#### TITLE IX COMPLIANCE TRAINING

### Practical Solutions for a Complex Process

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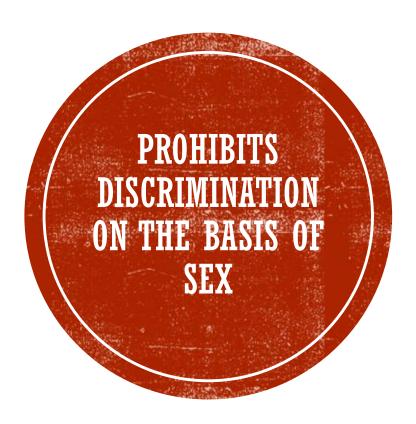


### TITLE IX

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







**NEW DEFINITIONS** 



NEW INVESTIGATION REQUIREMENTS



## CENERAL 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 HARRAS SINT 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





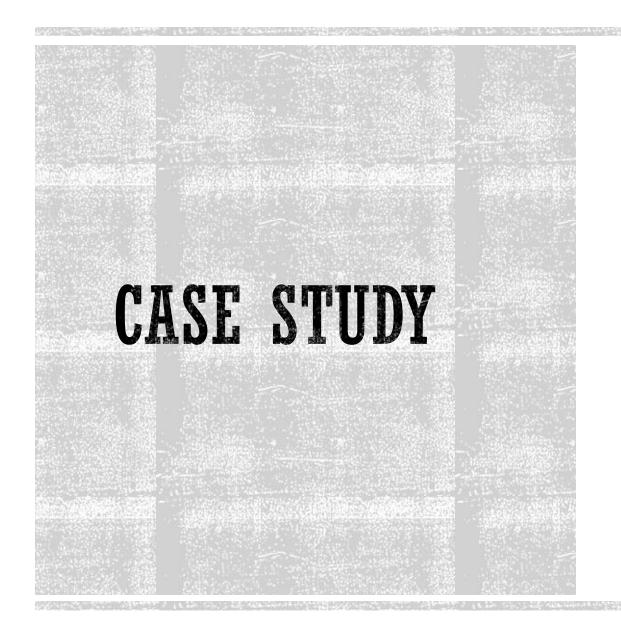
## PERSON IN THE UNITED STATES



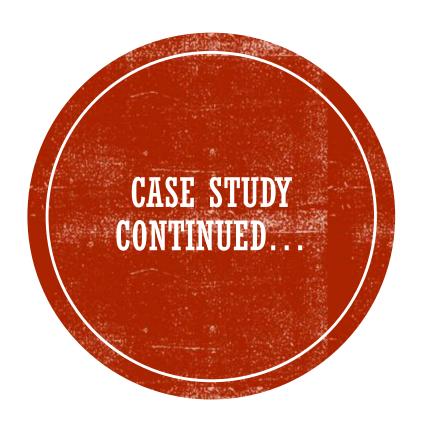
# RESPONSE: NOT DELIBERATELY INDIFFERENT

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



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)

## DELIBERALLY INDIFFICATION INDIFICATION INDIFFICATION INDIFFICATION INDIFFICATION INDIFFICAT

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





### 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

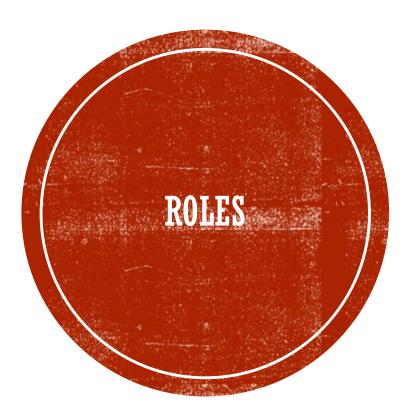


School must offer the complainant supportive measures regardless of formal complaint





- 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



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



- 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



## 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

Receipt of Report from a Witness

Content of Report is "Actual Knowledge"

Deliberate Indifference Standard Requires Contact with Complainant

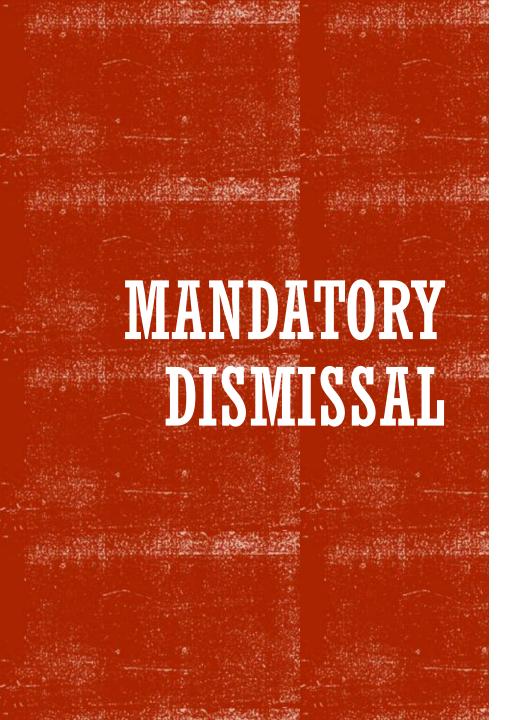
Complainant Files
Complaint

Next Step

Content of Complaint Results in "Actual Knowledge"

Title IX Coordinator Files 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

## REFERRAL OF COMPLAINT TO OTHER STAFF OR ENTITIES

Harassment
Based on
Protected
Class

Bullying

Code of Conduct

Criminal Activity

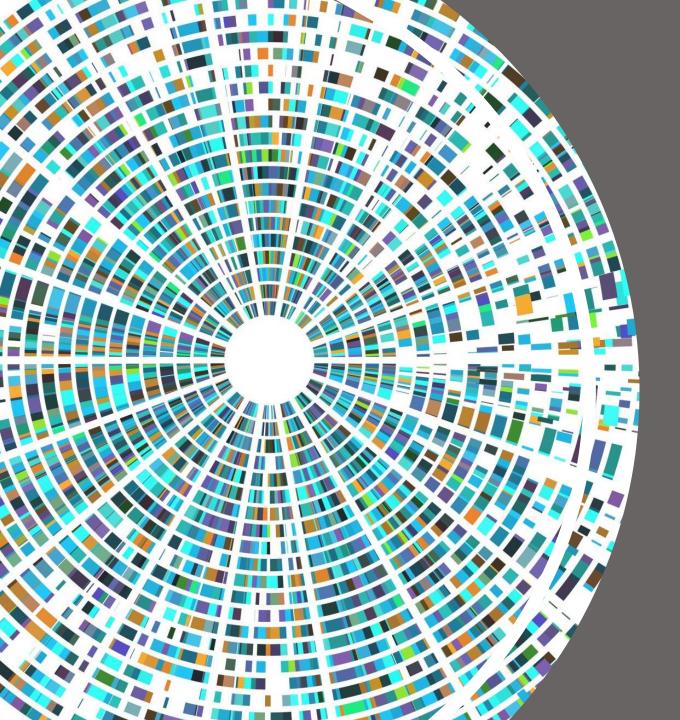
Maltreatment of a Minor



Human Rights Office Building Administrator Building Administrator Law Enforcement Law Enforcement or MDE



- 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

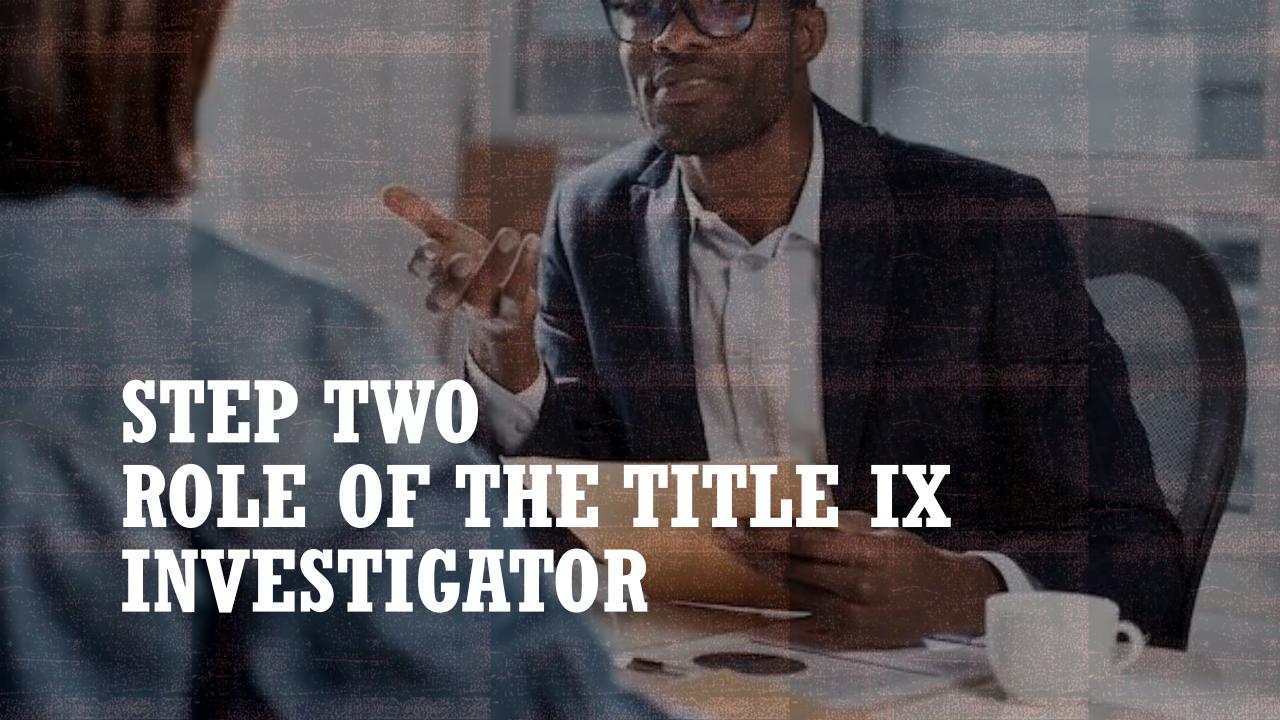
- Non-Applicability of Title IX Procedures
- Factors to Consider
- Possible Directives to Employees



### INFORMAL RESOLUTION

- Timing
- Notice
- Non-Applicability to Employees







## 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 under the Maltreatment of Minors Act
- 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

Explaining the Tennessen Warning







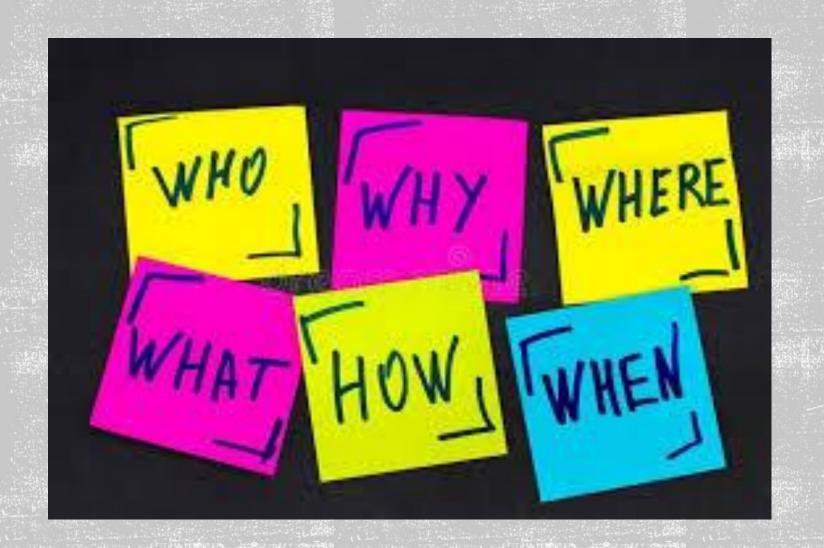
# DO NOT GUARANTEE RESULTS



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



# INTERVIEWING THE COMPLAINANT AND FACT WITNESSES

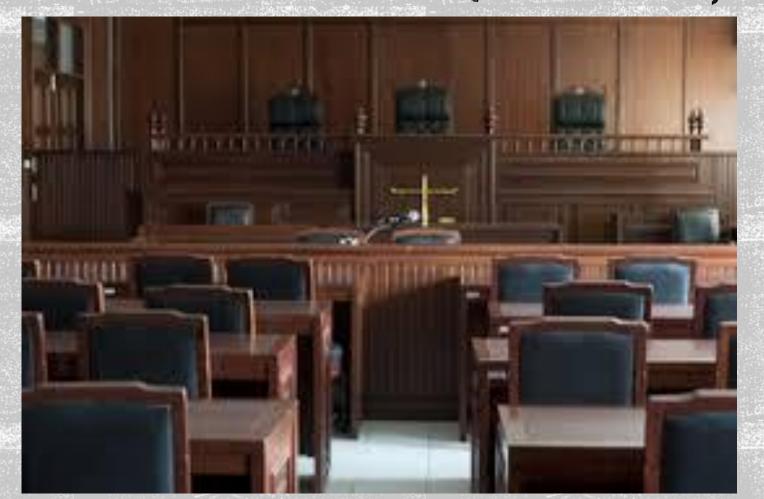


### INTERVIEWING THE COMPLAINANT AND WITNESSES

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

Administering
Tennessen or
Garrity
Warnings

Establishing ground rules

Provision of similar initial statements that were provided to the Complainant

#### OPENING REMARKS





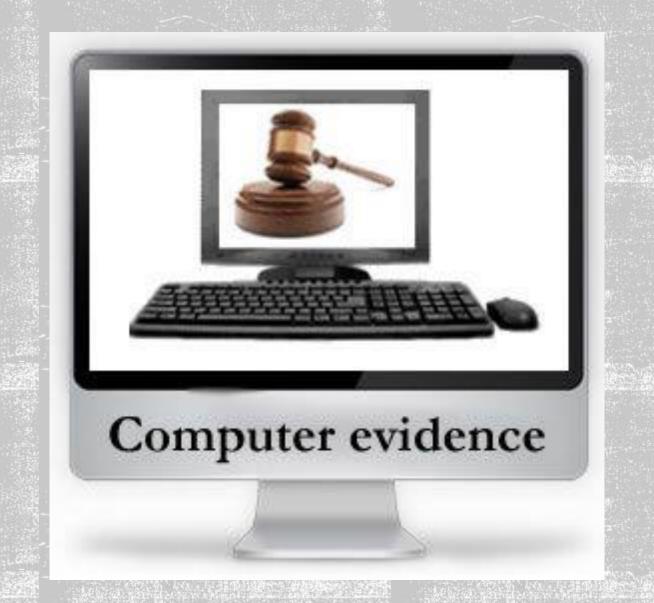
# SPECIFIC STRATEGIES FOR INTERVIEWING THE RESPONDENT





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









### SOCIAL MEDIA 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

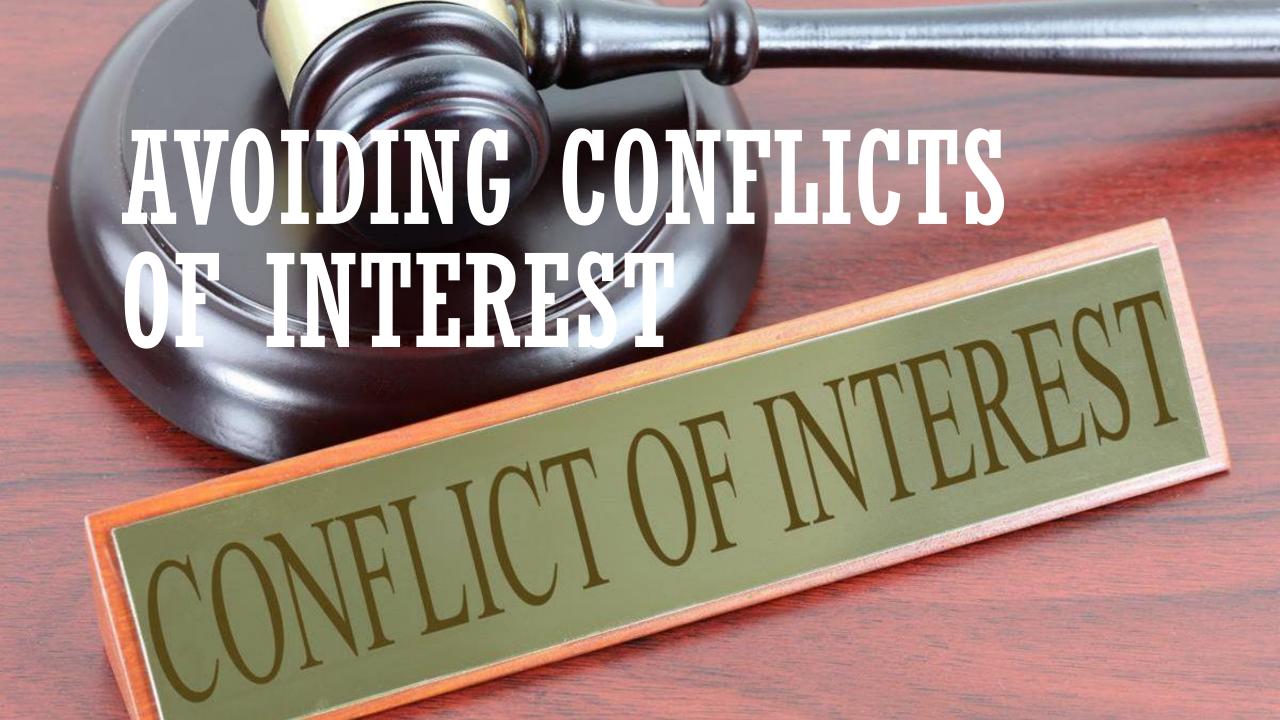
The investigator does not decide if harassment occured

### WRITTEN INVESTIGATION REPORTS

# STRATEGIES FOR WRITING AN INVESTIGATION REPORT









## ONE MORE WORD ABOUT BIASES



### 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



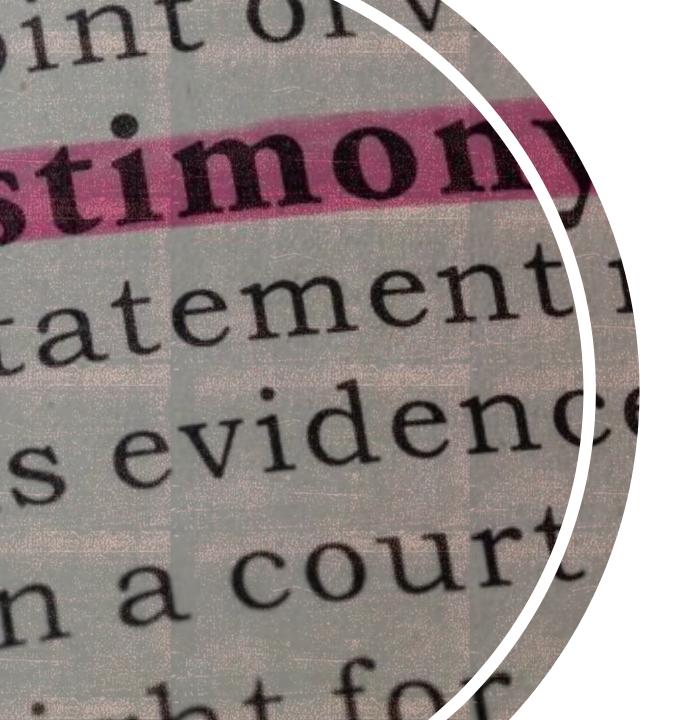
### SUBMISSION OF WRITTEN QUESTIONS

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)



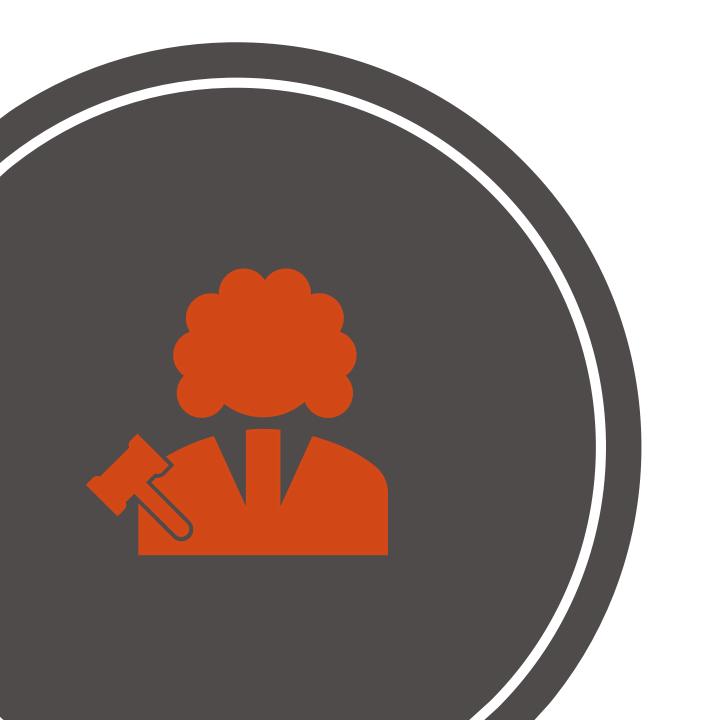
May include but are not limited to:

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



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