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Association of
Title IX Administrators

Diversity, Equity, Inclusion Practitioner: Foundations

Training & Certification Course



Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.



CONTENT ADVISORY

The content and discussions in this course will necessarily engage with protected characteristic harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary Chief Diversity Officers and civil right practitioners encounter in their roles including slang, profanity, and other graphic or offensive language.

TRAINING AGENDA

- 1 Foundational Concepts
- 2 Historical Civil Rights Context
- 3 Current Federal Civil Rights Laws
- 4 Additional Civil Rights Provisions
- 5 Legal Intersections and Mixed Motive Theory and Complaints
- 6 Free Speech

TRAINING AGENDA (CONT.)

7

Free Speech Exceptions

8

Additional Free Speech Topics

9

Understanding Speech Forums

10

Policies, Practices, and Pitfalls

11

Managing and Responding to Incidents

12

Establishing Bias Response Team Protocols

TRAINING AGENDA (CONT.)

13 Resolution Processes

14 Formal Investigations

15 Organizational Challenges and Recommendations

LEARNING OUTCOMES





TITLE IX NOTICES OF PROPOSED RULEMAKING 2022 & 2023

TITLE IX REGULATIONS

- **1972:** Congress passed Title IX of the Education Amendments
- **1980:** the Department of Education's Office for Civil Rights (OCR) given primary responsibility for enforcing Title IX
- **November 2018:** OCR proposed the most detailed and comprehensive Title IX regulations to date, which focused on sexual harassment response
- **August 2020:** Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- **June 2022:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on sexual harassment response and pregnancy and related conditions

NPRM PROCESS TIMELINE

- **July 2022:** NPRM published in the Federal Register and the 60-day comment period began
- **September 2022:** Review and comment period ended
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- **April 2023:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on gender identity and athletic participation; notice of a 30-day comment period
- Athletics Final Rule anticipated Spring 2024
- Athletics Effective Date anticipated Summer/Fall 2024

PREPARING FOR IMPLEMENTATION

- Continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new sexual harassment and pregnancy-related Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:

- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach



FOUNDATIONAL CONCEPTS

- Definitions
- Protected Characteristics
- Discrimination

DEFINITIONS

Diversity: Individual differences, including group, social, and any and all human characteristics that define a person and make them unique

Equity: Addressing and eliminating systemic and structural barriers to employment and education and ensuring all individuals are treated fairly through consistent application of strategically designed policies, processes, and approaches that take into account each individual's circumstances, context, and background

DEFINITIONS (CONT.)

Inclusion: active, intentional, and ongoing engagement with diversity and equity allowing individuals to feel they can connect in ways that increase awareness, knowledge, cognitive sophistication, and empathic understanding of the complex ways that individuals interact within systems

Multiculturalism: The active acknowledgment, promotion, and acceptance of the coexistence of different cultures

FEDERALLY PROTECTED CHARACTERISTICS

Race

Color

**Religion or
Creed**

**National
Origin or
Ancestry**

Sex*

Age

**Disability
(physical and
mental)**

**Veteran
Status**

**Predisposing
Genetic
Information**

Citizenship

*includes pregnancy, sexual orientation, and gender identity/expression

DISCRIMINATION

To treat another differently, or less favorably, based upon specific or perceived protected characteristics

- Can be connected with a prejudice
- Always based on a protected characteristic
- Considered a public health issue
- Can be intentional or unintentional
- Intentional discrimination often occurs between individuals
 - **Example:** Treating someone differently because of their gender identity
- Unintentional discrimination often occurs in systems
 - **Example:** Policies that impact racial groups differently

TYPES OF DISCRIMINATION

Disparate Treatment

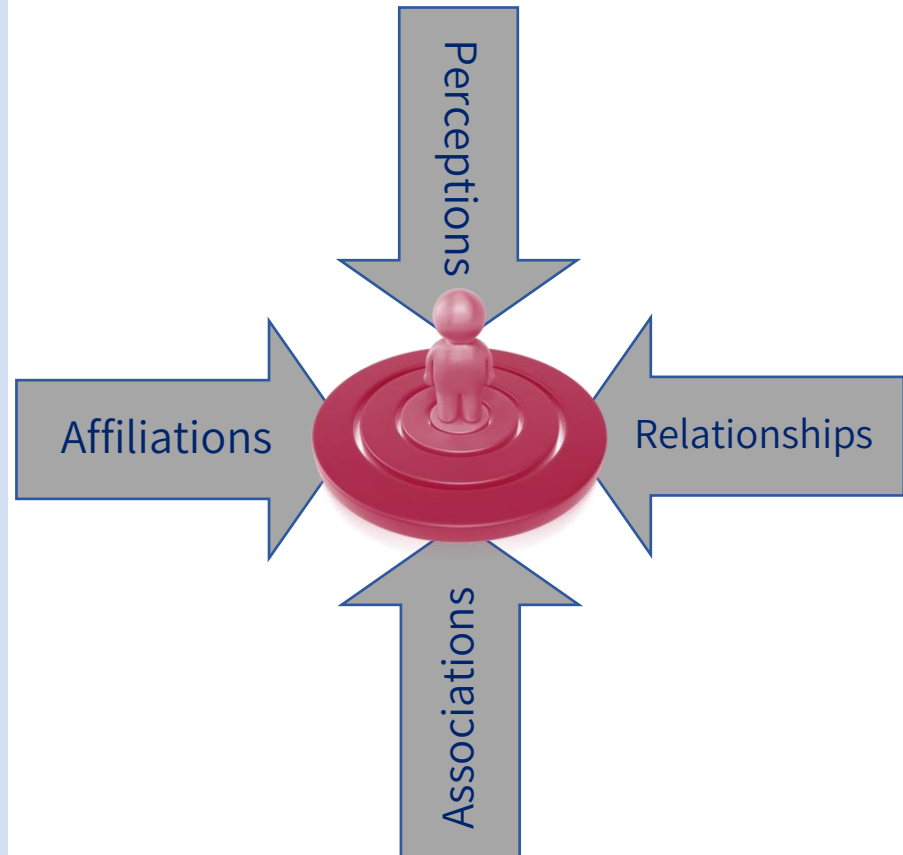
Adverse Impact

Harassment

Retaliation

Treating someone differently or worse than another because of an identity affiliated with a protected characteristic

- Intentional
- Disparate Treatment
- Generally, requires an adverse action
- Burden-shifting analysis: *McDonnell Douglas* case



TYPES OF DISCRIMINATION

Disparate
Treatment

Adverse
Impact

Harassment

Retaliation

- **Indirect Discrimination:**
occurs when a neutral plan or rule is implemented that disadvantages certain groups or individuals
- Unintentional
- Adverse/disparate impact



TYPES OF DISCRIMINATION

Disparate
Treatment

Adverse
Impact

Harassment

Retaliation

Quid Pro Quo

- This for that
- Power dynamic
- Unwelcome conduct
- Implicit or explicit condition
- Threatened detriment or promised advantage

Hostile Environment

- Unwelcome conduct
- Severe, and/or
- Persistent, and/or
- Pervasive, **and**
- Objectively offensive

TYPES OF DISCRIMINATION

Disparate Treatment

Adverse Impact

Harassment

Retaliation

Required Elements

- ✓ Someone engaged in **protected activity**
- ✓ Suffered materially adverse employment or academic action
- ✓ Sufficient evidence supports a causal connection between the protected activity and materially adverse action

Protected Activity

- Made a report/complaint
- Acted as a witness/ provided information regarding a complaint
- Filed a lawsuit
- Supported a person participating in a complaint
- Respondent(?)

MCDONNELL DOUGLAS V. GREEN

411 U.S. 792 (1973)

- Green, a black civil rights activist, worked as a mechanic for McDonnell Douglas. He was laid off.
- Green protested his discharge by claiming the company's hiring and firing practices were racially motivated. As part of his protest, he and other activists illegally parked their cars and blocked the main entrance and exit roads to McDonnell Douglas during the morning shift change.
- On July 2, 1965, McDonnell Douglas held a lock-in that prohibited workers from leaving. Green's involvement in the lock-in was undetermined.
- On July 25, 1965, McDonnell Douglas Corporation advertised for qualified mechanics. Green applied.

MCDONNELL DOUGLAS V. GREEN (CONT.)

411 U.S. 792 (1973)

- Green was not rehired due to his involvement in the protests.
- Green filed a complaint with the Equal Employment Opportunity Commission (EEOC) and filed a Title VII lawsuit in district court.
 - EEOC ruled in favor of Green, in part
 - District Court dismissed the complaint
- Case went to the U.S. Supreme Court
 - Established the **Burden-Shifting Analysis**

BURDEN-SHIFTING ANALYSIS

- Used when an employee lacks direct evidence of disparate treatment discrimination
- Employee bears the initial burden in establishing a *prima facie* discrimination case (i.e., on its face):
 - Identify as having a protected characteristic
 - Adverse employment action taken by employer
 - Employer treated individual differently than similarly situated employees who do not identify with the protected characteristic
- Prima facie case for failure to hire:
 - Identify as having a protected characteristic
 - Applied for and was qualified for the job
 - Rejected from employment despite being qualified
 - Position remained open and employer continued to solicit applicants from similarly qualified people

BURDEN-SHIFTING ANALYSIS (CONT.)

- If prima facie elements are met, burden shifts to employer to articulate:
 - Legitimate non-discriminatory reason for its actions
- If employer articulates a legitimate non-discriminatory reason, the burden shifts back to the employee to show:
 - Employer's articulated reason is pretext for behavior motivated by discrimination
 - Substantial additional information needed
 - Can use statistics, direct evidence, and/or comparative evidence


WHY LAWS MATTER IN DEI WORK

- Laws and Executive Orders dictate institutional policies
 - Provide equal opportunity and equal education access
 - *Plessy v. Ferguson*, 163 U.S. 537 (1896)
 - *Brown v. Board of Education*, 349 U.S. 294 (1954)
- Institutional policies create expectations and goals
 - *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
- Critical for effective diversity, equity, and inclusion work
 - *Grutter v. Bollinger*, 539 U.S. 306 (2003)
 - *Gratz v. Bollinger*, 539 U.S. 244 (2003)



HISTORICAL CIVIL RIGHTS CONTEXT

- Thirteenth Amendment
- Nineteenth Amendment
- Immigration Act of 1924
- The Holocaust
- Historical Timeline



“Have great respect for the past. If you don’t know where you’ve come from, you don’t know where you’re going.”

(Maya Angelou)



JAN. 31, 1865

13th Amendment abolished slavery

1920



19th Amendment
ensures women
the right to vote

IMMIGRATION ACT OF 1924:

LIMITED THE
NUMBER OF
IMMIGRANTS
ALLOWED ENTRY
INTO THE UNITED
STATES THROUGH A
NATIONAL ORIGINS
QUOTA AND
EXCLUDED ASIAN
IMMIGRANTS.

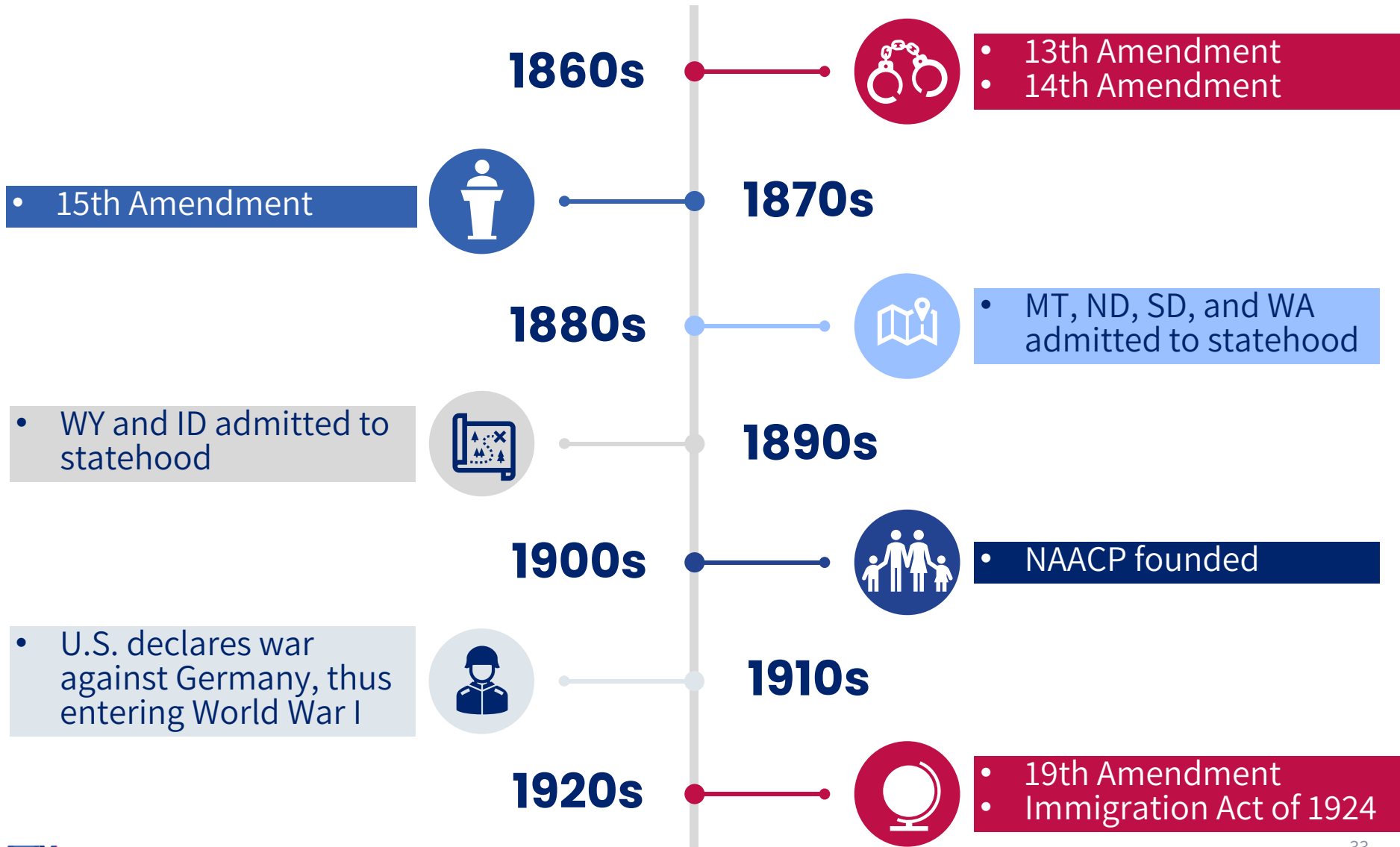




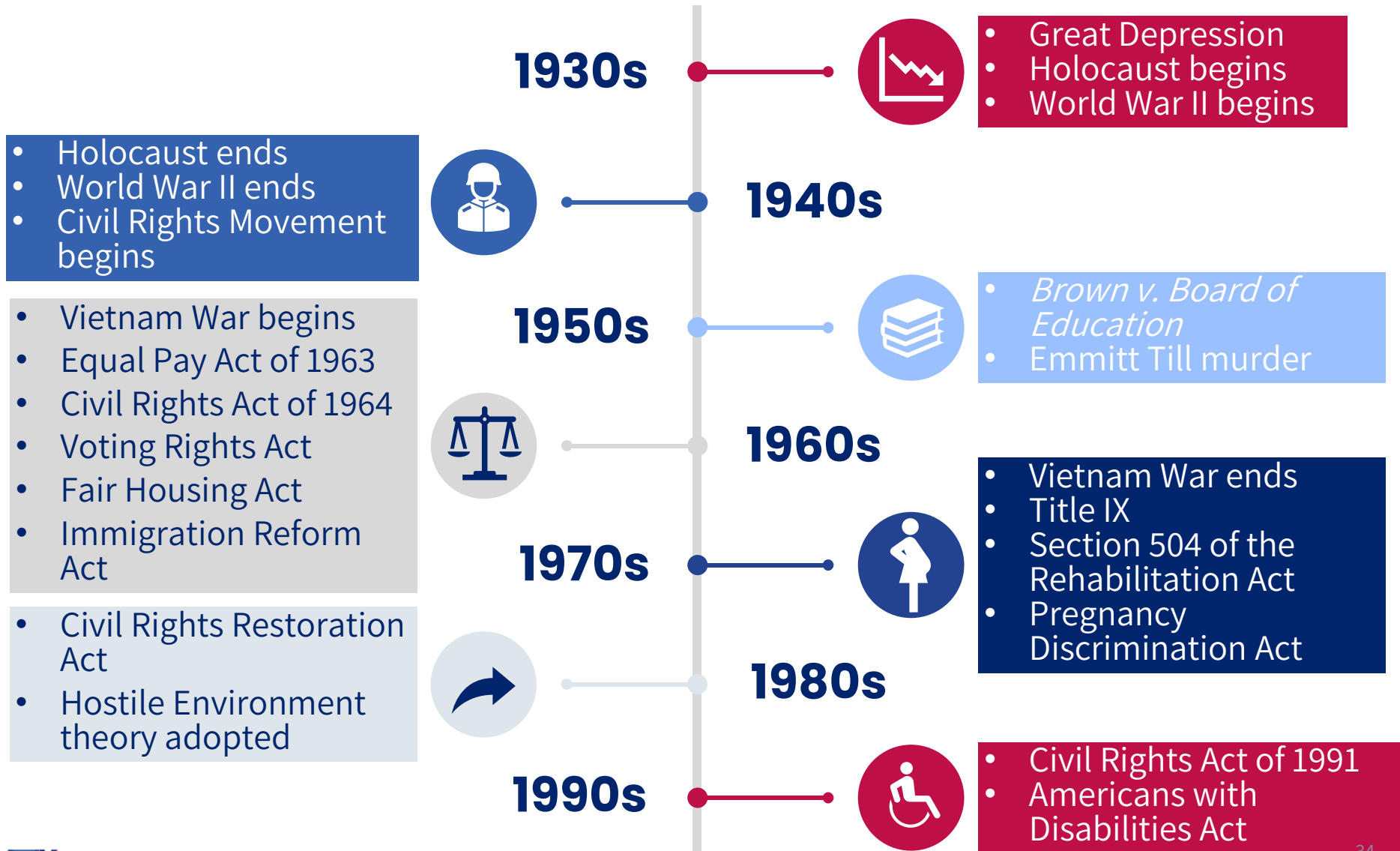
THE HOLOCAUST 1933-1945

The U.S. was not welcoming to Jewish refugees from Europe and Antisemitism was perpetuated by American leaders.

HISTORICAL TIMELINE



HISTORICAL TIMELINE (CONT.)



HISTORICAL TIMELINE (CONT.).

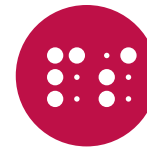
- *Obergefell v. Hodges* grants marriage equality
- 2011 OCR Dear Colleague Letter Re: Title IX

2000s



2010s

2020s



- ADA Amendments Act of 2008

- *Bostock v. Clayton County*
- Title IX Regulations (more anticipated)
- Section 504 Regulations (revision anticipated)





CURRENT FEDERAL CIVIL RIGHTS LAWS

- Equal Pay Act of 1963
- Title VI of the Civil Rights Act of 1964
- Title VII of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972

EQUAL PAY ACT OF 1963

“No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees **on the basis of sex** by **paying wages** to employees **in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex** in such establishment for **equal work** on jobs the performance of **which requires equal skill, effort, and responsibility**, and which are **performed under similar conditions.**”

29 U.S.C. § 206(d)

EQUAL PAY ACT OF 1963 (CONT.)

Prohibited Conduct

- Discrimination in pay rates based on sex
- Includes all forms of pay
 - Salary
 - Bonuses
 - Life Insurance

Jurisdiction

- All employers regardless of number of employees

Employer Defenses – pay differential based upon:

- Seniority system
- Merit system
- Quantity or quality of production
- Any factor other than sex

EQUAL PAY ACT STANDARDS

- **Skill** – Based on skills required for the job, not individual employee skills
- **Effort** – Amount of physical and/or mental exertion needed to perform the job
- **Responsibility** – Degree of accountability required to perform the job
- **Working Conditions** – Physical surroundings (e.g., temperature, fumes, and ventilation) and hazards
- **Establishment** – Jobs within a distinct physical place of business rather than an entire business or enterprise consisting of several business

Source: <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm>

EQUAL PAY ACT OF 1963 (CONT.)

- **Statute of Limitations**

- 2 years from receipt of last discriminatory paycheck
- 3 years for willful violations

- **Administrative Process**

- Not required before filing a lawsuit

- **Remedies**

- Back pay for the pay differential
- Liquidated damages in an amount equal to the back pay

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

“No person in the United States shall, on the ground of **race, color, or national origin**, be **excluded from participation in, be denied the benefits** of, or be **subjected to discrimination** under **any program or activity receiving Federal financial assistance.**”

42 U.S.C. § 2000d et seq.

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (CONT.)

Prohibited Conduct

- Discrimination on the basis of race, color, and national origin
 - Disparate impact (not litigable post-*Sandoval*)
 - Disparate treatment
- Harassment on the basis of race, color, and national origin
 - Hostile environment
 - Retaliation

Jurisdiction

- Program and activity defined as
 - K-12, college, university, or other postsecondary institution
 - Public system of higher education

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

“It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate** against any individual **with respect to their compensation, terms, conditions, or privileges of employment**, because of such individual’s **race, color, religion, sex, or national origin**; or
(2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to **deprive** any individual **of employment opportunities or otherwise adversely affect their status as an employee**, because of such individual’s **race, color, religion, sex, or national origin.**”

42 U.S.C. § 2000e-2(a)

TITLE VII OF THE CIVIL RIGHTS ACT (CONT.)

Prohibited Conduct

- Discrimination based on race, color, religion, sex, and national origin
 - Disparate impact
 - Disparate treatment
- Harassment based on race, color, religion, sex, and national origin
 - Hostile environment
 - Retaliation

Jurisdiction

- Employers with **15 or more employees**
- Employment agencies and labor organizations

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (CONT.)

Exceptions/Exemptions/Defenses

- Provided that the distinctions are not made with intent to discriminate, employers may make a distinction based upon:
 - Bona Fide Seniority or Merit System
 - Professionally Developed Test
 - Quality/Quantity of Production
 - Different Work Locations
- **Bona Fide Occupational Qualification (BFOQ)**
 - Distinction is reasonably necessary for normal operation (e.g., authenticity, genuineness, privacy)
 - Can be used for religion, sex, or national origin
 - No BFOQ for race or color
- **Ministerial Exception**
 - Religious entities may hire based upon religion for positions whose primary duties are religious in nature

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

“No person in the United States shall, on the basis of **sex**, be **excluded from participation** in, be **denied the benefits** of, or be **subjected to discrimination** under any **educational program or activity receiving federal financial assistance.**”

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

TITLE IX PROHIBITED CONDUCT

Sex-Based Discrimination

- Program Equity
- Recruitment, Admissions, & Access
- Pregnancy
- Athletics
- Employment, Recruitment, & Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries & Benefits
- Financial Assistance
- Facilities
- Funding
- Sex & Sexual Orientation
- Gender Identity & Expression

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

Retaliation

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

“It shall be unlawful for an employer to (1) fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to [their] compensation, terms, conditions, or privileges of employment, because of such individual’s age; (2) limit, segregate, or classify [their] employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [their] status as an employee, because of such individual’s age; or (3) reduce the wage rate of any employee in order to comply with this chapter.”

29 U.S.C. § 623(a)

ADEA

Prohibited Conduct

- Discrimination/harassment based on age (40 or older)
 - Not illegal for an employer to favor an older worker over a younger one, even if both workers are age 40 or older
- Retaliation
- Outlines specific provisions that must exist if someone wants to waive their ADEA rights/claims

Jurisdiction

- Private employers with **20 or more employees**
- Federal, State, and local governments
- Employment agencies and labor organizations

ADEA (CONT.)

Employee must identify a specific adverse employment action based upon age

- Exceptions/Exemptions/Defenses
 - Compulsory retirement for executives/high-level policy makers aged 65 or older
 - Reasonable Factor Other Than Age (RFOA)
 - *Smith v. City of Jackson*, 544 U.S. 228 (2005)
 - Bona Fide Occupational Qualification (BFOQ)
 - Distinction is reasonably necessary for normal operation of business
 - Seniority System
 - Bona fide benefit plan
 - Foreign country employee

SECTION 504 OF THE REHABILITATION ACT (1973)

“No **otherwise qualified individual with a disability** in the United States, as defined in Sec. 705(20) of this title, shall, **solely by reason of her or his disability**, be **excluded from the participation** in, be **denied the benefits** of, or be **subjected to discrimination** under any program or activity receiving Federal financial assistance.”

Section 704(a) Promulgation of nondiscriminatory rules and regulations

SECTION 504 OF THE REHABILITATION ACT (CONT.)

- **Prohibits discrimination** on the basis of disability in **all programs or activities** that receive federal financial assistance
- Forbids institutions from excluding or denying individuals with disabilities an **equal opportunity** to receive program benefits and services
- Enforced by the U.S. Dept. of Education, Office for Civil Rights
- Codified at 29 U.S.C. § 701

AMERICANS WITH DISABILITIES ACT OF 1993 (ADA)

“No covered entity shall **discriminate against a qualified individual on the basis of disability** in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other **terms, conditions, and privileges of employment.**”

42 USC § 12112(a)

ADA (CONT.)

Prohibited Conduct

- Discrimination/harassment on the basis of disability or because of an individual's relationship with a person with a disability
- Failure to provide a reasonable accommodation
- Retaliation

Jurisdiction

- Employers with **15 or more employees**
- Employment agencies and labor organizations

Exceptions/Exclusions/Defenses

- Qualification Standards/Test/Criteria that is job-related and consistent with business necessity
- Undue Hardship or Fundamental Alteration

WHO IS PROTECTED?

Individual with a disability is defined as a:

- Person **with** a physical or mental impairment which **substantially limits one or more major life activities;**
- Person who has a **record of** having a physical or mental impairment; or
- Person who is **regarded as** having a physical or mental impairment that substantially limits one or more major life activities.

Source: 29 C.F.R. § 1630.2(g)

WHAT DO “RECORD OF” AND “REGARDED AS” HAVING AN IMPAIRMENT MEAN?

Record of Having an Impairment

Individual has a history of having a mental or physical impairment that substantially limits one or more major life activities

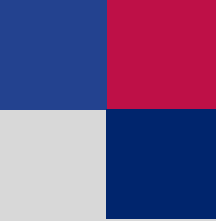
Regarded as Having an Impairment

Person may or may not have a qualifying impairment but is treated as having an impairment that qualifies as a disability

QUALIFIED INDIVIDUAL

- A qualified individual is someone who, with or without a **reasonable accommodation**, can perform the essential functions of the job.
- Consideration shall be given to the employer's judgment as to what functions of a job are essential
- A written job description prepared before advertising or interviewing applicants shall be considered evidence of the essential functions of the job.

Source: 42 U.S.C. § 12111(8)



CASE STUDY

THE CASE OF LINDSEY

Lindsey came to her supervisor after six months on the job asking for permission to be excused from budgetary assignments because of a learning disability.

Lindsey's job responsibilities include preparing budgetary spreadsheets for the department. She presented her supervisor with assessment results from approximately five years ago when she was an undergraduate student. The results indicate a difficulty with math concepts. Lindsey doesn't have any more recent testing but shares that all of her prior employers accepted her undergraduate assessments, so her current employer should, too.

The supervisor informs you that math is a major component of Lindsey's job, but the job description, as advertised, did not mention math computation as a significant job function.

Considering your professional role, what is your advice for the supervisor?



ADDITIONAL CIVIL RIGHTS PROVISIONS

- Pregnancy Discrimination Act
- Immigration Reform and Control Act
- Uniformed Services Employment and Reemployment Rights Act
- Genetic Information Nondiscrimination Act
- Executive Orders

PREGNANCY DISCRIMINATION ACT OF 1978 (PDA)

“The terms ‘**because of sex**’ or ‘**on the basis of sex**’ **include**, but are not limited to, because of or on the basis of **pregnancy, childbirth, or related medical conditions**; and women affected by pregnancy, childbirth, or related medical conditions **shall be treated the same for all employment-related purposes**, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work...”

42 U.S.C. § 2000e(k)

PDA

Prohibited Conduct

- Discrimination/harassment based on pregnancy, childbirth, or related medical conditions as it relates to any form of employment
 - **Example:** Pay
 - **Example:** Job assignments

Jurisdiction

- Employers with 15 or more employees
- Employment agencies and labor organizations

Rights under the ADA and FMLA still apply.

PDA REQUIREMENTS

“ A written or unwritten employment **policy** or **practice** which excludes from employment applicants or employees because of pregnancy, childbirth, or related medical conditions is in prima facie violation of Title VII.”

29 CFR § 1604.10 (a)

An employer cannot refuse to hire an applicant because of their pregnancy-related condition as long as they are able to perform the major functions of the job

PDA REQUIREMENTS (CONT.)

- **Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions**, for all job-related purposes, shall be **treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan** available in connection with employment
- Written or unwritten employment policies and practices should be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities
 - **Example:** Commencement and duration of leave
 - **Example:** Availability of extensions

IMMIGRATION REFORM AND CONTROL ACT OF 1968 (IRCA)

“It is an unfair immigration-related employment practice for a person or other entity to **discriminate against any individual...**with respect to the **hiring, or recruitment, or referral for a fee**, of the individual for employment or the discharge of the individual from employment **because of such individual’s national origin, or** in the case of a protected individual...because of such individual’s **citizenship status.**”

8 U.S.C. § 1324b (a)(1)

Prohibited Conduct

- Discrimination on the basis of national origin against U.S citizens, U.S. nationals, and authorized aliens
- Discrimination on the basis of citizenship status against U.S. citizens, U.S. nationals, and the following classes of aliens with work authorization:
 - Permanent residents
 - Refugees
 - Asylees
- Retaliation

Jurisdiction

- Employers with 4 or more employees

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

“A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.”

838 U.S.C. § 4311 (a)

USERRA

Prohibited Conduct

- Discrimination based on membership, application for membership, performance of uniformed service, application for uniformed service, or obligation
- Retaliation

Jurisdiction

- Any person, institution, organization, or other entity that pays salary or wages for work performed
- No quantitative employee requirement

USERRA (CONT.)

- To prove discrimination or retaliation, the Complainant must show that the employer's actions were motivated by one or more of the following:
 - Membership or application for membership in a uniformed service
 - Performance of service, application for service, or obligation for service in a uniformed service
 - Testimony or statement made in or in connection with a USERRA proceeding
 - Assistance or participation in a USERRA investigation
 - Exercise of a right provided for by USERRA
- Burden shifts to employer to prove an affirmative defense

GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA)

“It shall be an unlawful employment practice for an employer to fail or refuse to hire, or to discharge, any employee, or otherwise to **discriminate against any employee** with respect to the compensation, terms, conditions, or privileges of employment of the employee, **because of genetic information** with respect to the employee; or to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or **otherwise adversely affect the status of the employee** an an employee, because of genetic information with respect to the employee.”

42 U.S.C. § 2000ff-1

WHAT IS GENETIC INFORMATION?

Information about an individual's genetic tests

Information about the genetic test of a family member

Family medical history

Requests for and receipt of genetic services by an individual or a family member

Genetic information about a fetus

GINA

- **Prohibited Conduct**

- Discrimination/harassment against an individual on the basis of genetic information
- Disclosure of genetic information
- Requesting, requiring, or purchasing genetic information with respect to an employee or family member of an employee
- Retaliation

- **Jurisdiction**

- Employers with 15 or more employees
- Employment agencies and labor organizations

OBERGEFELL V. HODGES

576 U.S. 644 (2015)

- U.S. Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment
- Requires all U.S. states, the District of Columbia, and the Insular Areas to perform and recognize same-sex marriages on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities
- **Employers that offer benefits to employees with opposite-sex spouses must also extend these benefits to same-sex spouses**

EXECUTIVE ORDERS – EMPLOYMENT DISCRIMINATION

1941 - EO 8802

Bans discrimination based on race, color, creed, and national origin in federal government and defense industries

1943 - EO 9346

Extended EO 8802 to federal contractors

1961 - EO 10925

Requires government contractors to take “affirmative action” in employment and established the EEOC and OFCCP

1965 - EO 11246

Prohibits federal contractors and sub-contractors, who do over \$10,000 in govt. business/year from discriminating in employment

1978 - EO 12086

Consolidated all affirmative action enforcement actions under U.S. Dept. of Labor

2002 - EO 13279

Amends EO 11246 to allow religiously affiliated contractors to prefer individuals of a particular religion

EXECUTIVE ORDERS – EMPLOYMENT DISCRIMINATION (CONT.)

2014 - EO 13665

Prohibits federal contractors from retaliating against employees or applicants who inquire about or discuss compensation

2014 - EO 13672

Amends EO 11246 to prohibit covered contractors from discriminating based on sexual orientation or gender identity

2021 - EO 13988

Directed all federal agencies to extend protections for sex discrimination to cover sexual orientation and gender identity

2021 - EO 14035

Seeks to create a government-wide initiative to promote diversity, equity, inclusion, and accessibility in the federal workforce

EXECUTIVE ORDERS – ADDRESSING INEQUITY

2021 - EO 13985

Advancing racial equity and support for underserved communities through the federal government



2021 - EO 14031

Advancing educational equity, excellence, and economic opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders



2021 - EO 14045

Advancing educational equity, excellence, and economic opportunity for Hispanics

2021 - EO 14049

Advancing educational equity, excellence, and economic opportunity for Native Americans and Tribal Colleges and Universities



2021 - EO 14050

Advancing educational equity, excellence, and economic opportunity for Black Americans



2021 - EO 14053

Improving public safety and criminal justice for Native Americans and addressing the crisis of murdered Indigenous people

EXECUTIVE ORDER – EDUCATION

- [EO 14021](#): issued March 8, 2021, “Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.”
 - This order declared that all students should be guaranteed an educational environment free from discrimination in the form of sexual harassment, which encompasses sexual violence and includes discrimination on the basis of sexual orientation or gender identity.

OTHER ADMINISTRATIVE ACTIONS

- Following Executive Order 13988, the U.S. Dept of Housing and Urban Development incorporated prohibitions on discrimination on the basis of gender identity or sexual orientation in housing on February 11, 2021.
 - While regulations and/or specific guidance is still forthcoming, and enforcement has not yet been announced, this rule will be binding on **residential colleges and schools**.
 - At this point, no religious exception has been announced, but one is likely to be recognized, as is an exception for single-sex residence halls.
- On March 26, 2021, the U.S. Department of Justice declared that the ruling in *Bostock* would also be applicable to Title IX, but it is unclear what force that opinion carries. Forthcoming Title IX regulations will likely solidify this position.

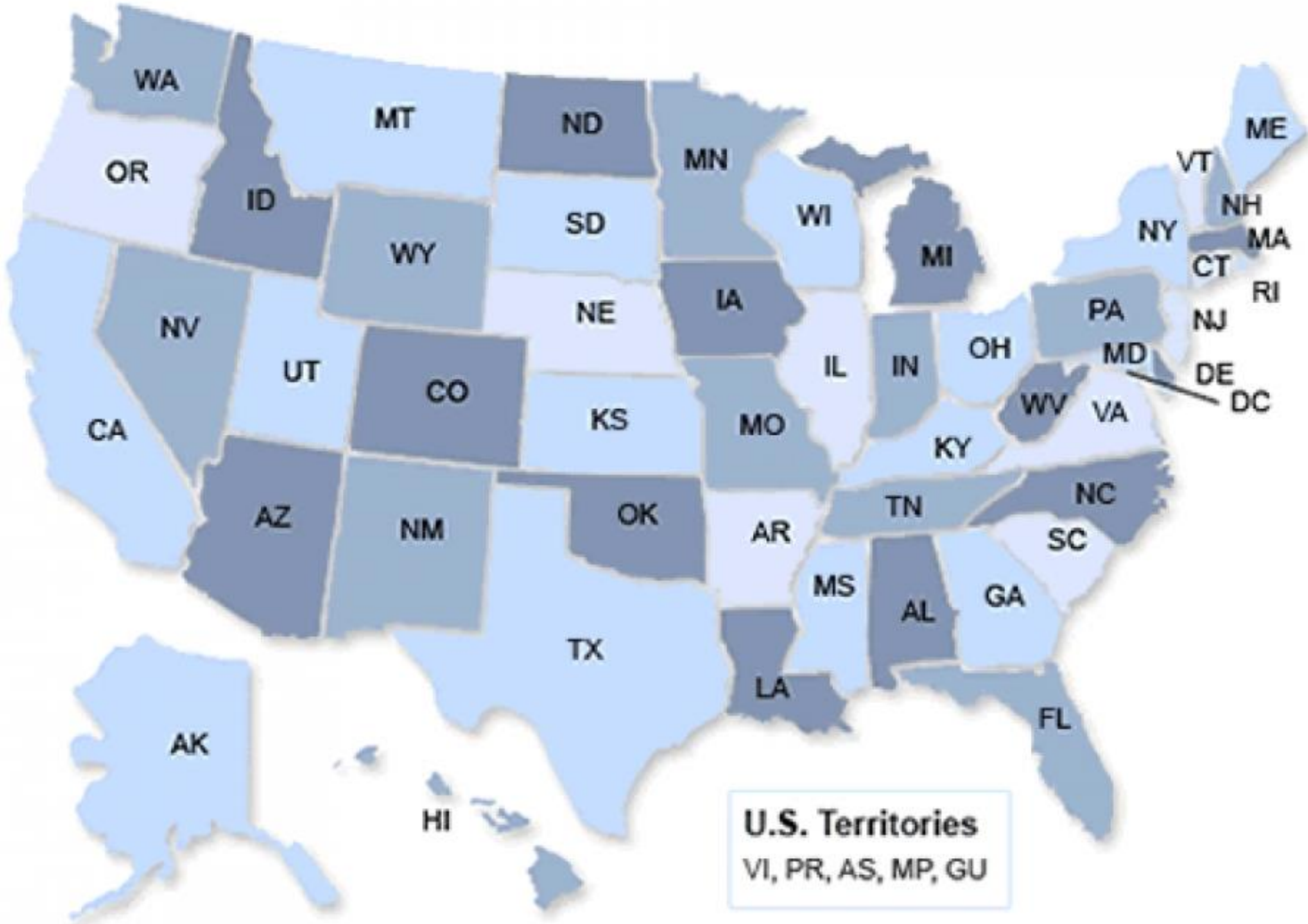
OCR NOTICE OF INTERPRETATION

- On June 16, 2021, the U.S. Department of Education’s Office for Civil Rights issued a Notice of Interpretation (NOI) for enforcement of Title IX with respect to discrimination based on sexual orientation and gender identity
- “This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.”
- “Consistent with the Supreme Court’s ruling and analysis in *Bostock*, the Department interprets Title IX’s prohibition on discrimination “on the basis of sex” to encompass discrimination on the basis of sexual orientation and gender identity.”

OCR NOTICE OF INTERPRETATION (CONT.)

- “[T]he Department finds no persuasive or well-founded basis for declining to apply *Bostock’s* reasoning — discrimination “because of . . . sex” under Title VII encompasses discrimination based on sexual orientation and gender identity — to Title IX’s parallel prohibition on sex discrimination in federally funded education programs and activities.”
- The NOI and Title IX apply to both employees and students.
- The NOI was effective upon publication in the Federal Register.

STATE LAWS





LEGAL INTERSECTIONS AND MIXED MOTIVE THEORY AND COMPLAINTS

LEGAL INTERSECTIONS

Discrimination

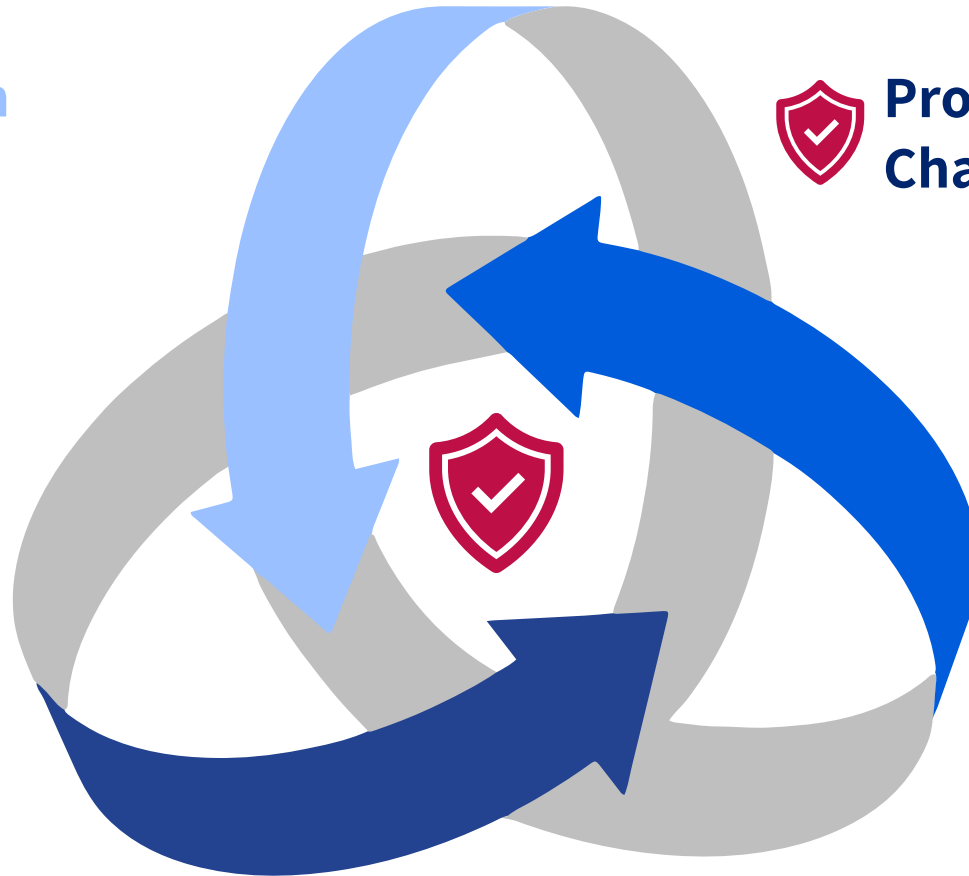
- Disparate Treatment
- Disparate Impact
- Failure to Accommodate

Harassment

- Quid Pro Quo
- Hostile Environment



Protected Characteristics



Retaliation

MIXED MOTIVE

Theory

- Involves any civil right violation
- A concept used to prove illegal discrimination against an employee
- Decisions are motivated, in part, by discrimination

Complaints

- Involves any civil right violation
- Includes multiple protected characteristics
- Potential discriminatory and non-discriminatory reasons for the actions

MIXED MOTIVE THEORY

“A” Motivating Factor

- Both legitimate and illegitimate factors contributed to the employer’s action at the time the action was taken
- Employer must prove it would have taken same action if the protected characteristic was not taken into account

“The” Motivating Factor

- The illegitimate factor has to be the “but-for” or “sole” reason for the employer’s actions
- Employer not required to show it would have taken the same action if the protected characteristic was not taken into account

MIXED MOTIVE - DR. WEST'S COMPLAINT

- Dr. West, a female, tenure-track Assistant Professor in Business was recently up for her tenure review. In order to achieve tenure, faculty members must demonstrate excellent evaluations in the areas of teaching, research, service, and professional ethics.
- Despite receiving excellent evaluations in each area, Dr. West was denied tenure by the department. Dr. West demanded an explanation from the tenure committee and was told that despite her having excellent evaluations, her peers believed her to be unreliable due to her frequent absenteeism each semester.
- Dr. West files a discrimination complaint with you, alleging she has been discriminated against based on her sex.

What additional information do you need to know?

MIXED MOTIVE – ALEX’S COMPLAINT

- Alex, a gay, Asian male is a prominent student leader.
- Alex comes to your office and reports that Professor North, his openly gay chemistry professor, called him into his office and told Alex that he finds him attractive and wanted to know if Alex wanted to go out for drinks together on Saturday. Alex reports that he told Professor North he was not available on Saturday and Professor North asked him about the following Saturday. Alex told Professor North that he did not think it was a good idea for him to have drinks with his professor any day.
- In class the next day, Professor North only called on Alex to answer questions despite other students raising their hands, stating, “Asians are smart, so you should know these answers.”

MIXED MOTIVE – ALEX’S COMPLAINT (CONT.)

- Alex has now noticed that since he turned down Professor North’s social invitation, Professor North is now treating him differently than other students in the class.
- Alex tells you that Professor North did not return his assignments when the other students received their assignments. Professor North makes it a point to stand directly behind Alex during exams, which is something he has never done before. Professor North also rejected Alex’s midterm thesis, stating that someone of his culture should be submitting more intellectually rigorous theses than the one he submitted.
- Alex has stopped attending his chemistry class and his grade has dropped from an A to a D.

Considering your professional role, how would you respond to Alex’s allegations?



FREE SPEECH

- First Amendment
- Guiding Principle
- Common Challenges
- Academic Freedom
- *Meriwether v. Hartop*

THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

1791



I DISAGREE WITH MY
OPPONENTS' POSITIONS
BUT SUPPORT THEIR RIGHT
TO EXPRESS THEM FREELY!

GUIDING PRINCIPLE

“The Guiding Principle for virtually all institutions of higher learning is that free speech must be protected, even when the speech for which freedom is sought may be offensive or disruptive or at variance with the campus mission.”

Dr. Robert M. O’Neil
Founder, Center for the Protection of Free Expression
Former President, University of Virginia

FREE SPEECH: COMMON CHALLENGES

- Most common challenge is a disruption to an institution's DEI mission
 - Controversial speakers and challenging messages
 - Clashes between protected expression and Academic Freedom in the classroom
 - Offensive organizational themed parties
 - Social media
 - Student press autonomy
 - Offensive speech or expression
 - Bias incidents – “hate speech”
 - Cancel culture

WHY FREE SPEECH MATTERS

Moral and Practical Standpoint

- Essential to freedom of thought: the right to have beliefs without risking punishment
- Necessary for democratic self-government: the ability to freely receive information and opinions on matters of public interest and the actions of government officials

Institutional Standpoint

- Mission/Vision
- Strategic priorities
 - Aspirational goals vs. legal restrictions
- Ideologies of diversity, equity, and inclusion
 - **Example:** Equity perspective
 - **Example:** Universal perspective

Source: Williams, D.A. (2013). *Strategic diversity leadership*. Style Publishing, LLC
Source: Chemerinsky, E. & Gillman, H. (2017). *Free speech on campus*. Yale University Press.

ACADEMIC FREEDOM AND THE FIRST AMENDMENT

- Not coextensive of each other
 - Courts have recognized a relationship between the two
- Academic Freedom
 - Rights within the educational context of teaching, learning, and research
 - Covers both inside and outside of the classroom
 - Protections apply to public and private institutions
 - Protections extend to the institution, faculty, and students
- Sources of Academic Freedom Rights
 - *Adler v. Board of Education*, 342 U.S. 485 (1952)
 - *Wieman v. Updegraff*, 344 U.S. 183 (1952)
 - *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)
 - *Keyishian v. Bd. Of Regents*, 385 U.S. 589 (1967)

Source: AAUP. (2007, July). *Academic Freedom and the First Amendment*.

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts

- Case against Shawnee State University (SSU) (Ohio)
- Meriwether is a tenured faculty member who has worked at SSU for 25 years
- In 2016, SSU informed faculty “they had to refer to students by their ‘preferred pronouns.’” If not, they were subject to discipline.
- School used existing policy re: discrimination based on gender identity
- Meriwether complained to Dept. Chair who told him, “Christians are primarily motivated by fear.”

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)

- Meriwether taught without incident until 2018
- In the first class of the term, Meriwether referred to a student (Doe) who presented as male as “sir” (he used formal pronouns for all students)
- Following class, Doe approached Meriwether and demanded to be referred to using female titles and pronouns
- Meriwether said his religious beliefs prevented him from communicating about gender identity that he believes to be false and therefore couldn’t comply with the student’s demands

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)

- The student became hostile and threatening.
- Meriwether reported incident; the Title IX Office was informed.
- Meriwether was advised to eliminate use of all sex-based pronouns. Meriwether proposed a compromise to call Doe by her last name.
- This worked for two weeks, but Doe again complained. Meriwether was told to comply or be in violation of school policy.

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)

- Meriwether proposed using the preferred pronouns if he could put a disclaimer in his syllabus saying he was compelled to do so, and it was against his religious beliefs.
- This proposal was rejected.
- SSU initiated an investigation and found Meriwether responsible for creating a hostile environment. He was given a formal, documented warning that could lead to additional progressive discipline.
- Meriwether argued that he couldn't use the female pronoun with Doe because of his religious convictions.

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)

- Doe received a high grade in Meriwether's course.
- Meriwether filed a grievance, but the Provost would not discuss academic freedom and religious discrimination aspects of the case.
- Meriwether alleged he could not address a “high profile issue of public concern that has significant philosophical implications.” He filed a lawsuit under the First Amendment.

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Decision

- Meriwether lost at the trial court level
- The Court of Appeals overturned the decision and found in favor of Meriwether
- The Court held that under Supreme Court decisions & 6th Circuit precedent, the First Amendment protects the academic speech of university professors
 - “The First Amendment protects the right to speak freely and right to refrain from speaking...and the government may not compel affirmance of a belief with which the speaker disagrees”

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Decision (Cont.)

- Citing to the *Tinker*¹ case the court said, “Government officials violate the First Amendment whenever they try to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.”
- Citing to *Keyishian v. Bd. of Regents*² the court said the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”
- This decision was returned to the district court for trial, resulting in a \$400,000 settlement in 2022.

¹ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

² *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

ACADEMIC FREEDOM & FREE SPEECH

- There may be a balancing test applied to the First Amendment rights of the professor vs. the rights of the institution to maintain a non-disruptive learning environment.
- The professor may not create a hostile environment, but if speech is protected, that protection overcomes a potential hostile environment finding.
- Individual academic freedom remains an important protection for faculty in the performance of their role
 - If a faculty member can show that their comments are germane to the course content, are pedagogically appropriate to advancing an academic message, and are not merely gratuitous use of shocking language, the professor will likely be protected from disciplinary action.

NON-FACULTY EMPLOYEE SPEECH RIGHTS

- Employers are generally free to restrict employee speech, at least while they are at work.
 - Employer cannot limit the viewpoint of an employee.
- Can a public employee speak out on a matter of public concern or importance on social media or in public?
 - If the speech touches on matters of public concern, then the court balances the employee's right to free speech against the employer's interests in an efficient, disruption-free workplace.
 - To determine whether a public employee's speech is too disruptive, a court will ask whether it affects close working relationships, interferes with the employer's normal operation of business, or impairs discipline on the job.



FREE SPEECH EXCEPTIONS

- Fighting Words
- Obscenity
- Incitement of Imminent Lawless Action
- True Threat
- Defamation

FIGHTING WORDS

CHAPLINSKY V. NEW HAMPSHIRE, 315 U.S. 568 (1942)

- Chaplinsky was convicted under a state statute for verbally attacking the City Marshall by calling him a “damned racketeer” and a “damned Fascist”
- This case took place during WWII, at a time in which accusations of racketeering or fascism were taken quite seriously
- The Court held that Chaplinsky’s epithets were “fighting words” which were “likely to provoke the average person to retaliation, and thereby cause a breach of the peace”
- There have been no other holdings on fighting words since 1942

Do you think there are words that would rise to that level today?

OBSCENITY

MILLER V. CALIFORNIA, 413 U.S. 15 (1973)

- Marvin Miller sent advertisements for adult books and films he had for sale through a mass mailing campaign which depicted sexual acts.
- Recipients who received the mail did not willingly request or grant permission to receive the mailed advertisements.
- The Court ruled in favor of the State of California, saying Miller engaged in obscenity.

OBSCENITY (CONT.)

MILLER V. CALIFORNIA, 413 U.S. 15 (1973)

- The court found obscenity was determined by:
 - Whether the average person, applying contemporary standards of the community, would find that the work only appeals to the prurient interest of others
 - Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law
 - Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value

INCITEMENT OF IMMINENT LAWLESS ACTION

BRANDENBURG V. OHIO, 395 U.S. 444 (1969)

- The leader of the Ku Klux Klan was convicted under the Ohio statute for threatening that “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken”
- The Supreme Court found in favor of the Klan, stating “**speech that merely advocates rather than actually incites violence shall be protected by the First Amendment**”
- The Court stated that a governmental entity may not forbid or proscribe advocacy of the use of force or law violations except where such advocacy incites or **produces imminent lawless action** and is likely to produce such action

TRUE THREAT

VIRGINIA V. BLACK, 538 U.S. 343 (2003)

- Barry Black and others were convicted of violating a Virginia statute that makes it a felony “for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place,” and specifies that “any such burning...shall be prima facie evidence of an intent to intimidate a person or group”
- The Supreme Court held that while a state, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional

TRUE THREAT ANALYSIS

In analyzing a true threat, one must assess:

- If there is a specifically expressed intent to carry out the threat and places the victim in fear
 - Directed toward a specific person or group
 - Specifically communicated to the target
 - Capable of being carried out

DEFAMATION

MILKOVICH V. LORAIN JOURNAL CO., 497 U.S. 1 (1990)

- Milkovich, Maple Heights High School’s wrestling coach, testified at a hearing concerning a physical altercation at a recent wrestling meet
- After the hearing, Theodore Daidium published an article in the local newspaper saying that anyone at the wrestling meet “knows in their heart” that Milkovich lied at the hearing
- Milkovich sued Daidium and the paper for defamation, alleging that the article accused him of perjury, damaged his occupation, and constituted libel
- The Supreme Court found against the newspaper, stating that Milkovich was not a public figure, and the defamatory statements were **factual assertions**, not **constitutionally-protected opinions**



ADDITIONAL FREE SPEECH TOPICS

- Student Press
- Controversial Speakers
- Social Media
- Dress Codes and Grooming Discrimination

STUDENT PRESS - TEXAS STATE UNIVERSITY

- Texas State University fired the author of an inflammatory anti-white article that was published in their student newspaper in November 2017.
- Publication of the article resulted in the student body president demanding termination of the paper's editor-in-chief and opinions editor. Stating they “knowingly allowed racist material to stain the reputation of the university,” he said the paper should no longer be funded.
- This was followed by an outcry for the student body president to resign because, “to directly threaten a publication because of the content of an opinion piece that he happens to disagree with is a threat to constitutional free speech and censorship.”

STUDENT PRESS - TEXAS STATE UNIVERSITY (CONT.)

- The article and the response resulted in sit-ins and demonstrations at the school.
- The student body president was impeached by the student senate in April 2018 for using the campus Twitter account to express his views.
- The impeachment was later overturned by a subsequent student government administration in February 2021.

CONTROVERSIAL SPEAKERS - PORTLAND STATE UNIVERSITY

- In March 2019, the Portland State University College Republicans student organization hosted Michael Strickland to discuss his appeal from a conviction for brandishing a firearm during a demonstration.
- The police took no action when a protester disrupted Mr. Strickland's talk for over an hour by ringing a cowbell and standing in front of the projector.

Was this the protester's right?

HECKLER'S VETO

- What the protester engaged in is called the **Heckler's Veto**
 - Occurs in circumstances when opponents to a message block the delivery of that message by direct action or shouting down a speaker through protest
 - Also occurs when a representative of the public entity accepts limits or restrictions on speech that overrides another speaker, or when the public entity restricts or cancels a speech based on anticipated or actual reactions of the opponents of the speech

Is this OK?

SOCIAL MEDIA - UNC CHAPEL HILL

- A student at the University of North Carolina at Chapel Hill accused the University of taking down her web-post that lampooned officials' handling of race relations.
- The website called "UNC Anti-Racist Jeopardy," modeled off the game show, asked questions about the University's history and ties to racism and police and administrators' interactions with activists.

SOCIAL MEDIA - UNC CHAPEL HILL (CONT.)

- The University argued that the website was her “personal work” and not appropriate for the University’s computing network. However, many students had personal work on the campus computing network—some about their pets, their love of coffee and favorite colors —and the University had never intervened in websites that were created for personal business.
- FIRE* intervened in this matter and the University informed the student they would reinstate her website and would “review its web policies.”

*Foundation for Individual Rights in Education

DRESS CODES

- Be cautious when regulating attire
 - Freedom of Expression
 - *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
 - *Smith v. McDavis, Jones, and Compton* (settled 2015)
 - Sex-based Discrimination, *Peltier v. Charter Day School*, 7:16-cv-00030-H-KS (4th Cir. 2022).
 - Reinforcement of gender binary and stereotypes
 - Tip: do not specify which gender is required to wear approved clothing
 - Religious attire, including headwear
 - Racial Discrimination

GROOMING DISCRIMINATION

- Similar considerations as those for dress codes should be given to grooming or appearance policies
 - Freedom of Expression
 - Sex-based Discrimination
 - Reinforcement of gender binary and stereotypes
 - Religious Freedom
 - Racial Discrimination
- Grooming discrimination is most commonly a result of policy that has a disparate impact
 - Hairstyles
 - Hair length
 - Facial hair
 - Nail polish



THE IMPORTANCE OF ANALYZING THE ACTIVITY BEFORE TAKING ACTION

CONSIDERATIONS

- Free expression at public institutions **does not guarantee unfettered access to property** simply because it is owned or controlled by a government entity
- Public institutions have the **right to impose reasonable regulations compatible with the institutional mission** by carefully **assessing the type of expression in the location of the expression** and using a **viewpoint-neutral approach with any time, place, and manner restrictions**
- Not all locations on campus have the same type of standards on restricting/permitting expression

THREE-STEP ANALYSIS

STEP 1: Are there First Amendment implications in the activity presented?

- Does it include any components of “expression” (not conduct)
 - Consider: not just speech, but leafleting, signs, bulletin boards, chalking, clothing, etc.
- Does it have a religious component? Political component?
- Does it involve an institutional newspaper, radio, TV station?
- Does it involve a group activity on campus, i.e., demonstration, protest, walkout, rally?
- Is there a request for meeting room space?
- Does it involve group or organization with official recognition?

THREE-STEP ANALYSIS (CONT.)

STEP 2: Are there any clear exceptions to the First Amendment at issue?

- Each potential exception requires a separate analysis to the specific set of facts presented
- Courts will apply exceptions **very narrowly**
- Must be applied with extreme caution

THREE-STEP ANALYSIS (CONT.)

STEP 3: Analysis of facts identified in Steps 1 & 2 in consideration of the location on campus (the “forum”)

- Any restriction based solely on the message to be delivered will always be prohibited (unless it’s one of the exceptions)
- Institution can apply a content (message) neutral “time, place, and manner” limitation, but it must do so with careful consideration of the facts and the location, while also offering appropriate alternative outlets for the speech or expression
- Document the basis for the decision



THE IMPORTANCE OF FORUM IN REGULATING FIRST AMENDMENT ACTIVITY

UNDERSTANDING LOCATION (FORUM)

- **Traditional Public Forum**
 - Campus malls/quads, public streets through campus, public sidewalks
- **Designated Public Forum**
 - Areas the institution designates for “free speech” such as green space, campus mall areas
- **Limited Public Forum**
 - Auditoriums, meeting rooms, athletic facilities
- **Non-public Forum**
 - Classrooms, residence halls, campus offices

TRADITIONAL PUBLIC FORUM & DESIGNATED PUBLIC FORUM

- A **traditional public forum** has the fewest number of restrictions for any form of expression
- Any limitation to the speech, assembly, or other forms of expression **must serve a significant interest** of the institution:
 - Not disrupting the delivery of education
 - Not posing a significant health or safety risk (but one can't speculate on the risk—it must be imminent and specific)
 - Placing a priority on the use of the space to support the institutional mission
 - Not blocking the ingress or egress of buildings, hallways, or offices

LIMITED PUBLIC FORUM

- The institution is only required to meet a “**reasonableness**” standard when applying limitations on public forum spaces
 - An activity may be limited based on the nature of the location and type of activity, but it cannot be limited based on the message of the activity
 - Any limitation must be related to legitimate, clearly articulated standards based on the type of the location
 - Limitations cannot restrict more speech or expression than is necessary
 - Schools must be careful about “**prior restraints of speech,**” that is anything that would be unnecessary and may limit or chill protected expression

NON-PUBLIC FORUM

- Any location that the institution has not opened for general public discourse, such as classrooms, offices, etc.
- May limit the location (forum) for its intended purpose only
 - May apply limitations on the subject matter being discussed and the identity of the speaker, but not based on the speaker's message
 - For example, institution may limit classroom discussion to the subject matter of the course being taught, but not on the opinion that the faculty member or student would have about what is being discussed

NON-PUBLIC FORUM (CONT.)

- May restrict commercial solicitation in residence halls
- May restrict someone from an office whose message is disruptive or inconsistent with the nature of the office
- Any limitation must maintain viewpoint neutrality
- Limitation must be reasonable



POLICIES, PRACTICES, AND PITFALLS

- Essential Policy Elements
- Policies and Procedures
- Policy Pitfalls
- *Speech First, Inc. v. Schlissel*

IMPORTANCE OF POLICY

- Policies = The Rules
 - Goal is unified policy (e.g., 1P2P)
 - One civil right is not more important than others
 - Employer's affirmative defense to a discrimination claim
- Outlines organization standards and values
 - Mission
 - Vision
 - Strategic priorities
- Articulates the rules of the work, learning, and living environment
- Defines prohibited and expected conduct (floor vs. ceiling)

ESSENTIAL POLICY ELEMENTS

- Alignment with federal, state, & local laws
- Connection to DEI goals/aspirations
- Identification of jurisdiction
- Provides clear, non-ambiguous description of when conduct is subject to the policy
- Includes institutional positions on:
 - Dating in the workplace
 - Amorous relationships
 - Nepotism
 - Speech
 - Others

ADDITIONAL POLICY CONSIDERATIONS

- Reporting requirement?
 - Who to report to
 - Voluntary disclosures
 - What is needed for a formal complaint?
 - Include description of any applicable confidentiality
- Caution regarding different “bubbles”
 - Huggers
 - Face-kissers
 - Touchers
- Cultures/customs of institution/organization

POLICIES AND PROCEDURES

- Statement of institutional expectations and values on nondiscrimination
- Clear definitions of prohibited conduct
 - Floor vs. ceiling
 - Avoid overlap with criminal terms when possible
 - Include examples of prohibited conduct
 - Include retaliation prohibition
- Jurisdiction
 - Policy applications
 - To whom does the policy apply?
 - When does the policy apply?
 - What is the prohibited conduct?

POLICIES AND PROCEDURES (CONT.)

- Rights afforded to the parties throughout the formal grievance resolution process
 - Advisor of choice
 - Access to evidence
 - Ability to question opposing party
- Supportive/interim measures
 - Student organizations
 - Counseling
 - Affinity group support
 - No contact directives
- Information sharing
 - Private
 - Confidential

POLICY AND PROCEDURES (CONT.)

- Prompt and equitable complaint resolutions
 - Reporting options
 - Internal/external
 - Name, contact information, location of responsible administrator
 - Resolution options
 - Formal vs. Informal
 - Trained informal resolution facilitators, if applicable
 - Investigation process
 - Investigator model
- Use plain language; avoid legalese

POLICY PITFALLS

Avoid

- Overbroad policies (encompass more speech or expression than necessary to achieve the institutional mission)
- Policies that are not content neutral (i.e., prohibit expression based on one viewpoint but not another, such as “hate speech” policies)
- Policies that are too vague, and therefore, are subject to “unfettered administrative discretion”
- Policies that create a prior restraint of speech
- Not following the policy for complaints
 - Impacts trust and can inhibit a culture of reporting

SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (2019)

Background

- University of Michigan policy prohibits “[h]arassing or bullying another person – physically, verbally, or through other means.” Harassing and bullying are not defined in the University’s policy but there were definitions on the school’s website.
- The University also has a Bias Response Team (BRT).
- The University defines a “bias incident” as “conduct that discriminates, stereotypes, excludes, harasses or harms anyone in our community based on their identity (such as race, color, ethnicity . . .)”

SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (2019)

Facts

- Under University policy, a bias incident is not itself punishable unless the behavior violated some provision of the conduct code
 - The BRT does not determine whether conduct is a bias incident but has a procedure to follow for each report
- If a reporting party desires, the BRT invites the person alleged to have committed the incident to meet with a member of the BRT
- Speech First alleged the definitions of “harassing” and “bullying” are overbroad, vague, and “sweep in” protected speech

SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (2019)

Facts (Cont.)

- Speech First also alleged that the term “bias incident” is overbroad and that the BRT’s practices intimidate students and quash free speech
- Speech First filed suit on behalf of its members (associational standing) to challenge the policy definitions and BRT

SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (2019)

Decision

- The Court agreed with Speech First that students' speech is chilled by the BRT. Even though the BRT lacks disciplinary authority, the Court agreed that the invitation to meet with team member carries an implicit threat of punishment and intimidation such to quell speech.
- The Court supported Speech First's associational standing because it is challenging the definitions and BRT "on its face" as opposed to alleging the University applied the definitions in a manner that violated students' free speech rights.
- Even though the University voluntarily removed the definitions from its website after Speech First sued, its actions were akin to ad hoc regulatory action and can be easily and/or discretionarily reversed.

SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (2019)

Takeaways

- Policies and practices including those of the BRT, should not carry implied threats of discipline. Punishment is not an effective path to civility, tolerance, and inclusion.
- Institutions should clearly define prohibited behavior, particularly in policies that otherwise impact speech and expression
- National organizations that have campus chapters may have associational standing to sue when challenging a policy or practice, even without a showing of injury
- Best practice is to use BRTs as a resource as opposed to speech and behavior “police”



MANAGING AND RESPONDING TO INCIDENTS

RESEARCH AND DATA

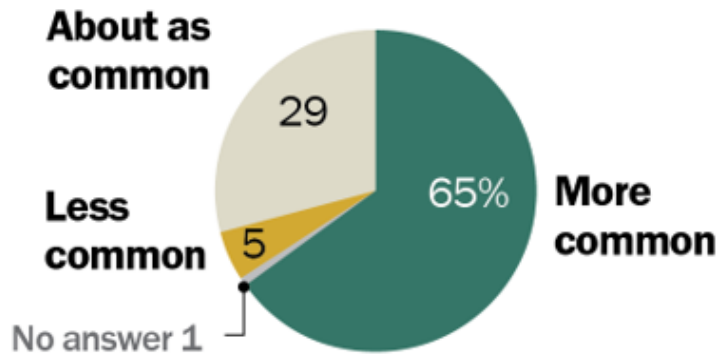
- 2019 PEW Research Center *Race in America* survey of the American Trends Panel (survey respondent composition)

Group	Unweighted sample size	Plus or minus ...
Total sample	6,637	1.7 percentage points
White	2,997	2.2 percentage points
Black	1,518	4.0 percentage points
Hispanic	1,574	3.6 percentage points
Asian (interviewed in English only)	332	8.1 percentage points

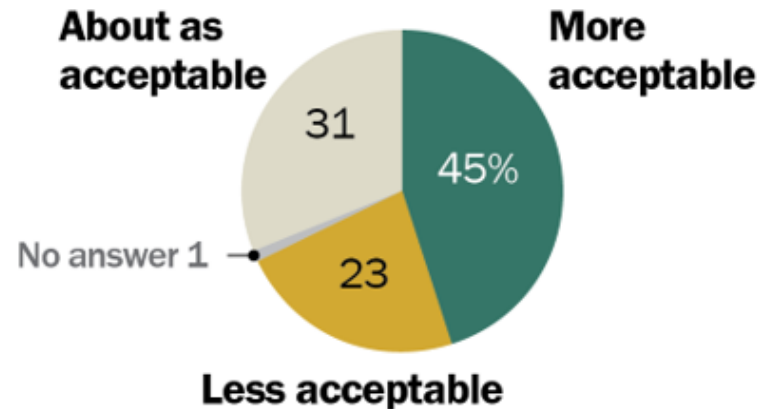
Most say it's now more common for people to express racist or racially insensitive views

% saying, since Trump was elected ...

It has become ____ for people to express racist or racially insensitive views



It has become ____ for people to express racist or racially insensitive views



Source: Survey of U.S. adults conducted Jan. 22-Feb. 5, 2019.
"Race in America 2019"

PEW RESEARCH CENTER

EEOC COMPLAINTS BY DISCRIMINATION TYPE

	FY 2019	FY 2020	FY 2021
Race	23,976	22,064	20,908
Sex	23,532	21,398	18,762
National Origin	7,009	6,377	6,213
Religion	2,725	2,404	2,111
Color	3,415	3,562	3,516
Retaliation – All Statutes	39,110	37,632	34,332
Retaliation – Title VII Only	30,117	27,997	25,121
Age	15,573	14,138	12,965
Disability	24,238	24,324	22,843
Equal Pay	1,117	980	885
Genetic Information	209	440	242

NOTE: Individuals could file complaints claiming multiple types of discrimination

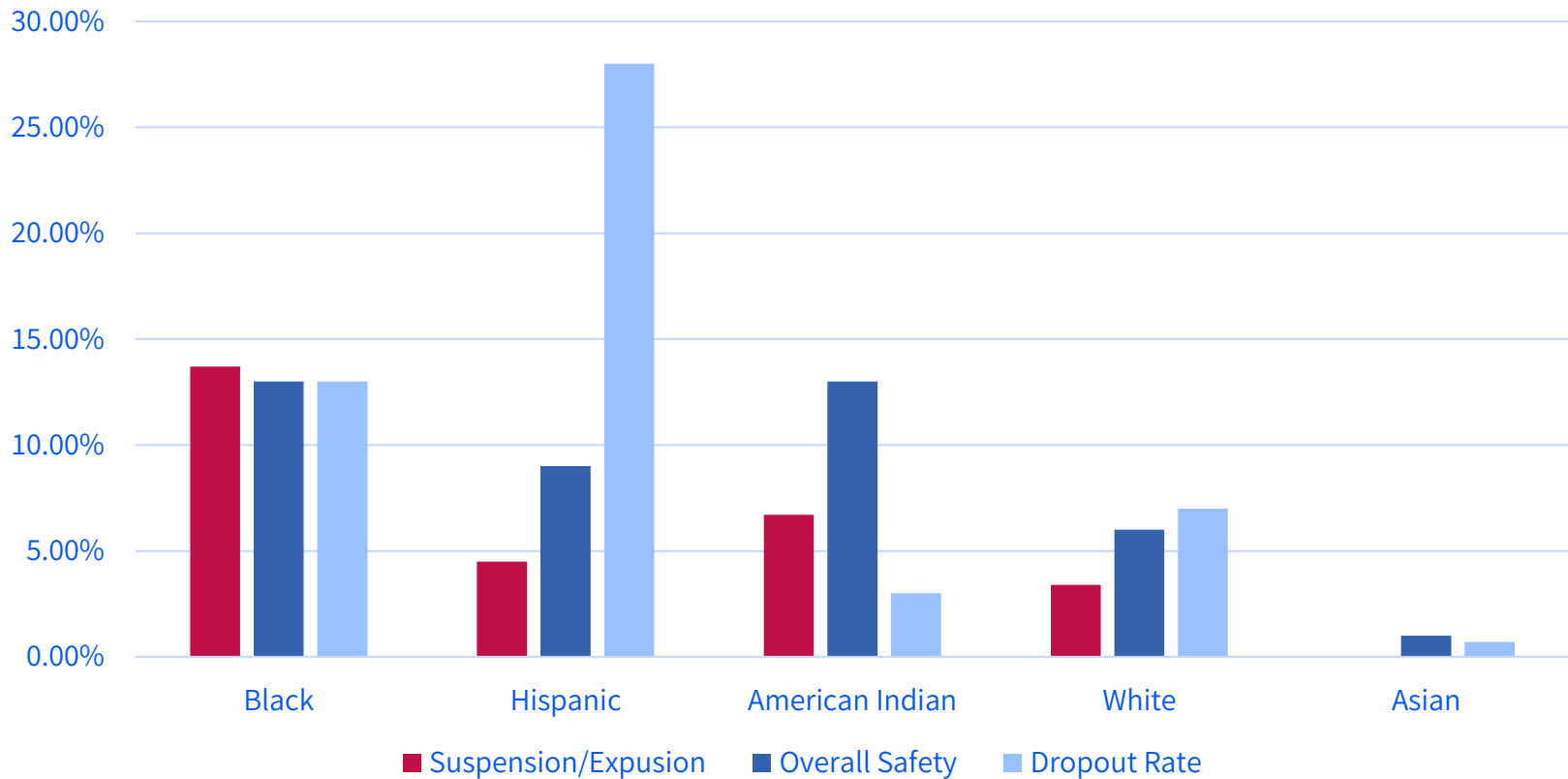
EMPLOYMENT DATA (CONT.)

Race	Race Discrimination Experience/Reporting
White	15/15
Black	75/24
Hispanic	24/8
Asian	12/1
Pacific Islander	49/7

Source: U.S. Equal Employment Opportunity Commission Fiscal Year 2020 Data

K-12 EDUCATION DATA

Student Discipline, Safety, and Dropout Rates by Race



Source: Department of Education 2020 Trends in Education of Racial and Ethnic Groups

REPORTING BARRIERS BY RACE

African American

- Mistrust in administrations
 - Actual
 - Perceived
 - Historical context
 - Geography
- Betrayal of Race
 - Differing interpretations of consent
- Biased/Non-existing cultural-specific resources
 - Use external resources
 - Cultural competence education
 - Monoracial marketing materials
- Fear of Retaliation

REPORTING BARRIERS BY RACE

Hispanic

- Possible language barriers
- Lack of culturally competent care
- Immigrants – laws in home country may differ
 - Retaliation
 - Deportation
- Familial Background
 - Childhood maltreatment higher than other cultures
 - Group-oriented culture with strong culturally based standards
 - Violation of group norms

REPORTING BARRIERS BY RACE

Asian

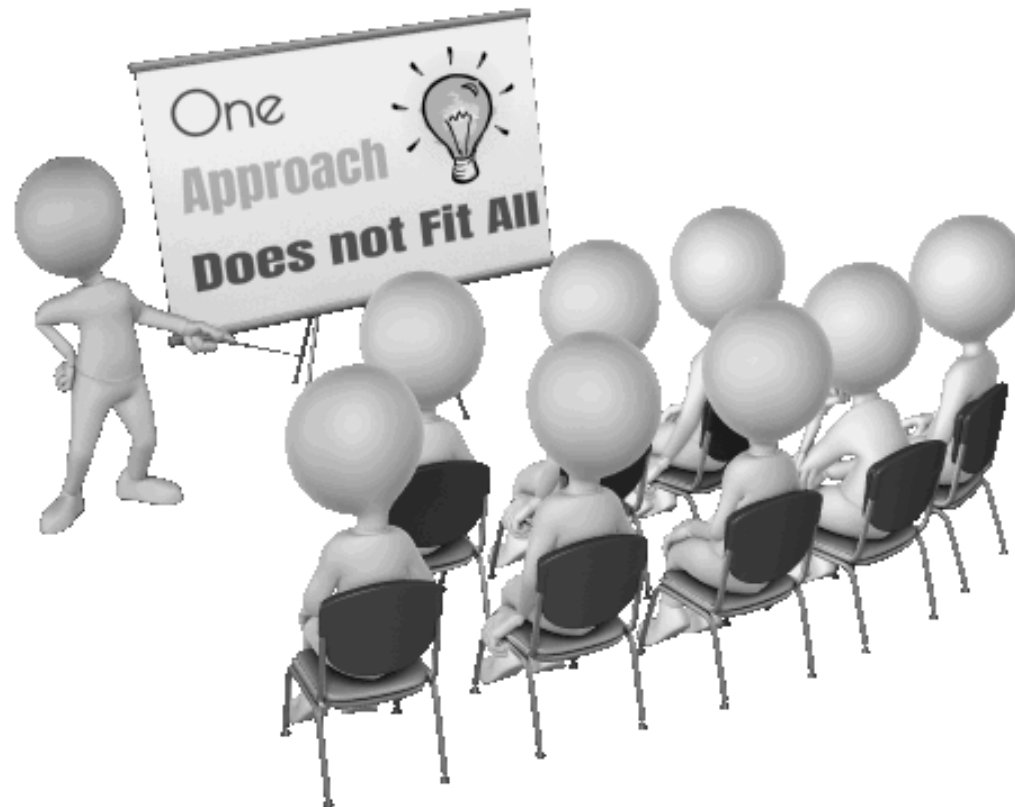
- Stigma attached to being a victim
 - Males more likely to report victimization than females
 - Directly impacts female reporting barriers
- Internalized traditional norms
 - Deep patriarchal values
- Fear of culturally significant consequences
 - Prioritization of family and community over individual
 - Fear of bringing shame to family and community
- Barriers to accessing services and resources

REPORTING BARRIERS BY RACE (CONT.)

American Indian

- Face the second highest rates of violence behind African Americans
- Complicated jurisdictional issues
 - Non-indigenous offenders cannot be punished by tribal courts
- Historical tense relationship with law enforcement
 - Significant lack of trust with outside authority
- Lack of knowledge and access to resources
- Significant cultural barriers

TIPS TO MITIGATE REPORTING BARRIERS



TIPS (CONT.)

- Understand your leadership framework
 - **Organizational:** applying differing learning strategies to advance institutional goals
 - **Political:** negotiating a variety of dynamics to advance diversity efforts
 - **Symbolic:** establishing a system of shared values, symbols, and rituals to advance DEI efforts
- Know your institutional community
 - Visibility
 - Climate Surveys
- Develop a strategic plan
- Establish partnerships
- Execute plan

CONSIDERATIONS - REPORTING OPTIONS

- Designate at least one official to receive reports and formal complaints
 - Chief Diversity Officer
 - EEO Officer
 - Human Resources
- Anonymous reporting options
- Who are considered mandated reporters?
 - Align with Title IX reporting obligations
 - Confidential employees?
- Consider barriers and chilling effects on reporting
- Third-party reports

CONSIDERATIONS - RECEIPT OF REPORTS

- What constitutes notice?
 - Constructive notice
 - Gossip, rumors
 - Collective warnings
 - Actual notice
 - Filing a formal complaint
 - Reporting to supervisor
 - Third-party reports
- Resistant/Reluctant Complainants
 - Cultural barriers
 - Retaliation
 - Reporting culture
 - Building the trust factor

PROCESS PRIVACY

- Confidential vs. private vs. privileged
- Resolution is a private process
 - Involved parties
 - Employees with a business/educational need to know
 - Possible external resources
 - Try to keep the circle of knowledge small
- Confidentiality exists outside of the administrative office
 - Gag orders/Non-disclosure Agreements?
 - Improper disclosures and discipline
- Viral knowledge
 - Addressing social media chatter
 - Countering cancel culture

PROCESS PRIVACY (CONT.)

- Share outcome with parties
 - Detailed investigation report with determination and rationale
 - Offer appeal rights
 - Share evidence with parties
 - Complainant has a right to know remedial actions
- Redacted reports
 - Not necessary but can align with Title IX process
 - Policy on improper disclosure/sharing of report
- Employment files and student records
- Future employment references
 - Best practice is to funnel through HR

REQUESTS FOR CONFIDENTIALITY

- Take reasonable steps to respond to requests
- May be precluded from honoring request
 - Workplace safety
 - Student safety
 - Risk of harm to others
 - Seriousness of offense
 - Elements of PPTVWM
- Due process implications for Respondent
- Institutional culture implications
- Possible impact on DEI efforts

REQUESTS FOR CONFIDENTIALITY (CONT.)

- Inform that response may be limited
 - Don't overpromise
 - Share information based upon legitimate business/educational need to know
 - Train community on what that means
- Institutional implications
 - Culture
 - Climate
 - Aspirations
 - Goals
- Title VII or other federal/state law implications
 - Response might be required



ESTABLISHING BIAS RESPONSE TEAM PROTOCOLS

BEST PRACTICES

- Clearly define the Bias Response Team (BRT) mission
 - Align with DEI goals and aspirations
- Develop and publish protocols to be followed by the team
 - Publish institution/district-wide
- The Bias Response Team should not be the vehicle to investigate and adjudicate potential policy violations
- Establish a clear mechanism for reporting conduct that potentially violates policy
- Team members should know the scope and limitations of the First Amendment/Free Expression
- Establish available resources and education tools/techniques

BIAS RESPONSE TEAM PROTOCOLS

- Understand institution's secure reporting mechanism for complaints; test it and ensure that it works
- Determine who will serve as Chair of team
 - What is the team's role?
 - How often does the team need to meet?
 - Knowledge of complaints from employee/student/visitor involvement
 - Additional referrals
- Reaching out to parties
 - Voluntary meeting options
 - Provide appropriate resources
 - Supportive measures
 - No contact orders
- Tracking data



RESOLUTION PROCESSES

- Resolution Procedure Requirements
- Civil Rights Investigation Model
- Resolution Procedures
- Interim Action Considerations

RESOLUTION PROCEDURE REQUIREMENTS

Prompt

Thorough

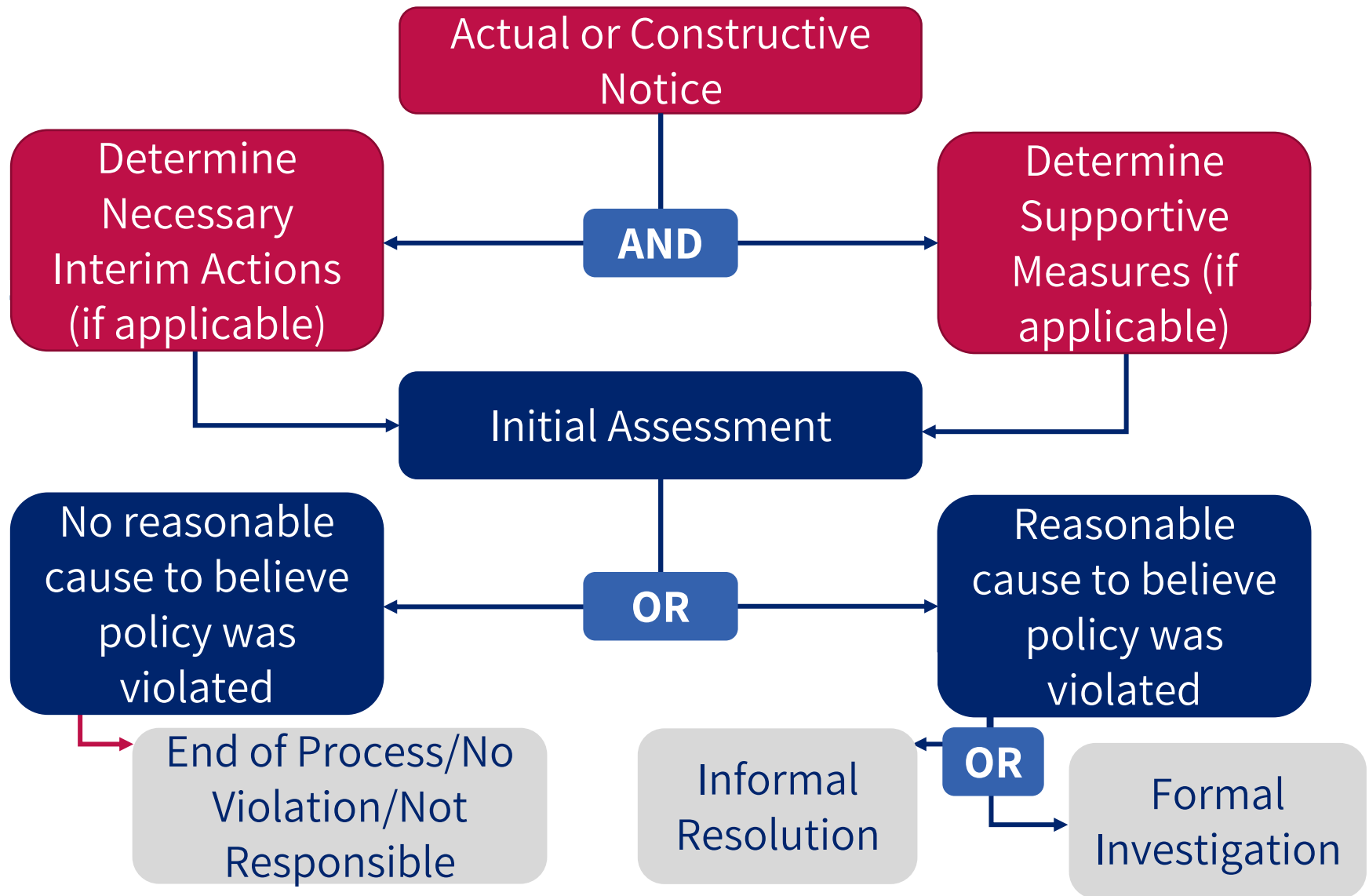
Impartial

Stop
(Title IX)

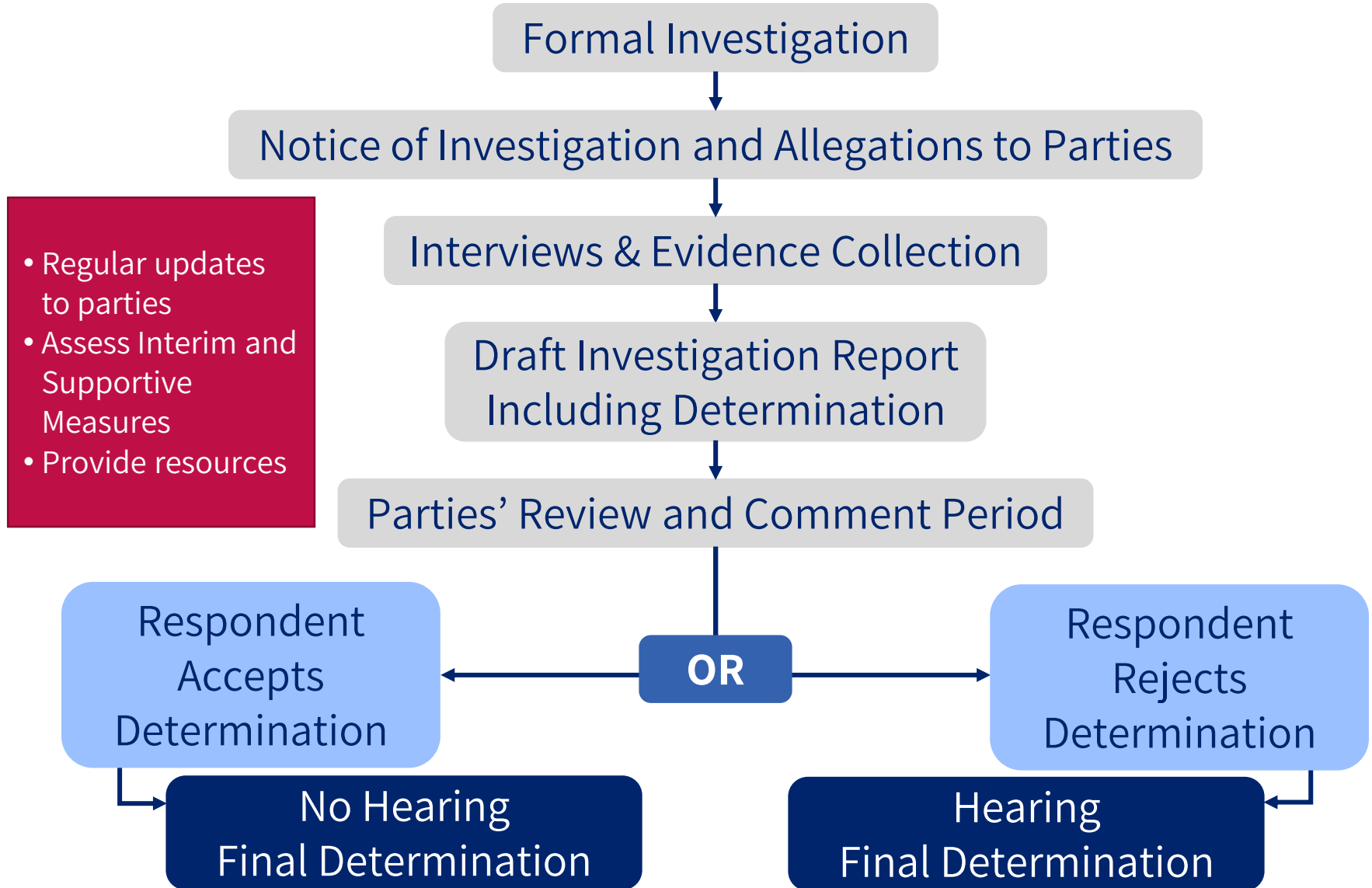
Prevent
(Title IX)

Remedy
(Title IX)

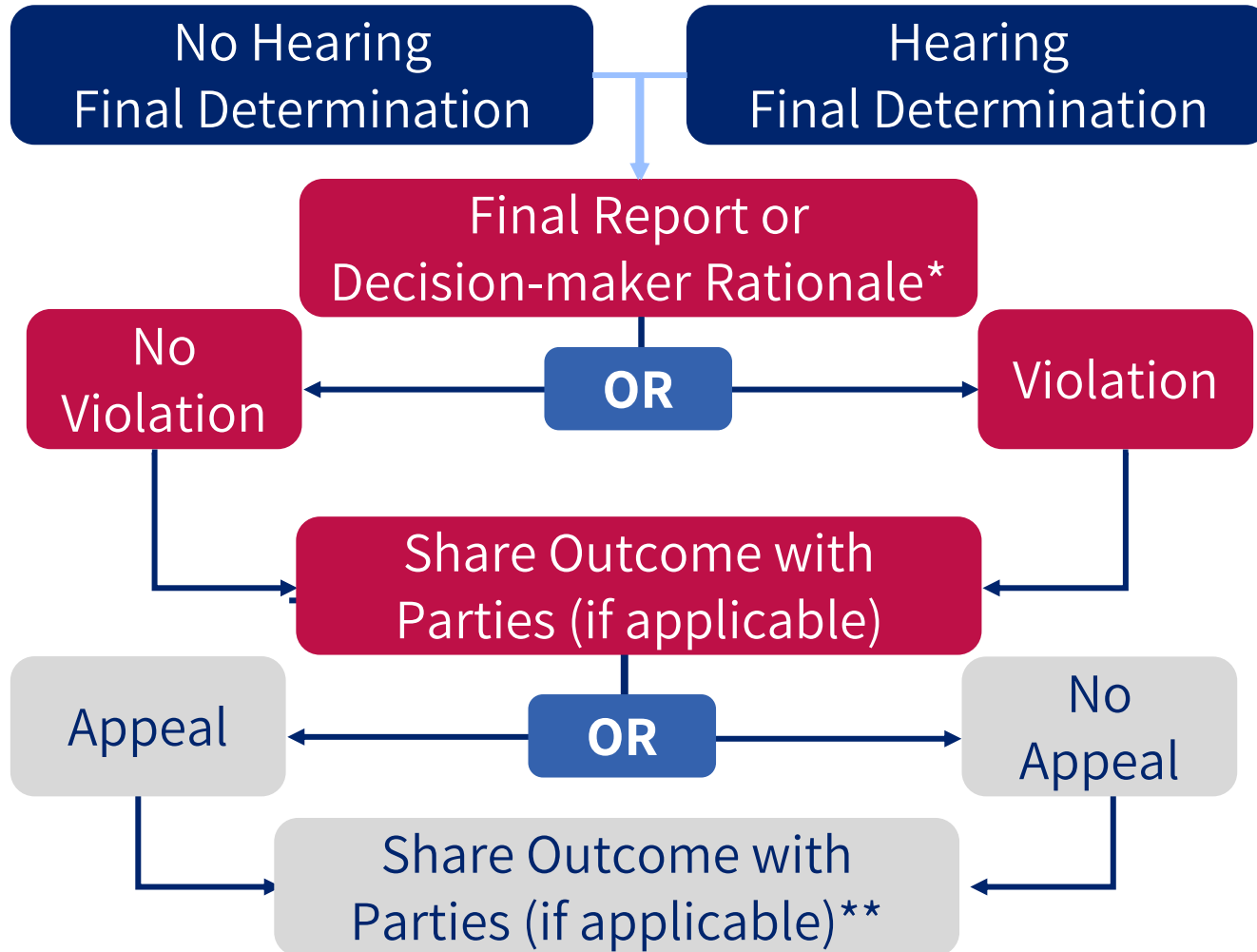
CIVIL RIGHTS INVESTIGATION MODEL



CIVIL RIGHTS INVESTIGATION MODEL (CONT.)



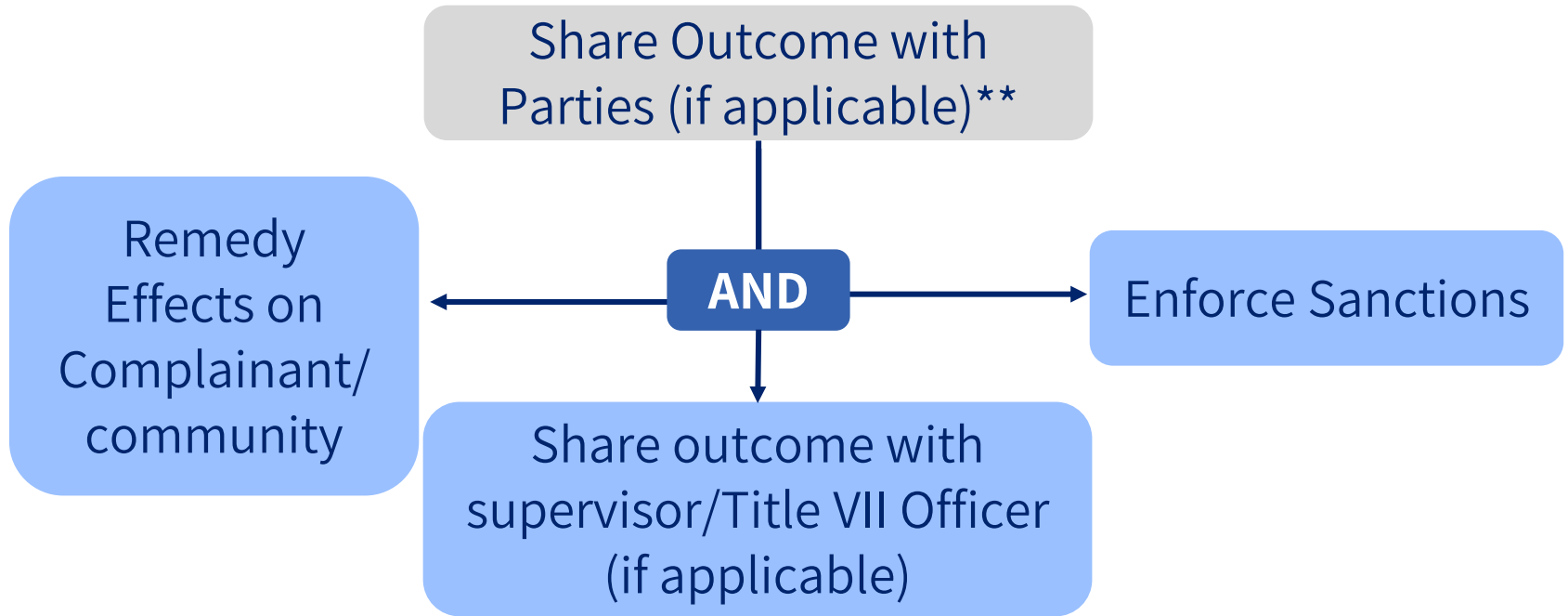
CIVIL RIGHTS INVESTIGATION MODEL (CONT.)



*Share outcome with Legal Counsel and/or EEO Officer

**Possible remand to Investigator(s) or Decision-Maker(s)

CIVIL RIGHTS INVESTIGATION MODEL (CONT.)



RESOLUTION PROCEDURES

- Prompt, thorough, impartial process
 - Reasonable
 - Policy-driven
- Preliminary inquiry
 - Formal vs. informal
 - Isolated incident/culture/climate investigation
- Evidence collection
 - Investigator's role
- Decision-making process
- Immediate and appropriate corrective and remedial action
- Recordkeeping

RESOLUTION PROCEDURES (CONT.)

- Ensure alignment with federal, state, & local laws
- Neutral, trained Investigator(s)
 - Best practice is regular, ongoing training
 - Can be included with Title IX Investigator training
 - State law may govern type and frequency of training
 - Neutral and inclusive materials
 - Avoid stereotype examples and activities
- Confidentiality to the extent possible
- Party transparency
 - Update parties frequently
 - Inform parties of determination

INTERIM ACTION CONSIDERATIONS

- Necessary employment measures
 - Address the mental/physical safety of complainant(s)
 - Address broader campus community concerns
- Specifically tailored to alleged circumstances
 - Document, document, document
 - Conduct annual assessments to ensure no disparate impact
- Goal is to stop conduct, prevent recurrence, remedy the impact
 - Can be short-term or long-term
- May require institutional partnership and collaboration
 - Supportive measures
 - Remedy
 - Sanctions



FORMAL INVESTIGATIONS

- Initial Assessment
- Notice of Investigation and Allegations
- Strategy Development
- Culturally-Infused Investigation Practices
- Interviewing Guidelines
- Types of Evidence
- Analysis and Findings
- Corrective Actions
- Final Remedies

INITIAL ASSESSMENT

Notice requires an investigation

- Start with the Initial Assessment
- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary
 - If true, is there reasonable cause to believe policy has been violated?
 - Impartial review
 - What policies, if any are implicated?
 - How does the Complainant want to proceed?
 - What interim actions should/can be taken?
 - Witness interviews?
 - Respondent interview?

INITIAL ASSESSMENT (CONT.)

- Check background for obvious patterns and/or indicia of predatory, violent, or threatening behavior.
- How much involvement does the Complainant want?
- Possible to remedy informally or without discipline?
 - Who will execute remedy?
 - How will you remedy?
- Give the Complainant as much choice in the process as possible.
- Notice to Respondent

NOTICE OF INVESTIGATION AND ALLEGATIONS

- Deliver the Notice of Investigation and Allegations (NOIA) to all parties in writing following the initial assessment if a formal investigation is to follow
 - Provide the details of the allegation(s), applicable policies, applicable procedures, investigator's contact information, etc.
 - Notice is given in advance (minimum of 2-3 days) of a request for an interview
 - Proposed interview appointments can be included
 - Notice can mirror the details to that of a Title IX NOIA
 - More details = better NOIA
 - Floor vs. ceiling approach

ISSUE-SPOTTING

- Engage in issue-spotting based on the preliminary information as an important first step in developing an investigation strategy
- Continue to identify issues as you interview others and gather evidence
- Revisit the facts gathered and identify issues critical to a comprehensive civil rights investigation
- Identify the presented issues to help determine which policies may be implicated

STRATEGY DEVELOPMENT

- Use issues list as a guide
- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses and parties, where necessary
- Solicit a witness list from the Complainant
- Solicit a witness list from the Respondent
- Determine when to question the Respondent
- Identify who will be the primary interviewer
 - Are they culturally competent?
- Identify questions in advance

FORMAL INVESTIGATION

- When warranted, move to a formal investigation
- Notify parties by issuing a NOIA
- Informal, administrative resolution ruled out
 - Option to revisit
 - Watch for abuse of process
- Interview all relevant witnesses
 - Corroborative witnesses
 - Contemporaneous witnesses
 - Outcry witnesses
 - Expert witnesses

FORMAL INVESTIGATION (CONT.)

- Active collection of all available evidence
- Share evidence with parties
- Investigation report
 - Fact Analysis
 - Conclusion

CULTURALLY INFUSED INVESTIGATION PRACTICES

- Understand the cultural norms involved and impacted
- Recognize communication barriers
 - Linguistic
 - Perceptual
 - Cultural
 - Interpersonal
- Stages of Engagement
 - **Macro level:** U.S. mainstream, culture, experience, acculturation
 - **Meso level:** ethnic/cultural community norms, expectations, beliefs, practices
 - **Familial level:** norms, beliefs, expectations, practices

CULTURALLY INFUSED INVESTIGATION PRACTICES (CONT.)

- Know where institution and investigatory team are on the cultural competence continuum
 - Destructiveness
 - Incapacity
 - Blindness
 - Pre-competence
 - Competence
 - Proficiency
- Perception vs. reality
 - Identities involved
 - Self-reflection
- Institutional fabric
 - Cross-cultural engagement
 - Commitment to equity

CULTURALLY INFUSED INVESTIGATION THINKING STYLES

Method Thinking Style

- Driven by procedural steps
- Focused more on non-relational information gathering
- Expect everyone to be the same

Challenge Thinking Style

- Driven by the challenge of the job
- Overwhelmed mentality
- Seeking easiest way to close complaint
- Unintentional blind eye to culture

Skill Thinking Style

- Driven by parties involved
- Focused on relating to people at different levels
- Culturally competent
- Conversational style interview

Risk Thinking Style

- Culturally ignorant
- Focused on evidence to determine guilt
- Operates on personal biases and assumptions
- Interrogation style interview

CULTURALLY INFUSED INTERVIEWING TIPS

- Ensure consistency and fairness in questioning
 - Leave personal assumptions out
 - Don't asked bias-based questions
 - Allow parties to make their point
- Maintain awareness of individual's cultural identities and communication norms
 - Not always necessary to call out the obvious identity differences
 - Understanding/recognizing their worldview
 - **Example:** Interruptions, eye contact, special distancing, animations
- Meet individuals where they are
 - Relational style interviewing: Be you!
 - Apologize if unintentionally offend a party

INTERVIEWING CONSIDERATIONS

- Recording interviews
 - Best practice
 - Might have cultural implications
- Interview attendees
 - Support person
 - Advisor of choice
- Transparency is key
 - Expectations
 - Policy/procedures
 - Records kept
- Be aware of FERPA/confidentiality issues or promises, and public records and privacy of employees

INTERVIEW GUIDELINES

- Fail to plan; then plan to fail
 - Create questions in advance
 - Know the preliminary facts of the case
 - Research involved parties
- Practice questioning skills in advance
- Establish comfort with individual's language usage and sensitive subjects/words
 - Caution on language/verbal mirroring
- Be careful with assumptions regarding individual cooperation or resistance/reluctance
 - Can be loaded
- No evaluative statements

INTERVIEW GUIDELINES (CONT.)

- Try to frame questions neutrally
- Don't make questions too long or confusing
- Don't suggest an answer in your question
- Note discrepancies and ask questions based on them
- Be on the lookout for “cued” responses or rehearsed or memorized answers
- Address emotions sensitively and tactfully
- Observe body language of the person you're interviewing
 - But don't read too much into it
- Be cognizant of your own body language

TYPES OF EVIDENCE

Different types of evidence may be weighted differently

Documentary
Evidence

e.g., supportive writings or documents

Electronic Evidence

e.g., photos, text messages, and videos

Real Evidence

i.e., physical objects

Direct or Testimonial
Evidence

e.g., personal observation or experience

TYPES OF EVIDENCE

Circumstantial
Evidence

i.e., not eyewitness, but compelling

Hearsay Evidence

e.g., statement made outside the hearing
but presented as important information

Character
Evidence

subject to relevance determination; often
not probative of the underlying allegation

Impact/Mitigation
Statements

should only be reviewed after a
responsibility determination is made

ANALYSIS AND FINDINGS

- Review the applicable institutional policies
- List the evidence and what it shows (relevance)
- Evaluate evidence/assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial
- Make determination or recommendation of whether a policy violation occurred based on the standard of evidence
 - Clear and convincing
 - Preponderance of the evidence (industry standard)
- Cite concrete reasons for conclusion(s)
- Refer allegations and findings to appropriate administrator for implementation, sanctioning, and/or hearing

TITLE VII DISCRIMINATION POLICY ANALYSIS

Remember the **Burden-Shifting Analysis**.

To establish a prima facie case of discrimination:

- Establish identification of a protected characteristic
- An adverse employment action occurred
- Similarly situated individuals who identify with different protected characteristics were treated differently or more favorably
 - Burden shifts to employee
 - Elicit any legitimate, nondiscriminatory reason(s) for the actions
 - Assess whether the articulated reason is a pretext

TITLE VII DISCRIMINATION POLICY ANALYSIS (CONT.)

Additional elements for disability discrimination claims:

- Same elements as other Title VII discrimination elements **and**
- Evidence that supports a disability that substantially limits major life activity
- History of a disability
- Regarded as having a disability (not for accommodations)
- Institutional documented disability with accommodations
- Failure to accommodate and/or improper invocation of undue hardship

CORRECTIVE ACTION

- Taken when a Respondent is found to have engaged in discrimination/harassment

- Corrective actions should:

Be Appropriate to
the Offense(s)

Be Consistently
Applied

Consider DEI goals
and mission

- Determine appropriate corrective actions
 - In collaboration with other stakeholders, authorities
 - Communicate actions taken with Complainant and Respondent as appropriate
- Monitor to ensure corrective actions are implemented
 - Discipline noncompliance

FINAL REMEDIES CONSIDERATIONS



Remedies should seek to restore affected individuals to their pre-deprivation status



Recover any lost work/education time



Restore opportunities, if applicable



Repair damage from misconduct, both short- and long-term



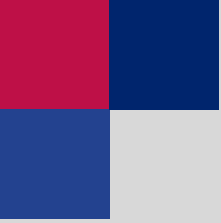
ORGANIZATIONAL CHALLENGES AND RECOMMENDATIONS

ORGANIZATIONAL CHALLENGES

- Deeply rooted cultural concerns
 - Systemic issues
 - Outside community concerns
 - Anti-DEI culture; reactive v. proactive
- “Diversity Police” mentality
 - Can accompany newly created CDO roles
 - Key stakeholders aren’t bought-in
 - Exclusionary mentality amongst community
- Funding
- Lack of accountability structure
- Competing state laws

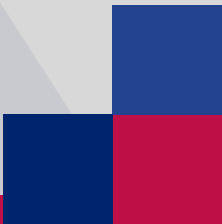
TRAINING AND PROGRAMMING RECOMMENDATIONS

- Data-driven approach
 - Regular climate surveys, focus groups, etc.
- Separate populations
 - Administrators
 - Faculty
 - Students
 - Others
- Make culturally relevant to community
 - Requires agency
 - Possible outsourcing
 - Evidence-based interventions often required
- Recycle programs sparingly



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Questions?



Thanks for joining us today.



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