

# Informal Resolution for Title IX 2021 ASCA Gehring Institute

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# Land Acknowledgment

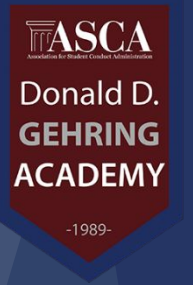
- ▶ The Association for Student Conduct Administration recognizes the genocide and forceful removal of tribal communities from, and those still connected to, the various lands we occupy.
- ▶ It is important to remember the importance of understanding the longstanding history that has brought you to reside on the land, and to seek to understand your place within that history.
- ▶ This land acknowledgement is read to recognize and honor the elders of the Indigenous peoples and the genocide, forceful removal and displacement of the peoples whose lands and territories were stolen from them.

# Why we do Land Acknowledgments

- ▶ A Land Acknowledgment is a simple, powerful way of showing respect and a step toward correcting the stories and practices that erase Indigenous people's history and culture and toward inviting and honoring the truth. Acknowledgment by itself is a small gesture. **It becomes meaningful when coupled with authentic relationships and informed action.** But this beginning can be an opening to greater public consciousness of Native sovereignty and cultural rights, a step toward equitable relationship and reconciliation (U.S. Department of Arts and Culture [Honor Native Land Guide](#), 2017)

# Welcome!

- ▶ Who are we?
- ▶ Who are you?
  - ▶ Name
  - ▶ Pronouns (optional)
  - ▶ Institution & Role
  - ▶ If you were a conduct violation what would you be?



# Agenda

- ▶ Welcome
  - ▶ Introductions
  - ▶ Parking Lot
  - ▶ Community Guidelines
- ▶ Quick overview
  - ▶ Dear Colleague Letters & other guidance
- ▶ Review of the Final Rule
  - ▶ Informal resolution
  - ▶ Title VII
- ▶ Neurobio/Developmental Aspects
- ▶ Spectrum of Resolution Options
- ▶ Lunch/Break
  - ▶ Check-in/Parking Lot
- ▶ Implementation
- ▶ Now what?
  - ▶ Q&A

# Community Guidelines and Virtual Parking Lot



# Disclaimer

- ▶ Federal vs. State Laws vs System Expectations
- ▶ Words mean things!
- ▶ No legal advice (make friends with your General Counsel!)

# Quick Overview

DCL's and Other Guidance



# Dear Colleague Letters & Other Guidance

- January 19, 2001: Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties
- April 4, 2011: Guidance on Addressing Sexual Harassment/Sexual Violence
- June 25, 2013: Guidance on Supporting the Academic Success of Pregnant and Parenting Students
- April 29, 2014: Questions and Answers about Title IX and Sexual Violence
- April 24, 2015: Guidance on Obligation of Schools to Designate a Title IX Coordinator, Letter to Title IX Coordinators, and Title IX Resource Guide
- May 13, 2016: Guidance on Rights of Transgender Students
- February 2017: U.S. Secretary of Education Statement on New Title IX Guidance
- September 22, 2017: Interim Guidance, Q & A on Campus Sexual Misconduct
- May 6, 2020: Final Title IX Regulations released
- August 14, 2020: Compliance date
- July 20, 2021: Questions and Answers on the Title IX Regulations on Sexual Harassment

# Final Rule

Related to Informal Resolution

# Informal Resolution

- ▶ May be offered by the institution, except in instances of alleged employee sexual harassment against a student
  - ▶ Not required that the institution offer an informal resolution option
- ▶ Requires its own notice, including:
  - ▶ The allegations
  - ▶ The requirements of the informal process
  - ▶ Rights of parties to withdraw from the informal process at any time and return to the formal grievance process
  - ▶ Any consequences of participation in informal process, including records that may be maintained or could be shared

*Section 106.45(b)(9)*

# Informal Resolution

- ▶ Requires a formal complaint
  - ▶ Cannot offer informal resolution prior to receiving the formal complaint
- ▶ The parties must voluntarily agree in writing to the informal resolution process
  - ▶ May not require participation in the process as a condition of employment or enrollment
  - ▶ May be entered into at any time in the process, prior to reaching a determination regarding responsibility
  - ▶ May be stopped at any time prior to determination regarding responsibility

# Informal Resolution - Training

- ▶ Title IX coordinators, investigators, decision-makers, and “any person who facilitates an informal process” must receive training on:
  - ▶ The definition of sexual harassment in the regulations
  - ▶ The scope of the institution’s education program or activity
  - ▶ How to conduct an investigation and grievance process
  - ▶ How to serve impartially
  - ▶ Any technology to be used at a live hearing

# Informal Resolution - Training

- ▶ All training materials for coordinators, investigators, and decision makers “must not rely on sex stereotypes” and must be maintained for a period of seven (7) years.
- ▶ All materials must be made publicly available on its website, or, if no website, they must be made available upon request for review and inspection by the public.

# Informal Resolution - Training

Additionally, anyone performing informal resolutions should also be well trained on the following:

- ▶ Institutional process and procedure
- ▶ Limits of confidentiality, what may be reported
- ▶ How to perform the particular ADR process(es) required as part of the informal resolution process
- ▶ Appropriate resource referrals for follow up for the parties
- ▶ Appropriate documentation, follow up, and record keeping practices

# Informal Resolution Final Rule Highlights

- ▶ Must identify persons designated to facilitate informal resolution processes.
- ▶ Informal resolution processes must be reasonably prompt.
- ▶ Informal resolution processes should be included with notice of allegations.
- ▶ Informal resolution processes must be voluntary and can only be offered if a formal complaint is filed.
- ▶ Must keep records regarding the facilitation of an informal resolution process.
- ▶ Must be trained!



# Q&A on the Title IX Regulations on Sexual Harassment (July 20, 2021)

**Question 58:** May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

**Answer 58:** Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.<sup>192</sup> A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

The 2020 amendments explain that they leave the term “informal process” undefined to allow a school the discretion to adopt whatever process best serves the needs of its community.<sup>194</sup> The amendments do not require that the parties interact directly with each other as part of an informal resolution process; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately.<sup>195</sup> The parties’ participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process. Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a complaint. The Department will not require the parties to attempt mediation in its enforcement of Title IX.

# Q&A on the Title IX Regulations on Sexual Harassment (July 20, 2021)

**Question 59:** If a school chooses to offer an informal resolution process, are there any requirements under Title IX?

**Answer 59:** Yes. If a school chooses to offer an informal process, the 2020 amendments require that the school obtains the complainant's and the respondent's voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice.<sup>197</sup> With the parties' consent, schools have the freedom to allow the parties to choose an informal resolution mechanism that best suits their needs.<sup>198</sup> If those needs change, however, the 2020 amendments also make clear that either party may withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution.

A school's discretion to offer an informal resolution process is also limited by the school's obligation to ensure that all persons who facilitate informal resolutions are free from conflicts of interest and bias, and are trained to serve impartially without prejudging the facts at issue.<sup>200</sup> For example, schools that choose to offer restorative justice as a means of an informal resolution should ensure that the restorative justice facilitators are well-trained in effective processes.<sup>201</sup> A school may use trauma-informed techniques during the informal resolution process.

# Q&A on the Title IX Regulations on Sexual Harassment (July 20, 2021)

Example Policy Statements

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

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# Title VII

Intersections with Title IX

# Title VII

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of race, color, national origin, sex, or religion.

# Title VII and Title IX

- Title IX was modeled after Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII
  - Title VI (Public Accommodation, inc. Federally Funded Programs) does not address sex as a protected category
  - Title VII (Employment) was limited to only discrimination in employment, not education more broadly
- Title IX prohibits sex discrimination in education related to recruitment, evaluation, classification, payment, assignment, retention, and treatment of employees
- Title IX and Title VII can be used to pursue the same violations within the university employment context

# Title VII and Title IX

- In cases involving employment discrimination based upon sex in an educational environment, both laws are implicated -- but it's your policy that drives your response!
- Both require remedial/supportive measures
- In public institutions, both require consideration of the First Amendment
- Informal resolutions can be used under both
- It's critical for HR and Title IX/Conduct (if not the same office/entity) to discuss the requirements under both statutes
  - For instance, Title IX Final Rule applies equally to students and employees in terms of procedure

# Title VII and Title IX

- They diverge in the applicable standard to achieve hostile environment harassment:
  - Title IX = severe, pervasive and objectively offensive
  - Title VII = severe or pervasive
- There are differences in an institution's legal liability as well

## Title VII

1. Must exhaust administrative remedies before filing federally/externally
2. Specific compensatory damages prescribed
3. State- or federal-level
4. Private right of action predicated on agency action (EEOC right to sue letter - except EPA)

## Title IX

1. No requirement to exhaust administrative remedies before filing federally/externally
2. No specific compensatory damages prescribed
3. Federal-level
4. Private right of action

***Claims may be eligible for review under both statutes.***



# Takeaways

- Conduct and/or Title IX must communicate with HR / EEO
- General counsel should be involved in determining how procedures are designed
- There may be minimum requirements under Title VII that inform the Title IX process, and vice versa

# Developmental and neurological underpinnings

# Moral Development (Kohlberg)

(6) Universal Principles We live in accordance with our deeply held moral principles, which are more important than the law.

(5) Social Contract Our personal values dictate what is right and wrong, though the social contract (e.g. democratically determined laws) are important.

(4) Authority and Social Order Doing your duty to society is what makes one's actions good. Obeying laws without question and respecting authority prevails.

(3) Conformity and Interpersonal Accord Being good means pleasing/appeasing others, so concepts of what is right and what is wrong are dictated by the social majority.

(2) Self-Interest Right and wrong are determined by what we are rewarded for and by doing what others want us to do. Concern for others is a selfish concern for self.

(1) Obedience/Punishment Right and wrong are determined by what we are punished for.

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Informal resolutions offer the opportunity to engage at this level in a way that other forms of resolution may not; more discourse and engagement required

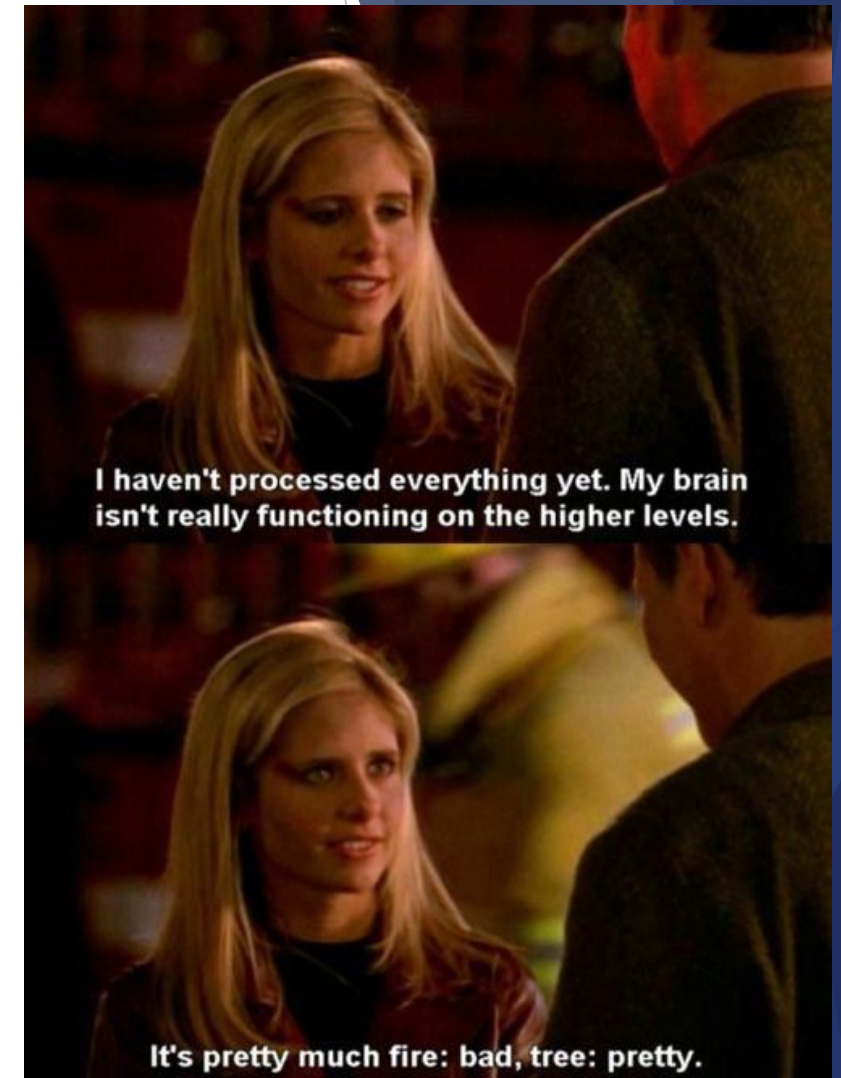
Most adults  
max out right  
about here.

# Neuroscience of Conflict

## Basic Tenets

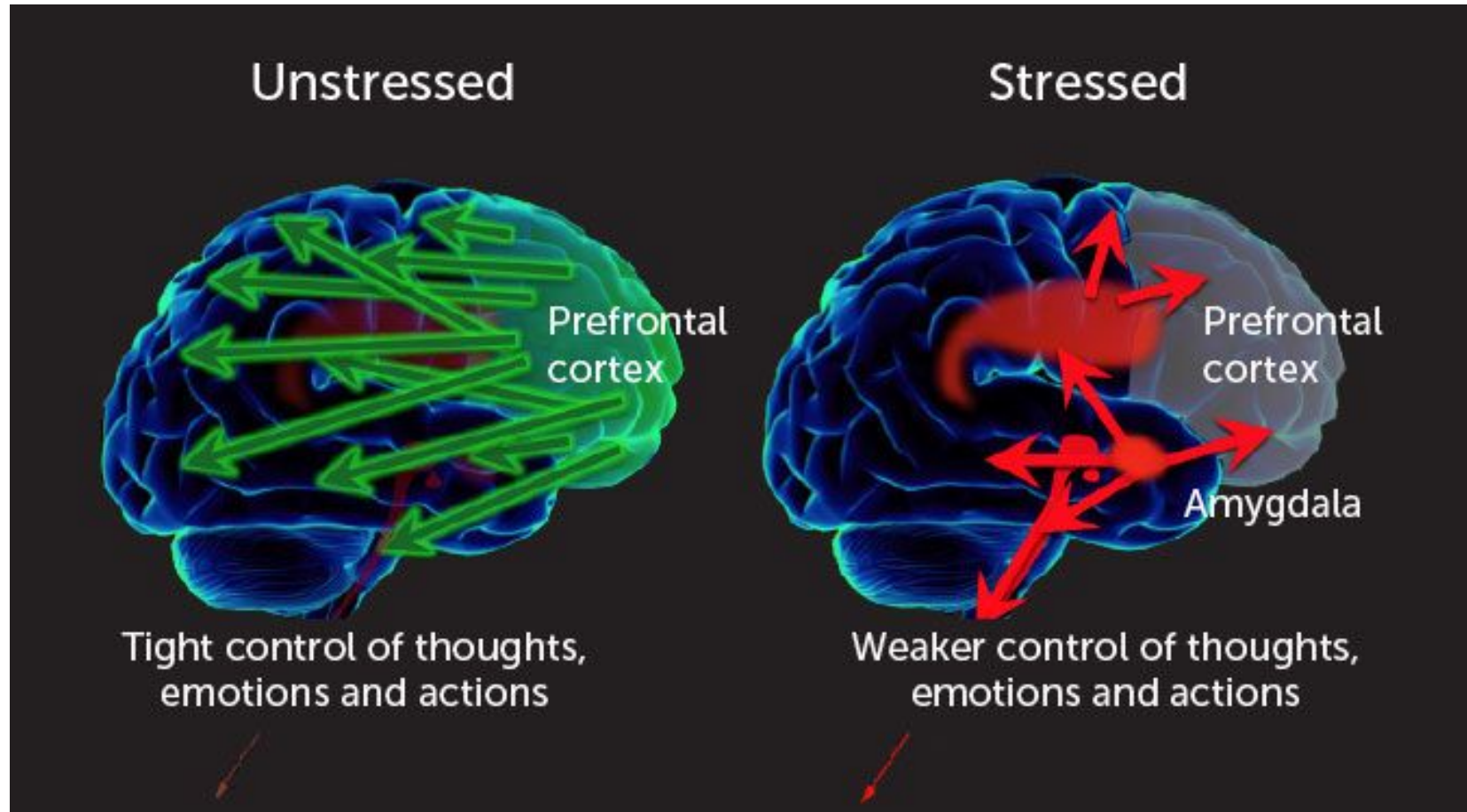
- ❖ Our brains are embodied.
- ❖ Our brains are hardwired to respond to threats in the environment.
- ❖ We experience conflict as a threat to our safety and welfare, so stress responses are activated (think fight-flight-freeze).
  - Instead of using the prefrontal cortex (logic brain), we use the less-developed reptilian brain (older, basal)
  - That's not to say that the logic brain can't prevail
- ❖ Therefore, we cannot learn when our brains are in a defensive posture.
- ❖ Informal resolution options reduce the sense of conflict by engaging the brain in logical processes through dialogue, mutual understanding, emotional processing, and empathy.

**Goal:    REDUCE AND REPAIR HARM WHILE  
          MAXIMIZING BUY-IN FOR ALL**



<https://twitter.com/bestofbuffy/status/858817732162310144>

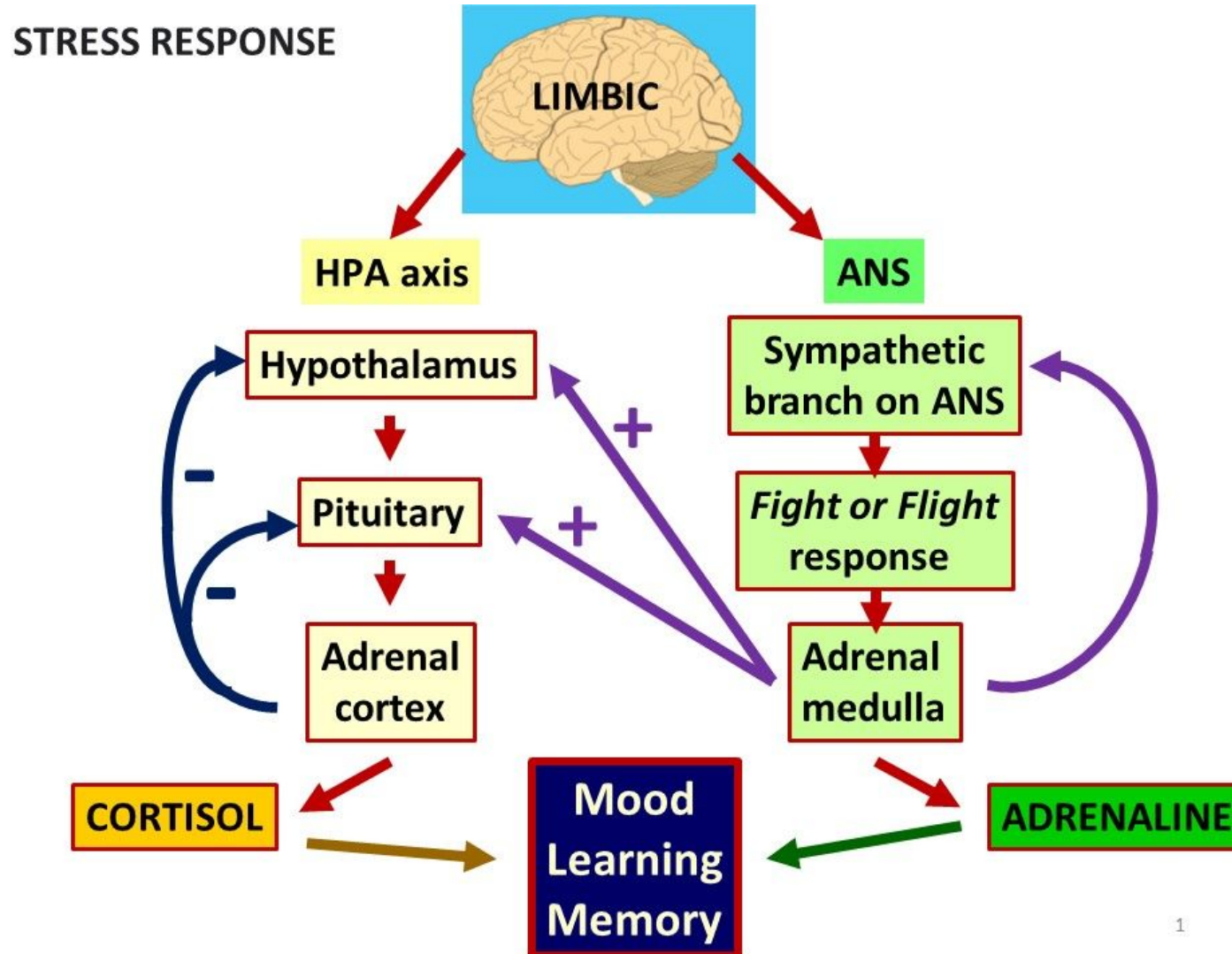
# This is your brain on stress



<https://www.sciencenews.org/article/coronavirus-covid19-stress-brain>



# This is your brain on stress



# Trauma

- ▶ Trauma is an emotional, psychological, physical, and/or neurological response to a *real or perceived* threat to life, well-being, or safety.
- ▶ How common is trauma?
  - ▶ Of children ages 0-17, approximately 48% will experience at least one adverse family experience during childhood (National Survey of Children's Health)
  - ▶ Between 50-60% of all adults will experience at least one traumatic event in their lifetimes (US. Dept. of Veterans Affairs)
  - ▶ 7-8% will develop PTSD at some point in their lives, and about 8 million adults have PTSD in any given year (Id.)
- ▶ Individuals who experience traumatic events experience developmental delays including in neurobiological development, which can impact information processing, inhibition, verbal and attentional skills, and abstract conceptualization.



# Underpinning Psychological Principles

- ▶ **Human beings can change.** Neuroplasticity; humans are capable of unlearning old patterns of mind/habit and learning new behaviors/ways of being and engaging with each other.
- ▶ **Empathy is key.** Informal resolutions are less adversarial, and offer an opportunity for parties to develop empathy and understanding through the process.
- ▶ **Trauma-informed interventions.** These models are (and should be) implemented in a trauma-informed manner.
  - ▶ Trauma causes our brains to re-wire themselves to remain in an extremely stress-reactive state beyond our conscious control.
- ▶ **Engagement fosters buy-in.** By engaging in a restorative process as co-participant, all parties increasingly buy into the outcome (safety, trust, choice, control, collaboration).

# Considerations

- ▶ *Knowing what you know now, how might you offer an informal option to parties? What might you say?*
  - ▶ Ambiguous or unfamiliar circumstances are most often interpreted negatively (think about how we explain our formal processes!)
  - ▶ Circumstances that feel like a party might “lose” something are interpreted negatively as well
- ▶ *How can you set up the informal option in a way that is non-threatening?*
  - ▶ Physical environment
  - ▶ Sensory environment (sounds, “fidget” options)
  - ▶ Food and beverages
  - ▶ Rituals
- ▶ *How might the selection of the facilitator(s) shape the experience for the parties?*
  - ▶ Who is doing this work? How are they perceived?
  - ▶ Do they have trauma-training?

# Compare and contrast (Karp, 2019)

Restorative Approaches	Retributive/Disciplinary Approaches
Increased buy-in to the legitimacy of the process, increasing likelihood of amicable resolution	Respondents perceive process as illegitimate, increasing likelihood of external filings
Reduces adversarial nature of the conflict	Increases adversarial nature of the conflict
Levels the playing field for less advantaged parties (access)	Exacerbates inequities as parties hire high-fee legal counsel to assist (disparities)
Less formalism increases agency (it's <i>our</i> process)	High level of formalism based upon legal compliance (it's the <i>institution's</i> process)
Authentic approach that allows parties to engage in exploration of the issues and responsibilities	Formalist approaches often disempower survivors and perpetuate gender stereotypes
Encourages acknowledgement of harm	Discourages acknowledgement of harm
Focused on interdependency	Focused on dependency
Process lives in the shades of grey (abstraction)	Process tries to make abstract concepts very concrete
Minimizes trauma by reducing stress response	Exacerbates trauma by heightening stress response
Responsive to reporting needs	Low reporting/filing/follow-through

# Spectrum Model

# Responding to Conflict

There are two factors that strongly shape our choice of conflict style:

## Agenda

- ▶ How hard do we push for the things we want

## Relationship

- ▶ How much attention do we give to the relationship

# Responding to Conflict

We each have our own way of dealing with conflict

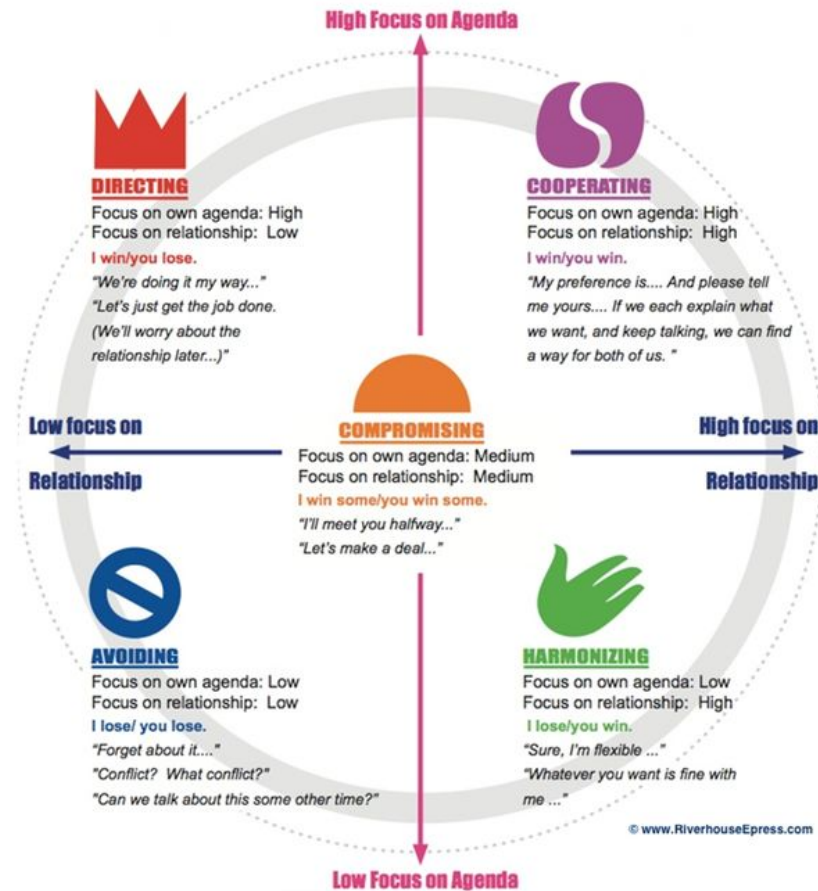
Approaches are based on:

- ▶ *Temperament*
- ▶ *Personality*
- ▶ *Environment*
- ▶ *Personal/Professional lives*

None of the styles are right or wrong.

Each of them are effective when used in the appropriate context

## Five Styles of Responding to Conflict







No Conflict  
Management



Debate  
Dialogue  
Discussion



Conflict  
Coaching



Facilitated  
Dialogue



Social  
Justice  
Mediation



Restorative  
Justice  
Practices



Shuttle  
Negotiation



Agreement  
Formal Conflict  
Resolution  
Process



Arbitration  
Formal Conflict  
Resolution  
Process



Looking at the spectrum model,  
which types of scenarios do you  
think could be applied?

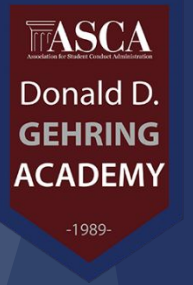


# Key components of the RJ process that also show up in other models



# Things to consider....

- ▶ Benefits of integrating these models
  - ▶ Survivor lead
  - ▶ Community involvement
  - ▶ Equity and inclusion
  - ▶ Reintegration
- ▶ Campus buy-in
  - ▶ Stakeholders
  - ▶ Elevator speech
- ▶ Integration beyond the informal resolution process
  - ▶ Restorative Practice vs Restorative Justice
  - ▶ Using in addition to the formal Title IX process
    - ▶ Language
    - ▶ Restorative solutions



Lunch / Break

# Check In!

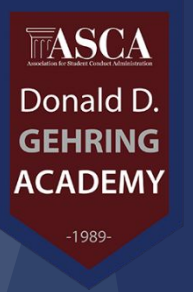




# Implementation

# Things to think about....

- ▶ Models
  - ▶ What is appropriate to use?
- ▶ Record Keeping
  - ▶ Whose job is it?
- ▶ Who needs to be involved?
  - ▶ Title IX vs Student Conduct vs ...
  - ▶ Importance of confidentiality



# Case Study



Now What?



# Going back to campus....

- ▶ When do you integrate alternative resolutions?
- ▶ What do you need to move forward?
  - ▶ Understanding your current process and policies
  - ▶ Is integration realistic?
  - ▶ Who needs to be involved?
    - ▶ How do they need to be prepared?
- ▶ Incorporating campus/community resources and partnerships in your process
- ▶ Importance of creating an action plan

# Our Contact Information

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  - ▶ [MLP.Ricke@gmail.com](mailto:MLP.Ricke@gmail.com)

# Resources: Journal Articles

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- Karp, D. R. (2019). Restorative justice and responsive regulation in higher education. In G. Burford, J. Braithwaite, & V. Braithwaite (eds.), *Restorative and responsive human services*, pp. 143-164. Routledge.
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# Resources: Books

- Davis, F.E. (2019). *The Little Book of Race and Restorative Justice: Black Lives, Healing, and US Social Transformation*. New York: Good Books.
- Karp, D. R. (2019). *The little book of restorative justice for colleges & universities: Repairing harm and rebuilding trust in response to student misconduct* (2nd ed.). New York: Good Books.
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- Zinsstag, E., & Keenan, M. (2017). *Restorative responses to sexual violence: Legal, social and therapeutic dimensions*. New York: Routledge.

# Resources: Videos

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# Land Acknowledgement Resources

- ▶ <https://nativegov.org/a-guide-to-indigenous-land-acknowledgment/>
- ▶ <http://landacknowledgements.org/>
- ▶ <https://native-land.ca/>
- ▶ <https://www.whose.land/en/>
- ▶ [https://segalcentre.org/common/sitemedia/201819\\_Shows/ENG\\_AllyToolkit.pdf](https://segalcentre.org/common/sitemedia/201819_Shows/ENG_AllyToolkit.pdf)



**Thank you  
for  
attending!**

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