



Association of  
Title IX Administrators

# Diversity, Equity, & Inclusion Foundations

Training & Certification Course

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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 or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, 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.

# Course Introduction



The primary focus of this course is developing awareness of civil rights laws, regulations, and policies related to diversity, equity, and inclusion.



Practitioners will review historical context of non-discrimination laws and practices that inform current policies and practices.



Our goal is to provide a comprehensive framework to apply policy and procedures to diversity, equity, and inclusion in education and employment settings.

# Context and Foundational Concepts

# Grounding Context

- Operate throughout course with TNG definitions and foundational approach
- View the landscape and future in terms of civil rights laws and provisions
- Provide insight into the connections to schools and institutions' policies and procedures and practitioners' responsibilities within these communities



# 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

**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



# Discrimination

**Definition:** The act of treating an individual differently, or less favorably, based upon specific or perceived protected characteristics

**1**

**Can be connected with prejudice**

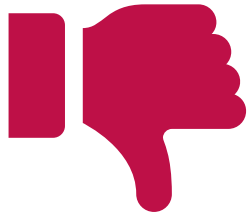
**2**

**Can be intentional or unintentional**

**3**

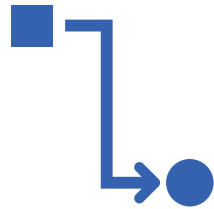
**Always based on a protected characteristic**

# Types of Discrimination



## Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliated or perception of affiliation to protected class



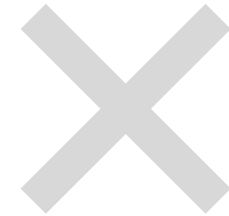
## Adverse Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



## Harassment

- Quid Pro Quo
- Hostile Environment



## Retaliation

- Prohibited if engaged in protected activity
- Suffered adverse academic or employment action

# McDonnell Douglas v. Green

- Green, a black civil rights activist, worked as a mechanic for McDonnell Douglas. He was laid off.
- Green claimed 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.



# McDonnell Douglas v. Green (Cont.)

- On July 25, 1965, McDonnell Douglas Corporation advertised for qualified mechanics. Green applied but was not rehired.
- 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

# Burden Shifting Analysis

- 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

- 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 and district 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)
- 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)
  - Even despite limits in *SFFA v. Harvard* and *SFFA v. UNC*, 600 U.S. \_\_\_\_ (2023)

# Historical Context

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# **13<sup>th</sup> Amendment: Abolition of Slavery Jan. 31, 1865**



# 14<sup>th</sup> Amendment: Established Citizen Rights

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# 15<sup>th</sup> Amendment: Guaranteed African American Men the Right to Vote



# 19<sup>th</sup> Amendment: Women's Right to Vote 1920



# Immigration Act of 1924

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V23428—U. S. Inspectors Examining Eyes of Immigrant  
Ellis Island, New York Harbor.

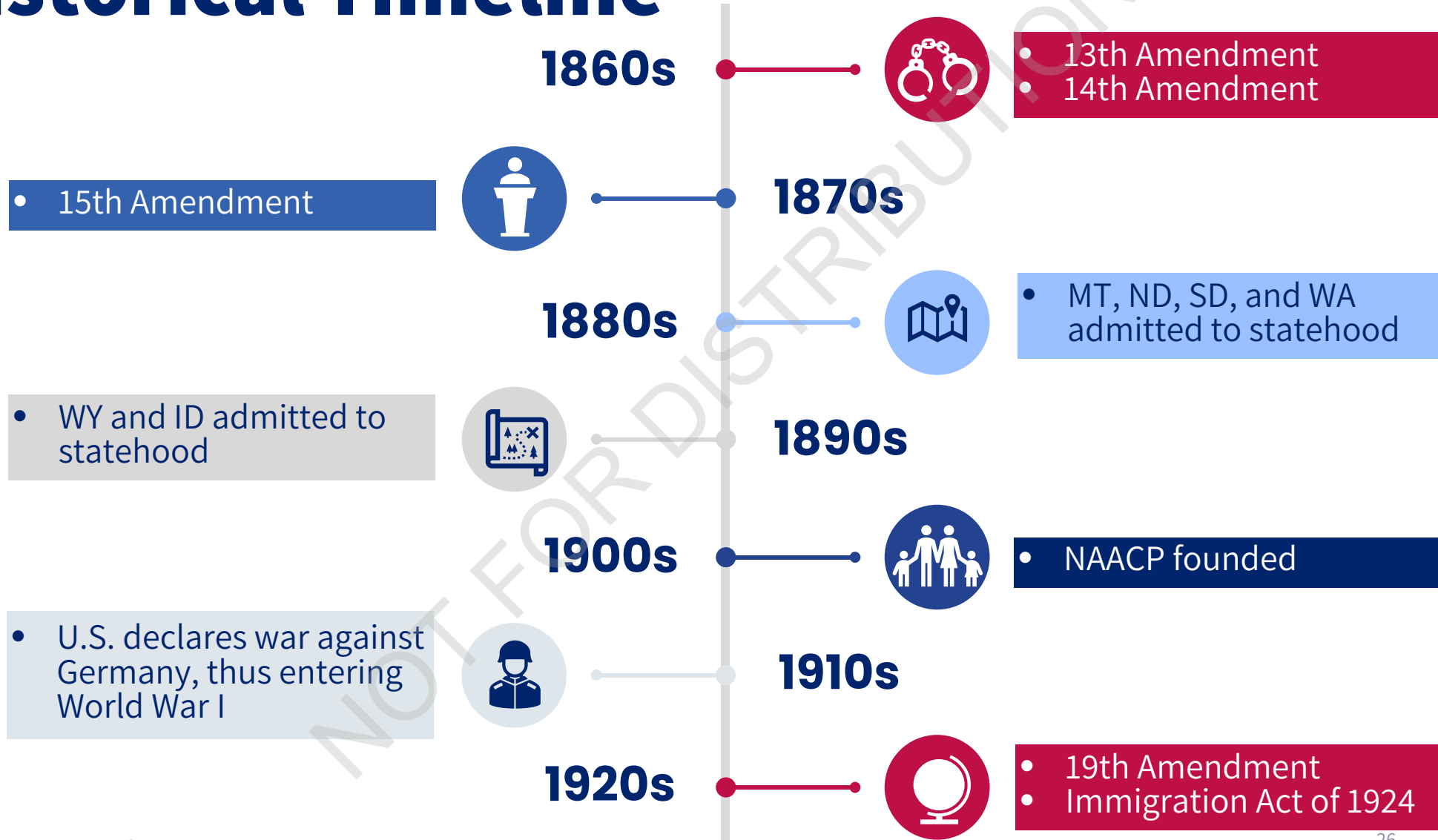


# The Holocaust 1933-1945

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# Historical Timeline



# Historical Timeline

- Holocaust ends
- World War II ends
- Civil Rights Movement begins

- Vietnam War begins
- Equal Pay Act of 1963
- Civil Rights Act of 1964
- Voting Rights Act
- Fair Housing Act
- Immigration Reform Act

- Civil Rights Restoration Act
- Hostile Environment theory adopted

1930s



- Great Depression
- Holocaust begins
- World War II begins



1940s



- *Brown v. Board of Education*
- Emmett Till murder

1950s



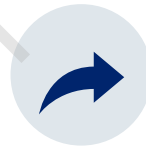
1960s

- Vietnam War ends
- Title IX
- Section 504 of the Rehabilitation Act
- Pregnancy Discrimination Act

1970s



1980s



1990s



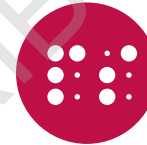
- Civil Rights Act of 1991
- Americans with Disabilities Act

# Historical Timeline

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



2000s



- ADA Amendments Act of 2008

2010s



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

2020s



# Current Civil Rights Law

# 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 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

# 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)*

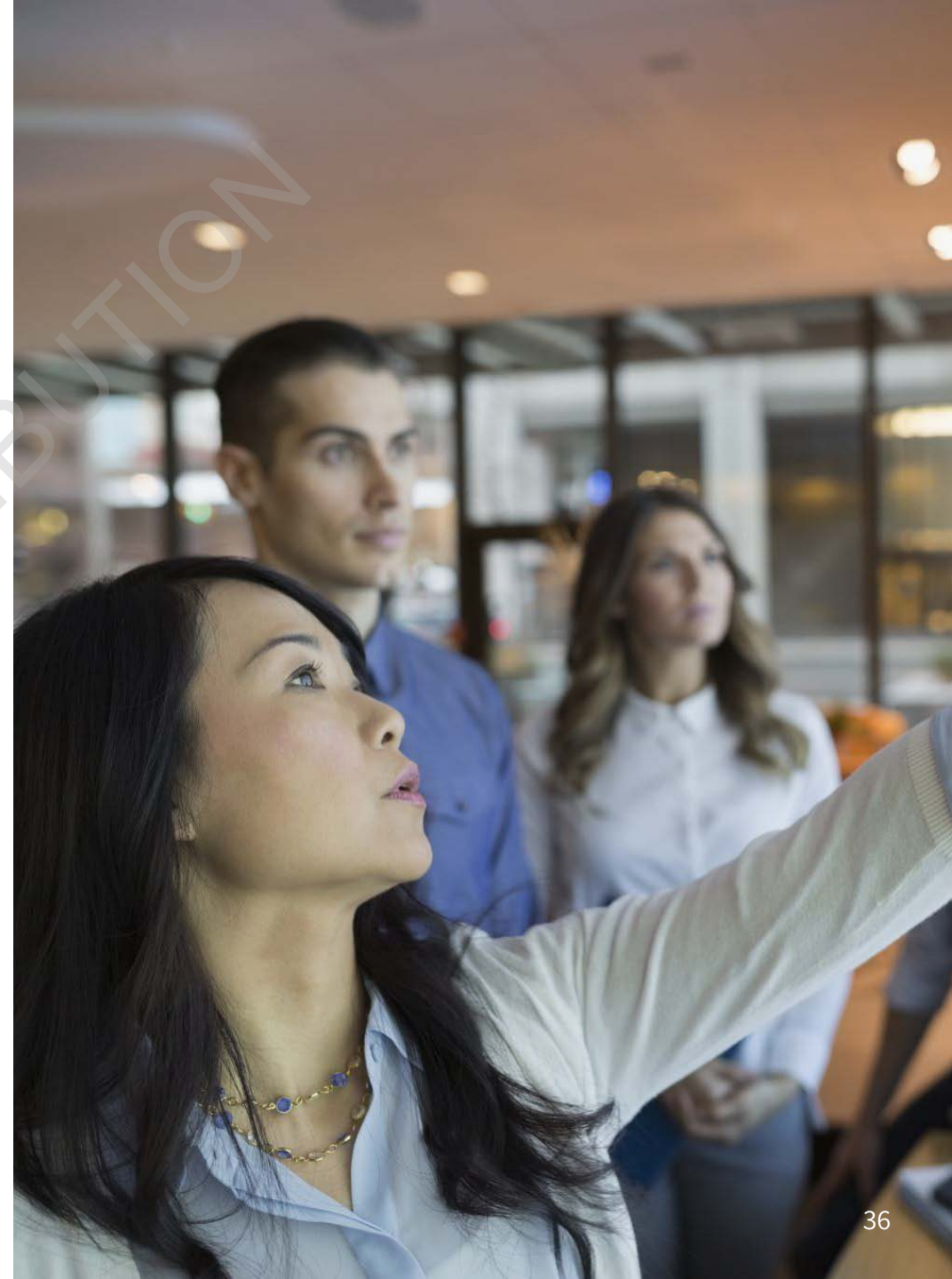
# Title VII of the Civil Rights Act of 1964 (Cont.)

## 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 the distinctions are not made with intent to discriminate, employers may make distinction upon:

- Bona Fide Seniority or Merit System
- Professionally Developed Test
- Quality/Quantity of Production
- Different Work Locations

## Bona Fide Occupational Qualification

- Distinction is reasonably necessary for normal operation
- Can be used for religion, sex, or national origin
- No BFOQ for race or color

## Ministerial Exemption

Religious entities may hire based upon religion for positions whose primary duties are religious in nature

# Affirmative Action

## 1961: EO 10925

- Requires government contractors to take “Affirmative Action” in employment
- Established the EEOC and OFCCP

## 1978: EO 12086

- Consolidated all affirmative action enforcement actions under the U.S. Department of Labor

# Title IX

“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

- Applies to employees and students
- OCR Notice of Interpretation for enforcement with respect to discrimination based on sexual orientation and gender identity

**Sex-Based  
Discrimination**

**Sexual Harassment**

**Retaliation**



# 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 (1973)

- **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

# Americans with Disabilities Act of 1990 (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.)

- Expansive law that addresses many accessibility issues
- Applicable to all institutions regardless if they receive federal funding

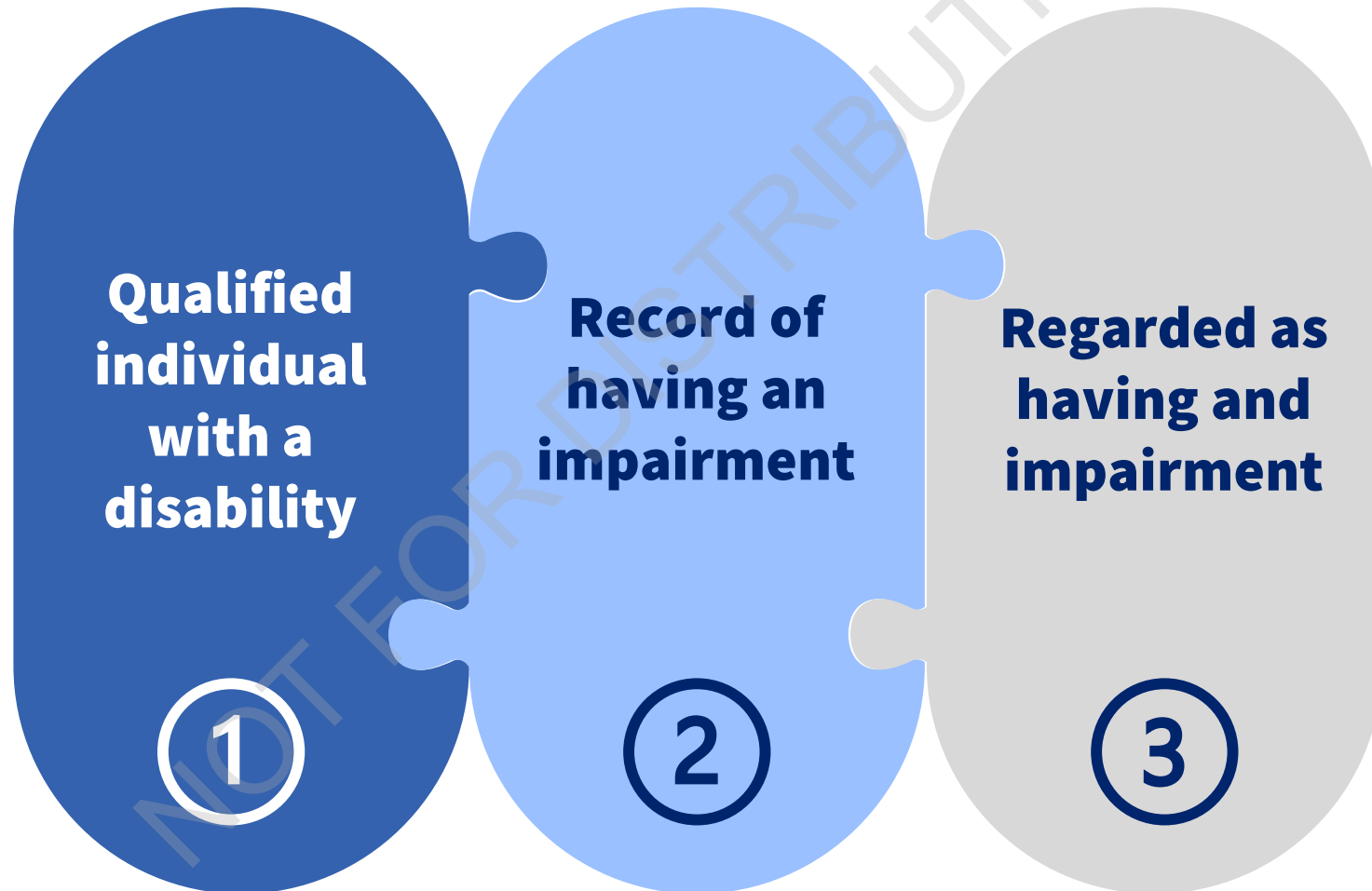


# Who is Protected by ADA/Section 504?

Under these laws, qualified individuals with disabilities are defined as:

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

# Breaking It Down: Three Prongs



# **Activity: ADA/Section 504 Case Study**

# 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?**



# 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 (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

# 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 employee, because of genetic information with respect to the employee.” *42 U.S.C. § 2000ff-1*



# GINA (Cont.)

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 (Cont.)

## 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

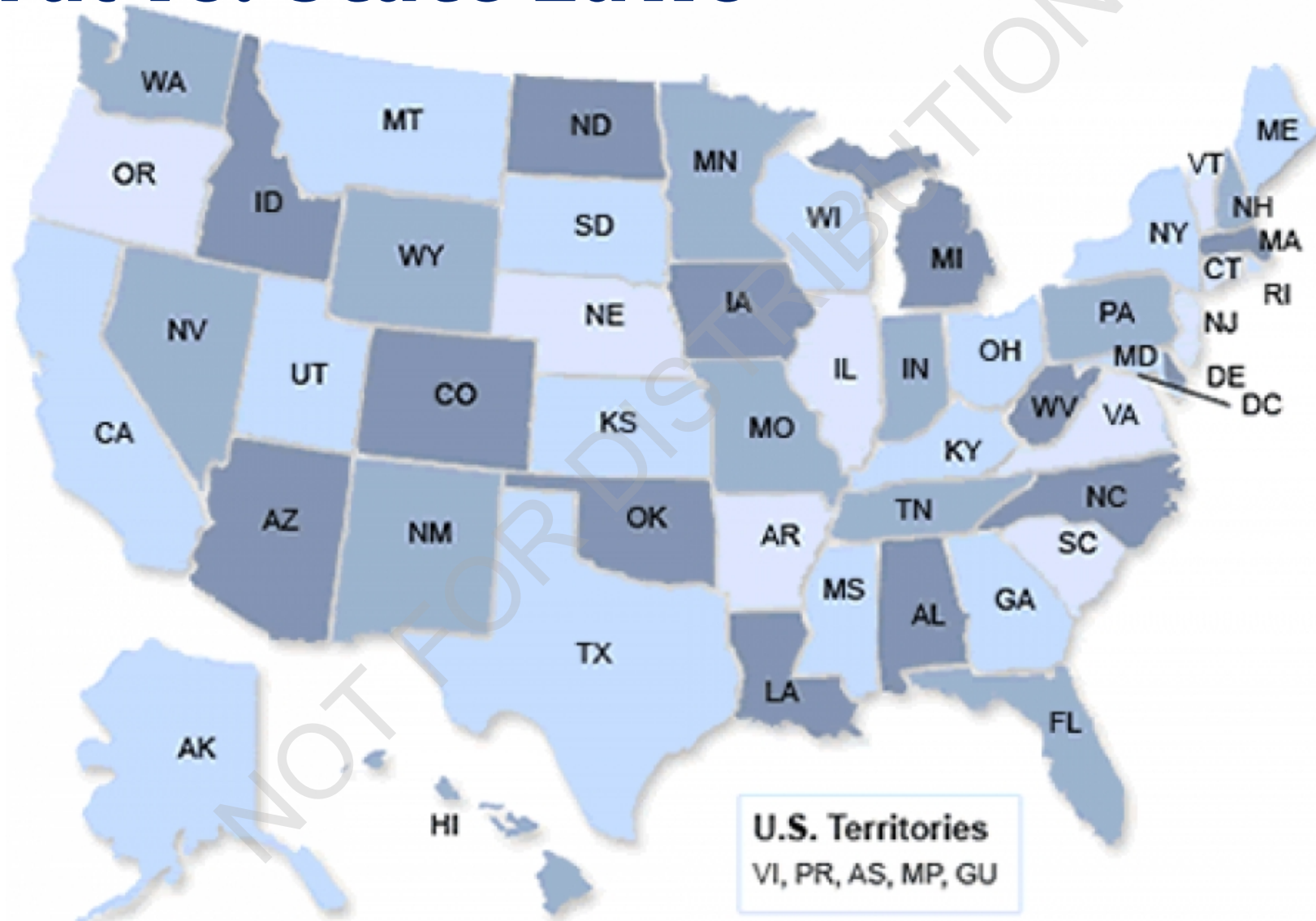
## Jurisdiction

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

# Legal Intersections

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# Federal vs. State Laws



# Evaluating Claims of Discrimination

- Sometimes highlights an intersection of events, types of behavior, or motives for certain behavior.
- Protected characteristics are central to all discrimination
  - Discrimination
  - Harassment
  - Retaliation





# Mixed Motive Complaints

- These complaints invoke protected characteristics
- Approach to resolution is contingent upon identifying the potential discriminatory motives
  - Involves any civil rights violation
  - Includes multiple protected characteristics
  - Potential discriminatory and non-discriminatory reasons for the action

# 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

# **Activity: Mixed Motive (Dr. West)**

# Dr. West's Complaint

- Dr. West, a female, tenure-track Assistant Professor in Business was recently up for her tenure review. 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?**

# **Activity: Mixed Motive (Alex)**

# 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.”

# 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 Professor North's class and his grade has dropped from an A to a D.

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

# First Amendment and Free Speech



# First Amendment

“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

# 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 and Former President, University of Virginia

# Why Free Speech Matters

- Essential to freedom of thought and necessary for self-government
- It articulates a point of view for an institution or district
  - Mission/Vision
  - Strategic Priorities
  - Ideologies of diversity, equity, and inclusion



# Common Challenges

- Currently, the majority of those defending free speech are not invested in advancing DEI
- Emergence of Cancel Culture
- Controversial speakers and challenging messages
- Clashes between protected expression and Academic Freedom
- Offensive theme parties
- Social Media
- Offensive speech or expression
- Bias incidents

# Academic Freedom and the First Amendment

- Courts recognize the relationship between Academic Freedom and the First Amendment
- Academic Freedom
  - Applied to higher education institutions
  - Rights within the educational context of teaching, learning, and research
  - Applies inside and outside the classroom
  - Applies to public and private institutions
  - Protections extend to the institution, faculty, and students

# ***Meriwether v. Hartop***

**992 F.3D 492 (6<sup>th</sup> 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 (6<sup>th</sup> CIR. 2021)

## Facts

- 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 (6<sup>th</sup> CIR. 2021)

## Facts

- 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 (6<sup>th</sup> CIR. 2021)

## Facts

- 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 (6<sup>th</sup> 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 (6<sup>th</sup> CIR. 2021)

## Decision

- Citing to the *Tinker*<sup>1</sup> 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*<sup>2</sup> 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.

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

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

# Guidance

- The EEOC recognizes the incidental misuse of pronouns or deadnames does not constitute a hostile environment
  - Outlines a framework based on intentionality **and** free speech
  - Acknowledges these are difficult to unlearn
- In the Sixth Circuit, intentional and repetitious speech is protected based on *Meriwether*

# Faculty Speech Rights

- Balancing test applied to the First Amendment rights of the professor vs the rights of the institution to maintain a non-disruptive environment
- Professors may not create a hostile environment
- Faculty will likely be protected if:
  - Comments are relevant to course content
  - Pedagogically appropriate to advancing the academic message
  - Language is not used to be gratuitously shocking



# Non-Faculty Speech Rights

- Employers are generally free to restrict employee speech while at work
- Courts balance the employee's right to free speech against the employer's interests in disruption-free workplace
- To determine if speech is too disruptive, consider whether the speech:
  - Impacts close working relationships
  - Interferes with the employer's normal business operations
  - Impairs on-the-job discipline

# Exceptions to Free Speech

## Exceptions include:

- 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



# Obscenity

## *Miller v. California*, 413 U.S. 15 (1975)

- 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

## *Miller v. California*, 413 U.S. 15 (1975)

- 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

*Bradenburg v. Ohio*, 395 U.S. 444 (1969)

- The leader of the Ku Klux Klan was convicted under an 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:**

- Whether there is a specifically expressed intent to carry out the threat and places the victim in fear

**1**

**Directed toward a specific person or group**

**2**

**Specifically communicated to the target**

**3**

**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**

# 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

**1**

**Are there First Amendment implications in the activity presented?**

**2**

**Are there any clear exceptions to the First Amendment at issue?**

**3**

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



# The Importance of 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 (e.g., classrooms, offices)
- 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 a student or faculty member's opinion about what is being discussed



# Non-Public Forum

- 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

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# Discriminatory Policies and Practices

# 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)

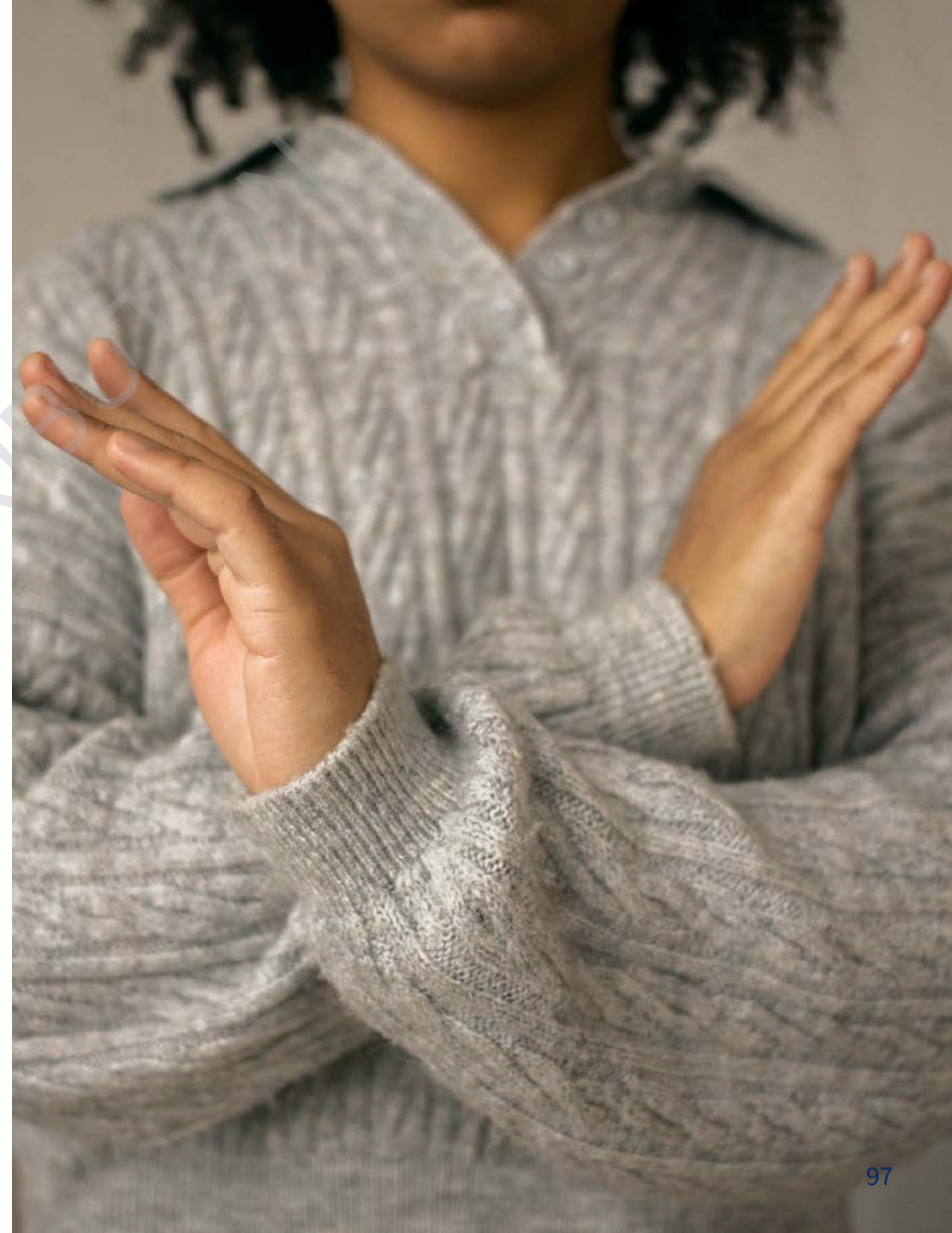
# Essential Policy Elements

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



# Additional Considerations

- Reporting requirements
  - To whom reports are made
  - Voluntary disclosures
  - Requirements of a formal complaint
  - Include description of any applicable confidentiality
- Caution regarding different “bubbles”
  - Huggers
  - Cheek-kissers
  - Touchers
- Cultures/customs of institution/organization



# Policy 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
    - Applicable populations
    - Define when the policy applies
    - Outline prohibited conduct

# Policy and Procedures

- 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 (6<sup>th</sup> Cir. 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 (6<sup>th</sup> Cir. 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 (6<sup>th</sup> Cir. 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

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## Takeaways

- 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.
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# Speech First, Inc. v. Schlissel Takeaways

1

## Policies & Practices

- Should not carry implied threats of discipline
- Punishment is not effective to civility, tolerance, and inclusion

2

## Adverse Impact

- Institutions need to clearly define prohibited behavior

3

## Challenging Policy

- Campus chapters of national organizations may have associational standing to sue

4

## Bias Response Teams

- Use BRTs as a resource and not the speech and behavior “police”

# Current Landscape and Reporting

# Research and Data

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

---

<b>Group</b>	<b>Unweighted sample size</b>	<b>Plus or minus ...</b>
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

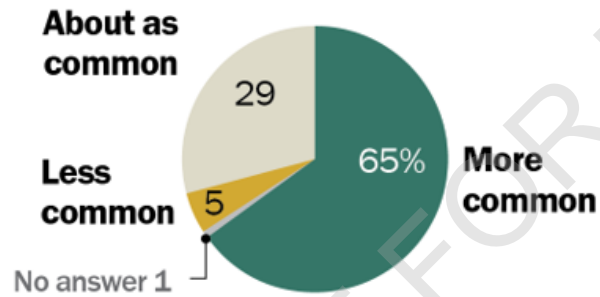
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# Research and Data (Cont.)

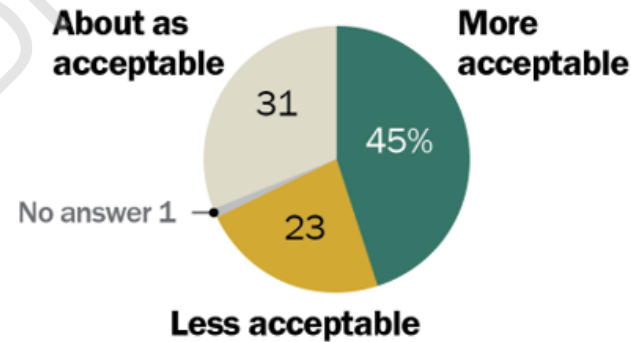
## Most say it's now more common for people to express racist or racially insensitive views

*% 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

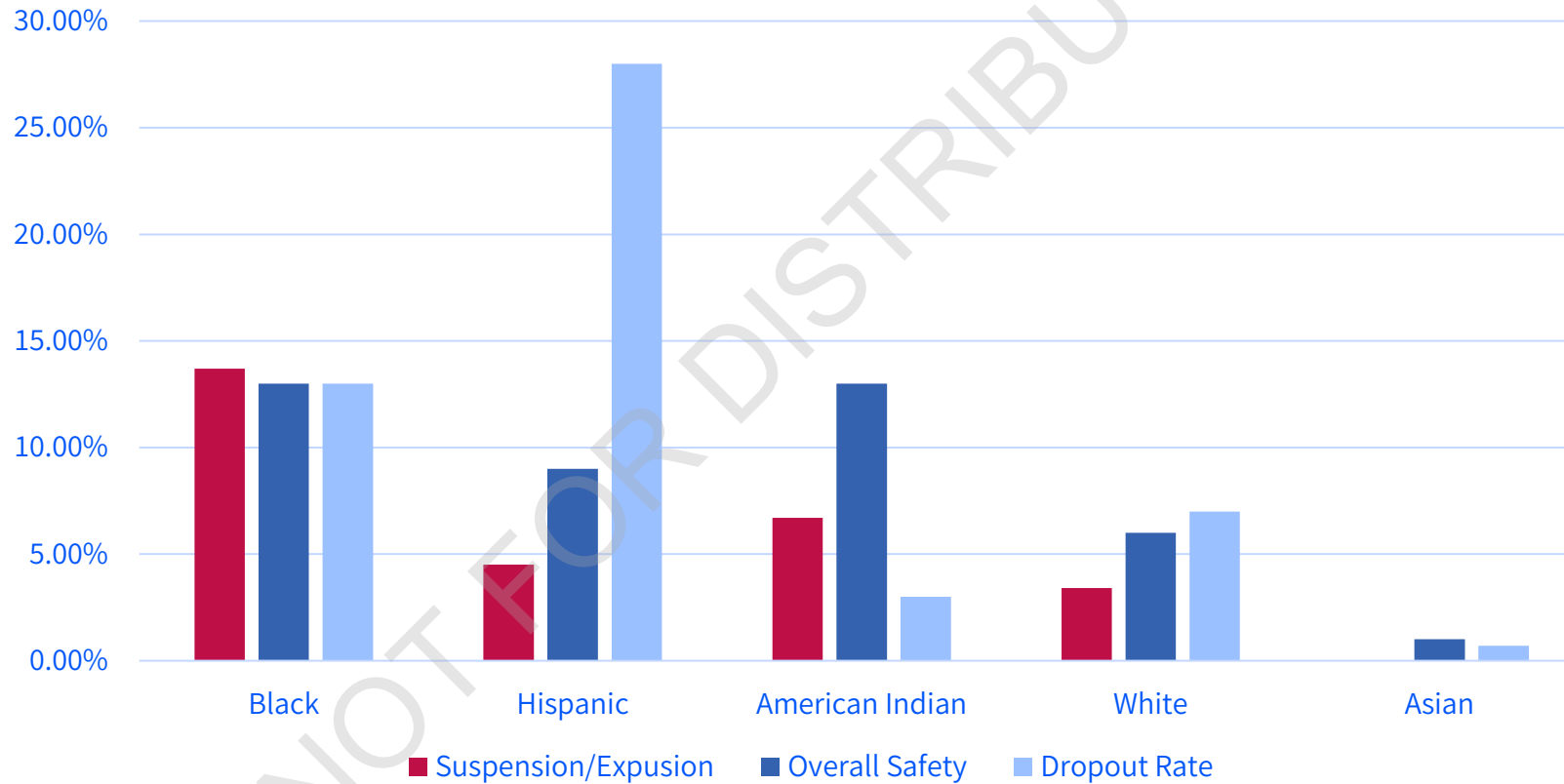
**NOTE:** Individuals could file complaints claiming multiple types of discrimination

# Employment Data (Cont.)

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

# K-12 Education Data

## Student Discipline, Safety, and Dropout Rates by Race



# Reporting Barriers – African American/Black

## MISTRUST IN ADMINISTRATORS

- Actual
- Perceived
- Historical context
- Geography

## RACE BETRAYAL

- Differing consent interpretation

## NONEXISTENT CULTURE-BASED RESOURCES

- External resources
- Cultural competence education
- Monoracial marketing materials

## FEAR

- Retaliation



# Reporting Barriers – 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 – 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 – American Indian

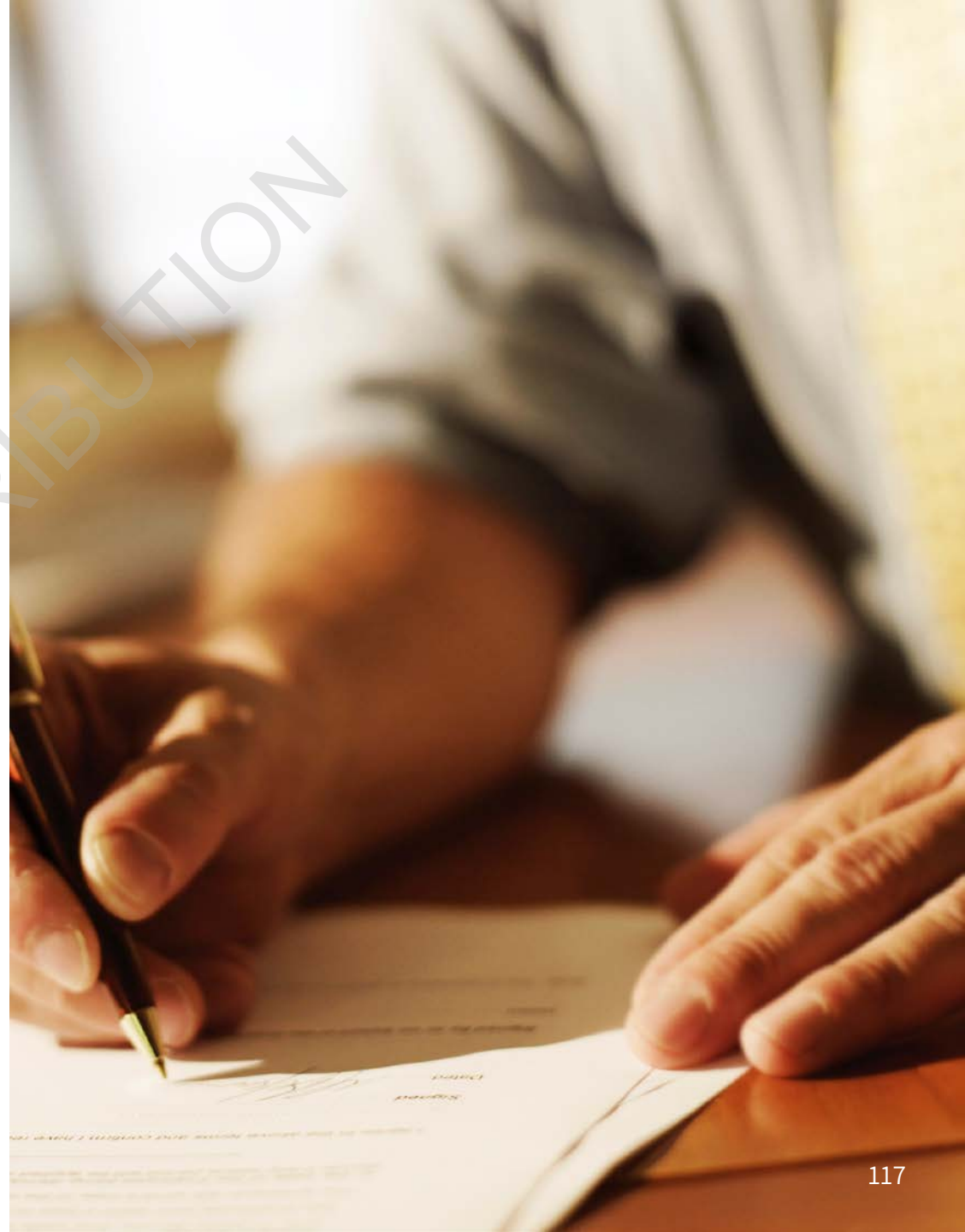
- Face the second highest rates of violence behind African Americans
- Complicated jurisdictional issues
  - Non-indigenous offenders cannot be punished by tribal courts
- Historically tense relationship with law enforcement
  - Significant lack of trust with outside authority
- Lack of knowledge and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

# Mitigating Reporting Barriers

- 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 for Reporting

- 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

- 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.)

## Confidentiality vs. Privilege vs. Privacy

**1**

### **CONFIDENTIALITY**

Those who receive reports from students (and sometimes employees) and need not report

**2**

### **PRIVILEGE**

A legal obligation, such as an attorney giving advice in an attorney/client relationship or clergy providing pastoral advice

**3**

### **PRIVACY**

Only disclosing the information to those who need to know, but cannot guarantee confidentiality



# 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

# Managing and Responding to Incidents

# Immediate Incident Response

- Institutions and districts should adopt a response protocol
  - Identify a team of administrators to assist in addressing situations
- Decide who will be responsible for conducting an immediate inquiry
- Draft a holding statement for inquiries to send to community and stakeholders
- Adopt a plan of action with input from the identified response team



# Violations

- Violations may be policy or non-policy violations
- Policy violations should be routed through conduct procedures or human resources with all due process rights intact
- Feed non-policy violations through the bias response team at the school or institution

# Bias Response Team 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 and ensure it works
- Determine who will serve as team Chair
  - What is the team's role?
  - How often does the team need to meet?
  - Knowledge of complaints from employee/student/visitor involvement
  - Additional referrals
- Outreach to parties
  - Voluntary meeting options
  - Provide appropriate resources
  - Supportive measures
    - No contact orders
- Tracking data

# Resolution Process



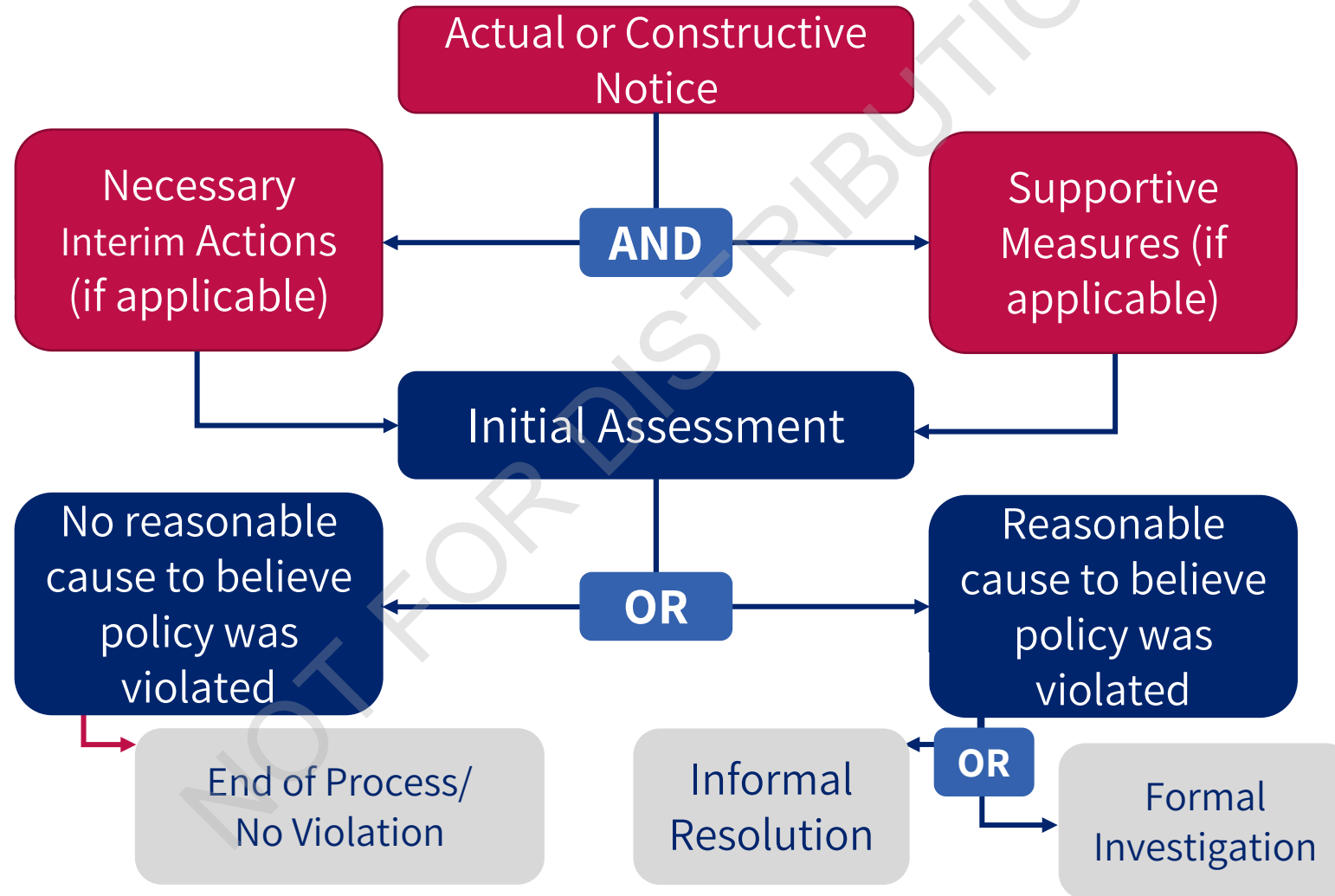
# Procedural Requirements



# Process Considerations

- Understand cultural norms involved and impacted
- Recognize communication barriers such as linguistic or perceptual barriers
- States 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

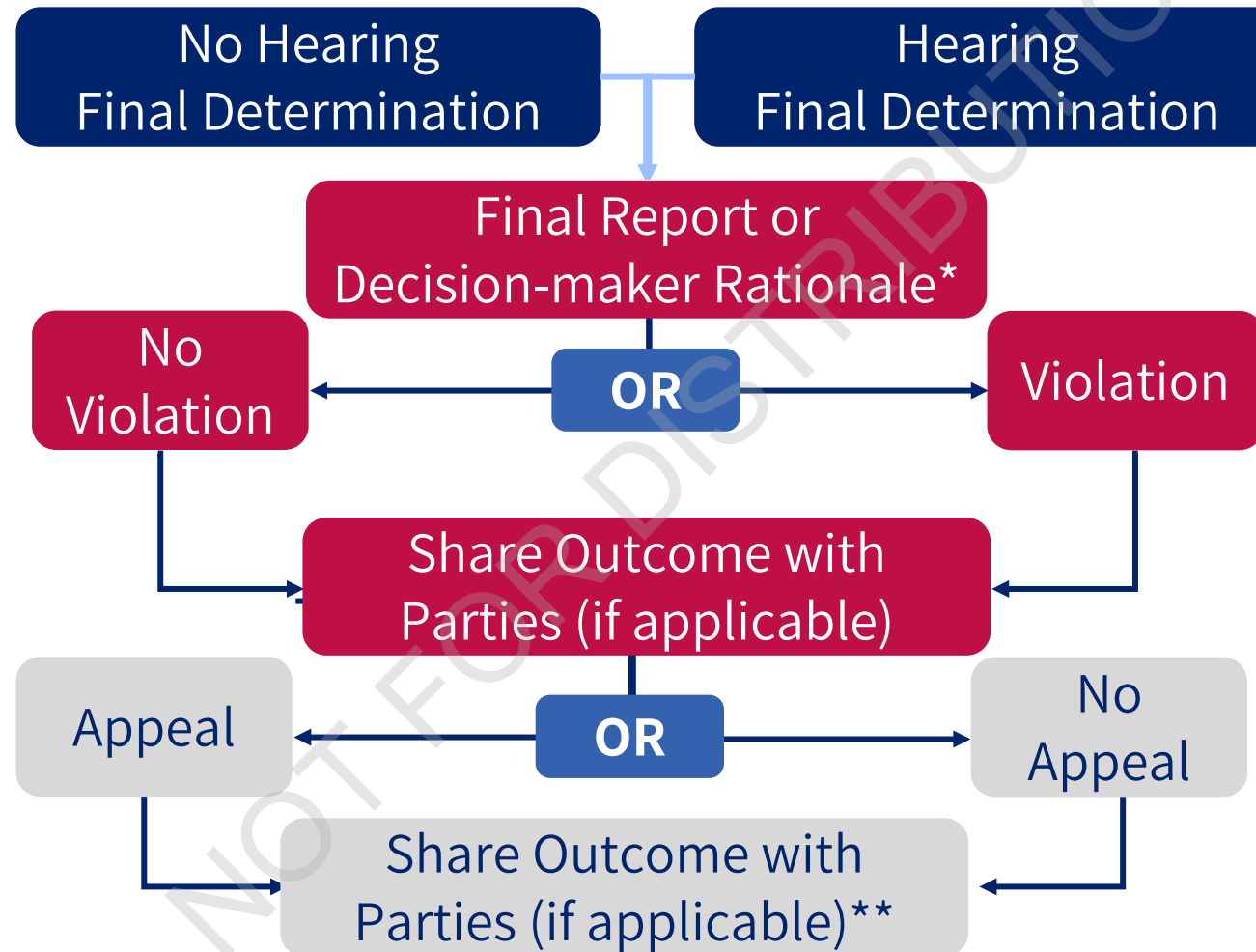
# Civil Rights Investigation Model



# Civil Rights Investigation Model (Cont.)



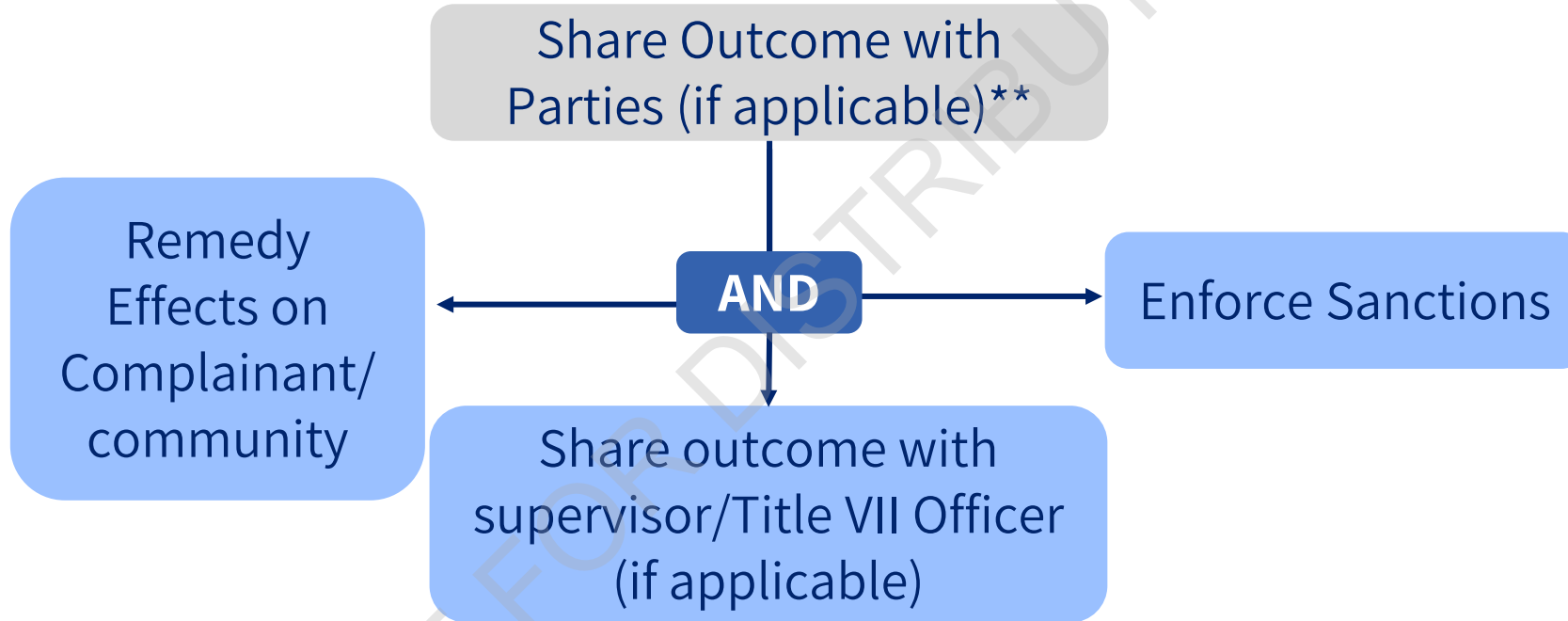
# Civil Rights Investigation Model (Cont.)



\*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

- 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

- It may be necessary to take interim action to address the mental/physical safety of the complainant(s) and broader community concerns
- Interim Actions should be tailored to the alleged circumstances
  - Document
  - Conduct annual assessments to ensure no disparate treatment
- The goal is to Stop, Prevent, and Remedy

# Title VII Discrimination Policy Analysis

- Remember Burden-Shifting Analysis
- To establish prima facie
  - 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

## 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

- Determination should be in collaboration with stakeholders and communicated to both parties as appropriate
- Monitor to ensure corrective actions are implemented

**Be appropriate to the offense(s)**

**Be appropriately applied**

**Consider DEI goals and mission**

## Final Remedy Recommendations



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

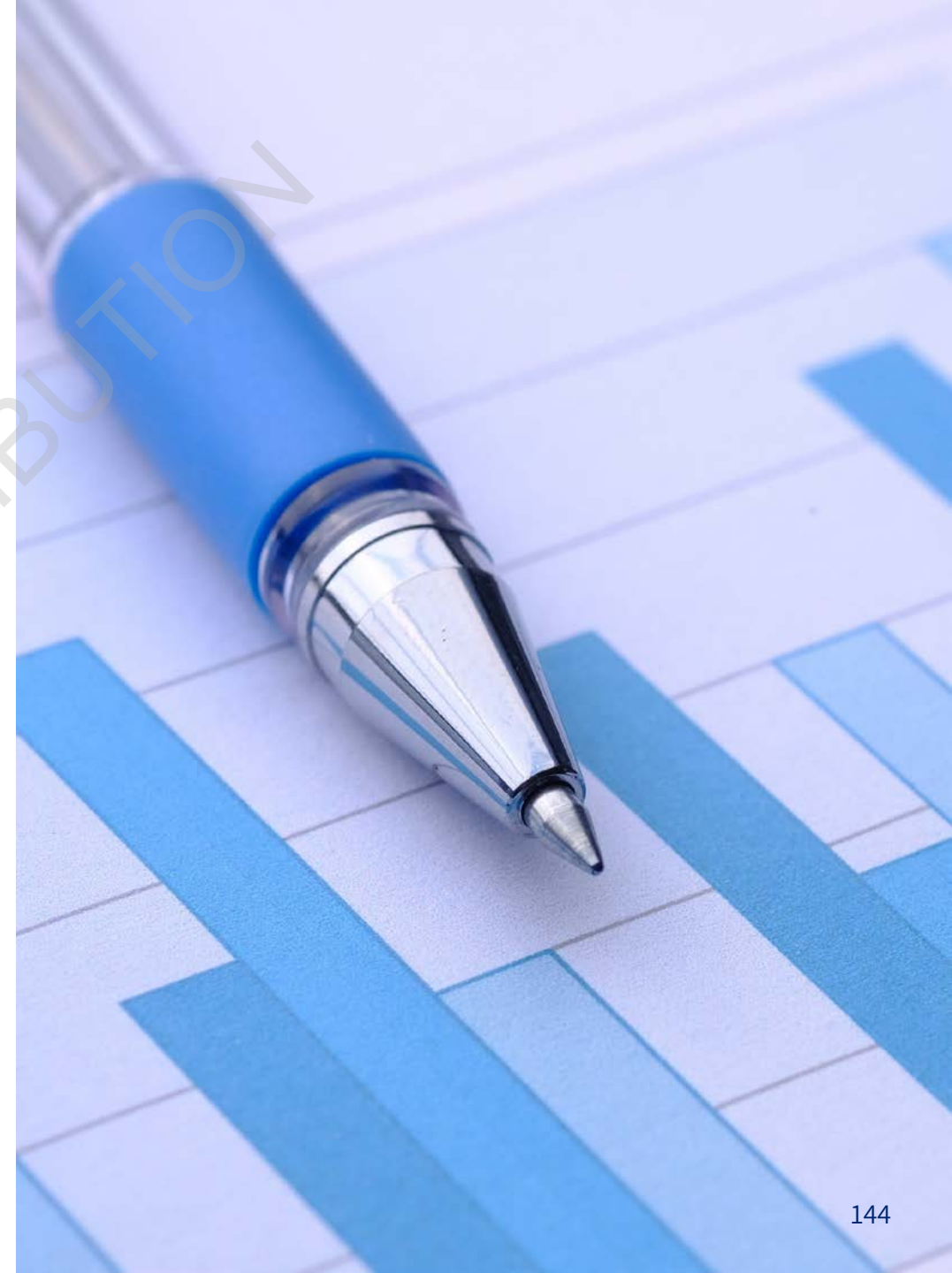
# Structural Concerns and Recommendations

# Organizational Challenges

- Need to examine deeply rooted cultural concerns and issues
- Structural elements may contribute to a lack of accountability
- Competing state and federal laws
- Politics may manifest as the “Diversity Police” mentality

# Training and Programming Recommendations

- Data-informed approach with regular climate surveys, focus groups, etc.
- Survey separate populations
  - Administrators
  - Faculty/Teachers
  - Students
  - Others
- Establish training and programming as culturally relevant to the community





# Questions?

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