



Association of  
Title IX Administrators

# Paul Mitchell Advanced Education Investigation and Documentation

Alisha Carter Harris, Senior Consultant, TNG

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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 discussion in this course will necessarily engage with sex- and gender-based 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 that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

# AGENDA – DAY 1

- 1 Best Practices for Conducting Investigations
- 2 Foundational Concepts
- 3 Policy Definitions
- 4 Managing and Responding to Incidents
- 5 Case Studies
- 6 Bias, Prejudice, and Conflict of Interest

# AGENDA – DAY 2

6

Resolution Processes

7

Formal Investigations

8

Trauma and Investigations

9

Questioning Skills

10

Case Study

11

Recordkeeping & Documentation



# **BEST PRACTICES FOR CONDUCTING INVESTIGATIONS**

NOT FOR DISTRIBUTION

# FAILURE TO FOLLOW POLICY

## Don't

- Fail to read the implicated policy(ies)
- Fail to understand the procedure's requirements
- Materially deviate from the institution's written procedures
- Use the incorrect policy/procedure for the investigation

## Do

- Read the policy and procedures prior to commencing an investigation
- Understand what is required under the procedures
- Use the policy in place at the time of the incident and the procedures in place at the time the complaint was filed

# FAILURE TO DOCUMENT

## Don't

- Fail to maintain adequate records
- Fail to document investigative activities such as phone calls
- Fail to create a comprehensive case file
- Fail to create an investigation timeline
- Fail to document the source of the evidence obtained

## Do

- Maintain a communication log of all contacts
- Document all investigation activities
- Understand the requirements of the institution's record retention policy
- Get interviewee verification of transcripts/notes
- Maintain complete and detailed notes
- Think about who may view your file (*e.g.*, judges, public)

# TRANSPARENT INVESTIGATIONS

## Don't

- Be secretive about the investigation with the parties and their advisors
- Withhold relevant/directly related evidence from the parties
- Fail to provide regular investigation updates to the parties/advisors
- Make promises related to things that investigation cannot do

## Do

- Do what you say you will do
- Provide the parties the ability to review the draft report and provide written feedback that is considered
- Explain the grievance process and allow interviewees to ask questions about the process
- Respond to emails in a timely manner
- Outline the parties' rights in written and verbal communication

# THOROUGH AND RELIABLE INVESTIGATIONS

## Don't

- Fail to gather all relevant evidence available
- Fail to interview witnesses who may have relevant evidence
- Fail to test the veracity of evidence
- Only gather inculpatory evidence
- Fail to interview outcry witnesses

## Do

- Document the inability to gather evidence and the reason why
- Document witnesses who did not participate in the investigation
- Verify documentary evidence with others (such as screenshots of messages)
- Gather relevant evidence from all sources, internal and external to the institution

# INADEQUATE NOTICE OF INVESTIGATION

## Don't

- Fail to read the Notice and understand what is being alleged and investigated
- Observe gaps in the Notice and fail to address them with the appropriate administrator
- Receive additional allegations from the Complainant and fail to update the Notice
- Mischarge, unclear charges, or broad charges (i.e., discrimination only)

## Do

- Read the Notice and understand the allegations
- Assess the Complainant's interview statement to ensure the appropriate charges are included in the Notice
- Ensure the administrator includes overlapping charges like retaliation or discrimination
- Ensure the investigation report reflects the information included in the Notice

# INADEQUATE INVESTIGATION REPORT

## Don't

- Include irrelevant evidence
- Use biased language
- Create a summary of the evidence
- Switch tenses
- Write in passive voice
- Fail to assess the credibility of the parties, witnesses, and evidence

## Do

- Create a comprehensive report that includes all relevant evidence
- Consider your audience (parties, legal counsel, court, etc.)
- Use formal language and write from the third-person objective point of view
- Have the report reviewed prior to submitting to parties

# RAPE MYTHS EXPOSED

**Myth:** Individuals who drink/take drugs deserve it if they are raped.

**Fact:** No one is ever to blame for being raped. 100% of the blame lies with the perpetrator.

**Myth:** Individuals lie about being raped because they want attention/regret having had sex with someone.

**Fact:** False allegations of rape are extremely rare. In fact, most people who are raped never report it to anyone.

**Myth:** If they didn't fight back/resist then it wasn't rape.

**Fact:** It's really common for people who experience rape to find they can't move or speak. This is one of our bodies' automatic responses to fear and is designed to keep us safe.

**Myth:** If they didn't say no, then it wasn't rape.

**Fact:** Not saying 'no' is not the same as someone giving their consent. If someone seems unsure, stays quiet, moves away or doesn't respond, they are not agreeing to sexual activity.

Source: <https://rapecrisis.org.uk/get-informed/about-sexual-violence/myths-vs-realities/>

# RAPE MYTHS EXPOSED

**Myth:** Boys/men can't be sexually abused.

**Fact:** Boys and men can be sexually used or abused, and it has nothing to do with how masculine they are.

**Myth:** Sexual abuse is less harmful to boys than girls.

**Fact:** Sexual abuse and assault harms boys/men and girls/women in ways that are similar and different, but equally harmful.

**Myth:** Being a male survivor means you're gay.

**Fact:** Whether he is gay, straight or bisexual, a boy's sexual orientation is neither the cause nor the result of sexual abuse.

**Myth:** Males abused by females "got lucky."

**Fact:** Girls/women can sexually abuse/assault boys/men. The boys/men are not "lucky," but exploited and harmed.

*Source: <https://1in6.org/myths/>.*



# FOUNDATIONAL CONCEPTS

- Protected Characteristics
- Discrimination
- Evidentiary Standards

# PROTECTED CHARACTERISTICS

**Race**

**Color**

**Religion or  
Creed**

**National Origin  
or Ancestry**

**Sex\***

**Age**

**Disability  
(physical and  
mental)**

**Military/Veteran  
Status**

**Predisposing  
Genetic  
Information**

**Marital Status**

**Medical  
Condition**

\*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

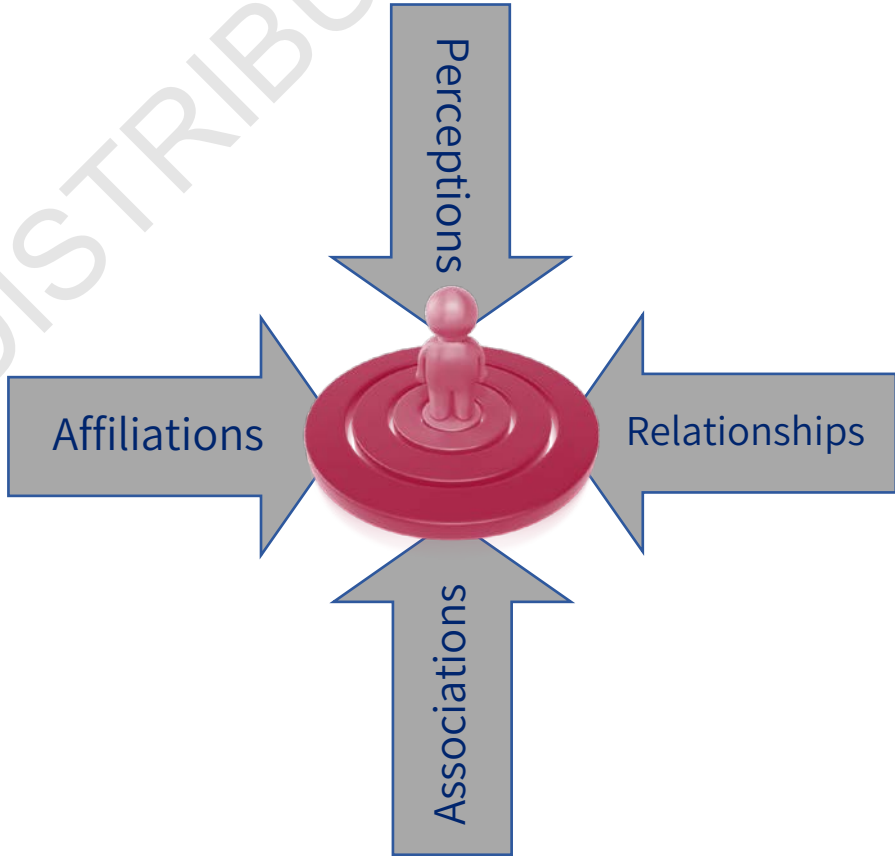
## Adverse Impact

## 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



# 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

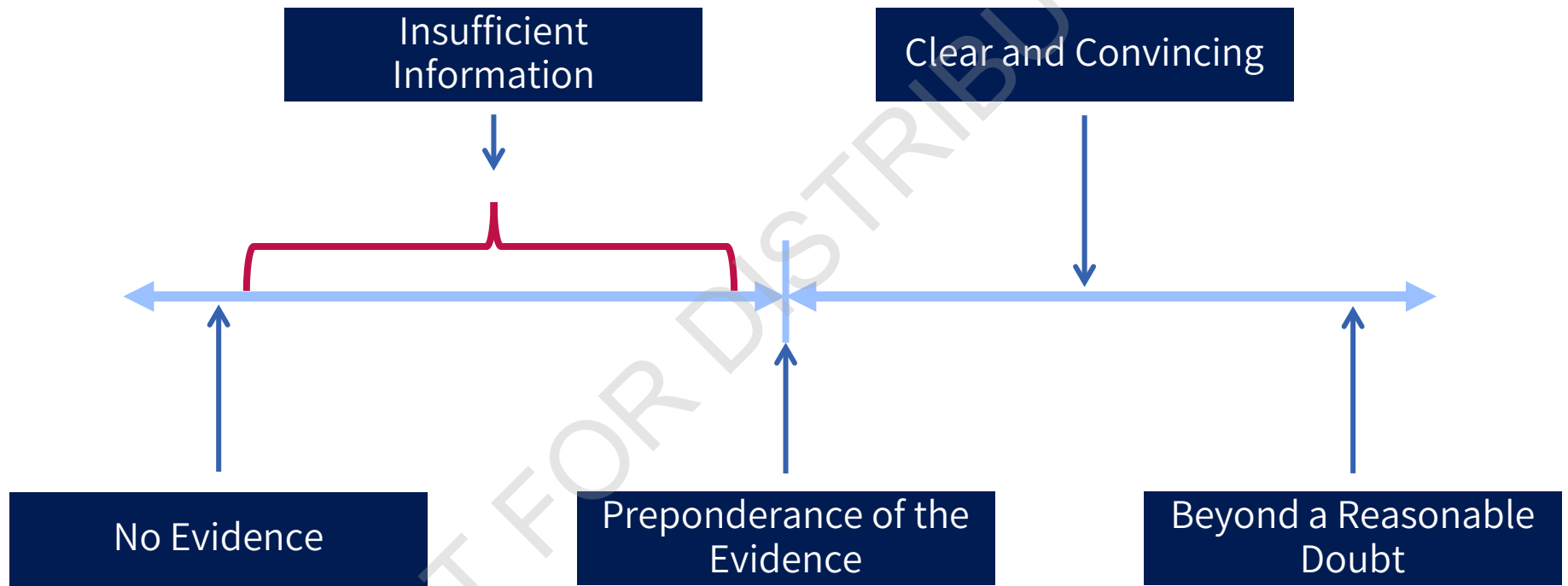
### Protected Activity

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

# EVIDENTIARY STANDARDS

- **Clear and convincing evidence:** it is highly probable that policy was violated
  - Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable
  - 65% 75% 85% – part of the problem with this standard is there is no real consensus on how to quantify it
- **Preponderance of the evidence:** it is “more likely than not” policy was violated
  - The only equitable standard
  - 50.1% (50% plus a feather)
  - The “tipped scale”

# EVIDENTIARY STANDARDS



# POLICY DEFINITIONS

- Sexual Harassment
  - Sexual Harassment
  - Quid Pro Quo Sexual Harassment
  - Sexual Assault
  - Dating Violence
- Domestic Violence
  - Stalking
  - Retaliation

# SEXUAL HARASSMENT

Title IX regulations require each Recipient to define **sexual harassment** as conduct on the basis of sex that satisfies one or more of the following:

- **Quid Pro Quo:** An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct.
- **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the Recipient's education program or activity
  - Education program or activity means employment, too!

# SEXUAL ASSAULT

**Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.**

- **Rape** - Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.
- **Fondling** - The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# CONSENT

- Consent can be defined per state law or best practices.
  - ATIXA Model Definitions found in *1P2P* or *The Playbook*
- Although the new regulatory definition of sexual assault is ostensibly consent based, it's not a great analytical tool. Luckily, the wording is generic enough to permit ATIXA best practice interpretations to be fully applicable.
- The FBI's definition of rape (upon which the regulatory definition rests) now incorporates the term "carnal knowledge"

# 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. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition —
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

# DOMESTIC VIOLENCE

- A felony or misdemeanor crime 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 [insert your state here];
  - 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 [insert your state here].

# DOMESTIC VIOLENCE (CONT.)

- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates.
- The people cohabitating must be current or former spouses or have an intimate relationship.

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# STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition:
  - **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.

# STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

**Please, please, please, don't interpret this to violate anyone's First Amendment rights.**

# OTHER ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under an institutional sexual misconduct policy, including:

**Sexual Exploitation:** an individual taking non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that behavior does not otherwise constitute sexual harassment.

Examples include, but are not limited to:

- Sexual voyeurism
- Invasion of sexual privacy (e.g., doxxing)
- Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity; or exceeding the boundaries of consent (such as allowing another person to hide in a closet and observe sexual activity; or disseminating sexual pictures without the photographed person's consent), including the making or posting of non-consensual pornography
- Prostituting another person
- Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually transmitted disease (STD) or infection (STI), without informing the other person of the virus, disease, or infection

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity
- Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections (e.g., spoofing)
- Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Knowingly soliciting a minor for sexual activity
- Engaging in sex trafficking
- Knowingly creating, possessing, or disseminating child pornography

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# OTHER SEX-BASED MISCONDUCT OFFENSES THAT MAY BE ADDRESSED BY POLICY

- Bullying/cyberbullying
- Hazing
- Threatening or causing physical harm
- Conduct which threatens or endangers the health or safety of any person
- Intimidation

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# RETALIATION

- No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
  - Does this now apply to private colleges?
- Charging an individual with a conduct code violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation if it is based on more than evidence that a Respondent violated the sexual harassment policy.

# RETALIATION

## BASIC LEGAL PRINCIPLES

The Title IX regulations prohibit Recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.

### Protected activity under Title IX:

- Reporting sex discrimination, including sexual harassment and assault
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any manner in an investigation of discrimination, for example as a witness
- Protesting any form of sex discrimination (e.g., lack of equity in athletics)

# ELEMENTS AND ANALYSIS OF A RETALIATION CLAIM

The following elements establish an **inference of retaliation**:

1. Did the individual engage in protected activity?
  - Usually straightforward,
  - Unless there is a question of reasonableness of belief or manner.
2. Was the individual subsequently subjected to adverse action?
3. Do the circumstances suggest a connection between the protected activity and adverse action?
  - Did individual accused of retaliation know about activity?
  - How soon after the protected activity did the adverse action occur?

**If these three elements are not shown,  
there is not a finding of retaliation.**



# MANAGING AND RESPONDING TO INCIDENTS

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# CONSIDERATIONS - REPORTING OPTIONS

- Designate at least one official to receive reports and formal complaints
  - Director
  - Title IX Coordinator
  - Other School Official
- 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
  - Future professional 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

# CASE STUDIES

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# INSTRUCTIONS

- For each of the following case studies, identify three possible solutions or approaches, and then select one that is your preferred approach.
- Please be prepared to share why you chose that one instead of the other options you identified, once we return to group discussion.

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# SAMANTHA

A male learning leader has been intentionally and repeatedly misgendering a future professional. Samantha is an openly trans female, but the faculty member insists on using the future professional's deadname when calling on her in class, and always calls the student "Mr.", both in class and in one-on-one conversations. Samantha has clarified her identity with the learning leader, who politely but firmly informed the future professional that they do not recognize chosen pronouns and will not use them.

# SAMANTHA (CONT.)

Last week, another future professional spoke out, telling the learning leader that he needed to call Samantha by her chosen name. The learning leader was dismissive and told the future professional that he can call anyone anything he wants, and that he will not be dictated to by “woke” future professionals who think they’re the gender police. Samantha was embarrassed, and has now sought out the Title IX coordinator, and told the TIXC that she wishes to file a formal complaint.

**What should the Title IX coordinator do?**

# A VARIATION ON SAMANTHA

- Samantha comes to the director to make sure her name is listed correctly for her courses. She's concerned because she changed her name in the information system to reflect her identity but is unsure whether the director has accurately carried over the change to her course assignments.
- It turns out that the director erred, and her birth-assigned name has already been provided to all her learning and educational leaders.

# A VARIATION ON SAMANTHA (CONT.)

Samantha approaches the Title IX coordinator about this, feeling like she is in an impossible position. If she does not correct her name with her learning and education leaders, they'll be deadnaming her all semester. But, if she does correct her name with them, it's possible she'll be outing herself to them as trans and she does not want to do that, if possible, because she fears they may discriminate against her.

**As a Title IX team member, what would you do to assist Samantha and to help her resolve the problem?**

# JUNE AND RAFI (ruh-fee)

- June walks into the Title IX coordinator's office, irate. Her education leader, Rafi, has disciplined June for being out of dress code. June alleges that Rafi only disciplined June for being out of dress code because June is trans.
- June files a complaint that she's being unfairly subjected to an adverse action, which is discrimination on the basis of her sex.

**How should the Title IX coordinator respond?**



# BIAS, PREJUDICE, AND CONFLICT OF INTEREST

- Impacts of Bias and Prejudice
- Conflicts of Interest
- Mitigating Bias, Prejudice, and Conflicts of Interest

# IMPACTS OF BIAS WITHIN INVESTIGATIONS

- Effects Investigator's perception of parties and witnesses
- Impacts the ability to build rapport, connect, and create safe/neutral spaces for all participants throughout the investigation
- Creates risk of *flawed* decision-making when collecting evidence and questioning participants
- Written materials become subjective and include biased language
- Presents moments for assumptions not based on evidence to be made during the investigation
- Increases opportunity for a party to successfully litigate
- Reticence to ask needed questions, pursue evidence, or witnesses who should be questioned

# IMPACTS OF PREJUDICES WITHIN INVESTIGATIONS

- Creates tension within the investigation and the process
- Presents risk of discriminatory actions/behaviors toward parties
- Ability to stop, prevent, and remedy diminished
- Can create a hostile environment
- Threatens equal access to the institution's educational program, activity, or employment
- Problematic and damaging to institutional culture

# BIAS AND PREJUDICE

## COMMON IDENTITIES IMPACTED

- LGBTQIAA2SP+
- Gender identity/Expression
  - Example: Nonbinary identities
- Race
  - Example: BIPOC
- Ethnicity
  - Example: International students/employees
- Religion
  - Example: Muslim
- Athletes
- Fraternity and Sorority Members

# CONFLICTS OF INTEREST

- Conflicts of interest create role confusion that can compromise impartiality and objectivity
- Types of conflicts:
  - Situational conflicts
    - Wearing too many hats in the process; making more than one substantive decision in the same matter
  - Positional conflicts
    - Divided loyalties; lack of independence
  - Legal Counsel as Decision-Maker
  - Non-impartial Decision-Maker(s) or Appeal Decision-Maker(s)
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest; the question is whether the knowledge/familiarity compromises objectivity
- Previously disciplining a student or employee is often not a conflict of interest, inherently

# MITIGATING BIAS, PREJUDICE & CONFLICTS OF INTEREST IN INVESTIGATIONS

- Establish a process for self-recusal
- Recommend the TIXC provide oversight of investigation and hearing
  - Strategy meetings
  - Regular check-ins
  - Report review
  - Insulation against internal/external pressures
- Allow parties the opportunity to challenge Investigators and Decision-makers
  - Replacement of personnel
  - Redo portions of grievance process

# MITIGATING BIAS, PREJUDICE & CONFLICTS OF INTEREST IN INVESTIGATIONS (CONT.)

- Anticipate questions about Investigator credentials/bias at the hearing
- When bias is disqualifying, fix it right away. Don't let it fester.
- Develop an appeal process that can address bias

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# RESOLUTION PROCESSES

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

# RESOLUTION PROCEDURE REQUIREMENTS

Prompt

Thorough

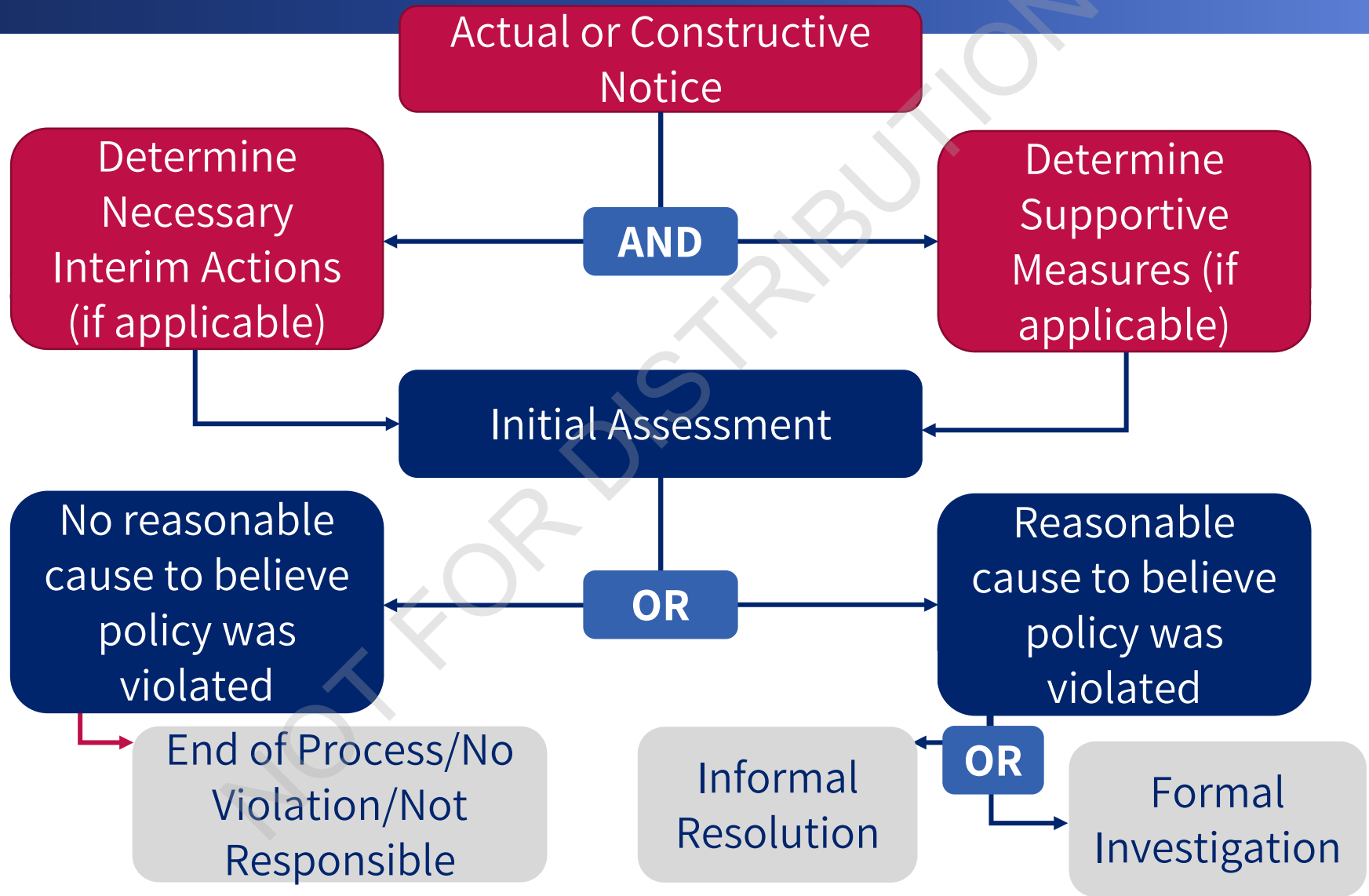
Impartial

Stop  
(Title IX)

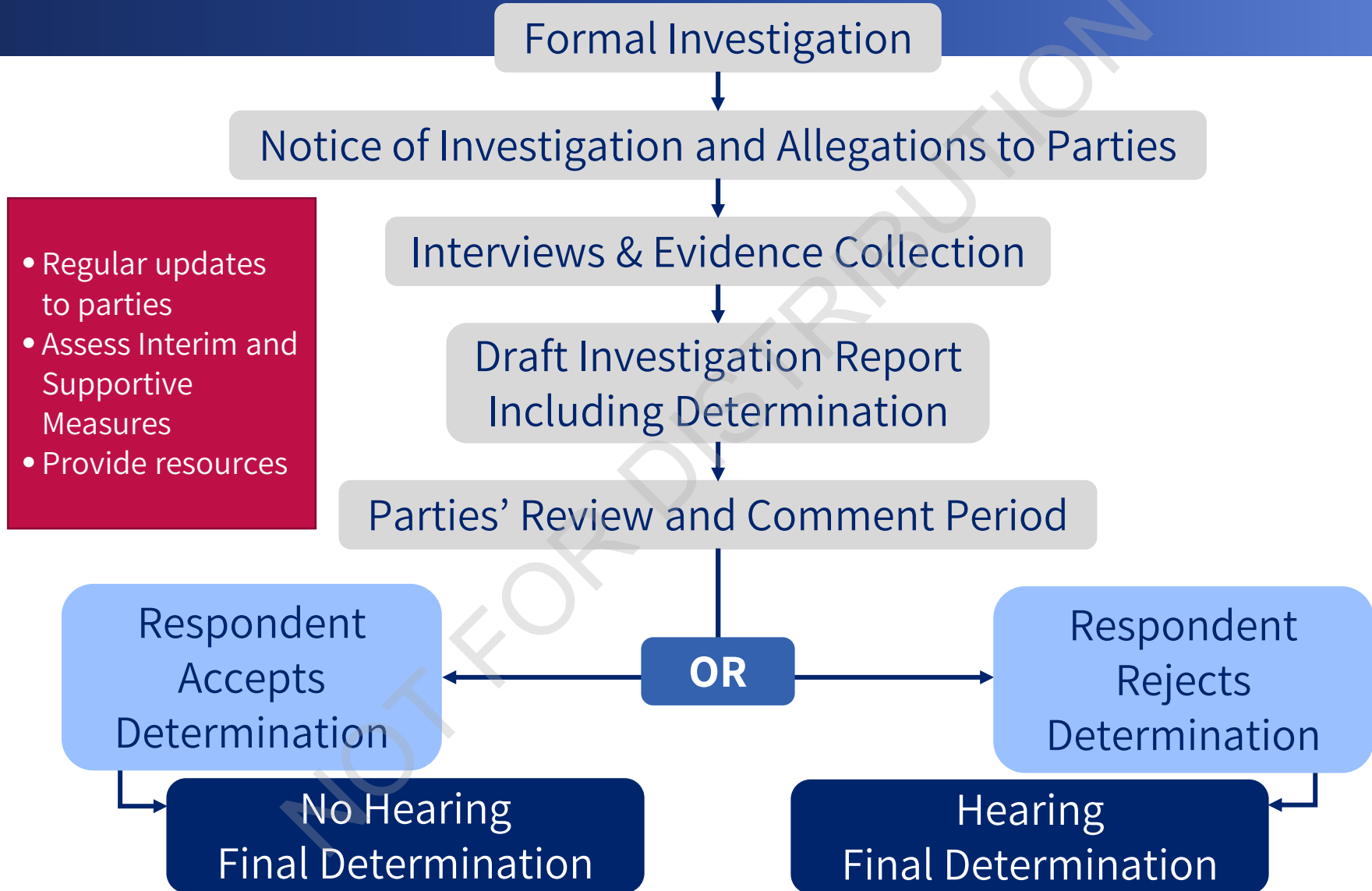
Prevent  
(Title IX)

Remedy  
(Title IX)

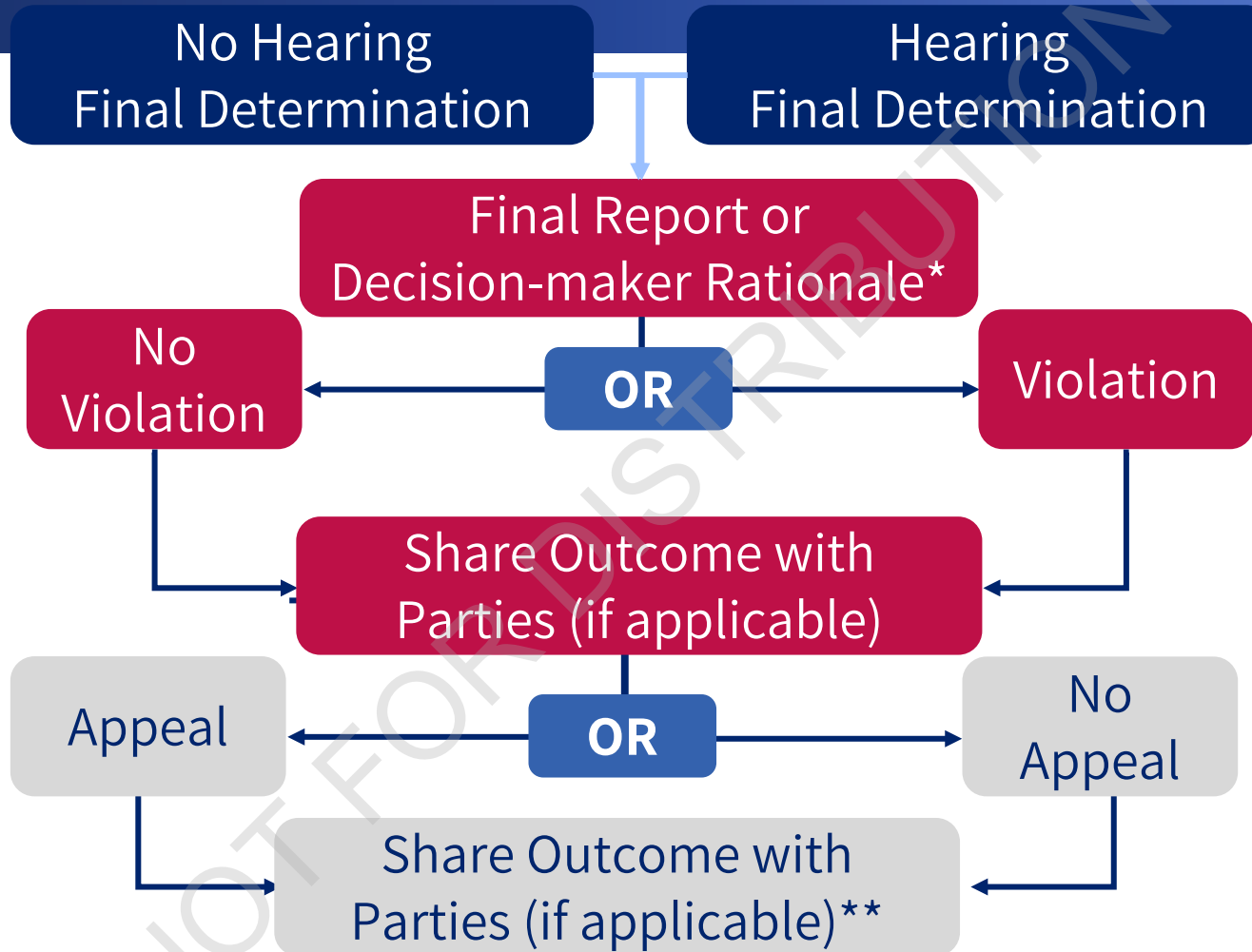
# CIVIL RIGHTS INVESTIGATION MODEL



# CIVIL RIGHTS INVESTIGATION MODEL (CONT.)



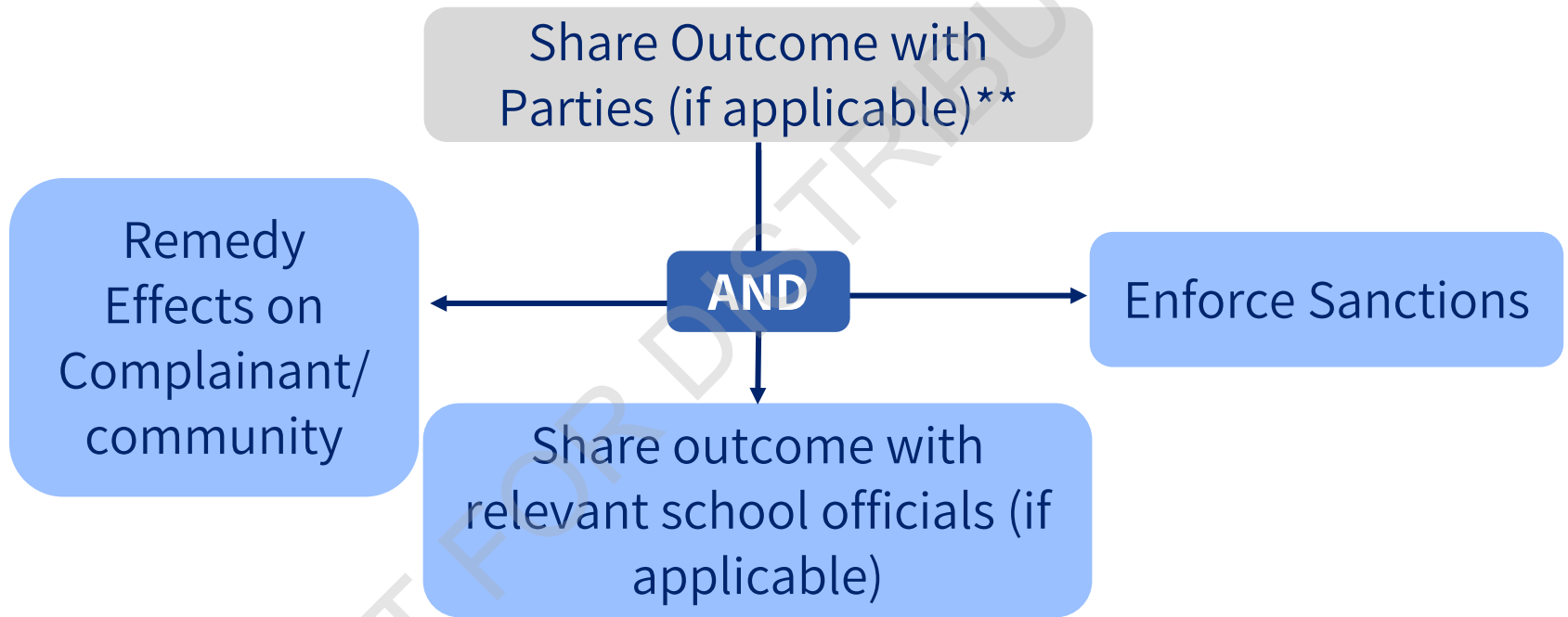
# CIVIL RIGHTS INVESTIGATION MODEL (CONT.)



\*Share outcome with Legal Counsel and/or Compliance 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

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# 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 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

# 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

# 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



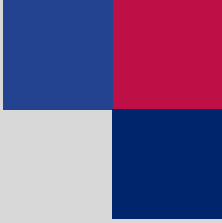
Recover any lost work/education time



Restore opportunities, if applicable



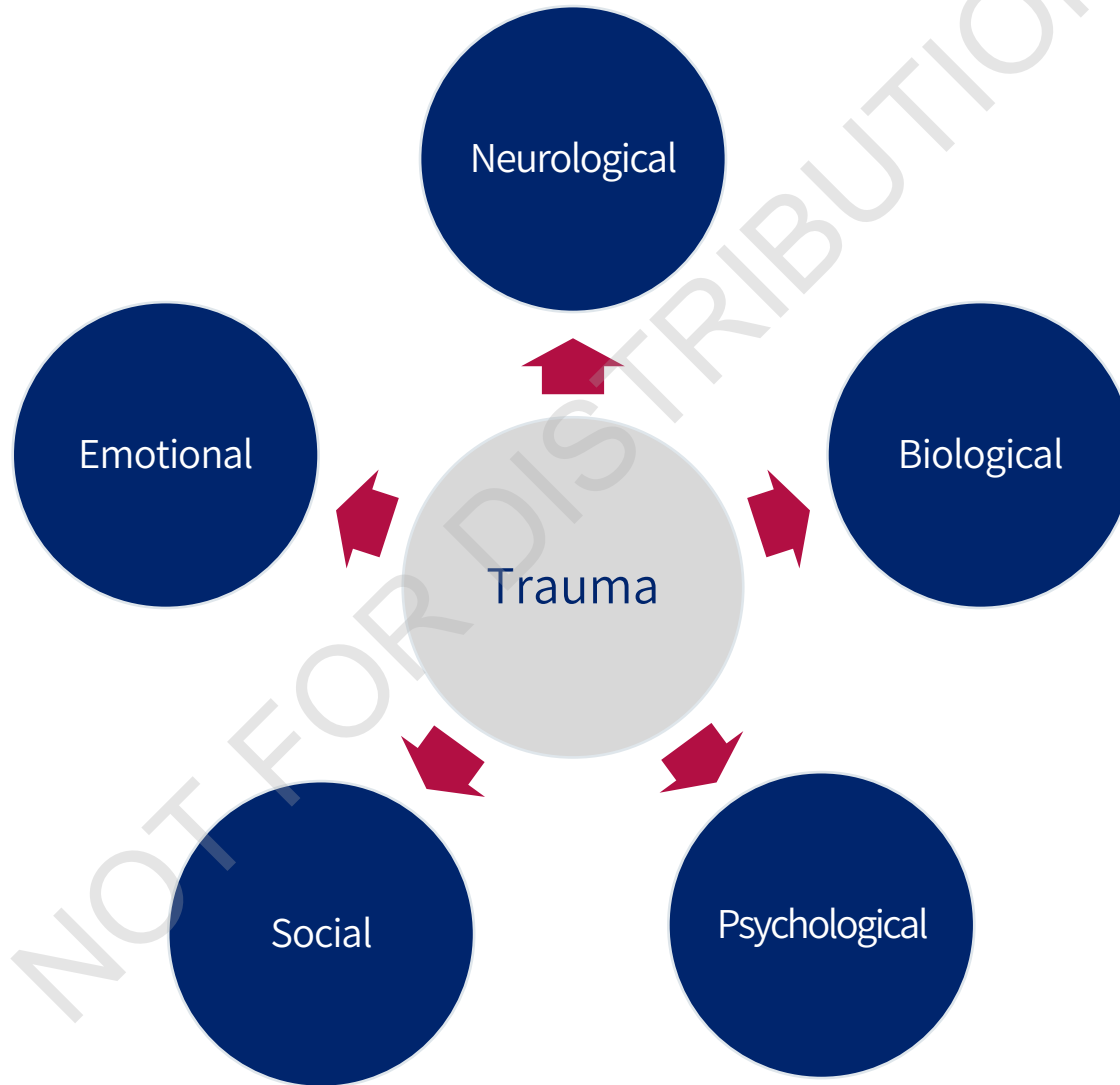
Repair damage from misconduct, both short- and long-term



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# TRAUMA AND INVESTIGATIONS

# IMPACT OF TRAUMA ON FUNCTIONING



# THE BRAIN'S RESPONSE TO TRAUMA

In response to the anticipated trauma of sexual assault or other violence, hormones can be released into body which impact:

- Ability to react physically
- Ability to think rationally
- Ability to consolidate or group memories

*This is a neurobiological response, not a choice.*

# TRAUMA-INFUSED RESPONSE

- Promotes safety
- Recognizes the impact of trauma on a cognitive, physical, psychological, emotional, and neurobiological level.
- Understands how trauma can impact someone's academics/work/social life
- Recognizes the need for support/positive relationships
- Honors choice with the goal of empowerment
- Is respectful and considers boundaries and privacy
- It does NOT mean that you cannot or do not probe the credibility of the interviewee

# TRAUMA AND INTERVIEWING

- Prioritize developing rapport and building trust
- Emphasize transparency and predictability
- Physical aspects of interview (light, access, comfort, etc.)
- Be cognizant of why someone may have responded in a “counterintuitive” manner
- Be mindful that recall is often difficult and slow following trauma
- Use non-judgmental/non-blaming language
- Avoid re-traumatization (but must still ask necessary questions)
- Use Cognitive Interviewing to aid recall (learn more about this in Investigator Level Four Certification)

# TRAUMA AND INTERVIEWING (CONT.)

## **Avoid:**

- Unsupportive responses
- Taking control any more than is necessary
- Escalating the situation
- Defining or labeling a party's experience.
- Asking why questions (i.e., "Why did you . . . ?")
- Verbalizing judgment in the moment
- Using trauma as a substitute for evidence or basis to assess credibility
  - Trauma doesn't prove anything in terms of a policy violation

# QUESTIONING SKILLS

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# QUESTIONING

## Don't

- Interrogate the interviewee
- Ask accusatory or argumentative questions
- Ask questions out of curiosity
- Make questions long/confusing
- Ask compound, multiple choice, or leading questions
- Fail to prepare for what questions need to be asked in each interview

## Do

- Have a purpose for asking each question
- Prepare an outline of questions in advance of interview
- Apologize when a bad question is asked and rephrase
- Ask open ended questions
- Listen carefully and with empathy
- Learn the facts, establish a timeline, and understand each party's perception of what happened

# QUESTIONING CONSIDERATIONS

- Understand an “interview” versus an “interrogation”
  - An interview is a conversation designed to elicit information in a non-accusatory manner
  - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended
- What are the goals of questioning?
  - Learn the facts
  - Establish a timeline
  - Understand each party’s perception of what happened
- NOT the goals of questioning:
  - Curiosity
  - Chasing the rabbit into Wonderland

# QUESTIONING CONSIDERATIONS (CONT.)

## Consider before asking questions:

- What are the relevant issues?
- What do I need to know?
- Why do I need to know it?
- What is the best way to ask the question?
- Am I minimizing the re-traumatization potential for all parties?
- Am I avoiding blaming or biased questions?
- Am I the right person to ask this?

# QUESTIONING CONSIDERATIONS (CONT.)

- Have a purpose for asking every question
- Be sure to ask a question, not make a speech
- Don't be accusatory or argumentative. You don't decide the allegations and should have no real stake in their outcome
- Don't make questions too long or confusing
- If you ask a bad or blaming question, take it back
- If you say something inappropriate, apologize

# QUESTIONING

- Listen carefully and adapt follow-up questions
- Avoid evaluative responses to a person's answers
  - E.g., "That's too bad;" "I'm glad you said that"
  - Empathy vs. sympathy
- Do not moralize or sanitize
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," "had a few drinks," "was acting weird"
- Be cautious with questions that invite parties to second-guess their actions, as this may be perceived as blaming. The questions may be fair game, but it's all in how you ask them

# QUESTIONING GUIDELINES

**Take the complaint from start to finish through a process of broad to narrow questions and issues that need to be addressed.**

- Prepare an outline of your questions in advance
  - Ask questions about the allegations and the evidence and the policy elements
  - Focus on areas of conflicting evidence or gaps in information
  - Drill down on timelines and details
  - Review your questions before ending interview

# ASKING GOOD QUESTIONS

- Generally, use open-ended questions (tell us...,who..., what..., how...)
- Try to avoid close-ended questions (Did you..., were you...)
- Don't ask Compound Questions
  - “I have two questions; First,..., Second,...”
- Don't ask Multiple Choice Questions
  - Were you a or b?
- Avoid suggesting an answer in your question

# QUESTIONING SKILLS

- Listen carefully and adapt follow-up questions.
- Work from your prepared outline but stay flexible.
- Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “acted weird,” “sketchy,” or “had a few drinks.”
- Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts).
- Be aware of your own body language. Stay neutral, even if you hear something you distrust or dislike.

# QUESTIONING TIPS

- Restate/summarize what was said. Helps validate that you are listening and helps ensure you understand what is being said.
- Consider using these phrases:
  - “So it sounds like...”
  - “Tell me more...”
  - “Walk me through”
  - “Help me understand”
- Frame questions neutrally.
- Be on the lookout for “cued” responses or rehearsed or memorized answers.
- Handle emotions sensitively and tactfully.
- Observe body language, but don’t read too much into it.

# QUESTIONING EXERCISE

## Please critique the following questions:

- 1) When you did (X), what effect do you think that had on the other party?
- 2) What was your goal when you offered to take them home?
- 3) What were you thinking when you went into their room?
- 4) Do you feel like you had too much to drink?
- 5) Do you remember the training session we did on Title IX and consent and harassment?
- 6) I have a couple of questions: First, could you tell they were incapacitated?; and second, why did you give them another drink when they already appeared to be really drunk?

# QUESTIONING EXERCISE

- 7) If you were in this situation again, what would you do differently?
- 8) Did you have any expectations when you got back to the apartment?
- 9) How would you feel if you were the other party?
- 10) How would you like if someone did this to you?
- 11) Do you think you have any responsibility for what happened?
- 12) What clear words or actions gave you consent?

# CASE STUDY

- Sally Hansen

# SUSAN SMITH

- On November 8<sup>th</sup>, Jake Ivins notified the Title IX coordinator that on November 7<sup>th</sup>, Susan Smith inappropriately touched one of his classmates, Jesse Sullivan, during a classroom demonstration in color lab. Jake stated that he also heard Susan make a sexual comment about Jesse's physical appearance.
- Jesse reports to the Title IX coordinator that Susan has been engaging in unwelcome conduct of a sexual nature with her throughout the term. Jesse also reports that another classmate, Jaidyn, has had a similar experience with Susan.

# SUSAN SMITH

- Jaidyn reports to the Title IX coordinator that not only has Susan made unwelcome sexual comments to her and inappropriately touched her, she believes that she was graded unfairly based on her sex, and that she previously reported that information to the Education Leader.
- The Title IX coordinator contacts the Education Leader, Fran Drescher, who reports that she received complaints from two women students that they were graded unfairly by Susan on the basis of their sex. No documentation indicates what follow-up was provided for those allegations.

# SUSAN SMITH

- To determine whether additional allegations/Complainants exist, the Title IX coordinator reviews the School's academic records. These records indicate that Susan has taught 50 future professionals in the last two years. Aggregate data indicate that male future professionals scored an average of 15 points higher in Susan's classes than female students in the same classes. Ten men received "A" grades out of 50, while no women received an "A." Susan does not grade blindly and knows the sex of each future professional when she assigns grades.

# SUSAN SMITH

- After receiving the Notice of Investigation, Susan provides a written statement in advance of her investigation interview to the allegation about this grading pattern as follows: “This is correct. Many women struggle with the color lab, and their performance typically trails that of male future professionals, who are more adept with the subject matter.”
- The Education Leader provides Susan’s evaluations for the past year. There were 15 comments in the evaluations suggesting that Susan is biased against women, is a “misogynist,” is “sexist”, and “picks only women she finds attractive for color lab demonstrations.”

# CASE STUDY

- How will you proceed with an investigation?
  - Who do you want to talk to?
  - Order of interviews?
  - What information do you need to gather?
  - When will you meet with the Respondent?
  - What questions do you want to ask:
    - Complainant
    - Respondent
    - Witnesses
  - What additional documentary/other evidence do you want to gather?



# **RECORDKEEPING & DOCUMENTATION**

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# RECORDKEEPING AND DOCUMENTATION

- Certain records must be created, retained, and available to the parties for at least **seven** years:
  - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
  - Any appeal and related result(s)
  - Any informal resolution implemented
  - Any supportive measures implemented
  - **For each formal complaint, must document the basis for why the Recipient's response was not deliberately indifferent**

# RECORDKEEPING AND DOCUMENTATION (CONT.)

- Rationale for each determination
- Measures taken to preserve/restore access to education programs/activity

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# Questions?

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