



Association of  
Title IX Administrators

# Title IX Coordinator Foundations Level Two: Sex Discrimination for Higher Education

Training and Certification Course

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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 discussion in this course will necessarily engage with sex discrimination, sexual harassment, sexual 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. It is not used gratuitously, and no offense is intended.

# Introduction



This training focuses on Title IX compliance responsibilities and techniques to stop, prevent, and remedy sex discrimination.



Participants will explore areas of an institution's program or activity from which complaints of sex discrimination historically originate.



Our goal is to provide an in-depth understanding of a Title IX Coordinator's roles and responsibilities to assess and address program-wide sex equality and access concerns.

# Introduction to Title IX Compliance

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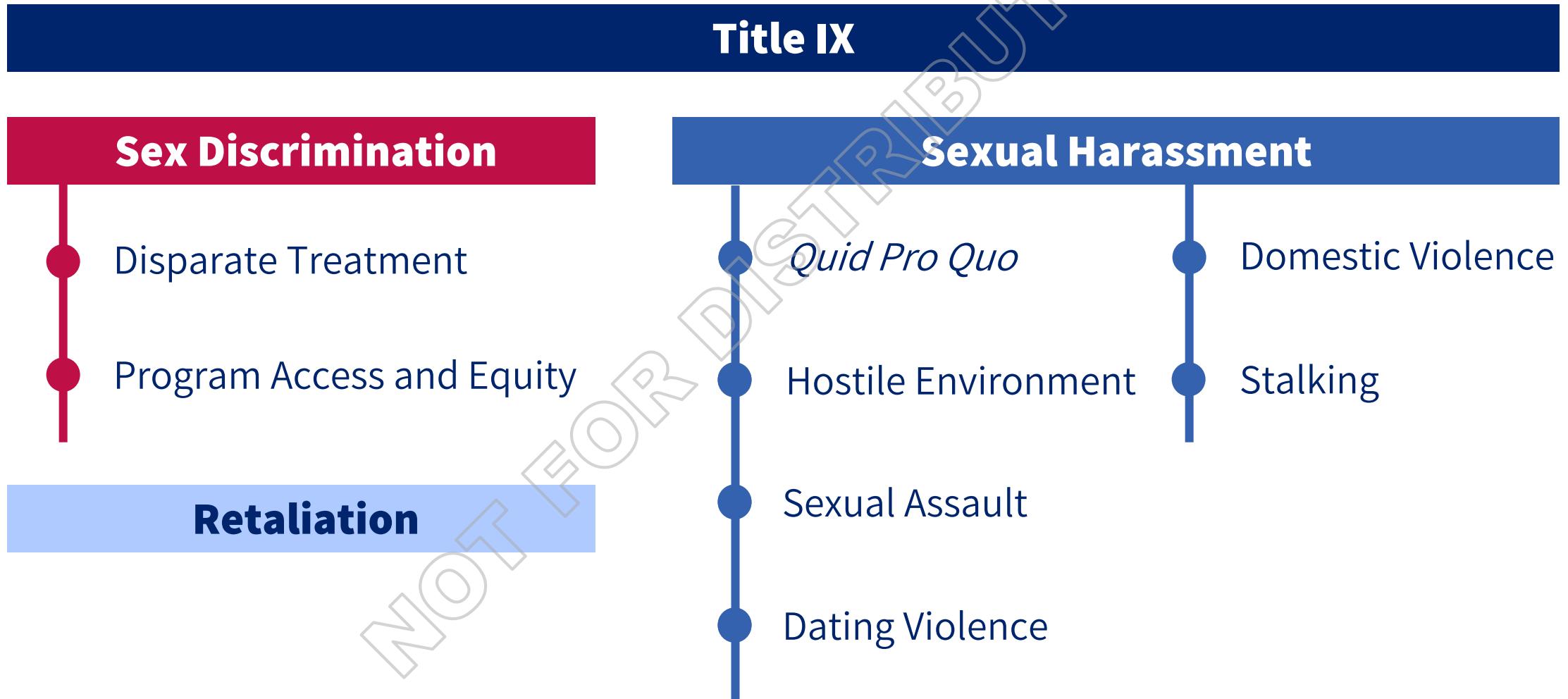
# Title IX and Fairness

- Title IX is a sex equality law
- Focuses on increasing access by reducing disparities and barriers
- Title IX imposes a duty on institutions to stop, prevent, and remedy inequalities created by sex discrimination

Title IX has always mandated a response to sex discrimination; however, the 2020 Title IX Regulations **only** apply to sexual harassment complaints, thus the 1975 Regulations pertain to sex discrimination



# Title IX Scope: Statute vs. Regulations



# Essential Compliance Elements

The requirements to **Stop**, **Prevent**, and **Remedy** guide Title IX Coordinators (TIXCs) in their compliance work

**1**

**STOP** discriminatory conduct

**2**

**PREVENT** recurrence, on both individual and institutional levels

**3**

**REMEDY** the effects of discrimination for individuals, for the community, and on an institutional level

# Title IX Compliance Oversight

- Title IX Regulations mandate that each institution designate a Title IX Coordinator (TIXC)
- Responsibilities fall into two categories:
  - Responding to reports or complaints of sexual harassment and sex discrimination
  - Leading efforts to ensure sex equality and access across the entire institution



# Office for Civil Rights (OCR) Oversight

- OCR enforces Title IX compliance
- Conducts compliance reviews
  - Responds to complaints
- Common reasons for OCR investigations
  - Athletics issues
  - Single-sex programming
  - Failure to accommodate pregnant individuals
  - Failure to stop, prevent, and remedy
  - Failure to investigate



# Title IX Coordinator and OCR

- TIXC serves as the point person for OCR (and other federal agency) inquiries
  - If OCR makes contact, loop legal counsel and other stakeholders (e.g., public relations, President's Office)
- OCR investigations involve document collection and interviews, which can lead to a complaint, mediation, negotiation, settlement, or litigation
- Responding to OCR complaints is a resource-intensive process
  - Money, time, resources, and reputation
  - Adds significant levels of stress
- OCR can also be a resource for TIXCs
  - Program Legal

# Discrimination

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# Discrimination Defined

- The act of treating an individual differently, or less favorably, based upon specific or perceived protected characteristics
  - Discomfort vs. discrimination

Can be intentional or  
unintentional

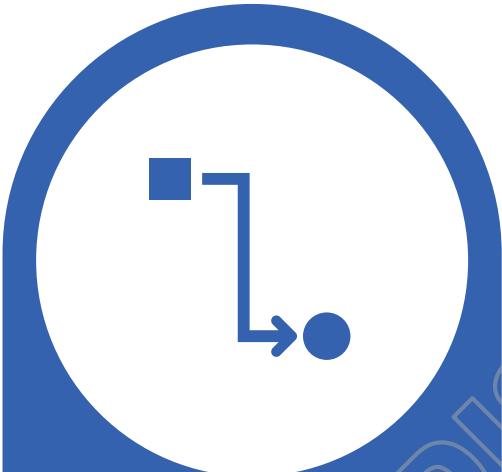
Based on a protected  
characteristic

# Types of Discrimination



## Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliation or perception of affiliation with protected characteristic



## Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups
- Limited applicability\*



## Harassment

- *Quid Pro Quo*
- Hostile Environment



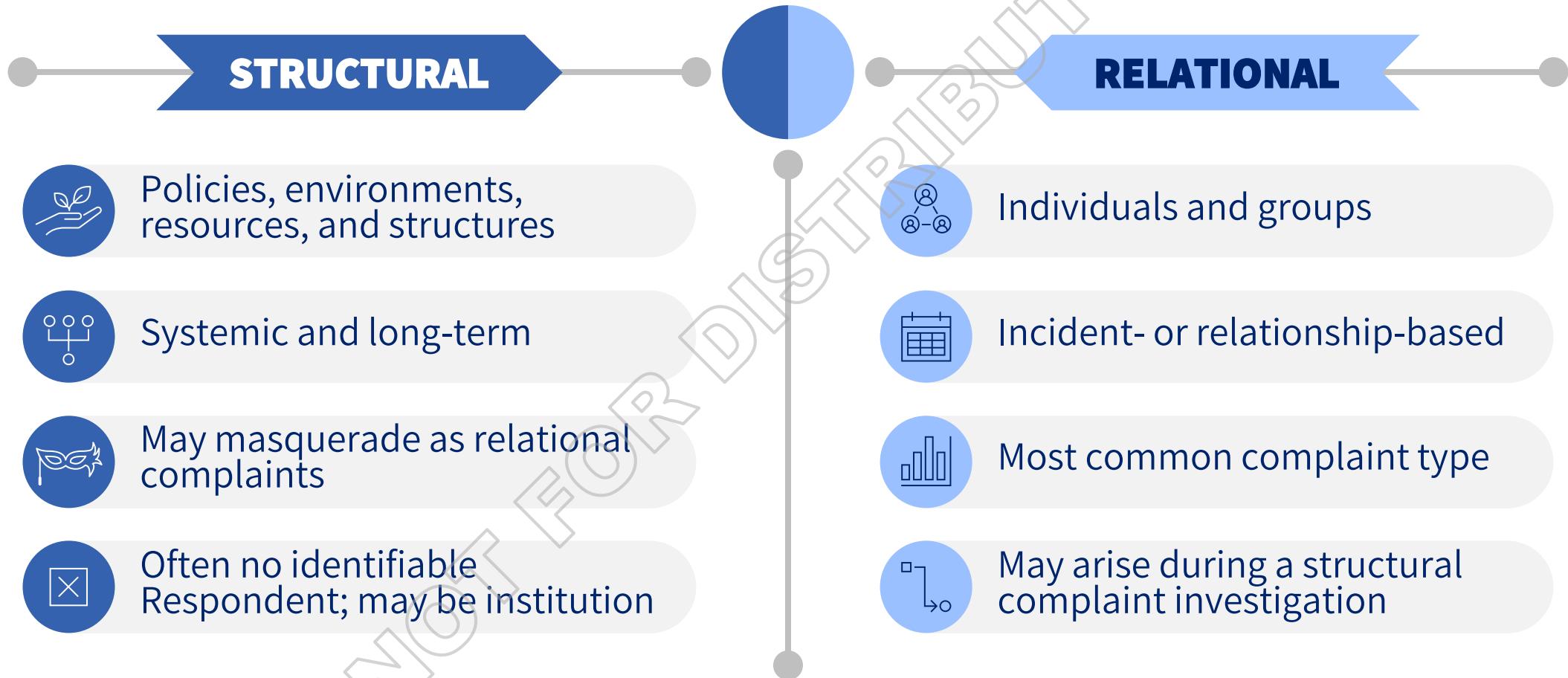
## Retaliation

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

# Discrimination-Related Concepts

- **Protected Characteristic:** Personal trait that cannot be used to discriminate against someone as determined by law or policy (e.g., sex, race, national origin)
- **Adverse Action:** An action taken against an individual that negatively impacts their access to or participation in the institution's education program and activity
- **Pretext:** Occurs when the Respondent asserts that there was a legitimate, non-discriminatory reason for an adverse action, but the real reason for the action was retaliation or discrimination
- **Similarly Situated Comparator:** A person is similarly situated if it is reasonable to expect that they would receive the same treatment as the Complainant, within context
  - Does not mean identically situated

# Types of Complaints



# Types of Discrimination: Disparate Treatment

# Disparate Treatment (DT)

- Disparate treatment exists when an individual treats another person **differently**, or takes an **adverse action**, because of that person's actual or perceived protected characteristic (e.g., sex)

## Examples:

- Access to resources
- Athletics
- Grading
- Hiring
- Pay
- Promotion/performance reviews
- Program access
- Responsibilities/job assignments
- Shifts
- Student conduct outcomes

# Adverse Action Examples

- Abusive verbal or physical behavior
- Discipline
- Inaccessible resources
- Inaccessible remedies
- Less desirable work assignments
- Not hiring/demotion/termination
- Opportunity denial
- Promotion/tenure denial
- Poor performance reviews
- Pay and compensation disparity
- Supervisory responsibility removal
- Unfair grading
- Work-related threats

# ATIXA's Model Policy Definition

## **Disparate Treatment Discrimination:**

- Any intentional differential treatment of a person or persons that is based on a person's actual or perceived protected characteristic and that:
  - Excludes a person from participation in;
  - Denies the person benefits of; **or**
  - Otherwise adversely affects a term or condition of a person's participation in a Recipient program or activity

# Disparate Treatment Analysis

# Disparate Treatment Construct

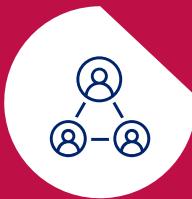
**Step 1:** Does the complaint satisfy the required elements for a disparate treatment complaint?

**Step 2:** Does the Respondent offer a non-discriminatory reason for the adverse action?

**Step 3:** Is there evidence that the offered reason is legitimate, or is it a pretext for discrimination?

# Initial Considerations

**Step 1:** Does the complaint satisfy the required elements for a disparate treatment complaint?



1(a)

Does the complaint implicate a protected characteristic?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the protected characteristic status caused the adverse action?

# Step Two: Non-Discriminatory Reason

## Collect evidence related to any proffered non-discriminatory reason

- Interview the Respondent about the allegations to elicit an explanation:
  - Ask about the **why** behind the alleged adverse action or disparate treatment
    - “Why didn’t Sally get tenure?”
    - “Why did John get tenure when Sally didn’t?”
  - Gather any evidence that supports the stated reason(s)
- Investigator should seek corroboration of any offered non-discriminatory reason(s)
  - Analyze the Respondent’s offered reason in light of relevant evidence
    - Statistical evidence may also be used to rebut a discriminatory motive

# Step Three: Pretext Analysis

- If the Respondent offers a non-discriminatory reason for the adverse action, the Investigator must then seek relevant evidence to determine if that reason is legitimate
  - **Pretext:** When an adverse action occurred for discriminatory reasons, but an individual nonetheless asserts that there was a legitimate reason for the action
    - Is the Respondent's stated reason just pretext for discrimination?
- Provide the Complainant with an opportunity to respond to the Respondent's reasoning
  - Use follow-up interview(s) to identify any evidence that may rebut the Respondent's reasoning
    - Direct evidence
    - Other witnesses or documents
  - Consider other sources to thoroughly investigate whether the reasoning is pretextual

# Investigating Disparate Treatment

**Some evidence must connect the adverse action to the protected characteristic**

- **Direct evidence of a connection**
  - Documents or witnesses who have evidence of discriminatory intent/animus
  - Can also be circumstantial or indirect evidence
- **Comparison to “similarly situated individuals” (SSI) can be helpful**
  - SSIs are outside the protected group; treated differently than those in the protected group
  - An individual is “**similarly situated**” if it is reasonable to expect that they would receive the same treatment as the Complainant, within context
- **Consider the scope of the complaint**
  - If a student is reporting an individual faculty member, SSIs may be the other students in that course and students in the faculty member’s other courses
  - If an employee reports a VP’s hiring/promotion bias, SSIs may be other divisional employees

# Gathering Evidence

- Similarly situated does not mean identically situated
  - **Most relevant** comparisons based on the available evidence
  - Evidence of differential treatment of similarly situated individuals creates an inference of the presence of a discriminatory motive
- It is the institution's responsibility to gather relevant evidence once an initial showing of disparate treatment is made
  - This can function as a gatekeeping mechanism for complaints



# Statistical Evidence

**Statistical evidence could be important for an alleged pattern or practice of discrimination**

- **Example:** A professor alleges the department chair implemented a hiring process that is biased against males
  - Consider the identities of the department chair hires against the overall applicant pools in those hiring cycles
  - 75% of applicants are men but men only comprise 25% of hires
- Common in disparate impact assessments



# Case Studies

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# Case Study: Ahmad and Becky

- Ahmad and Becky are both students in the nursing program
- Becky is the President of the Nursing Students Association and part of her role is running elections
- Ahmad is seeking an executive board position for the next academic year
- All individuals filing to run must submit their paperwork to Becky for approval by Becky and the faculty advisor
- Becky did not approve Ahmad's application to run for election
- Ahmad was the only male who applied to run for election next year and the entire executive board this year is female, so Ahmad believes he was excluded on the basis of sex

Does this report contain all the information you need for a discrimination complaint?

# Case Study, Part 2: Ahmad and Becky

- In response, Becky provides the following explanations for her decision:
  - A female student, Priscilla, applied and was not approved
  - Ahmad submitted his paperwork after the deadline, whereas all approved candidates submitted their paperwork on time
  - The faculty advisor is male
  - Ahmad is rude during club meetings
  - The Vice President is Becky's best friend and Becky is trying to eliminate any competition

Which of the above could be considered a valid, non-discriminatory reason?

# Case Study, Part 3: Ahmad and Becky

**The following could be evidence of pretext:**

- **Reason:** Ahmad submitted his paperwork after the deadline, whereas all approved candidates submitted their paperwork on time
  - **Evidence of pretext:** The faculty advisor granted Ahmad an extension and cc-ed Becky on the email granting the extension
- **Reason:** Ahmad is rude during club meetings
  - **Evidence of pretext:** Witnesses describe Ahmad as respectful and engaged during club meetings, raising his hand to speak and listening to others attentively
- **Reason:** The Vice President is Becky's best friend and Becky is trying to eliminate any competition
  - **Evidence of pretext:** Becky approved three other female students plus the VP

# Case Study: Liz and Jordan

- Liz is the AVP for Facilities & the Physical Plant at ATIXA State College (ASC)
- Liz is hiring a Director of Facilities, a position that oversees academic and residential buildings
  - The position requires 5-7 years of experience working with (1) residential facilities, including emergency management; (2) ASC's work order system; and (3) experience supervising staff
- Jordan, a woman, is the Associate Director of Residence Life at ASC, meets all the requirements, and worked with the previous Director often
- Liz hired Bill, a facility manager from a local outdoor mall
  - Bill has no experience with residential facilities but checks all the other boxes
- Jordan files a complaint that she was discriminated against based on her sex

Does this complaint satisfy the required elements for a disparate treatment complaint?

# Case Study, Part 2: Liz and Jordan

- In response, Liz provides the following explanations for her decision:
  - Jordan just wasn't a good fit for the role or the divisional culture
  - The previous Director did not think Jordan was a good worker (e.g., Jordan was often late to meetings, missed deadlines)
  - She is a woman working in facilities so she would not discriminate against Jordan because she, herself, is a woman
  - Bill is a friend of hers, so she overlooked his resume shortcomings
  - She has hired other women during her time as AVP – in fact, she just hired a woman to work in the facilities main office

Which of the above could be considered a valid, non-discriminatory reason?

# Case Study, Part 3: Liz and Jordan

## The following could be evidence of pretext:

- **Reason:** Jordan just wasn't a good fit for the role or the divisional culture
  - **Evidence of pretext:** Liz's interview notes include the statement: "Pretty **and** passive, bad combo in this division..."
- **Reason:** The previous Director did not think Jordan was a good worker (e.g., Jordan was often late to meetings, missed deadlines)
  - **Evidence of pretext:** The previous Director provided a statement to the Investigator that contradicted Liz: "I enjoyed working with Jordan and think she would be good in that job. I never spoke with Liz about Jordan's fitness for that role."
- **Reason:** Bill is Liz's friend, so she overlooked his resume shortcomings
  - **Evidence of pretext:** Liz's email inviting Bill to a final interview suggested they had only recently met at a job fair for trade professionals, where she referred him to the Director role

# Types of Discrimination: Disparate Impact

# Disparate Impact (DI)

- Disparate impact exists when “neutral” policies and practices have a discriminatory impact
- Complex investigations
  - Often examines culture/climate
- High level statistical analysis
  - Validity studies
  - Programmatic necessity
- Focuses on remedies, not sanctions



# ATIXA's Model Policy Definition

## Disparate Impact Discrimination:

- Disparate impact occurs when policies or practices that appear to be neutral unintentionally result in a disproportionate impact on a protected group or person that:
  - Excludes a person from participation in;
  - Denies the person benefits of; **or**
  - Otherwise adversely affects a term or condition of a person's participation in a Recipient program or activity

# Disparate Impact Analysis

# Disparate Impact Allegations

**Key point: Disparate impact discrimination is almost always unintentional (or claimed to be)**

- **Analysis**

1. Determine whether adverse outcomes of a policy or practice have a disproportionate impact on members of a certain group
2. Determine whether there is an educational/business necessity for the policy or practice and no alternative could have achieved the same goal without a discriminatory impact

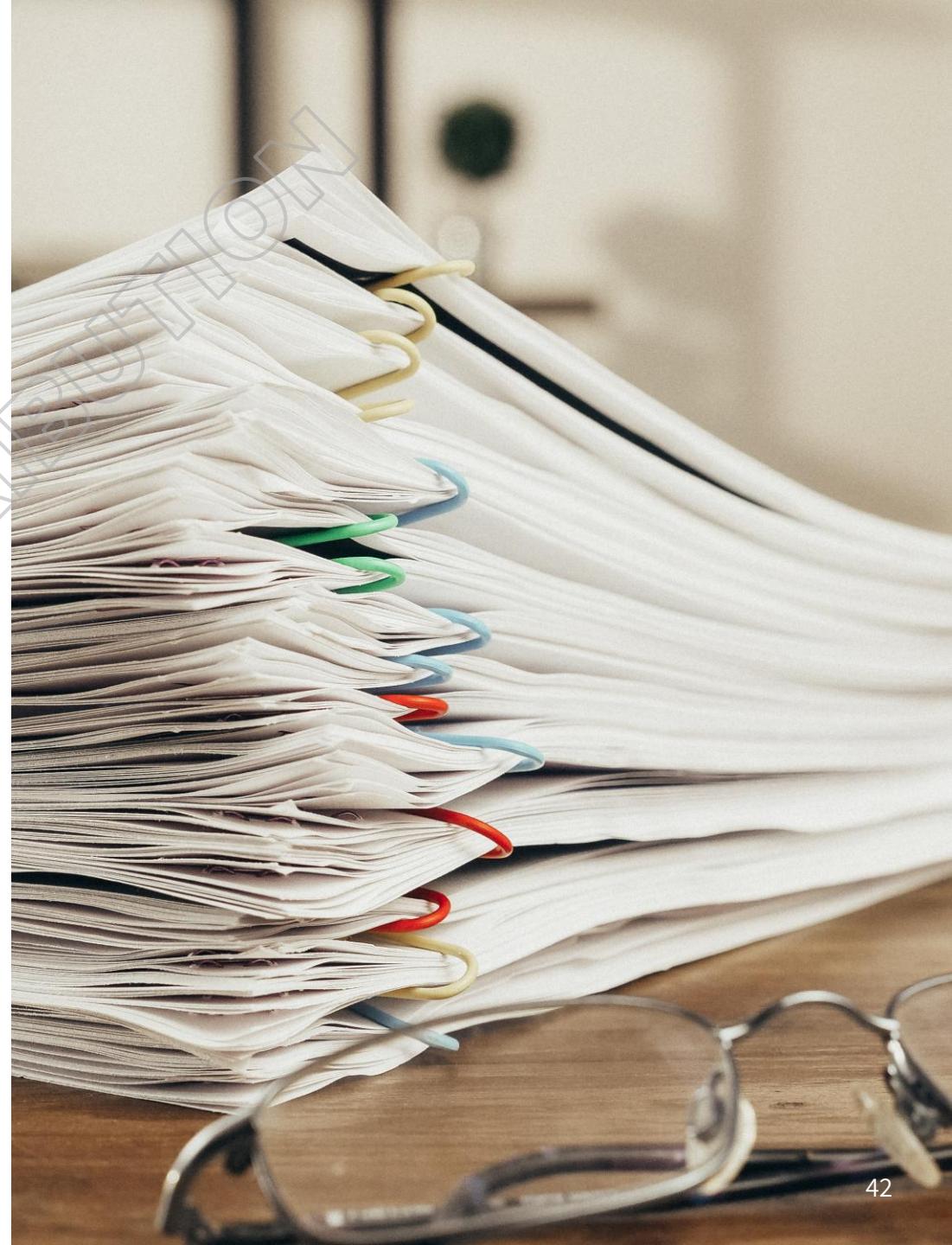
- **Common Examples:**

- Discipline processes
- Hiring processes
- Housing policies

**Note:** The current Administration will not enforce disparate impact under Title VI, but it is currently unknown whether that applies to Title IX

# Disparate Impact Allegations, Cont.

- Often disparate impact complaints will not have an identifiable Respondent
  - Usually, the institution, a department, or organization, or a proxy will be the named Respondent
- Lend themselves well to culture/climate assessments
- If a disparate impact is identified, consider whether the TIXC can take direct action to resolve the problem
- Remedies, rather than discipline, are the common results of DI investigations



# Case Study

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# Case Study: Discretionary Discipline

- The student code of conduct permits discretion for student conduct administrators (SCAs)
- SCAs may consider any of the following:
  - Prior misconduct history
  - Aggravating or mitigating factors
  - Remorse or willingness to accept accountability
- A group of male students alleged they are treated more harshly than female students for similar behaviors/violations, perhaps as the result of the discretion permitted to SCAs
  - This came to light after a series of incidents involving fraternities and sororities at off-campus houses and community event spaces

Could this policy be disproportionately impacting men? What evidence may exist?  
What are next steps? Could there be a legitimate justification?

# Types of Discrimination: Retaliation

# ATIXA's Model Policy Definition

## **Retaliation:**

- The institution or any member of the institutional community,
- Taking or attempting to take materially adverse action,
  - By intimidating, threatening, coercing, harassing, or discriminating against any individual,
    - For the purpose of interfering with any right or privilege secured by law or policy; **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 the Policy and associated procedures

# Retaliation Analysis

# Retaliation Complaints

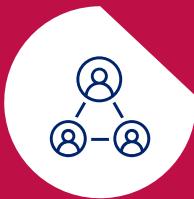
**Step 1:** Does the complaint satisfy the required elements for a retaliation complaint under Title IX?

**Step 2:** Does the Respondent offer a non-retaliatory reason for the adverse action?

**Step 3:** Is there evidence that the offered reason is illegitimate or a pretext for retaliation?

# Step One: Complaint

**Step 1:** Does the complaint satisfy the required elements for a retaliation complaint under Title IX?



1(a)

Does the complaint implicate a protected activity?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the adverse action was because of the protected activity?

# Step 1(a): Protected Activity

- Engaging in **protected activity** is a required element of all retaliation claims
  - Without the protected activity, being mistreated is not enough for retaliation
- Examples of a protected activity:
  - Making a Title IX report
  - Initiating a discrimination complaint
  - Assisting someone reporting discrimination or filing a complaint
  - Participating in the process (e.g., investigation, meetings, hearings)
  - Protesting discrimination (including contemplating making a complaint)
- Different than the “protected characteristic” or “protected class” concept in disparate treatment complaints

# Step 1(b): Adverse Action

- If there is protected activity, move on to the next step:
  - **Did an adverse action occur?**
- Recall: similar concept in disparate treatment complaints
- An **adverse action**:
  - Significantly disadvantages or restricts
    - An individual in their status as a student/employee, **or**
    - Their ability to gain the benefits or opportunities of Recipient's program
  - Could deter a reasonable person from future protected activity (e.g., bringing a complaint or supporting allegations of discrimination)
- Very broad definition
  - Could be based on action or non-action

# Step 1(c): Causation Element

- If there is protected activity and adverse action, move on to the next step:
  - **Does a causal connection exist between the two?**
  - Recall: similar concept in disparate treatment complaints
- While causation is required, **direct** evidence of motive or intent is not required
  - Often only indirect evidence is available
  - Consider whether the individual taking the adverse action knew of the protected activity
- Direct evidence
  - Supervisor told a peer, “I want to teach Davey a lesson about complaining”
- Indirect evidence
  - Close timing between protected activity and adverse action
  - A Respondent posting “lol got him” after Complainant’s car was keyed

# Step Two: Non-Retalia**TITLE IX**tor Reason

- Interview the Respondent about the allegations:
  - Ask about the **why** behind the adverse action
    - “What led to the decision to deny Sally’s tenure application?”
    - “Describe what led to the student receiving a C+ in your class”
  - Gather any evidence that supports their rationale
    - Respondent may need to direct the Investigator to potential sources for that evidence, rather than providing it themselves
- Investigator should seek corroboration of any offered non-retaliatory reason(s)
  - Analyze the Respondent’s reason(s) in light of relevant evidence

# Step Three: Pretext Analysis

- **Pretext:** When the Respondent asserts that there was a legitimate reason/justification for the adverse action, but the real reason is actually retaliation
  - Recall: similar concept in disparate treatment complaints
- When determining whether an alternative explanation for the adverse action is pretextual, consider whether:
  - The explanation makes sense
  - Other actions taken are inconsistent with the explanation
  - The explanation is inconsistent with past policy or practice
  - There is evidence of other individuals being treated differently in similar situations
  - There is witness testimony, including experts
  - The timeline of events aligns

# Pretext Evidence

- Complainant may have evidence or be able to suggest evidence to rebut Respondent's position as **pretext**
- It is the Investigator's responsibility to investigate pretext
- When a conflict between Respondent's position and Complainant's position arises, seek corroborating evidence
  - Coworkers or other students may be able to verify
  - Documents or testimony of senior officials may verify a policy or practice
- Analyze credibility of all parties' positions and the evidence they provided

# Common Non-Retaliaitory Reasons

**Any reason that is not retaliatory, including:**

- Budget cuts or hiring freezes
- Does not qualify for requested accommodation or adjustment
- Evidence of misconduct and/or history of misconduct
- Inadequate qualifications for role or position
- Insubordination
- Other candidates are better qualified
- Poor academic or work performance

# Timing and Retaliation Complaints

- Retaliation allegations often arise during an ongoing grievance process
- May address in a consolidated investigation with the original allegations
  - Always update Notice of Investigation and Allegations (NOIA)
- May address separately at the end of the original grievance process
- Consider approach on case-by-case basis:
  - Timing
  - Complexity



# Retaliation Best Practices

- The adverse action need not:
  - Be sex-based, if the protected activity was
  - Create a hostile environment or meet the disparate treatment standard
- The Title IX Regulations allow the use of any fair process to address retaliation; Recipients are not required to use §106.45 procedures to do so, though many do
- Retaliation can thus be a collateral misconduct charge
- To find retaliation, it is often necessary to establish the facts of the underlying charges
  - Example: a Respondent claims that a Complainant retaliated by spreading rumors that the Respondent physically abused the Complainant
    - The institution would have to first determine the truth of the allegation related to the physical abuse
    - If true, telling people about it is not retaliatory

# Case Studies

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# Case Study: Scottie and Byron

- Scottie is a graduate student employee in the Department of Athletics and Recreation
- Byron is an Assistant Athletic Director and a friend of Scottie's supervisor, Sherie
- Byron often stops by Scottie's workspace after hanging out in Sherie's office
  - Byron will often flirt with Scottie and has asked Scottie for drinks several times
  - About a month ago, Byron approached Scottie from behind and began massaging Scottie's shoulders and again asked Scottie to come have a drink with him at his apartment
  - Scottie filed a report with Title IX and HR for sexual harassment
- Two weeks later, Scottie received a "below expectations" annual evaluation and started receiving undesirable work assignments from Sherie

Could this qualify as retaliation?

# Case Study, Part 2: Scottie and Byron

- Sherie provides the following explanations for her decisions to provide Scottie a “below expectations” rating and shift in assignments:
  - Byron publicly flirts with a lot of graduate students all of whom rebuff his advances and Sherie doesn’t do anything after learning about it
  - All the graduate students rotate through the undesirable assignments, and it is Scottie’s turn
  - Sherie is jealous of the attention Scottie is getting from Byron
  - Sherie did not know about Scottie’s complaint until after annual evaluations

Which of the above could be considered a valid, non-retaliatory reason?

# Case Study, Part 3: Scottie and Byron

**The following could be evidence of pretext:**

- **Reason:** All the graduate students rotate through the undesirable assignments, and it is Scottie's turn
  - **Evidence of pretext:** Scottie has already received this assignment twice and others in the rotation have yet to receive the assignment once
- **Reason:** Sherie is jealous of the attention Scottie is getting from Byron
  - **Evidence of pretext:** Multiple witnesses state that Sherie has repeatedly said that Byron is a good friend but can be very creepy when he likes someone
- **Reason:** Sherie did not know about the complaint until after annual evaluations
  - **Evidence of pretext:** An email shows that Sherie knew about the complaint three days prior to the annual evaluation meeting

# Case Study: Raj and Nicholas

- Raj and Nicholas dated for about six months but broke up recently
- Raj reported that Nicholas had been showing intimate and nude photos of Raj to others
  - The photos were consensual when taken but sharing was not consensual
- Raj confronted Nicholas about it and Nicholas responded by telling other students that Raj had given Nicholas an STI during their relationship, which Raj says is untrue
- Raj wants to move forward with a formal complaint for sexual harassment
- Upon receiving notice of the complaint, Nicholas asked to file a formal complaint regarding dating violence allegations
- Raj contends Nicholas's STI comments, and the counter complaint, are retaliatory

Do either of these qualify as retaliation? How would you respond?

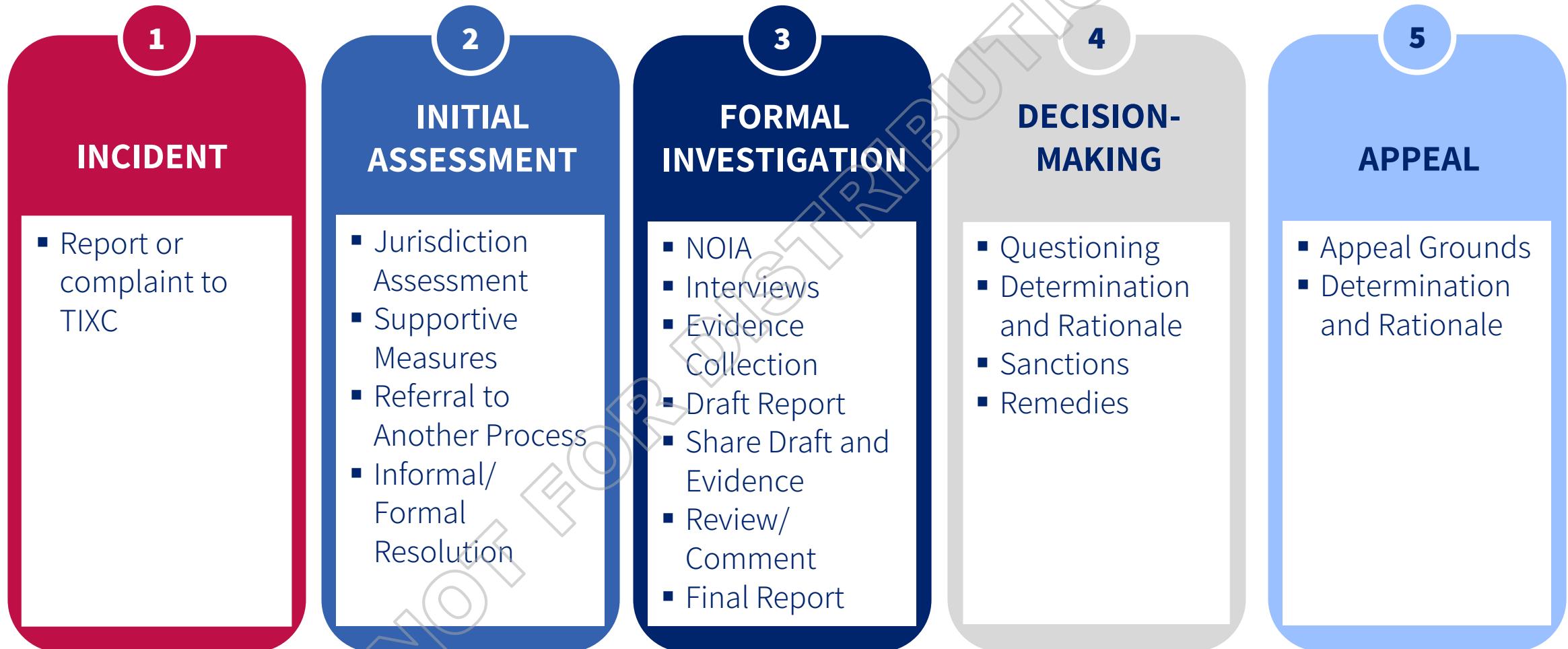
# **Formal Grievance Process: ATIXA's Model Process B**

# Grievance Process for Sex Discrimination

- Neither the 1975 nor the 2020 Regulations mandate a detailed grievance process for sex discrimination complaints
- Title IX – the law, not the regulation – still prohibits sex discrimination
  - Must still stop, prevent, and remedy promptly and effectively
  - Institution still has obligation to respond
- ATIXA recommends addressing all forms of discrimination in similar ways
  - One Policy, Two Procedures Model



# “Process B” Overview



# Due Process Best Practices

**Borrow basic due process protections outlined in the Title IX Regulations for sexual harassment complaints:**

- Written notice of the allegations and potential policy violations
- Gather and present witnesses and other relevant evidence, without restriction
- Discuss the allegations under investigation, without restriction
- Be accompanied by Advisor of party's choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Review and respond to evidence gathered in the investigation
- Opportunity to appeal the outcome on specific grounds

# Initial Assessment

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# Jurisdiction

- For sex discrimination complaints, the jurisdiction analysis is different
  - The jurisdictional factors in the Title IX Regulations do not apply – look to impact in the educational program or activity
  - How does the dismissal provision apply?
- Identify the applicable policy
  - Who owns the anti-discrimination policies and resolution procedures?
  - Do faculty and staff have a different process than students?
- Refer as necessary to other processes



# Intake

- Since disparate impact and disparate treatment complaints require very specific elements, consider adjusting intake approach to elicit key information to fill in the blanks
  - Who is alleged to have done what, precisely?
- Be transparent with the Complainant about the reasons for these questions
  - Intake meeting is usually **not** an interview, but can help to flesh out the Step One allegation elements
  - Intake meeting can also help to set expectations about the investigation
  - Explain the process and the DI/DT constructs

# Informal Resolution

- Voluntary Informal Resolution (IR) may be made available at the discretion of the TIXC at any time prior to a final determination
- **Available** for sex discrimination complaints between employees and students
  - Available without a Formal Complaint
- Available for structural complaints without an identified Respondent
  - Example: Academic Advising encouraging female-identifying students to major in education while discouraging interested male-identifying students from majoring in education



# Investigation

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# Who Should Investigate?

- More flexibility to assign roles in sex discrimination complaints
- ATIXA recommends Investigator(s) **not** be Decision-maker(s) (DM) in the same complaint, but that is discretionary
- Carefully assess whether an individual could have a bias or conflict of interest
- Investigators have **no side**, they are committed to the integrity of the process



# Investigation and Decision-Making Models

## Separation of Roles:

Every Title IX team member serves a distinct role with no overlap in the same complaint

### Pros:

- Avoids perceptions of bias
- Does not bog TIXC down with fulfilling other roles (e.g., Investigator) so they can provide process oversight
- Title IX team members may develop expertise in certain roles or types of complaints

### Cons:

- Need personnel and training budget
- Coordinating team member schedules
- Each new Title IX team member needs to review complaint material to get up to speed; less familiarity with specific complaints

# Investigation and Decision-Making Models

**TIXC as Investigator** with separate Decision-maker(s) chosen from Title IX team

## Pros:

- Middle ground to balance perceptions of bias against other considerations
- Helpful structure for resource-strapped institutions
- TIXC may be more highly trained than other individuals

## Cons:

- DM must commit to thoroughly understanding of the facts to render a fair and accurate decision
- TIXC must juggle dual roles
- Limits consultation between TIXC and DM
- TIXC becomes witness in Decision-making phase

# Investigation and Decision-Making Models

## Investigator as Decision-maker

### Pros:

- Investigator is often the individual most familiar with the facts of the complaint
- Has established rapport with parties and witnesses
- Can reduce time and staffing needs

### Cons:

- Perceptions of bias
- Only one perspective/viewpoint on the complaint
- May miss critical information or valuable perspective

ATIXA recommends a robust appeal opportunity that allows parties to challenge the substance of the decision, at least in suspension, expulsion, and termination cases

# Investigation and Decision-Making Models

## ATIXA recommends:

- TIXC does not serve as the Investigator
- Separate DM makes findings, policy violation determination, and sanctions/remedies determination
- Appeal opportunity

## Other options:

- Investigators make non-binding recommended findings
- Team decision-making involving the Investigator, TIXC, and a third person



# Initiating the Investigation

# Investigation Steps

1. Receive Notice/Report/Complaint
2. Initial Assessment
3. Establish Basis for Investigation
4. Notice of Investigation and Allegations
5. Establish Investigation Strategy
6. Comprehensive Investigation
7. Draft Investigation Report
8. TIXC Reviews Draft Report and Evidence
9. Parties Review Draft Report and Evidence
10. Final Investigation Report



# Determining a Basis for Investigation

**There are three bases for investigations (can overlap; not exclusive):**

- **Incident:** a specific incident, occurrence, or period
  - May involve one or multiple alleged violations (usually at once) and one or more Complainants and/or Respondents
- **Pattern:** repetitive or similar behaviors or targets chosen by the same Respondent over a period
  - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
  - May have no identifiable Respondent or the “Respondent” may be the institution
  - May be useful tool for DT/DI complaints
  - May lead to named Respondents or individual/pattern investigations

# Formal Investigation

## G.A.S. Framework

**Gather**  
Evidence

**Assess**  
Credibility and  
Evidence

**Synthesize**  
Areas of Dispute and  
Agreement

The burden to gather evidence is on the institution, **not** the parties

# Investigation Strategy

- TIXC consults with Investigator(s) to strategize and plan the investigation
- With sex discrimination complaints, the structure of the investigation process will look different based on the type of complaint
  - Disparate Treatment
  - Disparate Impact
  - Retaliation
  - Harassment



# Questioning Guidelines

- Investigating a sex discrimination complaint differs from investigating a sexual harassment complaint
- Investigator may be more direct than in a sexual harassment complaint (trauma may not be in play)
  - “Why do you feel like you have been subjected to sex discrimination?”
  - “Could there be any other possible reasons for your treatment?
    - “If your professor were to provide one of the reasons you described, how would you respond to that?”
  - “What prompted you to say that in front of the department?”



# Questioning Guidelines, Cont.

- Be transparent when being direct
  - Explain the DT or DI constructs, in comprehensible terms
  - “I need to establish some of these facts before we can move forward”
  - “These types of complaints focus on whether there is a legitimate, non-discriminatory reason for the action, so I am trying to gather insight and facts from all parties in that regard”
  - “Intent is an important element for a disparate treatment claim, what can you tell me about your motivation for your actions?”
- Structure questioning and evidence gathering based on DT or DI construct (questioning for retaliation very similar to DT)

# Evidence and Credibility

# Understanding Evidence

- Duty to collect **relevant** evidence
  - Evidence is any kind of information presented to help determine what occurred
  - Relevant evidence is evidence that tends to prove or disprove the allegations
- In sex discrimination complaints, Investigators look for **different** types of evidence, such as :
  - Similarly situated individuals
  - Statistical evidence
  - Intent/reason for the behavior
  - Pretext
- Circumstantial evidence may play a larger role in sex discrimination complaints
  - There may be little direct evidence (e.g., a statement or an email) of discrimination

# Evidence Activity 1: Biased Hiring

- Dr. Munroe, a faculty member, reports to the Title IX office that he believes his department is biased against men in its hiring, evaluation, and promotion practices, which in turn impacts compensation
- As evidence, he cites:
  - Recent hiring decisions to hire female faculty members despite the recruiting pool being overwhelmingly male
  - Recent performance concerns mentioned by the department chair, who is female, toward a handful of male faculty members
  - A recent decision by the department chair to pass him over for tenure in favor of a female faculty member with fewer years of experience and fewer publications in the field

**What evidence may be available in this situation?**

# Evidence Activity 2: Oliver's Grades

- Oliver is a male undergraduate student enrolled in a Major Women Philosophers course
  - Oliver contends that the faculty member, Dr. Banks, grades Oliver more harshly because Oliver is a man, and his presence challenges the “leftist feminine ideology” espoused by Dr. Banks in that course
  - Oliver also alleges that Dr. Banks refuses to approve his preferred topics for his two term papers and often refuses to call on Oliver during class
  - Dr. Banks insists she grades Oliver just like all her students and his grades reflect his work

What evidence may be available in this situation?

# Credibility

- Credibility is largely a function of **corroboration** and **consistency**
- **Credibility Assessment** involves evaluating the extent to which evidence is accurate and reliable
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Assessing **non-discriminatory reasons** and **pretext** evidence may involve substantial emphasis on credibility assessments



# Drafting, Reviewing, and Finalizing the Investigation Report



# Decision-Making

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# Decision-Making Process Options

- No prescribed decision-making process for sex discrimination complaints
  - Should provide opportunity for DM to ask questions and assess credibility
- ATIXA's Model Policy (1P2P) outlines a streamlined administrative resolution process without a hearing
  - DM reviews evidence, can ask questions of parties, and makes findings and a final determination
- No live hearing requirement for sex discrimination complaints, but a hearing could be required based on:
  - State or local requirements
  - Terms of a collective bargaining agreement
  - Public entities will want to consider hearing-based resolutions (Process A)

# Sanctions and Remedies

## Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
  - Consider impact statements, mitigating or aggravating factors
  - Tend to be more punitive than remedies
- **Goal:** stop, prevent, and remedy

## Remedies

- May be implemented before or after a determination
- Area of emphasis in many sex discrimination complaints
  - Especially if there is no identified Respondent or the institution is the Respondent
- **Goal:** preserve or restore access to education program and activity

# Sanctioning and Remedial Considerations

- Providing remedies is a **broader** responsibility beyond the parties to the complaint
  - Institutional-level remedies; remedies for impacted individuals who are not parties
- Remedies take on additional importance when the report/complaint identifies conduct protected by the First Amendment and/or academic freedom
  - Limits availability of disciplinary outcomes, so remedies may be the most valuable tool
- DI investigations are less likely to result in “sanctions” but should still be addressed remedially
- Investigations of disparate treatment or retaliation may lead to additional (or broader) allegations of discrimination
  - A directed campus climate survey may then be necessary as a remedy, followed by additional investigation
  - Continue to remediate and respond as appropriate as new details surface

## Remedy Recommendations



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



Recover any lost work, education time, economic, or access impacts



Restore opportunities, if applicable



Repair damage from misconduct/restitution/back pay, etc.

# Activity: Assigning Remedies

- A graduate student, Maia, reported to the Title IX office that her Executive MBA faculty member, Dr. Rodriguez, only hires young, female graduate students as graduate assistants (GAs)
  - Maia reported that Dr. Rodriguez sexually harasses the GAs and makes them run errands for him, like picking up his dry cleaning and going to the grocery store
- Dr. Rodriguez found out about the complaint a week ago
  - Dr. Rodriguez stopped giving her research work and has only had her run personal errands
  - Dr. Rodriguez allegedly told other faculty in the department that Maia was a poor GA, and they are lucky they did not hire her
  - Dr. Rodriguez informed Maia that he would not be renewing her position for the next term, putting Maia's funding at risk

What remedies would you consider?

# Best Practices for Supporting Pregnancy and Related Conditions

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# 1975 Title IX Regulations

## Recipient may not:

- Discriminate in its education program or activity against any student or employee based on
  - Pregnancy
  - Childbirth
  - False pregnancy
  - Termination of pregnancy
  - Recovery therefrom
- Adopt a rule which treats a student or employee differently on the basis of their actual or potential **parental, family, or marital status**
- Applies to applicants for admission and employment

PWFA and PUMP Act may provide rights and protections for pregnant employees

# Best Practices: Scope

## Individuals and Status:

- Students
- Employees
- Pregnancy and related conditions
- Family status
- Marital status
- Parenting status
- “Head of household”

## Non-Discrimination Issues:

- Academics and access to course offerings
- Admissions
- Athletics
- Employment, recruitment, and hiring
- Extra-curricular activities
- Facilities
- Externships/clinical placements
- Financial assistance
- Funding
- Lactation space and time
- Health insurance
- Housing
- Leaves of absence
- Salaries and benefits

# Best Practices for TIXC Oversight



Documentation



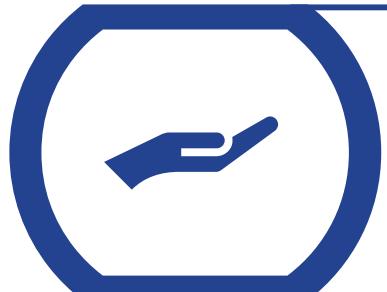
Policies,  
Practices, and  
Procedures



Resolution  
Process



Reporting/  
Information  
Sharing



Outreach and  
Support



Training

# Outreach and Intake

**TIXC should inform the individual of the institution's obligation to:**

- Prohibit sex discrimination
- Provide reasonable modifications to prevent discrimination
- Allow access, on a voluntary basis, to any separate and comparable portion of the institution's education program or activity
- Allow a voluntary leave of absence (resuming from the point where they left off)
- Provide information about available lactation space
- Maintain grievance process for alleged discrimination
- Treat pregnancy as comparable to other temporary medical conditions for medical benefit, service, plan, or policy purposes

# Reasonable Modifications

- The 1975 Title IX Regulations do not require institutions to modify policies or procedures for students or employees on the basis of pregnancy or a related condition
  - But not doing so could be discriminatory on the basis of sex
- ATIXA recommends using the term **reasonable modifications** to distinguish support for pregnancy and related conditions from **supportive measures** for sexual harassment and **reasonable accommodations** for disabilities
- **Reasonable Modifications** to the Recipient's policies, practices, or procedures to prevent discrimination:
  - **Individualized:** must consult with the individual before offering
  - **Voluntary:** individual may accept or decline each reasonable modification offered
  - Fundamental alteration of education program or activity is **NOT** reasonable

# Reasonable Modification Examples

Determine suitable reasonable modifications through an interactive and iterative process

Breaks During Academic Activities

Excusing Intermittent Absences

Online or Homebound Participation

Course Flexibility

Accessing Alternate Parking

Counseling

Adjusting Physical Space

Arranging Elevator Access

# Best Practices: Lactation Time & Space

Ensure student and employee access to a lactation space that is **functional, appropriate, and safe**:

- A space other than a bathroom, that is:
  - Clean
  - Shielded from view
  - Free from intrusion from others
  - Available for expressing breast milk or breastfeeding as needed



# Common Challenges

- Lack of clear process for requesting supports/modifications
  - Ad hoc and uncoordinated approach
  - No or poor communication with individual regarding options
- Faculty/staff:
  - Failing to consult with TIXC
  - Unwilling to accommodate
- Failing to engage in an interactive process
- Discriminatory documentation requirements
- State law intersections with pregnancy and pregnancy records/documentation



# Activity: Sasha Case Study

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# Case Study: Sasha

- Sasha is a sophomore theatre major and just found out she is pregnant
- Sasha is having a very rough first trimester and is having to miss a lot of rehearsal time for a play in which she was recently cast as the lead role
- Professor Alexa, Sasha's Acting II instructor, and the director of the production Sasha is in, has a very strict attendance policy when it comes to missing rehearsals
- Professor Alexa's policy prohibits a student from missing more than two rehearsals, otherwise they are removed from their role
- Sasha has now missed her third rehearsal and has been removed from the lead role and the play altogether

# Case Study: Sasha

- Sasha is mad that she has been removed from the cast of the show and reports to the TIXC that she is being discriminated against based upon her sex and pregnancy status
- Professor Alexa states that Sasha's removal has nothing to do with her sex or pregnancy status and has everything to do with the attendance policy which is applied equally to all students in productions
- According to the national theatre accrediting body, each production must include a minimum of twenty rehearsal hours for each actor prior to the first full dress rehearsal for the play to be considered of educational quality and for it to count toward degree requirements

# Case Study Discussion: Sasha

- Rehearsals take place one day per week for six hours each session
- Missing one rehearsal is the equivalent of missing three weeks of course material
- Sasha's three absences have significantly impacted the others involved in the production, including other students not having the ability to rehearse scenes with her, which has in turn decreased their total number of rehearsal hours
- Sasha tells the TIXC that she has been rehearsing during the weekends with her scene partners and knows her lines despite missing the three class periods

**What should the TIXC do?**

# Title IX and Athletics

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# Overview

- Since the 1970s, Title IX has spotlighted athletic program balance and fairness
  - Accommodation of interests and abilities
  - Balanced and fair distribution of resources
  - Balanced and fair treatment
- TIXC provides oversight, may delegate (but not abdicate responsibility)
  - Often the Senior Woman Administrator (NCAA)
- Compliance requirement applies to
  - Intercollegiate and interscholastic athletics
  - Intramurals
  - Club sports



# Accommodating Interests and Abilities: Three-Part Test

**Part 1:** Opportunities for males and females are **substantially proportionate** to their respective enrollments

**Part 2:** Where one sex has been underrepresented, there is a **continuing practice of expansion** responsive to interests and abilities of underrepresented sex

**Part 3:** Where one sex is underrepresented and there is no continuing practice of expansion, demonstrate that interests and abilities of underrepresented sex have been **fully and effectively accommodated** by present program

# Fair Treatment: “The Laundry List”

Equipment and Supplies

Scheduling

Publicity

Travel and Per Diem

Locker Rooms and Facilities

Housing and Dining

Medical and Training Services

Tutoring

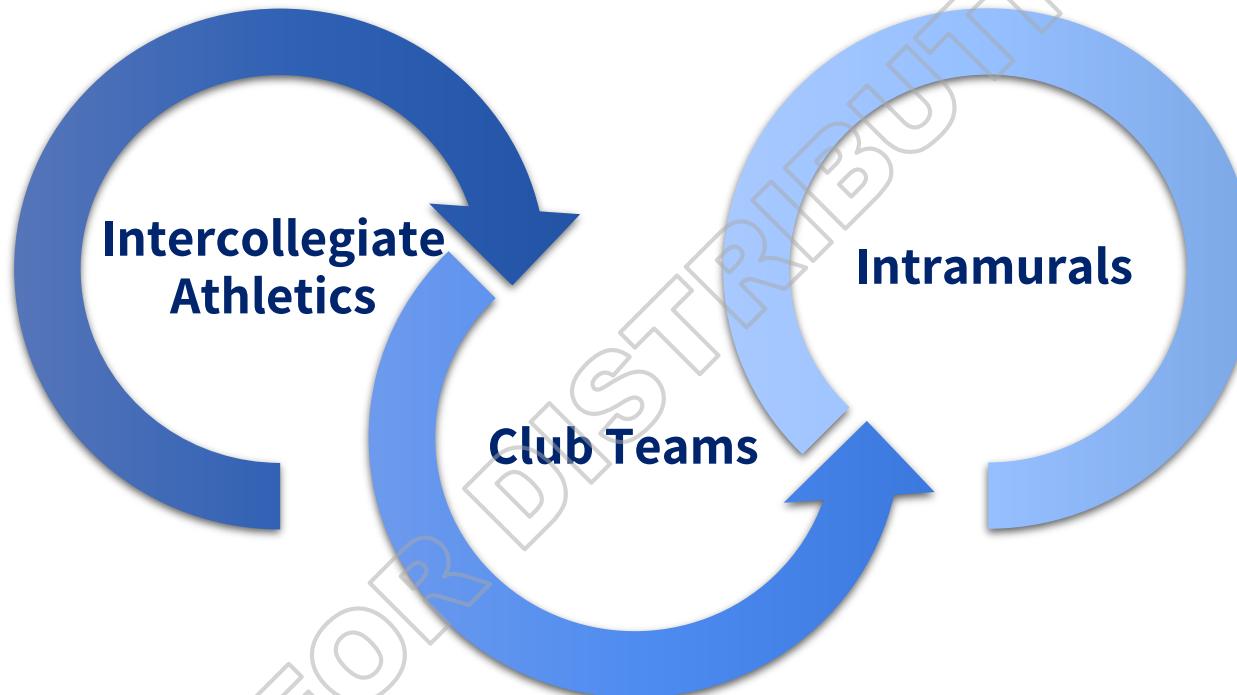
Coaching

Scholarships

Recruitment

Support Services

# Title IX and Athletics



Three-Part Test and the 12 program components are typically **not** as problematic for intramurals and clubs because those programs tend to be self-initiated with fewer institutionally provided benefits

# Common Areas of Concern

- Eliminating teams
- Executive orders re: athletic participation
- Financing concerns
  - Scholarship funding
  - Name, Image, and Likeness and institutions paying players
  - Fundraising/Donations from booster clubs or donors
- Hostile environment sexual harassment complaints
- Inequitable facilities or equipment
- Removal from team for Title IX-related reasons
- Scheduling of games or practice time

# Single-Sex Programs

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# Defining Terms

## Single-sex program

- An activity or program designated men-only or women-only
- Members of the other sex are only permitted to participate in programs designated for their sex

## Sex-preferred program

- A set of programs that are advertised or named in such a way as to indicate participation by one sex is preferred, but which are **open to all**

# Sex-Preferred Programs

- Historical justifications for disparate treatment through single-sex programs are likely no longer legally supportable
  - Most institutions enroll roughly equal numbers of male and female students
  - Offering separate, but equal programs will **not** satisfy Title IX in higher education
- OCR more likely to tolerate sex-preferred programs as opposed to single-sex-exclusive programs (at least, historically)
  - Many institutions offer programs that prefer one sex in participation and that are functionally single-sex, but may include small numbers of students of any sex if they choose to attend/participate
  - Enforcement remains an open question under current ED

# Regulatory Exceptions

- Admissions for private colleges
- Athletic teams (subject to broader analysis)
- Housing
- Religious exemption
- Restrooms and locker rooms
- Social fraternities and sororities



# Single-Sex Scholarships

- OCR has recently resolved a few scholarship-based complaints
- Single-sex scholarships are **not** an exception to Title IX
- Institutions may **not**, on the basis of sex:
  - Provide different amounts or types of financial assistance
  - Assist any organization or person providing aid in a discriminatory manner
  - Apply any rule that treats people differently regarding marital or parental status
- Limited “safe harbor”
  - Wills, trusts, bequests, acts of foreign governments

# Assessing the Title IX Program

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# Assessing the Title IX Program

**Assessment should be multifaceted:**

- Benchmarking
- Climate assessments
- Compliance reporting
- Complaint, investigation, and resolution process debriefing
- Internal reviews/audits/assessments
  - Identify strengths, program gaps
  - Conduct barrier analysis
  - Address areas for improvement
  - Assess Title IX team



# Program Audits and Assessments

- Audits are intermittent assessments to measure compliance
  - Factors such as cost and personnel capacity impact regularity
- Athletics
- Reports/Complaints
- Scholarships and financial aid
- Hiring, compensation, evaluation, and promotion



# Monitoring and Barrier Analysis

- Best practice to monitor the education program/activity for barriers to reporting and participation in the process
  - Take steps to address such barriers
- Examples:
  - Availability and ability to access the reporting process
  - Confusing or delayed procedures
  - Difficulty finding information or contacting Title IX staff
  - Perceptions that Title IX staff are biased

# Tips, Strategies, and Tools

- Annual caseload data analysis
- ATIXA's Barrier Analysis Tool
- Benchmark practices against peer institutions, leverage information and relationships from professional associations
- Focus group data
- Micro surveys, graduation/transfer surveys, and exit surveys
- Post-process surveys
- Training and education about reporting obligations, but especially for common sources of reporting

# Climate Surveys

# Climate Assessment Strategic Plan

## Develop a climate assessment strategic plan

- Provides the institution with:
  - Centralized, intentional, and prioritized assessment efforts
    - Short, medium, and long term
  - Direction for future education, prevention, and training
  - Data to improve policies and practices
  - Insight related to strengths and critical areas for improvement
- Demonstrates institutional commitment to goals of Title IX/compliance
  - Builds trust within the community

# Title IX-Based Climate Survey Objectives

- **Scope:** Can focus on sex discrimination and sexual harassment, including sexual assault, dating and domestic violence, and stalking
  - Assess **prevalence** of sex discrimination and sexual harassment
  - Evaluate awareness of Title IX **policies, resources**, and reporting **procedures**
  - Gauge the **perception** of institution/campus safety and the effectiveness of institutional responses
  - Identify **gaps** in services, support, and education related to Title IX
- Assists TIXC with **monitoring** the education program for barriers to reporting

# Climate Survey Development

## Climate Survey development steps:

1. Designate a climate survey leader and committee of key stakeholders
  - Individual with survey design expertise (internal or external)
  - Key stakeholders to provide feedback prior to launch
2. Identify clear goals and intended participants
3. Adopt a clear methodology
4. Plan for financial and human capital to support the development, implementation, analysis, and post-survey action plan
5. Select a survey software to collect and help analyze data

# Climate Survey Components

- **Demographic questions**
  - Provide the primary bases for analysis and comparison
  - Important to draft demographic data to maintain anonymity
- **Experience, Incidents, and Prevalence questions**
  - Incident nature, type, extent, and location
- **Perceptions and Opinions**
  - Perceptions of disparate treatment within departments and programs
  - Safety within educational environment

# Climate Survey Components

- **Awareness and Knowledge Questions**
  - Evaluate how well individuals understand existing policies and procedures
  - Programming and prevention efforts
- **Reporting, Response, and Resources**
  - Experiences with reporting incidents and support received
  - Barriers to reporting
  - Knowledge of resources
  - Confidence in the institution's ability to address complaints
- **Feedback** on how the institution can improve its Title IX policies and support systems

# Climate Survey Design Guidelines

- Keep the survey to a reasonable length that can be completed in one sitting
  - 10-15 minutes is ideal
- Use simple questions that can be understood by all participants (reliability)
- Focus on how the results will be reported
  - What is the purpose of this question?
  - What will we do with the information we learn from this question?
- Use a mixed-model design to capture both qualitative and quantitative data

# Analysis

- Ensure the analysis is conducted by individuals with survey expertise
- Analysis should provide a story for the data
  - This story should be easily understood and shed light on areas of further exploration
  - Overly complicated analysis and data presentation should be avoided
- Detailed statistics (e.g., correlative analysis, analysis of variance (ANOVA)) are often not needed
  - Summary percentages of the response rate can typically provide rich and meaningful data

# Leveraging Data

- Regularly rely on the data to:
  - Build trust with internal and external community
  - Increase connection to prevention and training initiatives
  - Inform policies, practices, and Title IX response efforts
- Infuse climate survey implementation into an annual assessment plan for continuous improvement



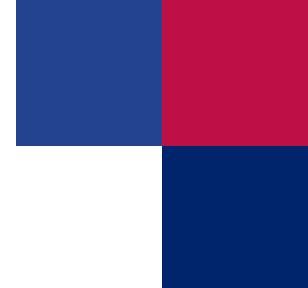
# Final Thoughts

- Some states have climate survey requirements
- VAWA Reauthorization, 2022
  - ED to create and administer a survey tool
  - Ability to add institutional-specific questions
- Unclear timeline



# Questions?

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