RRM Ratwik, Roszak & Maloney, P.A.

# TITLE IX COMPLIANCE TRAINING

## Practical Solutions for a Complex Process

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# WELCOME!



# TITLE IX

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

# TITLE IX PROVIDES….

"[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

# GENERAL RESPONSIBILITIES

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

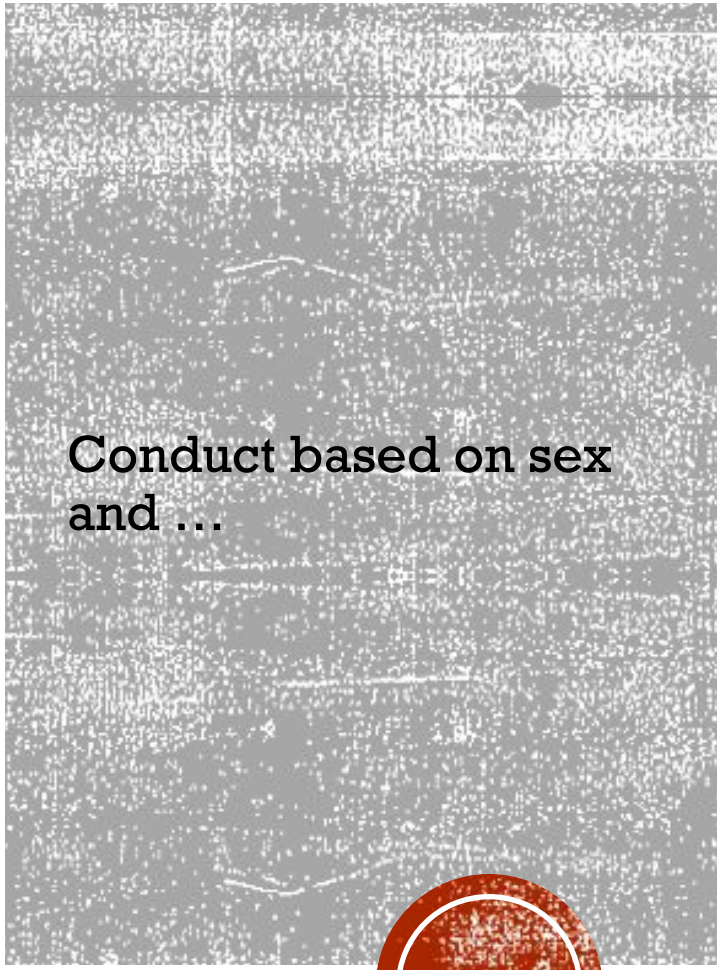
# RESPONSE TO SEX HARASSMENT

- 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 HARRASSMENT IS…



# 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.

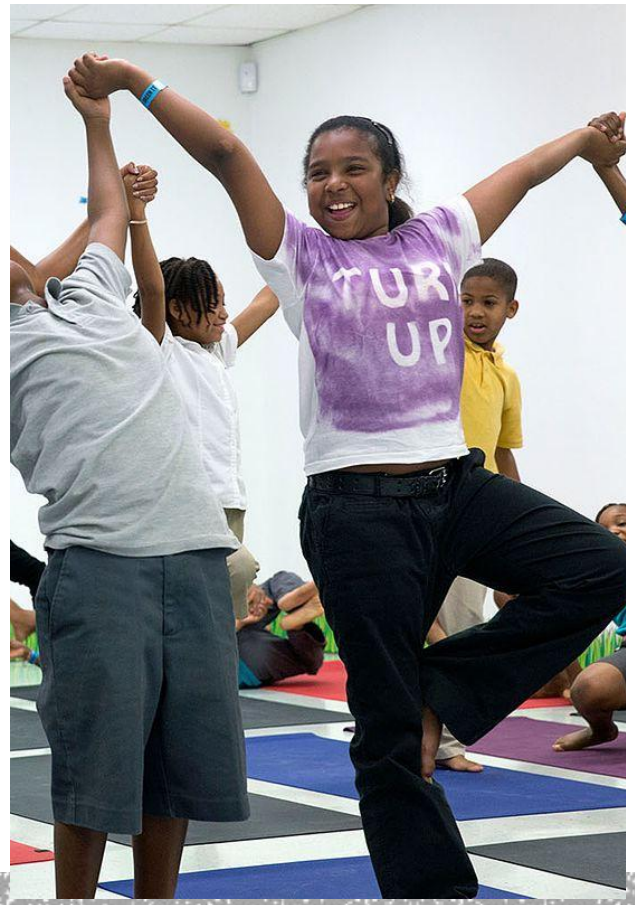
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# ACTUAL KNOWL EDGE

- 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.*

# CASE STUDY

- 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

# CASE STUDY CONTINUED …

Teacher assures parents that she has spoken with 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)

# DELIBERATELY INDIFFERENT

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

# FORMAL COMPLAINT

Previously, a formal complaint was not required

## Now a "formal complaint" is required and means:

| | | |
|---|---|---|
| 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

# REMEDIAL MEASURES/SELF EVALUATION

- If the USDOE determines a school engaged in discrimination, school can be ordered to take remedial action
- Schools should review the policy and MEASURE whether its being equitably enforced on an annual basis

# ROLES

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
- 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

# INVESTIGATOR

- 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 DECISION-MAKER

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



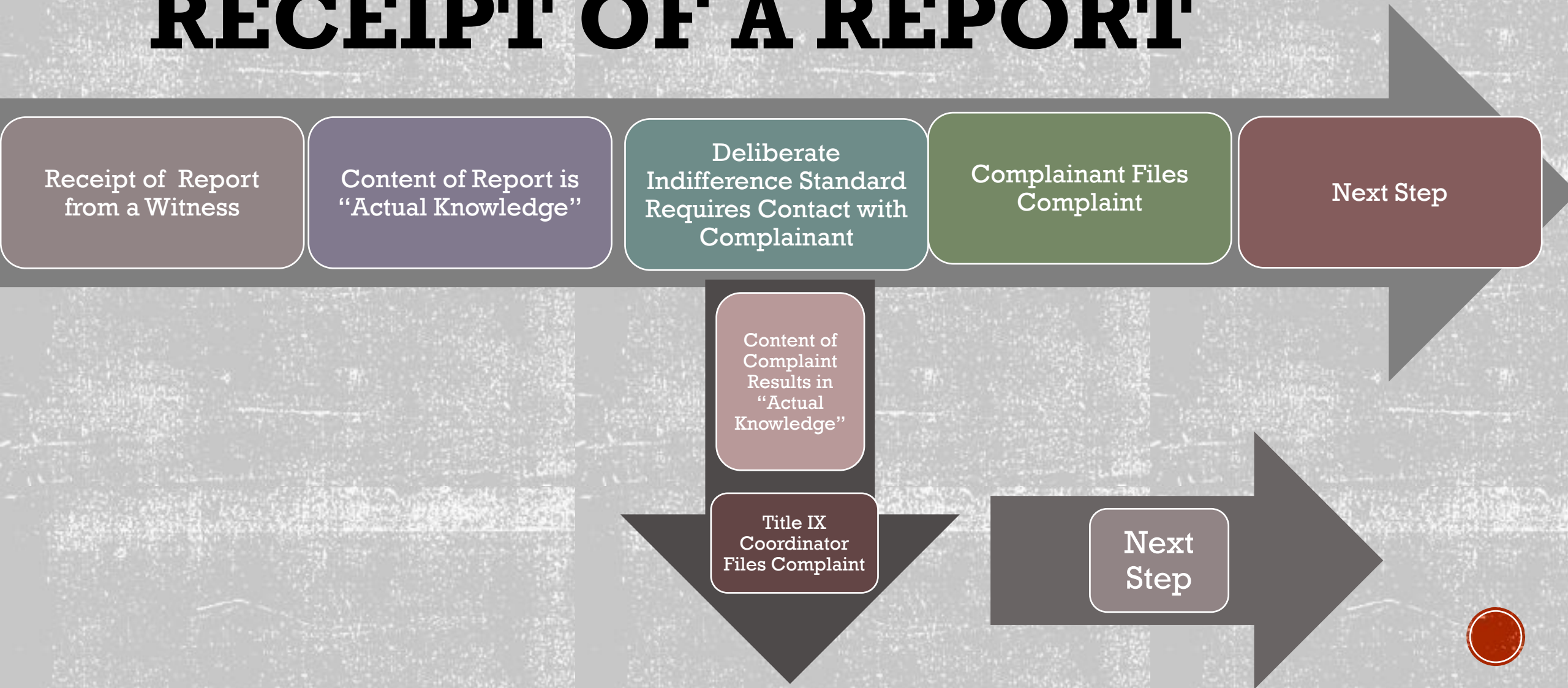
# STEP ONE
# ROLE OF THE TITLE IX COORDINATOR

# ACTIONS TO TAKE UPON RECEIPT OF A COMPLAINT

Receipt of a "Formal Complaint" from LaShonda/Parents

Next Step

# ACTIONS TO TAKE UPON RECEIPT OF A REPORT



# MANDATORY DISMISSAL

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.



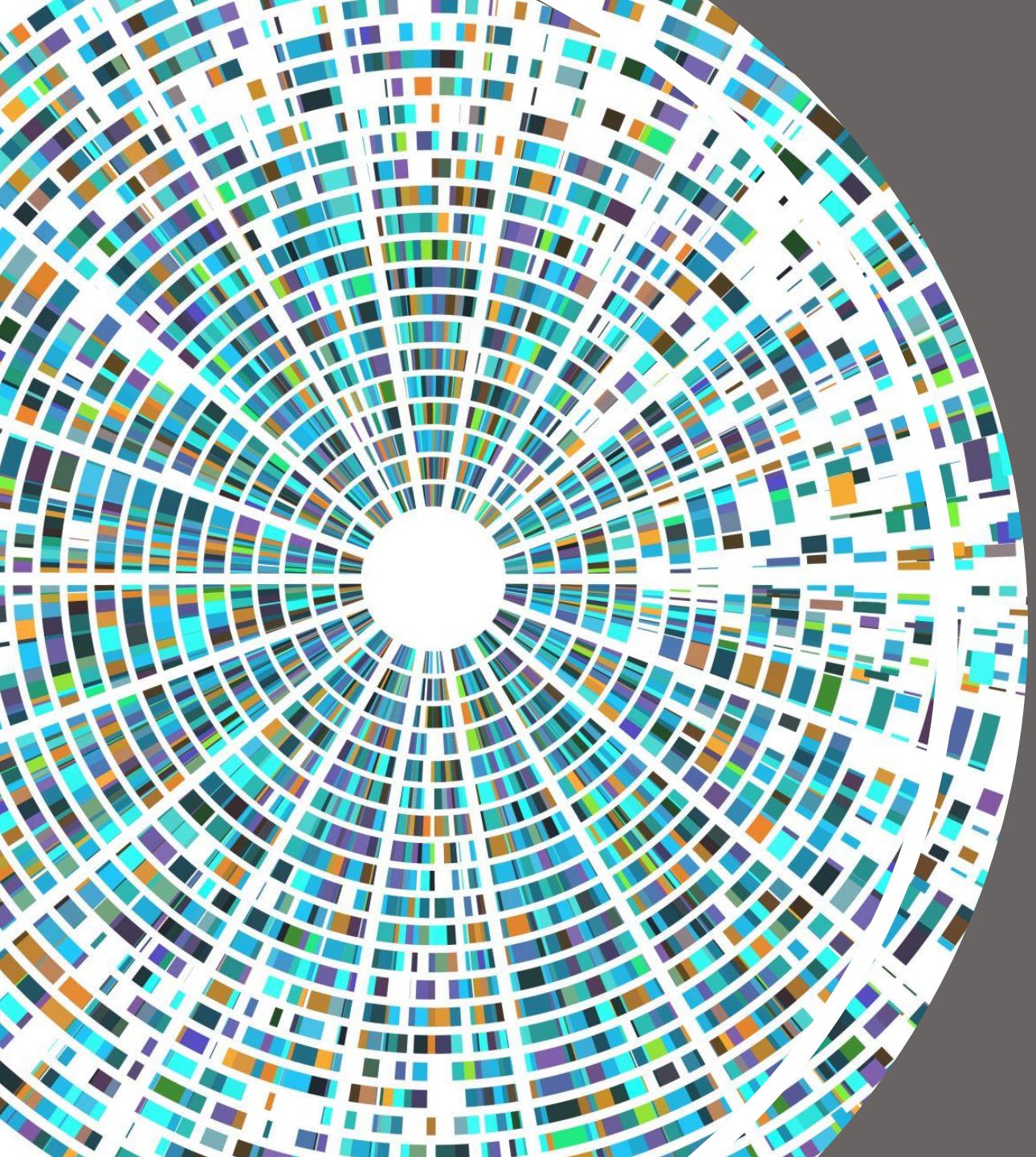

# RESPONSIBILITIES WHEN DISMISSING A COMPLAINT

# REFERRAL OF COMPLAINT TO OTHER STAFF OR ENTITIES



# NOTICE TO PARTIES

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




# INFORMAL RESOLUTION

- Timing
- Notice
- Non-Applicability to Employees



# STEP TWO
# ROLE OF THE TITLE IX INVESTIGATOR




# NEW TITLE IX REQUIREMENTS FOR INVESTIGATIONS


INDEPENDENT
INVESTIGATION



# 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 NOTICE AND OPPORTUNITY TO REVIEW EVIDENCE

# INVESTIGATION REPORTS




SELECTION

# INITIAL CONSIDERATIONS: EXTERNAL REPORTS




- Remember to make any mandated reports under the Maltreatment of Minors Act
- Potential referrals to law enforcement




# A BRIEF DATA PRACTICES INTERLUDE


8
9
10
11
4
15
18
21
22
25
PLAN
AHEAD

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




DISTRACTIONS


ACT NOW

# INTERVIEW BASICS






# REQUIRED INTERVIEW NOTICE

# OPENING REMARKS



## Explaining

Explaining the purpose of the interview



## Explaining

Explaining the investigation process and your role as investigator

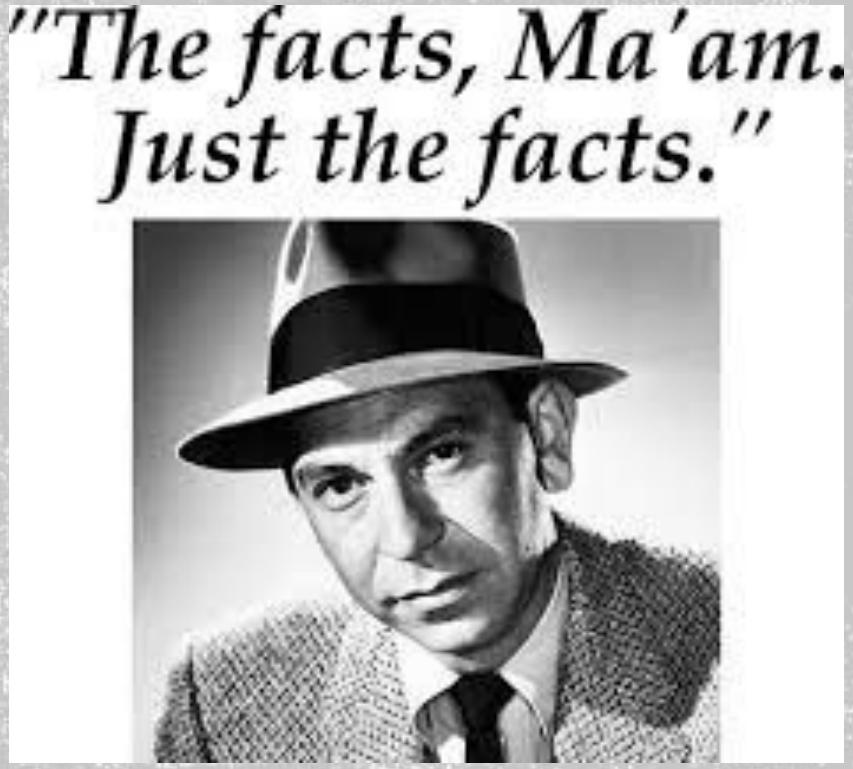
Explaining the *Tennessen* Warning


NOT CONFIDENTIAL


ASK
THE RIGHT
QUESTIONS

# DO NOT GUARANTE E RESULTS






# 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




# FOR INTERVIEWING THE RESPONDENT

# WATCH OUT FOR BIAS IN THE COMPLAINANT INTERVIEW



# OPENING REMARKS

- Explaining the role of the investigator as a neutral factfinder
- Administering *Tennessen* or *Garrity* Warnings
- Establishing ground rules
- Provision of similar initial statements that were provided to the Complainant

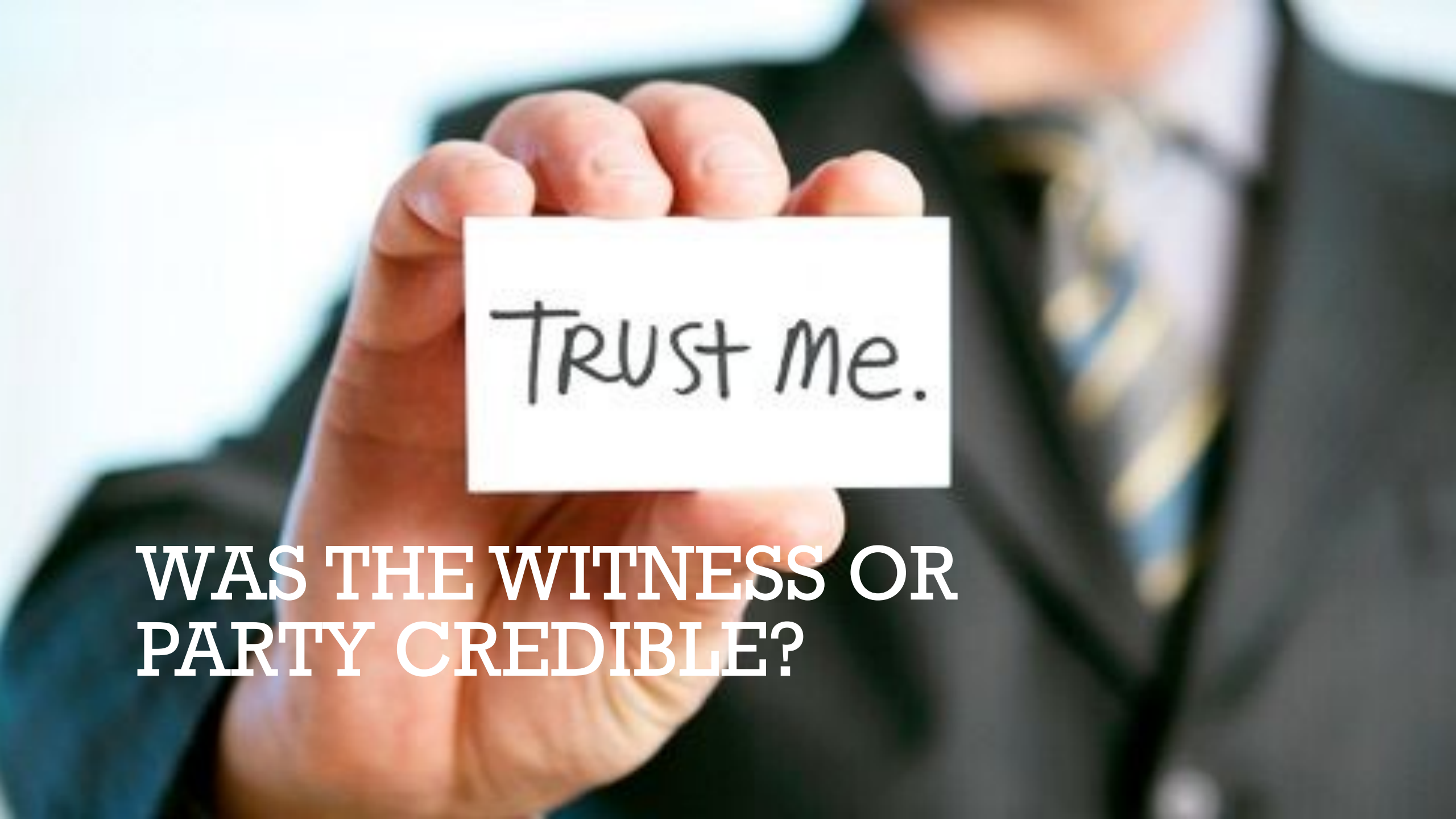

WHAT IF THE COMPLAINANT REFUSES TO ANSWER?



# SPECIFIC STRATEGIES FOR INTERVIEWING THE RESPONDENT



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




# WAS THE WITNESS OR PARTY CREDIBLE?


Computer evidence


SURVEILLANCE
FOOTAGE

# SOCIAL MEDIA IN INVESTIGATIONS



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




COORDINATING ANY
INVESTIGATION WITH LAW
ENFORCEMENT




# INVESTIGATION CONCLUSIONS MUST BE BASED ON RELEVANT EVIDENCE

# WRITTEN INVESTIGATION REPORTS

- 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

# STRATEGIES FOR WRITING AN INVESTIGATIO N REPORT

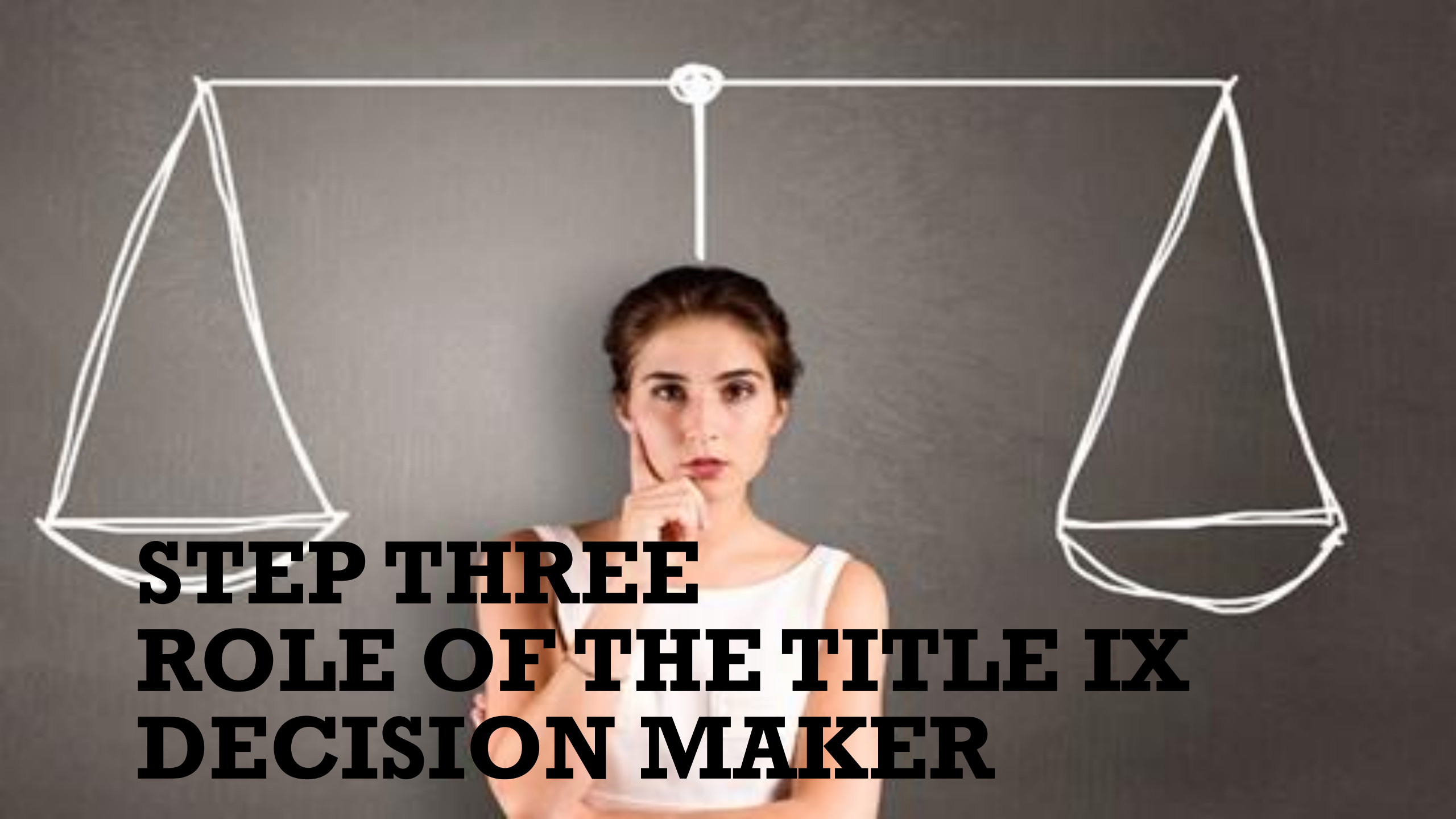


# AVOIDING CONFLICTS OF INTEREST






# ONE MORE WORD ABOUT BIASES



# STEP THREE
# ROLE OF THE TITLE IX DECISION MAKER

# 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

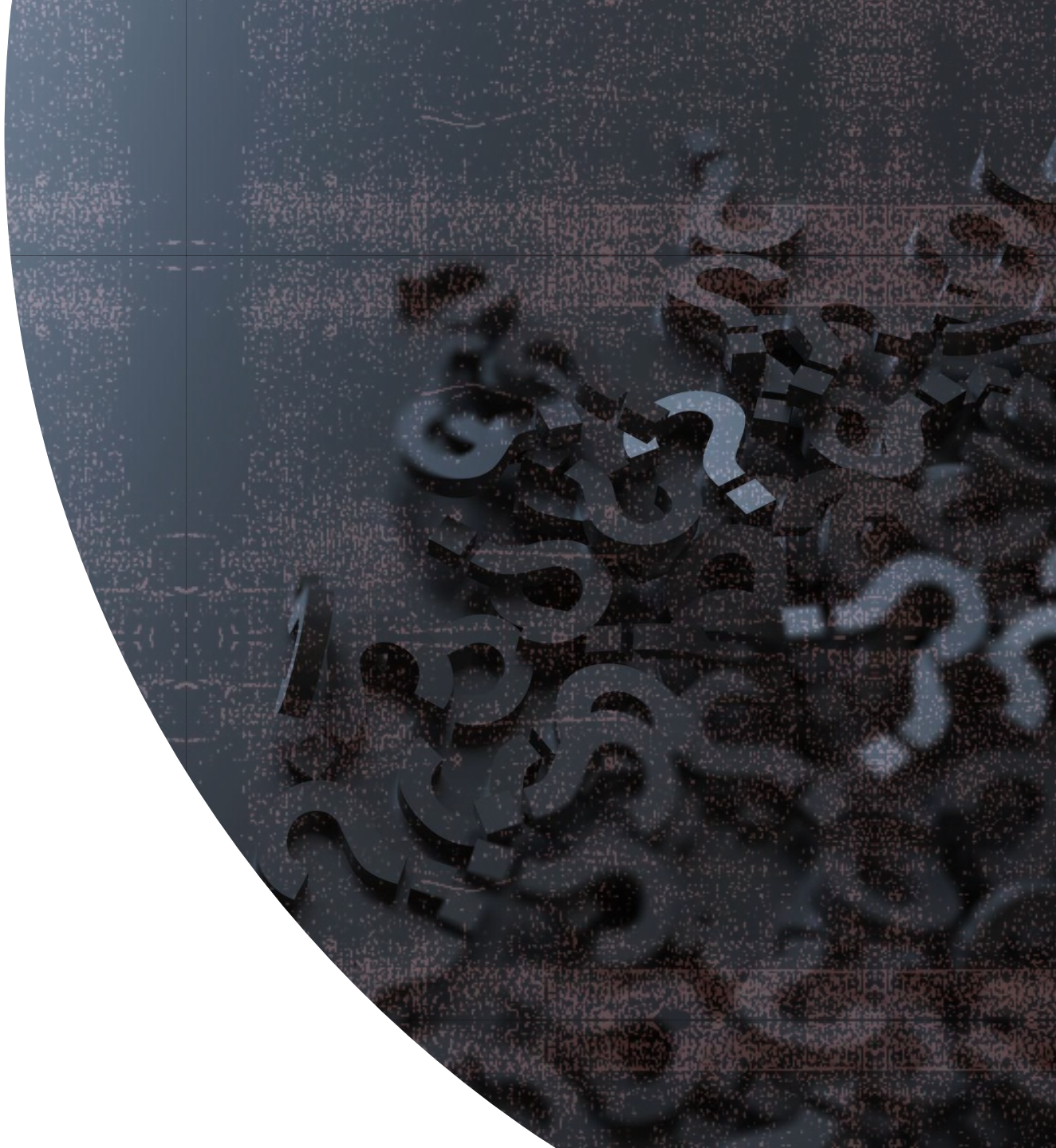
- Opportunity for Parties to Respond to the Report
- Notification of the Right to a Hearing and/or Written Questions

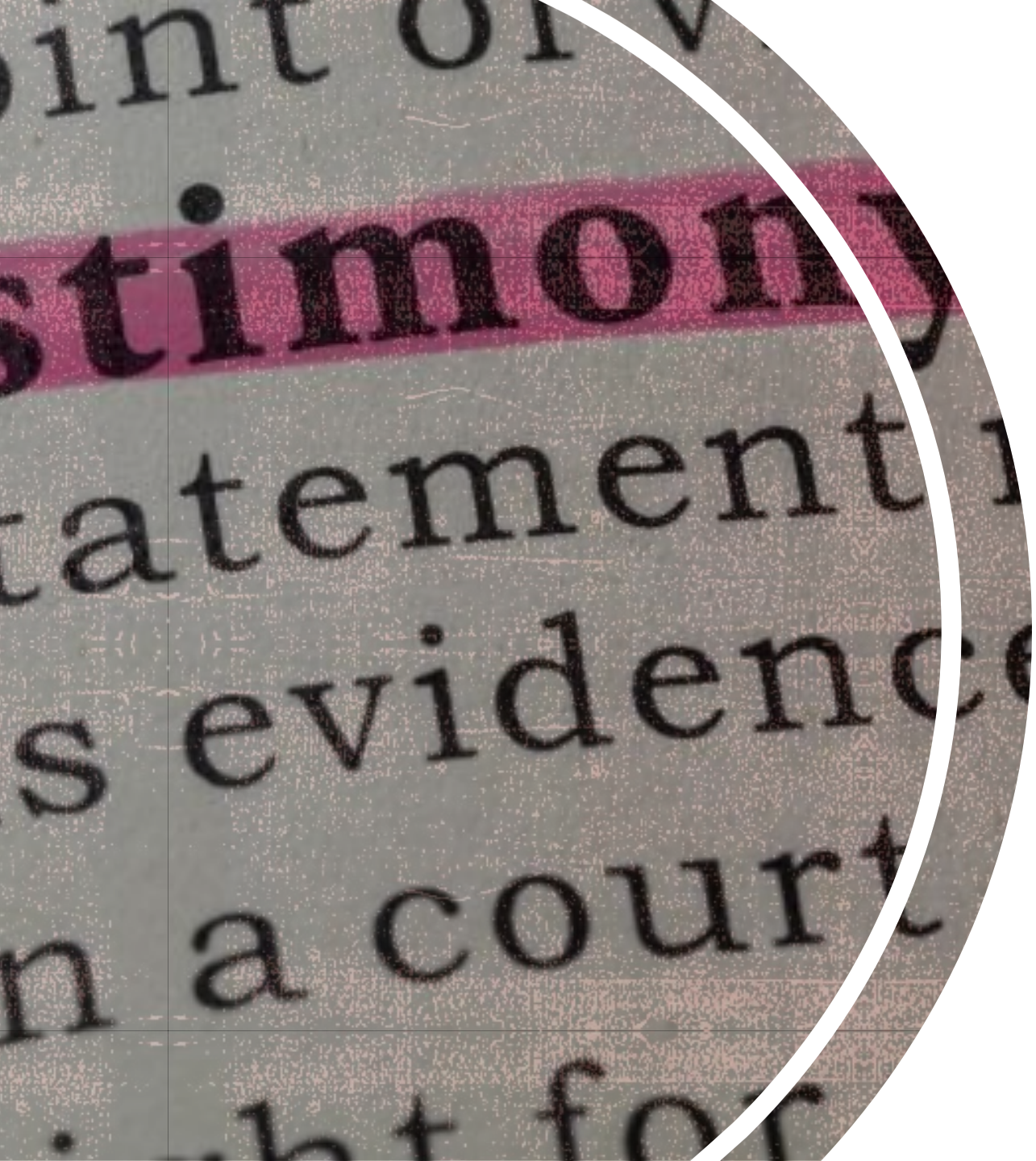
# SUBMISSION OF WRITTEN QUESTIONS

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.



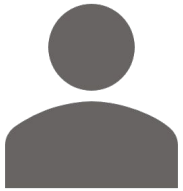



# EVIDENCE MAY BE APPROPRIATE TO EXCLUDE OR ALLOW IN LASHONDA'S CASE?

# LIVE HEARINGS



**Recording**



**Appointment of Advisor**



**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

# SCHOOL MUST….

- 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


Questions