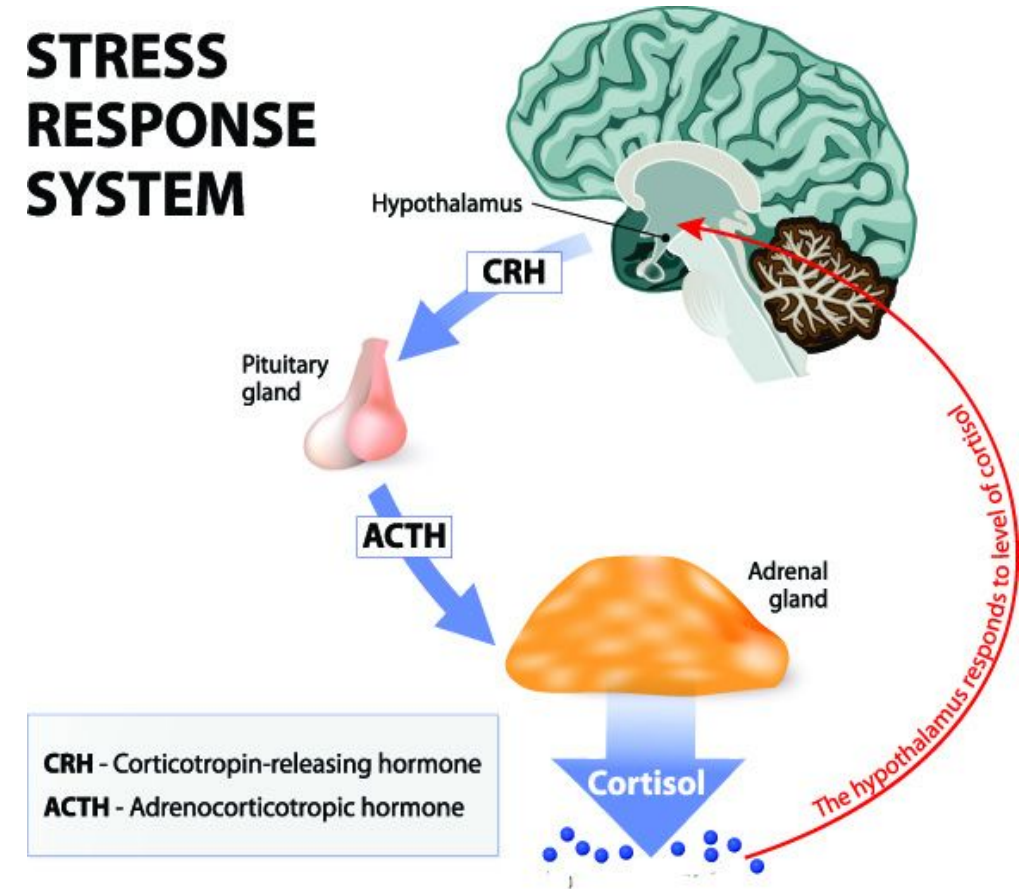
- What is released during a major trauma?
 - Catecholamines: Adrenaline – Fight/Flight or Freeze
 - Cortisol: Energy available
 - Opioids: Prevents pain
 - Oxytocin: Promotes good feelings
- ** Individual does not get to choose, or control levels released or body response**

Campbell, R. (2012). *Research for the real world: The neurobiology of sexual assault* [webinar]. National Institute of Justice. Retrieved from <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx>

Impact of Trauma

- **HPA Axis – elevated for 96 hours post-assault**
 - **Elevates when memory is re-activated**
 - Flat affect/emotional swings
 - Unable to concentrate
 - Unpredictable behavior (smiling, laughing, disruptive, violent)
 - Argumentative/Irritability
 - Headaches/body pain
 - Increase drug/alcohol use
- **Memory –**
 - Fragmented – inhibits processing events into memory and memory consolidation
 - Recall may be slow
 - *Alcohol can impede memory – no memory to recall

Campbell, R. (2012). *Research for the real world: The neurobiology of sexual assault* [webinar]. National Institute of Justice. Retrieved from <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx>



Credit: biologydictionary.net/hpa-axis

Impact of Trauma

- Drastic Survival Reflex
 - Dissociation – “spaced-out”, disconnected, “on autopilot”
 - Tonic Immobility – paralysis, cannot move or speak
 - Can overlap with dissociation
 - Muscle rigidity
 - Cold
 - Numbness/pain
 - Unfocused staring
 - Collapsed Immobility
 - extreme decrease in heart rate and blood pressure
 - Faintness, sleepiness, or loss of consciousness
 - Loss of muscle tone

Campbell, R. (2012). *Research for the real world: The neurobiology of sexual assault* [webinar]. National Institute of Justice. Retrieved from <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx>

Unconscious/Implicit Bias

- Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.
- These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control.

Unconscious/Implicit Bias

- Residing in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

Kirwin Institute: State of Implicit Bias, 2015

Unconscious/Implicit Bias

Implicit biases are pervasive and robust. (Nosek, Smith et al., 2007)

Everyone processes them, even people who swear to impartiality. (Rachinski, Johnson, Wistrich, & Guthrie, 2009)

Biases do not necessarily align with our declared beliefs or even reflect stances that we would endorse. (Graham & Lowery, 2004; Greenwald & Krieger, 2006; Kang et al., 2012)

Implicit biases are malleable and can be unlearned and replaced with new mental associations. (Blair, 2002; Blair, Ma, & Lenton, 2002; Dasgupta, 2013)

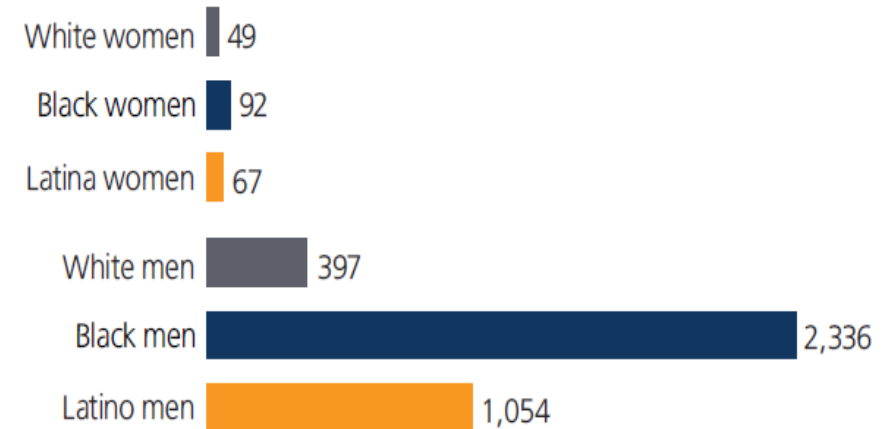
Examples – Workplace/Employment

- A survey utilizing randomly assigned names on resumes showed that the job applicants with “White-sounding names” were more likely to be interviewed than equally qualified candidates with “African-American sounding names.” (Bertrand & Mullainathan 2004)
- A survey of managers by McKinsey & Associates found that “women are often evaluated for promotions primarily on performance, while men are often promoted on potential.”
- Research shows both men and women tend to rate female applicants lower with same qualifications
 - High Heels, Violins and a Warning
 - Women without children are six times more likely to be hired than women with children.
 - Bias against women and men more likely when being considered for positions considered traditional opposite sex jobs

Examples – Criminal Justice System

- Since 1970, the prison population has exploded from about 325,000 to more than 2 million today.
- Drug offenses account for two thirds of the rise in number of people who are in federal prisons and for more than half of those in state prisons.
- African Americans constitute 15% of drug users in the United States, yet 90% of those incarcerated for drug use.
- According to Human Rights Watch (Punishment and Prejudice: Racial Disparities in the War on Drugs, 2000) although whites are more likely to violate drug laws than people of color, in some states black men have been sent to prison on drug charges at rates 20-50 times greater than white men.
- One in three young African-American men are now under the jurisdiction controlled by the criminal justice system (jail, prison, parole, probation).
- More than 7 million children have a family member incarcerated, on probation or on parole.
- Once released, former prisoners are caught in a web of laws and regulations that make it difficult or impossible to secure jobs, education, housing and public assistance and often to vote or serve on juries. Alexander calls this permanent second-class citizenship a new form of segregation.

Rate of Imprisonment per 100,000, by Gender, Race, and Ethnicity, 2017



Source: Bronson J. and Carson, E.A. (2019). *Prisoners in 2017*. Washington, DC: Bureau of Justice Statistics.

Alexander, M. *The New Jim Crow – Mass Incarceration in the Age of Colorblindness*.

Examples – K-12 Discipline

- Black preschool children are 3.6x as likely to receive one or more out-of-school suspensions as white preschool children
 - Black children = 19%, but 47% of those receiving one or more suspensions
 - White children = 41%, but only 28% of those receiving one or more suspensions
 - Black boys = 19% of male enrollment, but 45% of males suspended
 - Black girls = 20% of female enrollment, but 54% of females suspended
- Black K-12 students are 3.8x as likely to receive one or more out-of-school suspensions than white children
- Students with disabilities served by IDEA are more than twice as likely to receive out-of-school suspensions

2013-2014 Civil Rights Data Collection – A First Look. U.S. Department of Education. October 28, 2016.

Examples – K-12 Gifted and Talented

- Evidence that Black students in classrooms with non-Black teachers are systematically less likely to receive gifted services in subsequent years (Grissom and Redding 2016. Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs)

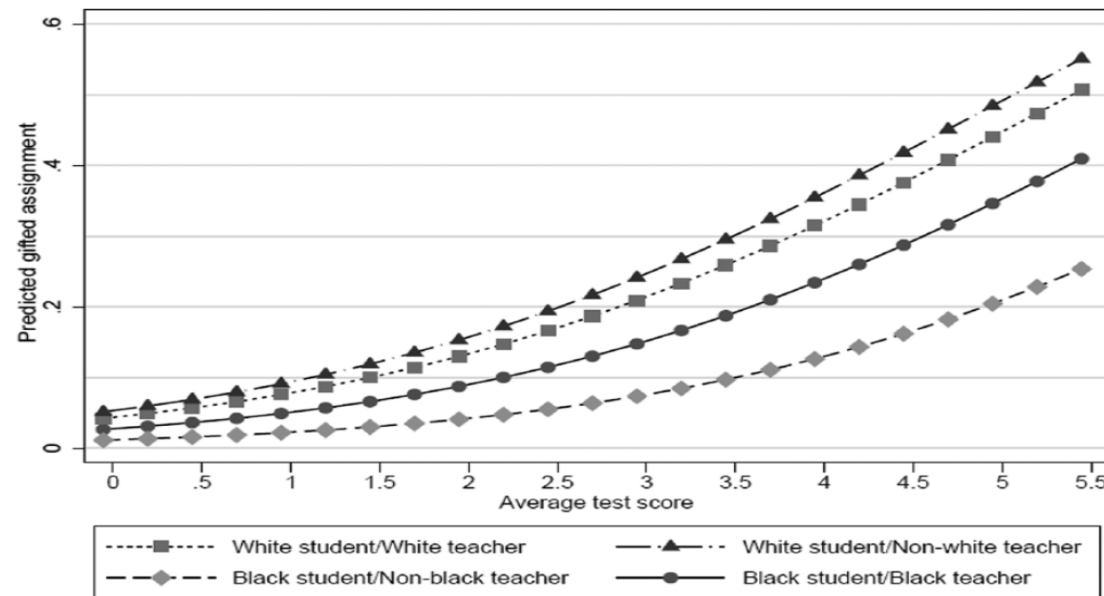
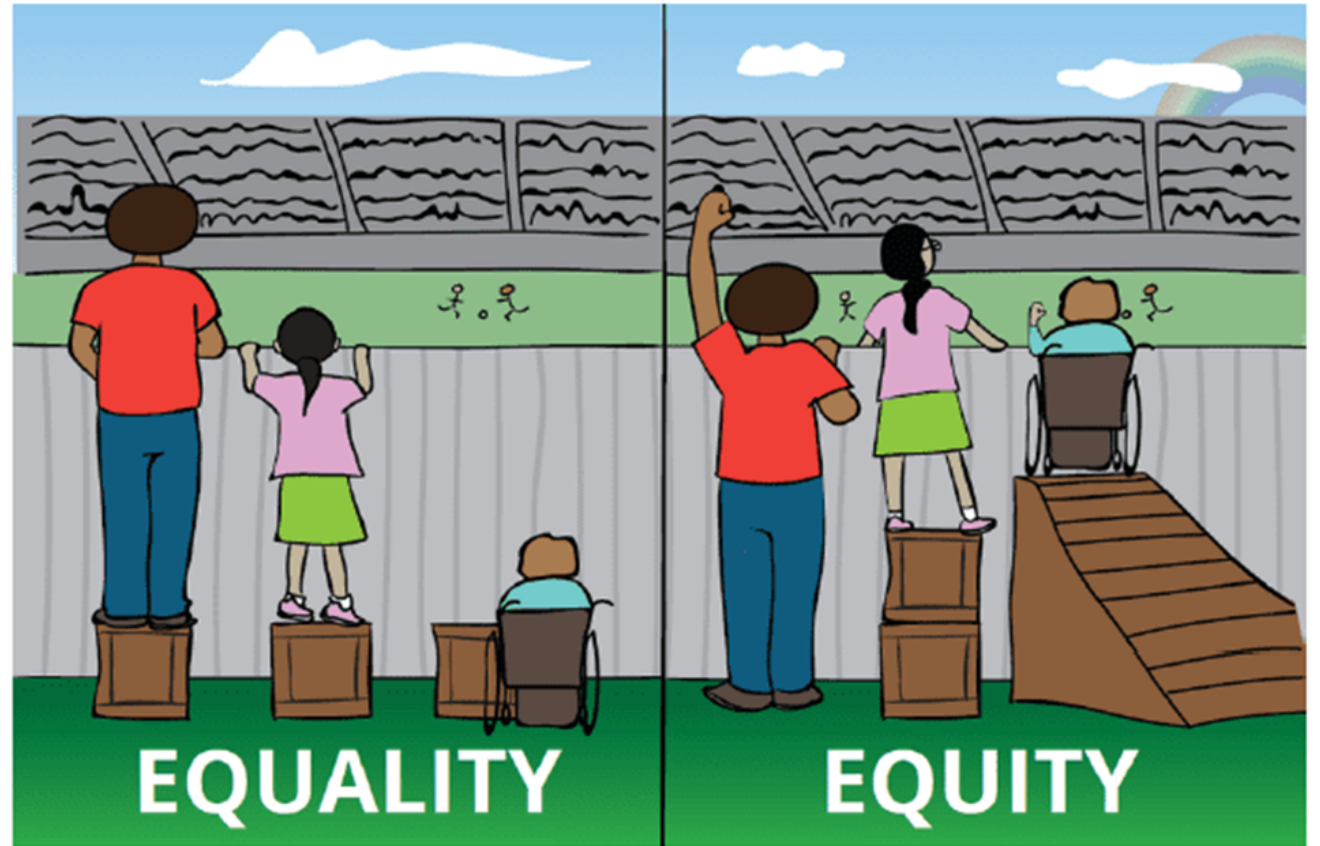


FIGURE 2. *Predicted assignment to gifted services for Black and White students.*

- Teachers may perceive potential giftedness differently in students from other-race groups, because of differences in backgrounds or biases in their judgments or expectations (Gershenson, Holt, & Papageorge 2015. Who believes in me? The effect of student-teacher demographic match on teacher expectations)

Combatting Bias

- Equity
 - Equity derives from a concept of social justice.
 - It represents a belief that policy should be directed with impartiality, fairness and justice.



Combating Bias

- Seek out information on implicit bias
 - <https://implicit.harvard.edu/implicit/>
- Identify and consciously acknowledge real group and individual differences.
 - “Colorblindness”
- Routinely check thought processes and decisions for bias.
- Institute feedback mechanisms.
- Audits

Promoting and Preserving Institutional Values

- **Final Note:**

- The approach, process, and outcome should be consistent with the broad institutional values reflecting the university's obligation to:
 - Commitment to each individual student
 - Commitment to the campus community as a whole
 - Commitment to safety and welfare
 - Commitment to recognizing and embracing differences
 - Commitment to the development of the individual
 - Commitment to educational process

Questions/Discussion

