



TITLE VI INVESTIGATOR WORKSHOP

Samantha Sears and Adam Wolkoff

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MEET YOUR FACILITATORS

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ABOUT US

Vision

We exist to create safe and equitable work and educational environments.

Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

AGENDA

● Overview of Title VI
Recent interpretations

● First Amendment and
Academic Freedom

● What Are We
Investigating?

● Gathering Evidence

● Special Guest Visitors

● Assessing: Is There a Hostile
Environment?

● Credibility and Reliability
Do we still need this?

● Wrap Up

OVERVIEW

1

Title VI of the Civil Rights Act of 1964

provides that 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.

TITLE VI

TITLE VI OVERVIEW

- History of Title VI
 - Race
 - Color
 - National Origin
- Is Religion covered under Title VI?
 - National Origin Discrimination
 - *Citizenship/Residency in a country with dominant religion*
 - Harassment Connected to Actual or Perceived Shared Ancestry (or ethnic characteristics)



RECENT OCR GUIDANCE AND FACT SHEETS

Six Title VI Guidance Documents since January 2023

- January 2023
- May 2023
- November 2023
- March 2024
- May 2024
- July 2024

GENERAL PRACTICAL TAKEAWAYS

- If hostile environment exists
- And the recipient knew or should have known
- OCR will evaluate whether took immediate and effective steps to end the harassment, eliminate hostile environment and its effects, prevent from recurring

RECENT OCR RESOLUTION AGREEMENTS

- Temple University (December 2024)
- Muhlenberg College (September 2024)
- University of Illinois (September 2024)
- Drexel University (August 2024)
- Brown (July 2024)
- Lafayette College (June 2024)
- City University of New York (CUNY) (June 2024)
- University of Michigan (June 2024)



KEY TAKEAWAYS

Brown University and Lafayette College

Brown University

Once an institution has notice of alleged discrimination, the school has a duty to assess whether a hostile environment exists. This duty persists even when a complainant is not responsive to the school's outreach or declines to otherwise engage or participate in a process.

Lafayette College

When they have notice, institutions have an obligation to redress a hostile environment, including when conduct contributing to the hostile environment takes place off-campus or on social media. Social media postings do not need to be on a College page or platform to be actionable or considered by the institution.

KEY TAKEAWAYS

Muhlenberg College and CUNY

CUNY

Investigations must be adequate—interview relevant witnesses and gather available information.

Communicate with impacted people, whether they are the “named” complainant or not—offer supportive resources and provide notice of outcome where appropriate

Muhlenberg

Ensure complete and accurate documentation that reflects that the school acted appropriately, including providing timely notices to parties and taking adequate steps to redress the effects of harassment.

Remember to consider the totality of the circumstances to assess whether there is a hostile environment.

KEY TAKEAWAYS

University of Illinois

- Ensure coordination among the various offices that are likely to receive reports of discrimination or harassment. How are these offices sharing information? Who holds the pen on recordkeeping? Develop a plan or protocol for recordkeeping when different offices may handle different pieces of institutional response.
- When an incident involves protected speech, the institution has at minimum “an obligation to evaluate whether any incidents of harassment of which it has notice rise to the level that they create or contribute to a hostile environment” and “must respond promptly and effectively.”
- Classify and address incidents of discrimination or harassment properly; be mindful to distinguish between “littering” or “vandalism” and discrimination and harassment. This too is important for Clery reporting (*note that hate crime vandalism is countable, where plain old vandalism is not).

KEY TAKEAWAYS

Drexel University

Drexel University

- Harassing conduct need not always be targeted at a particular person in order to create a hostile environment.
- Off-campus conduct and online conduct, including on social media, can create or contribute to a hostile environment.
- When an institution has notice of a number of incidents indicating a growing, pervasive hostile environment, develop a response that's holistic/global, in addition to addressing incidents on an individual basis.

KEY TAKEAWAYS

University of Michigan

- Centralize the reporting and response functions for Title VI complaints to ensure consistent, compliant response and accurate recordkeeping. If multiple offices are involved, establish a written protocol to determine who does what and how records are kept and shared.
- Educate the campus community about what Title VI discrimination is, and make sure they know how to report it, and what will happen if they do. If you have multiple offices addressing this type of discrimination, explain how they route concerns to each other or share information.

KEY TAKEAWAYS

Temple University

- Consistently take steps to assess whether incidents about which the institution has notice created a hostile environment for students, faculty, or staff—both individual incidents and cumulative. And if there is a hostile environment, take steps reasonably calculated to end it.
- Centralize or coordinate the response to incidents of alleged discrimination or harassment based on shared ancestry. Such coordination makes cumulative assessments possible and promotes consistent responses.

IN SUMMARY

- Harassment: Sufficiently severe pervasive or persistent so as to interfere or limit the ability to participate or benefit
- Need to assess the totality of the circumstances including context, nature, frequency, duration and location as well as the number impacted, relationships, and power differential(s)
- Does not need to be directed at a particular individual
- May be based on an association with others of a different race, color, national origin
- May occur in classrooms, dorms, hallways, facilities, social media
- Subjectively and objectively offensive harassment may occur when multiple offenders taken together meets the definition
- Need to assess whether the collective incidents created hostile environment (overall environmental impact)

HOW MUCH FOR FREE SPEECH

Academic Freedom and the First Amendment

2

OVERVIEW

- Complexity and Nuances of Campus Free Speech
- Quick Summary of Intersection Between Free Speech and Nondiscrimination
- Balancing Protection of Free Speech against Commitment to Nondiscrimination



THE SCOPE OF INSTITUTIONAL DISCRETION

Can be confusing . . .

- Constituents may have difficulty understanding why institutions can and do limit speech activities (maybe even less controversial ones) in some circumstances and not others.
- Often the exercise of discretion to limit speech turns on whether the speech activity at issue is in the context of a University-sponsored activity or event or occurs within a space over which the institution has greater control.

FREE SPEECH CAN BE EXPENSIVE

Campuses may be legally required to host speakers whose messages run counter to their fundamental tenets, sometimes at great expense:

UF: Hosts Richard Spencer, safety protocols cost over \$600K

OSU: Declines Hosting Spencer, based on communications evidencing threat

UCLA: Caps Institutional Spending on hosting outside speakers not invited by affiliated student orgs at \$100K/year

FIRST AMENDMENT

Congress shall make no law . . .
abridging the freedom of speech

- Freedom from v. Freedom to
- The “Government Action” Requirement
- Constitutionality of Government’s Restrictions on Protected Speech subject to “Strict Scrutiny”
- “Strict in Theory; Fatal in Fact.”

UNPROTECTED SPEECH

- True threats
- Inciting or Producing an Imminent Lawless Action
- Fighting Words
- Obscenity
- Libel & Defamation
- **Discrimination/Harassment**
- Disruption

TIME, PLACE, AND MANNER RESTRICTIONS

A public institution is constitutionally permitted to place reasonable time, place and manner restrictions on speech activities, provided the limitations are:

- Content neutral
- Narrowly tailored/compelling government interest
- Provide ample alternative means of expression

CAMPUS CONUNDRUMS

- What Speech is Protected by the First Amendment:
 - When Speaking as a Student Inside and Outside the Classroom;
 - When Speaking as an Employee Inside and Outside the Scope of Employment; and
 - When Speaking as a Private Citizen?

"Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

ACADEMIC FREEDOM



RESEARCH

Freedom to explore all avenues of scholarship, research, and creative expression and to publish the results of such work



EXTRAMURAL SPEECH

Freedom from institutional censorship or discipline when speaking or writing as citizens

TEACHING

Freedom to discuss all relevant matters in the classroom



INTRAMURAL SPEECH

Freedom from institutional censorship or discipline when speaking or writing as participants in the governance of an educational institution

ACADEMIC FREEDOM

Is Academic Freedom an Exception to Governmental Authority to Restrict Government Employees' Speech?

The Supreme Court recognized that applying Government's discretion to restrict Government Employee Speech to public university professors would deny professors First Amendment protection for "expression related to scholarship or teaching." The court did not "decide whether the analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching."

PICKERING BALANCING TEST

- Individual's Right to Speak on a Matter of Public Concern
- Institution's Interest in Promoting Efficiency of its Services and Avoiding Disruption

THE "BALANCE" MAY VARY BY STATE

- 23 States with "Campus Free Speech" Laws
 - May place additional limitations on institutional discretion to respond to speech activities:
 - Alabama, Arizona, Arkansas, California, Colorado, Georgia, Florida, Indiana, Iowa, Kentucky, Louisiana, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia
 - Many require Campus Free Speech Policies and restrict designation of "Free Speech Zones."
- California's "Leonard Law"
 - Extends First Amendment protections to students at private institutions in the state, despite lack of "Government Action."

ONE SCHOOL/TWO POLICIES

FREEDOM OF EXPRESSION/ANTI-HARASSMENT

FREE EXPRESSION POLICY

- The University shall foster an environment where all members of the community are free to share ideas and opinions, **even those that some may find offensive.**
- While **narrow restrictions to freedom of speech will apply** for expression that violates the law or University policies, freedom of expression protections are broad. Any necessary limitations will be enforced by the University. Individual members of the University community shall not attempt to prevent or otherwise interfere with the free expression of others, **no matter how objectionable they may find the expressed ideas or opinions.**

ANTI-HARASSMENT POLICY

- **Discriminatory harassment:** Unwelcome verbal or physical conduct based on race, color, sex (including sexual harassment and pregnancy), sexual orientation, gender identity, ethnicity or national origin, religion, age, genetic information, disability, or veteran status when it is sufficiently severe, persistent, or pervasive AND to:
- Unreasonably interfere with the individual's work or educational performance;
- Create an intimidating, hostile, **or offensive** working or learning environment; or
- Unreasonably interfere with or limits one's ability to participate in or benefit from an institutional program or activity.

THE "GRAY AREA" IS VAST



APPLYING WHAT WE'VE LEARNED

- A student taking an online class has a Confederate flag on the wall of the student's bedroom at home. The flag is visible in the student's Zoom background during class.
- Other students in the class complain about the flag, citing personal offense and the distraction created by the flag in the classroom setting.
 - Can the professor require the student to remove the flag or change the background?
 - Yes
 - No

WHAT ARE WE INVESTIGATING?

3

SHOULD I INVESTIGATE THIS?

1. Misconduct involves free speech:

A. Do I need to know what occurred in order to remedy? If so, I may need to investigate

B. Do I have other means to address it?

OPTIONS SUGGESTED BY OCR (May, 2024):

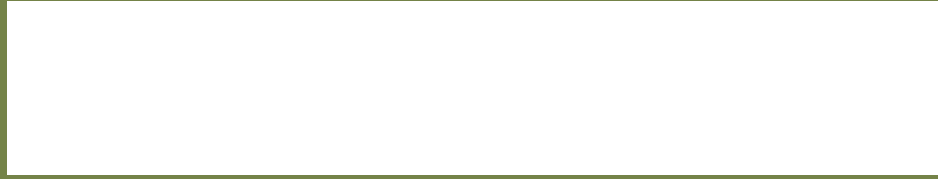
To meet its obligation, a university can, among other steps, communicate its opposition to stereotypical, derogatory opinions; provide counseling and support for students affected by harassment; or take steps to establish a welcoming and respectful school campus, which could include making clear that the school values, and is determined to fully include in the campus community, students of all races, colors, and national origins

SHOULD I INVESTIGATE THIS?

- A faculty member comments on a student's assignment that the work was "third world." The student is from Egypt, and was offended.
 - What else would you need to know in order to decide?
- A Black employee who works remotely came into the office one day, and a colleague referred to him as the "tall, dark, mysterious stranger."
 - Would the analysis change if the supervisor made the comment?
- A comment by a student in a history class stating that the professor is exaggerating the scope or impact of the Holocaust.
 - What else would you need to know in order to decide?



BEFORE LAUNCHING AN INVESTIGATION



- Are you sending the investigator on a fishing expedition?
- If true, would the allegations violate the policy?
- Did you ask enough questions to know whether or not to investigate?

INITIAL INTERVIEW

Harassment – what do
you need to know?

What occurred, identities of other party(ies)

How often (pervasiveness)

On the basis of . . . ?

Witnesses

Location (jurisdiction)

Impact on complainant

Evidence

TYPES OF DISCRIMINATION

Individual

- Intentional adverse act(s)
- Limit or deny participation or cause exclusion
- Has an identified respondent

Adverse Impact/Programmatic

A policy/procedure seems neutral, but has a discriminatory impact in practice

May be acceptable if there is a legitimate, non-discriminatory reason for the differential treatment

May not have a named respondent

INITIAL INTERVIEW

Discrimination

What occurred, identity of other party(ies)

On the basis of

Comparator

Reason(s) for differential treatment

Impact

Witnesses

Evidence

IDENTIFYING THE COMPLAINANT(S)

Persons(s) who
filed?



Are they the only one in a hostile
environment?

Impacted
persons?

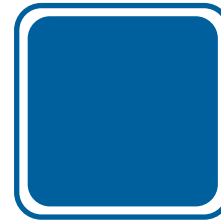


How many people might that be?

NOTICE LETTER



In writing



Discrimination or harassment?



On the basis of . . .



What specific conduct?

OTHER INVESTIGATION CONSIDERATIONS

1

A comment in class – do I need to interview every student?

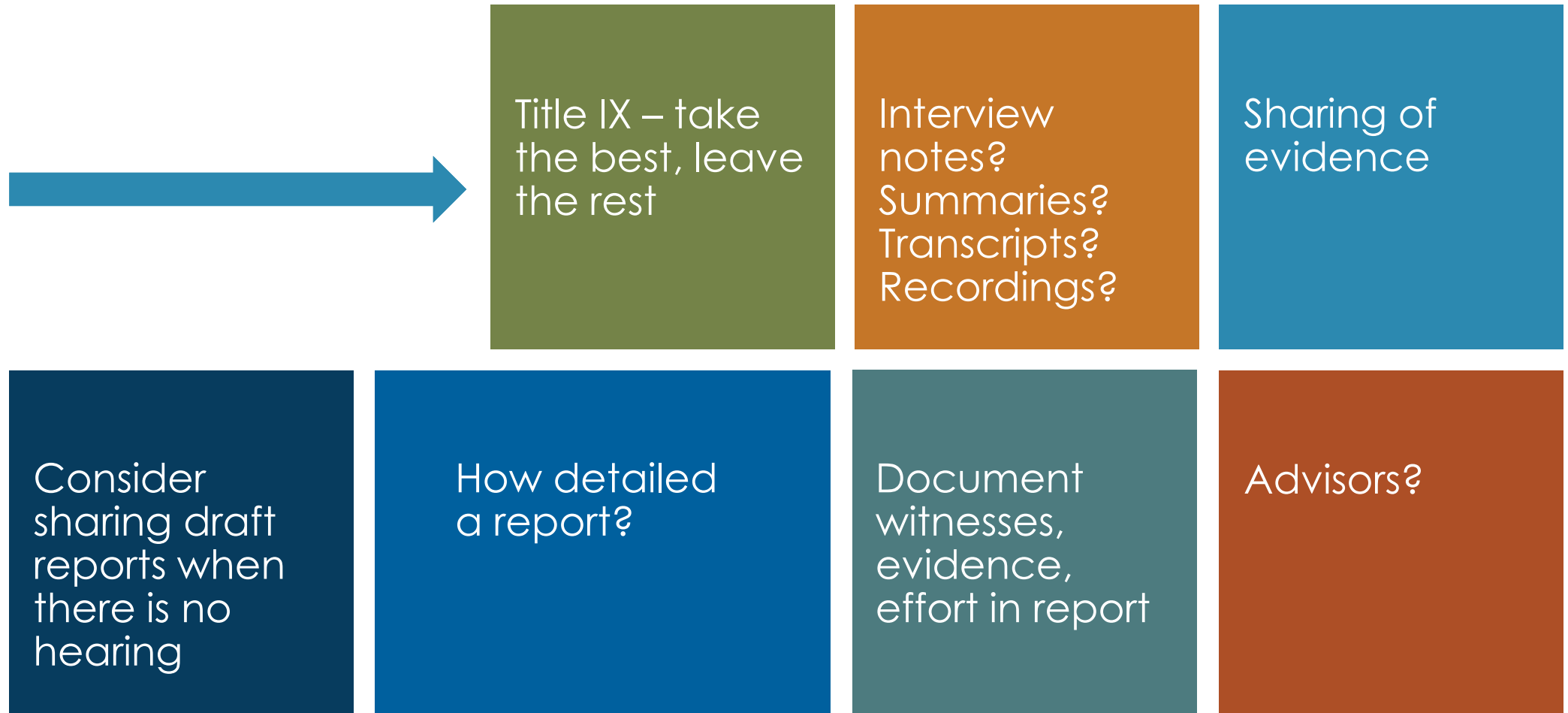
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I have video. Do I need to interview anyone?

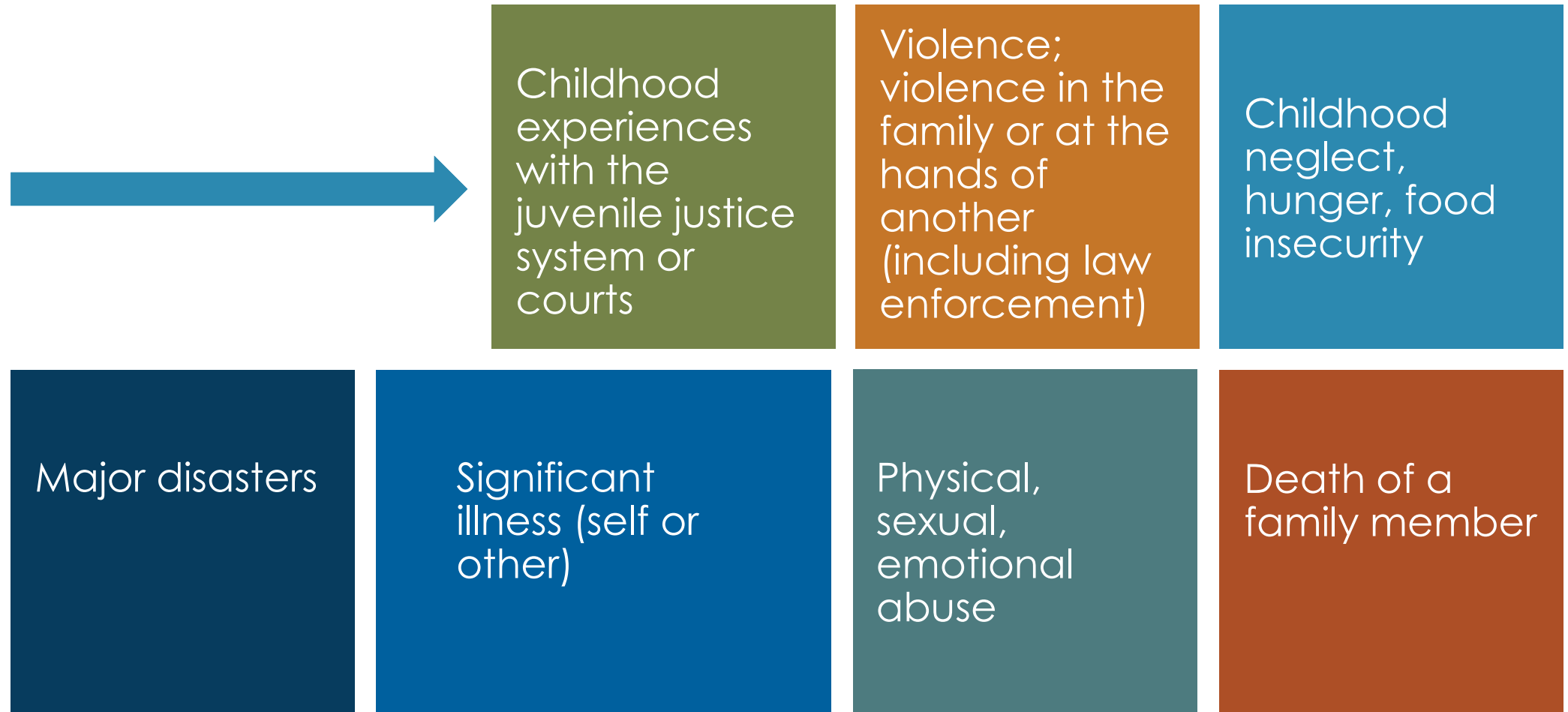
3

Why investigate - I don't see how that comment could have offended anyone.

SOME OTHER INVESTIGATION CONSIDERATIONS



DO WE STILL NEED TO BE TRAUMA INFORMED?



WELCOME TO DAY 2

4

IF IT IS PROTECTED SPEECH, DO YOU INVESTIGATE?

Who decides
if it is
protected
speech?

At what stage
is that
decision
made?

If it is
protected
speech, can
you
investigate?
Should you?

LET'S PRACTICE

Applying What We Have Learned

5

WOULD THIS FALL UNDER TITLE VI?

- A student states that they are glad to be away from their parents, whose religion they detest. The student then makes several comments denigrating both the religion itself and their parents for being believers.
- Protesters make negative comments about the Israeli government, and state that they believe the current leaders are ineffective and should be ousted.



ALLEGATION: A COMMENT MADE IN CLASS

- 100 students in large lecture class; do you try to interview them all?
- 12 students in small discussion group class; do you try to interview them all?
- What do we need to know?
 - Did the conduct occur as alleged
 - Does a hostile environment exist?
 - How broad was the impact of the harassment (Muhlenberg, CUNY)
 - What remedies, prevention might be required?

ALUM HELPS WITH JOB CONNECTIONS

Henry is a tenured faculty member, very well respected in the community, and always likes to connect recent graduates with new jobs. Most of the connections take place after church on Sunday; if he happens to see a senior student or recent graduate at church, he always makes a point of striking up a conversation and finding out whether they are still looking for work. If so, makes sure to find a way to connect them with someone he knows in the community, often through that same church. He has been very successful helping recent graduates find work.

A PARTY GONE AWRY

Abraham Abruti is a tenured professor in Grand River University's Department of Sociology. Every year, Professor Abruti hosts a holiday party for faculty, staff, and graduate students at his home off campus, sending colleagues invitations via their GRU email.

This year, Professor Abruti decided to use his party as an opportunity to examine laws from the Jim Crow era, a focus of his recent research on the effect of discriminatory laws on underrepresented groups. On the night of the party, attendees were greeted with signage over his front door, reading, "Front Entrance for Whites Only; All Others Use Side Entrance."

Upon seeing the sign, some of the invitees were confused and alarmed, and several turned away, electing not to attend. Upon learning that some invitees were offended, Professor Abruti began meeting guests at the door, encouraging them to stay and to participate in effort to build awareness about the disparities of the Jim Crow era and to reflect on the importance of the developments in the law since that time.

One staff member, who elected to stay, embraced the exercise, though in a manner Professor Abruti said he had neither intended nor anticipated. The staff member suggested a similar sign be placed on the guest bathroom, taking it upon herself to create a "Whites Only" sign for the guest bathroom. She then began policing the bathroom for compliance, directing individuals she did not regard as White to the downstairs bathroom instead.

On Monday, following the party, GRU's HR department received several complaints from invitees and guests, expressing offense and disdain at the signs and some of their colleagues' behavior at the party.

IN YOUR BREAKOUT GROUP

1. Would your campus have jurisdiction over this off-campus event?
 - A. Would your answer change if Professor Abruti had encouraged students to attend by offering extra credit to attendees?
 - B. What if the party had been hosted by the department, on campus?
2. Would you investigate (i.e., if true, would this violate a policy)?
3. What policy might you use – harassment, or discrimination?
4. Are there any First Amendment or Academic Freedom issues here? If so, what is the impact and does it change your decision to investigate?

GATHERING & EVALUATING EVIDENCE

6

RELEVANT OR NOT RELEVANT

RELEVANT

Does the evidence make a fact more or less probable than it would be without the evidence?

Can the Decision-Maker rely on the evidence in reaching a determination?

NOT RELEVANT

Does not contribute to making any fact more or less probable than it would be without the evidence.

"Character evidence"

GATHERING EVIDENCE

- Evidence may be direct or circumstantial
- Evidence may exist in past statements, past conduct, past practices, or deviation from standard/past procedures.

Yes, you may consider past conduct of either party. This isn't Title IX.

PRIOR BAD ACTS

- Title IX vs. Title VI: One of these things is not like the other
- Unlike in Title IX cases, prior bad acts can be relevant to prove a propensity.
- Prior bad acts can be relevant to assessing credibility and reliability.

POLL ACTIVITY: INCLUDE OR EXCLUDE IT

1

In a prior investigation, it was determined that the party submitted manufactured evidence.

2

The complainant was a respondent in a previous investigation. In that investigation, the respondent (who is now the complainant) stated that the comments about their religion were just light-hearted comments that couldn't possibly offend.

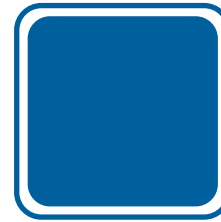
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Respondent stated that they were unaware that a certain phrase was offensive, and related to national origin. In a prior investigation, Respondent was found responsible for making offensive comments about national origin, and part of the investigation included the use of the same phrase.

EVALUATING EVIDENCE



Is it relevant?



Is it authentic?



Is it credible and/or
reliable?



How much weight, if
any, should it be given?

CONSIDERATIONS ABOUT CREDIBILITY AND RELIABILITY

- Sufficiency of details and specificity
- Internal consistencies / consistency over time
- Consistency with evidence or testimony
- Corroboration

- Inherent plausibility
- Material omission
- Motive to falsify
- Past record
- Ability to recollect events

GROUP ACTIVITY 2:
DOES THIS IMPACT
CREDIBILITY?
RELIABILITY?
AUTHENTICITY?
WEIGHT?



SCENARIOS

ONE

Respondent provided screenshots of text communications exchanged with Complainant's roommate, Dale. Dale said they no longer have the text communications.

TWO

Witness Robbie said they took video that “proves” who started a clash between multiple protesters, but refuses to share the video, stating that it will “just be mis-used to assign blame.” Complainant and complainant’s roommate state they saw the video.

SCENARIOS CONTINUED

THREE

Witness Jay was offered by Complainant as an eyewitness to the events leading up to the reported incident. While interviewing the Respondent, you learn that Witness Jay and Respondent have been secretly dating.

FOUR

Complainant shared with the investigator the impact of the misconduct. Respondent says it is ridiculous, that Complainant is not really upset, and just disagrees with Respondent's point of view.

FIVE: THERE WERE COMMENTS “ALL THE TIME”

He texted racist things all the time

Do you have those texts?

May I have those texts?

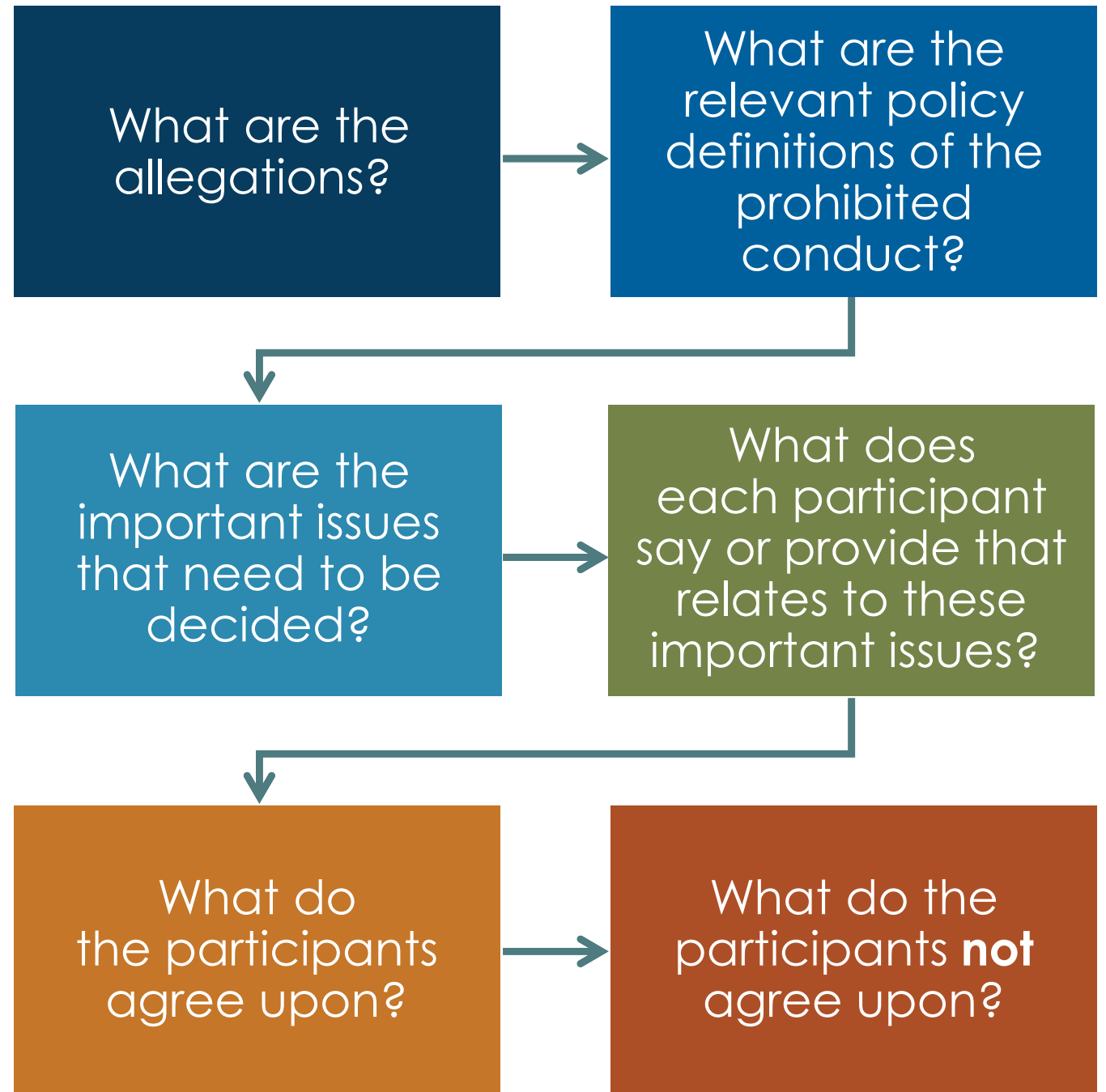
Oh, they weren't 'texts,' they were DMs?

Who else might have seen them?

Was anyone else copied?



EVALUATING UNDISPUTED/ DISPUTED FACTS



KEY TAKEAWAY - UNDISPUTED AND DISPUTED

The key to the undisputed/disputed section of the investigation report:

- Refer to the allegations and the relevant policy definition of the prohibited conduct.
- Focus on the relevant and material information as they relate to the allegations and prohibited conduct definition.
- Not every statement in the summary of evidence will be referred to in the undisputed/disputed section **BUT** every statement in the undisputed/disputed section, must have been referred to in the summary.



WRITING THE UNDISPUTED/DISPUTED FACTS SECTION

1. Determine the material facts – focus only on material facts.
2. Determine which material facts are:
 - a. Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties
 - b. Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains
3. State clearly which facts are accepted, and which are rejected, and state the reasons why.



BUT IS IT A HOSTILE ENVIRONMENT?


What factors do I need to consider?

7

CONFUSION ALERT



**ANALYZE THE
FACTS BEFORE YOU
ANALYZE UNDER
THE POLICY**



Definitions of Hostile Environment and the Implications for Your Campus

THE IMPORTANCE OF LEVEL-SETTING



WHAT IS A HOSTILE ENVIRONMENT?



WHAT IS A HOSTILE ENVIRONMENT?

- Unwelcome conduct based on race, color, or national origin that, based on the totality of circumstances, is subjectively and objectively offensive and is **so severe or pervasive that it limits or denies** a person's ability to participate in or benefit from a school's education program or activity
- Does not need to be directed at a single person
- Whether harassing conduct creates a hostile environment must be determined from the totality of the circumstances. Relevant factors for consideration may include, but are not limited to, the **context, nature, scope, frequency, duration, and location** of the harassment based on race, color, or national origin, as well as the identity, number, age, and relationships of the persons involved
- What do you do when there is no one respondent who created the hostile environment but, taken together, there is a hostile environment?

DISCUSSION ONE

A student group invited an Iranian journalist to campus. A group of protesters block entry to the event, stating they "do not want to give an Iranian filmmaker an opportunity to spread their propaganda." The university moves the event so that it can take place. The next day, the same protesters wrap "Do Not Cross" tape in front of a college building housing the campus chapter of the group that had invited the journalist. The protesters ask every student attempting to enter the building that houses the organization whether they are Iranian, or supporters of Iran. If they are, the protesters run towards the student and prevent them from entering the building. That night, graffiti featuring slurs about Iran and Shia Islam appears on the organization's building. The graffiti sparks fear in Iranian students in the university community, as well as many of the Muslim students, who complain to college administrators that they feel unsafe. Iranian students and Islamic who encounter these protests and the graffiti ask the university's administrators to provide them security to escort them across campus. Many Iranian and Muslim students ask to attend classes remotely.

- Physically blocking a specific group of students from entering a building and posting graffiti caused Iranian and many Muslim students to feel so unsafe that they left campus. The protesters' conduct was subjectively and objectively offensive and so severe or pervasive that it limited the ability of the the students to attend and benefit from educational activities of the college, based on national origin and shared ancestry.

A VISIT FROM 2 GUEST STARS

Adam Wolkoff, Pari LeGolchereh

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DISCUSSION TWO

Peter, a graduate student studying international politics, alleged that he was subjected to a hostile environment of his professor's comments about Israelis. The student alleged that a professor stated during office hours that "Israelis don't even deserve to have a country," and that, in subsequent weeks, the professor and other students made similar comments in class. The student's complaint stated that several Israeli students in the professor's class, including the complainant, shared that they too felt threatened, and several stopped attending class.

1. Is this harassment, or discrimination?
2. Who is the complainant?
3. Who would you interview?

TAKEAWAYS AND PARTING THOUGHTS



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