#### TITLE IX COMPLIANCE TRAINING

### Practical Solutions for a Complex Process

Laura Tubbs Booth Megan J. Renslow Christian R. Shafer





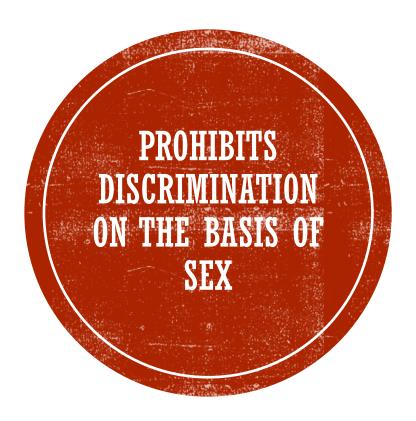


#### 

What do you think of when you think about Title IX?



"[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).



- Discrimination includes harassment
- Requires equity in treatment of complainant/respondent

#### NEW REGS EFFECTIVE 8/14/2020



USDOE ISSUED NEW
REGULATIONS
IMPLEMENTING TITLE IX



**NEW DEFINITIONS** 



NEW INVESTIGATION REQUIREMENTS



## CENERAL PERSONSIBILITIES

For Public Elementary/Secondary Schools



#### SCHOOLS MUST:

1

Have a policy

2

Identify Title IX Coordinator

3

Offer Supportive Measure 4

Have a grievance process



#### DEFINITIONS

#### RESPONSE TO SEX HARASSMENT

• A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent..





of Federal Funds

# SEX HARASSNETT IS

Conduct based on sex and ...



#### SEX HARASSMENT IS...

#### Conduct based on sex:

- 1. And a school employee conditions receipt of a benefit on participating in unwelcome sexual conduct or
- 2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
- 3. Sexual assault, dating violence, domestic violence, or stalking, as those terms are defined by federal law.



### ACTUAL KNOWLEDGE

- If an employee of the school knows of sex harassment or
- Allegations of sex harassment the district has "actual knowledge"









#### EDUCATION PROGRAM OR ACTIVITY





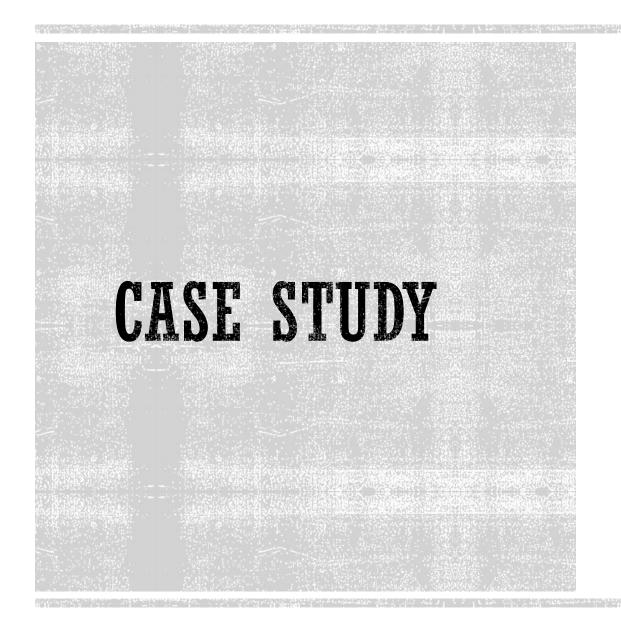
## PERSON IN THE UNITED STATES



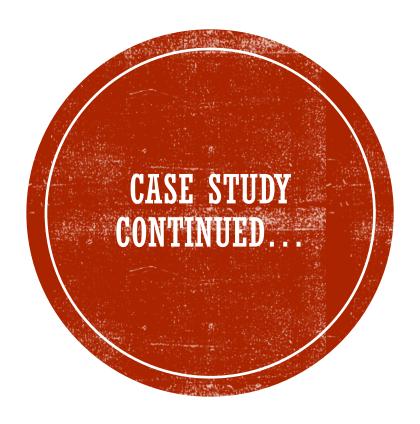
# RESPONSE: NOT DELIBERATELY INDIFFERENT

Davis v. Monroe
County Bd. of Ed.





- LaShonda was a fifth grade student
- Reports to parents & teacher three incidents during school by a classmate named Kim
- Mom speaks to teacher
- Eventually parents speak to principal



LaShonda reports to physical education teacher when Kim put a door stop in pants and motions toward LaShonda

P.E. teacher reports to principal

Another student asks to speak to principal but is denied

LaShonda's grades plummet, does not want to attend school, suicide note.

\* Davis v. Monroe Cty. Bd of Education, 526 U.S. 629 (1999)

## 

School is deliberately indifferent if it acted unreasonably in light of the known circumstances





#### Previously, a formal complaint was not required



The Complainant files a written complaint or

The Title IX
Coordinator
files a written
complaint

No third party complaints

#### REPORT VS. FORMAL COMPLAINT

#### Report

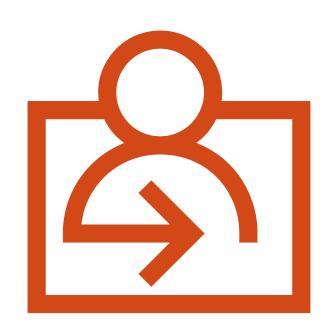
- Actual knowledge by school employee of harassment or
- Actual knowledge by employee of report or
- Complainant reports to Title IX
   Coordinator but no formal report

#### **Formal Complaint**

- By the complainant in writing or
- By the Title IX Coordinator



#### SUPPORTIVE MEASURES



School must offer the complainant supportive measures regardless of formal complaint





New regulations require that each school district have:

Title IX Coordinator

Investigator

decision-maker

Appeal Decision-Maker

## TITLE IX COORDINATOR

- Understands law and policy trained
- Must be an employee
- Can also be investigator
- May facilitate informal resolution
- MAY NOT be decision maker or appeal decision maker
- Responsible for coordination of grievance process & implementation of remedies



- Understands law and policy-trained to investigate
- May not be biased or have conflict of interest
- Must summarize findings in objective way
- May make recommendation but not required

#### DECISION-MAKER

- Understands law and policy trained
- May not be biased or have conflict of interest
- Must issue written report in compliance with requirements
- May not be Title IX investigator and may not decide appeal

## APPEAL DECISIONMAKER

- Must allow for written statement
- Be unbiased and have no conflict of interest
- May not be Title IX Coordinator or Decision-Maker

#### PRACTICALLY SPEAKING...

- Title IX Coordinator can also be the investigator & facilitate informal resolution
- Title IX Coordinator can't be decision-maker or appeal decision maker
- Each role must be trained
- Who might be one of the three-four roles:
  - Superintendent
  - HR Professional
  - Assistant Principal
  - Athletic/Acitivites Director
  - Dean
  - Social Worker
  - Counselor etc.





## STEP ONE ROLE OF THE TITLE IX COORDINATOR

#### ACTIONS TO TAKE UPON RECEIPT OF A REPORT

Receipt of Report from a Witness

Content of Report is "Actual Knowledge"

Deliberate
Indifference Standard
Requires Contact with
Complainant

Complaint Files
Complaint

Next Step

Content of Complaint Results in "Actual Knowledge"

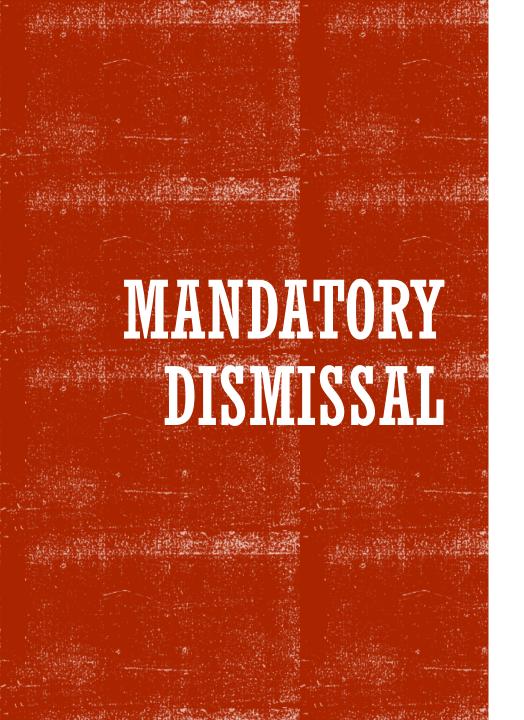
Title IX
Coordinator
Files Complaint

Next Step

### ACTIONS TO TAKE UPON RECEIPT OF A COMPLAINT

Receipt of a "Formal Complaint"

Next Step



A formal complaint *must* immediately be dismissed if:

- a. The conduct alleged in the formal complaint, even if proven, does not meet the definition of sexual harassment set by these regulations;
- b. The conduct alleged in the formal complaint did not occur in the school or school district's education program or activity; or
- c. The conduct alleged did not occur against a person in the United States.

#### PERMISSIVE DISMISSAL

A formal complaint may be dismissed if:

- a. The complainant notifies the Title IX
   Coordinator, in writing, that they would like to withdraw the complaint;
- b. The respondent is no longer enrolled at or employed by the school; or
- c. Specific circumstances prevent the school or school district from gathering evidence sufficient to reach a determination as to the complaint.





## RESPONSIBILITIES WHEN DISMISSING A COMPLAINT

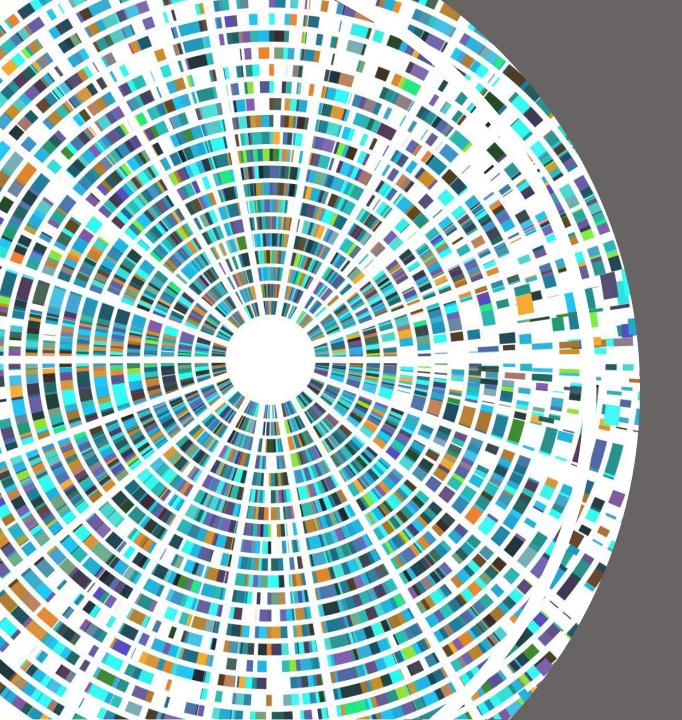
#### KEEP IN MIND...

• Conduct that does not rise to the level of a Title IX complaint may still require action





- 1. Grievance/Informal Resolution Process;
- 2. Allegations;
- 3. Presumption Respondent Is Not Responsible;
- 4. Right to an Advisor; and
- 5. Code of Conduct Prohibits False Statements or Information.



### INTERIM SUPPORT MEASURES

Supportive measures, offered equally to both parties, are non-disciplinary measures including:

- Counseling
- Modification of deadlines/other adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between parties
- Changes in work or school locations
- Leaves of absence
- Increased security and monitoring

# INTERIM EMERGENCY REMOVAL OF STUDENT RESPONDENTS

- Mandatory individualized safety and risk analysis
- Immediate threat arising from the allegations of sexual harassment
- The threat must relate to the physical health or safety of any individual
- Requires notice to the respondent and an opportunity for challenge immediately following removal
- The respondent bears the burden of proving the removal decision was incorrect
- Not applicable to offenses outside Title IX

# INTERIM EMERGENCY REMOVAL OF EMPLOYEES

- Non-Applicability of Title IX Procedures
- Factors to Consider
- Possible Directives to Employees



#### INFORWAL RESOLUTION

- Timing
- Notice
- Non-Applicability to Employees







## NEW TITLE IX REQUIREMENTS FOR INVESTIGATIONS





# THE SCHOOL OR DISTRICT BEARS THE BURDEN OF PROOF, NOT EITHER PARTY

# SPECIFIC TYPES OF INFORMATION AND DATA CONCERNS IN A TITLE IX INVESTIGATION





Consideration of privileged information

Review of external medical records



Interplay between data privacy laws and Title IX



### PRACTICAL CONSIDERATIONS

Consolidation of multiple complaints

 All parties must be given an equal opportunity to present witnesses





## REQUIRED NOTICES AND OPPORTUNITY TO REVIEW EVIDENCE

## INVESTIGATION REPORTS





### INITIAL CONSIDERATIONS: EXTERNAL REPORTS



- Remember to make any mandated reports of maltreatment
- Potential referrals to law enforcement





#### A BRIEF DATA PRACTICES INTERLUDE



## LASHONDA'S CLAIMS: WHO MIGHT THE INVESTIGATOR WANT TO INTERVIEW?





# INTERVIEW BASICS





# REQUIRED INTERVIEW NOTICE

#### OPENING REMARKS



#### Explaining

Explaining the purpose of the interview



#### Explaining

Explaining the investigation process and your role as investigator







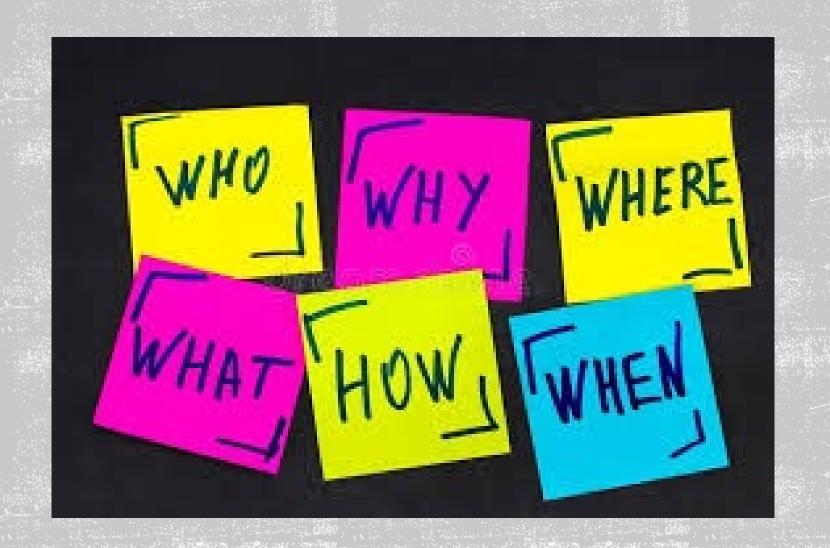
# DO NOT GUARANTEE RESULTS



"The facts, Ma'am. Just the facts."



# INTERVIEWING THE COMPLAINANT AND FACT WITNESSES



### INTERVIEWING THE COMPLAINANT AND WITNESSES

Short, open-ended questions



### THE INVESTIGATOR MIGHT HAVE TO DEFEND THE INTERVIEW QUESTIONS, SO...



WATCH OUT
FOR BIASES!





SOME SPECIFIC TIPS FOR INTERVIEWING WITNESSES AND COMPLAINANTS





SPECIAL CONSIDERATIONS FOR INTERVIEWING THE RESPONDENT

WATCH OUT FOR BIAS IN THE COMPLAINANT INTERVIEW TOO!



Explaining the role of the investigator as a neutral factfinder

Establishing ground rules

Provision of similar initial statements that were provided to the Complainant

#### OPENING REMARKS





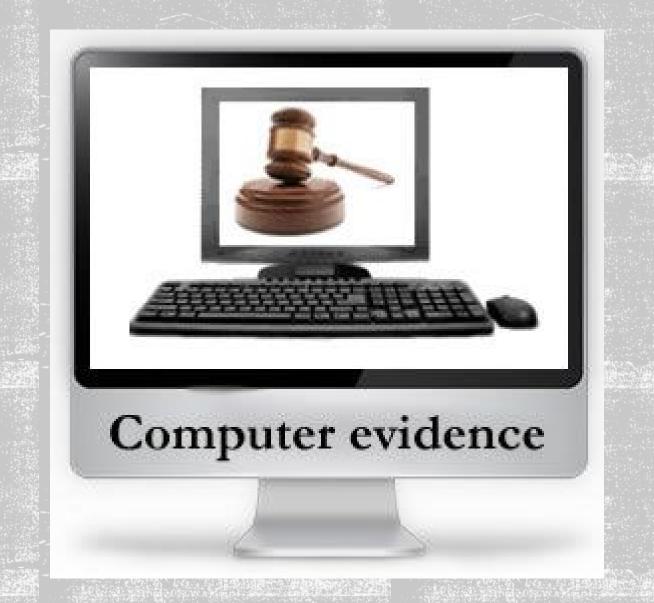
# SPECIFIC STRATEGIES FOR INTERVIEWING THE COMPLAINANT





### BACK TO LASHONDA: WHAT KINDS OF QUESTIONS MIGHT THE INVESTIGATOR ASK?









## SOCIAL WEDIA IN INVESTIGATIONS



# IS THERE ANY TYPE OF ELECTRONIC EVIDENCE THAT THE INVESTIGATOR MIGHT CONSIDER IN THE LASHONDA INVESTIGATION?





Time frame for completing investigation reports

Time frame for providing investigation reports to parties

An investigation must "fairly summarize" the relevant evidence

The investigator does not decide if harassment occured

## WRITTEN INVESTIGATION REPORTS

# STRATEGIES FOR WRITING AN INVESTIGATION REPORT







# ONE MORE WORD ABOUT BIASES



#### SELECT A STANDARD OF REVIEW

#### **Preponderance of the Evidence**

"Preponderance of the evidence" means that the respondent will be found responsible only if it is more likely than not that he or she engaged in the conduct constituting sexual harassment.

#### Clear and Convincing Evidence

"Clear and convincing evidence" means that the respondent will be found responsible only if it is highly more likely to be true that the respondent engaged in the conduct constituting sexual harassment.





## PROCEDURES REQUIRED PRIOR TO A DECISION

- Opportunity for Parties to Respond to the Report
- Notification of the Right to a Hearing and/or Written Questions



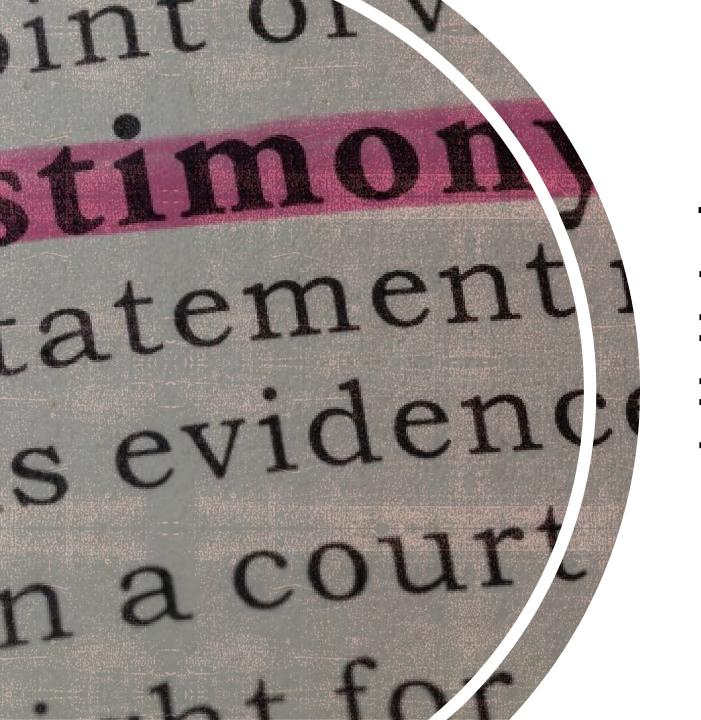
#### SUBMISSION OF WRITTEN QUESTIONS

All schools must allow for an exchange of written relevant questions, regardless of whether a live hearing is also offered.

#### RELEVANCY

"Relevant evidence"
means evidence having
any tendency to make
the existence of any fact
more probable or less
probable than it would
be without the
evidence.





WHAT EVIDENCE MAY
BE APPROPRIATE TO
EXCLUDE OR ALLOW
IN LASHONDA'S CASE?

#### LIVE HEARINGS









Questioning





#### THE DETERMINATION

- Identification of the allegations
- Description of the procedural steps taken
- Findings of fact
- Conclusions applying the code of conduct/policy
- Assignment of responsibility, rationale, sanctions and remedies
- The procedure for appealing the determination of responsibility





STEP FOUR IMPLEMENTATION OF THE DECISION AND THE APPEALS PROCESS (ROLE OF THE APPELLATE DECISION-MAKER)



May include but are not limited to:

Education

Continued supportive measures

Discipline

Restorative Justice



#### **APPEAL**

- Either party may appeal:
  - Determination of Responsibility or
  - Dismissal

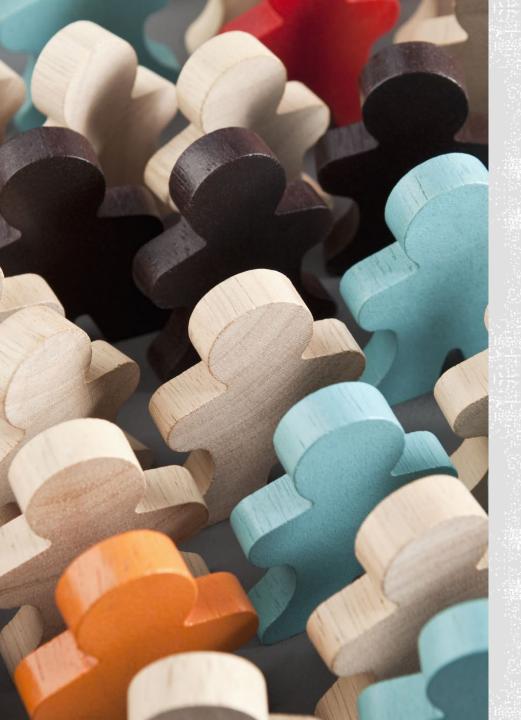




Procedural irregularity that impacted outcome

New evidence not available at the time of investigation that could impact outcome

Conflict of Interest or Bias on part of investigator, Title IX Coordinator or...



### OR ANY OTHER BASIS FOR APPEAL

As long as both parties have the right to appeal on that basis





Ensure appeal decision maker is not the investigator or Title IX Coordinator

And employs same standards as decision maker



Provide notice to both parties



Ensure each party has reasonable opportunity to submit written statement



Issue a written decision

### SCHOOL MUST...



#### TRAINING MATERIALS

- Must train the three roles at a minimum
- Must ensure employees know their responsibility to report = actual knowledge
- Must retain training materials for 7 years
- Must retain complaints, investigation, decision, appeal decision for 7 years
- Must review policy annually

## Questions