

TITLE IX - THE LAW
& RESPONSIBILITIES



A NEW ERA IN SEXUAL HARASSMENT

“The Cherry Creek School District will pay \$11.5 million to five teenage girls who were sexually assaulted by a middle school teacher, making it one of the largest settlements in Colorado history involving a school’s failure to respond to reports of sex assault.”

<https://www.denverpost.com/2018/09/24/cherry-creek-schools-sex-assault-settlement/>

SCHOOL DISTRICTS ARE NOT EXEMPT

“Des Plaines, Illinois, \$1 million in settlements: Five former students alleged that soccer coaches at Maine West High School allowed rampant inappropriate hazing by team members. Their lawsuit said they were sexually assaulted. Two coaches were fired, and one was charged with misdemeanor hazing and battery but not convicted. While it settled with the students for \$200,000 each in November 2016, the school board denied that the district had committed wrongdoing.”

<https://www.seattletimes.com/nation-world/a-look-at-student-on-student-sex-abuse-verdicts-settlements/>

WHAT ARE SCHOOL
DISTRICT'S
SUPPOSED TO DO?



INVESTIGATE



STOP



PREVENT



REMEDY

WHAT WILL THAT REQUIRE?





STATUTE & REGULATIONS

**TITLE IX: 20 U.S.C. § 1681 &
34 C.F.R. PART 106 (1972)**

“No 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 educational program or activity receiving federal financial assistance.”



HISTORY



1972: Passed by Congress



1975: Regulations codified by the Department of Health, Education and Welfare (the pre-cursor to the Department of Education)



1979: Supreme Court created a private right of action under Title IX (meaning people could sue in federal court)

APPLICABILITY OF TITLE IX



Title IX applies to all public and private educational institutions that receive Federal funds.



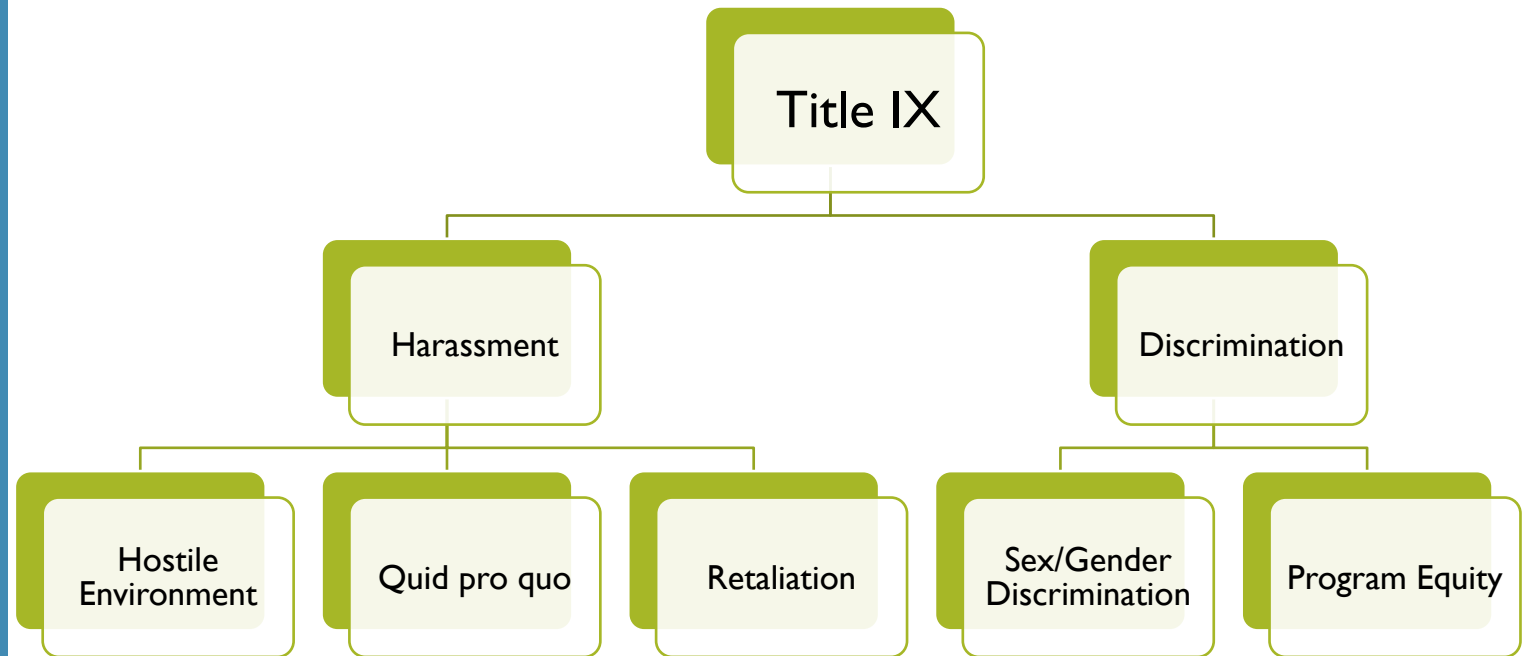
The “educational program or activity” of a school includes all of the school’s operations, including academic, educational, extra-curricular, athletic and other programs of the school.

WHY IS TITLE IX
KNOWLEDGE AND
COMPLIANCE SO
IMPORTANT?

Title IX establishes the basic law regarding sexual harassment claims by students.

Students may also bring sexual harassment claims under school district policies, state anti-bullying or anti-harassment statutes, negligence theories, etc.

TITLE IX –
DISCRIMINATION
V. HARASSMENT



ISSUES COVERED BY TITLE IX

SEX DISCRIMINATION

- Program equity
- Recruitment, Admissions and Access
- Pregnancy
- Athletics & extra-curriculars
- Employment, Recruitment & Hiring
- Course access & offerings
- Sex, gender, gender identity

SEXUAL HARASSMENT

- Sexual assault
- Sexual misconduct
- Bullying and cyberbullying
- Sexual violence
- Sexual intimidation
- Dating violence
- Sexual exploitation
- Retaliation

TITLE IX REGULATIONS

Title IX's implementing regulations are at 34 C.F.R. 106, and are enforced by the U.S. Department of Education's Office for Civil Rights.



CASE LAW

IMPORTANT CASES


- Title IX's prohibition against discrimination on the basis of sex includes discrimination against students *and* employees (*North Haven Bd. of Education v. Bell*, 452 U.S. 512 (1982)).
- The Supreme Court has determined that individuals possess a private right of action under Title IX (*Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)). In other words, individuals can bring a lawsuit against the employer in federal court.

FRANKLIN V. GWINNET COUNTY PUBLIC SCHOOLS (1992)

Teacher-student harassment


Importance

- Sexual harassment constitutes sex discrimination under Title IX
- Private right for recovery of monetary damages




FRANKLIN V.
GWINNET
COUNTY
PUBLIC
SCHOOLS

- Facts
 - Christine Franklin, a 10th grade female student, subjected to harassment by Andrew Hill, a male teacher/coach
 - Hill asked Franklin about sexual experience with her boyfriend and whether she would consider having sex with an older man
 - Hill forcibly kissed her on the mouth in the school parking lot
 - Hill called Franklin at home and asked her to meet him out socially
 - On three occasions during Franklin's junior year, Hill interrupted a class, requested that the teacher excuse Franklin, and took her to a private office and subjected her to coercive intercourse



FRANKLIN V.
GWINNET
COUNTY
PUBLIC
SCHOOLS

- Facts
 - Although the district became aware of and investigated the Hill's harassment of Franklin and other students, *they took no action to halt it and discouraged Franklin from pressing charges*
 - Hill eventually resigned on the condition that all matters against him be dropped.



FRANKLIN
V.
GWINNET
COUNTY
PUBLIC
SCHOOLS

- The U.S. Supreme Court held that:
 - Sexual harassment constituted sex discrimination under Title IX, and
 - Individuals could sue for recovery of monetary damages under Title IX

GEBSER V. LAGO VISTA INDEP. SCHOOL DISTRICT (1998)

Teacher-student harassment

Importance

- The Supreme Court created high standard for students to prevail when employee/student consensual relationship is basis of claim.



**GEBSER V.
LAGO VISTA
INDEP.
SCHOOL**

- Facts
 - Gebser, an 8th grade student, joined a high school book club led by Waldrop, a high school teacher
 - Waldrop often made sexually suggestive comments to the book club students
 - In the fall, Gebser entered high school and was assigned to classes taught by Waldrop
 - Waldrop's comments continued and eventually became targeted at Gebser, including when they were alone in the classroom
 - In the spring Waldrop visited Gebser's home to give her a book, and initiated sexual contact by kissing and fondling her

**GEBSER V.
LAGO VISTA
INDEP.
SCHOOL**

- The two then had sexual intercourse several times throughout the rest of the school year, the summer and into the following fall
- They often had intercourse during class time but never on school property
- Gebser did not report the relationship to school officials, indicating that she was not sure how school officials would react and that she did not want to lose Waldrop as a teacher



**GEBSER V.
LAGO VISTA
INDEP.
SCHOOL**

- Parents complained about Waldrop's comments in class, and the principal arranged a meeting, told Waldrop to be careful about his classroom comments, and told the guidance counselor but not the superintendent, who was the Title IX coordinator
- In January of 1993 (a couple of months after the complaint by parents), a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop
- The district terminated Gebser



**GEBSER V.
LAGO VISTA
INDEP.
SCHOOL**

The court said you cannot recover monetary damages against the school unless the behavior has been reported to someone with

- The power to alter the situation (“actual notice”), and
- “deliberate indifference” has been demonstrated by the school.

GEBSER – THE THREE-PART TEST

1

(1) An official of the educational institution must have had “actual notice” of harassment;

2

(2) The official must have authority to “institute corrective measures” to resolve the harassment problem;
AND

3

(3) The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

GEBSER STANDARD ONLY FOR CIVIL LIABILITY IN COURT

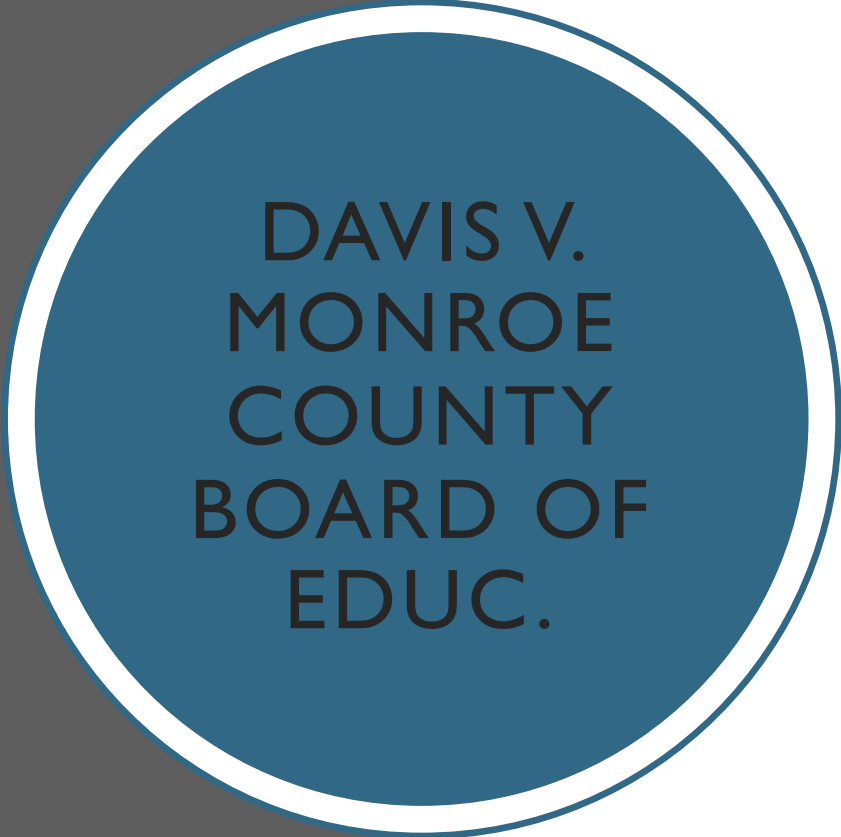
- Do not confuse the *Gebser* standard with liability under an Office for Civil Rights complaint, which we will discuss later.

DAVIS V. MONROE COUNTY BOARD OF EDUCATION (1999)

Student-student harassment

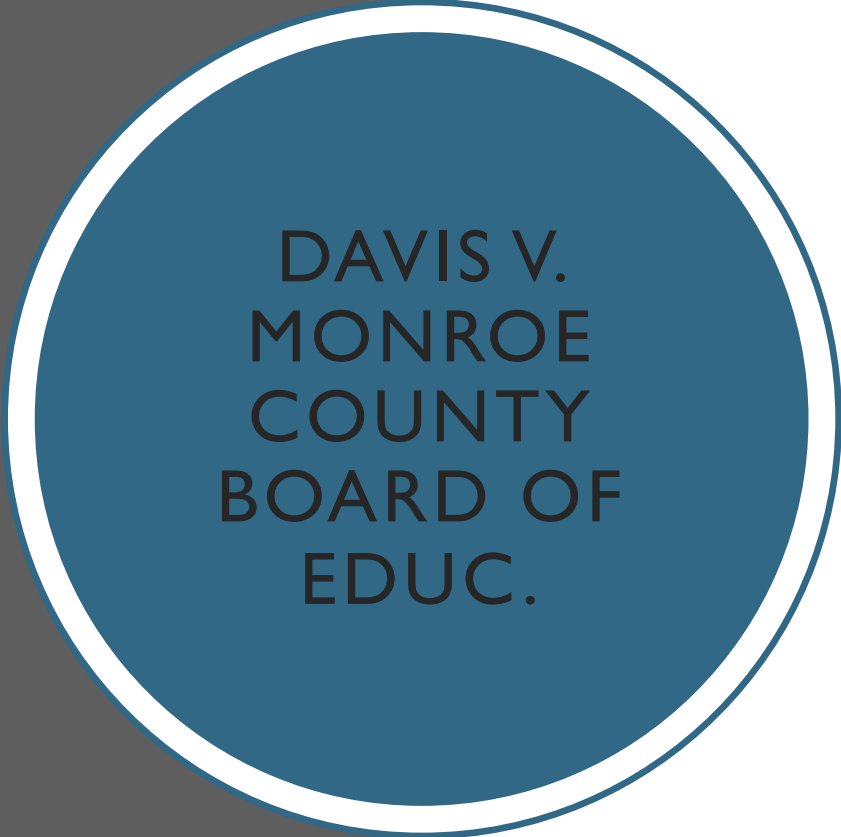
Importance

- Created a standard for harassment
- Defined “deliberate indifference”



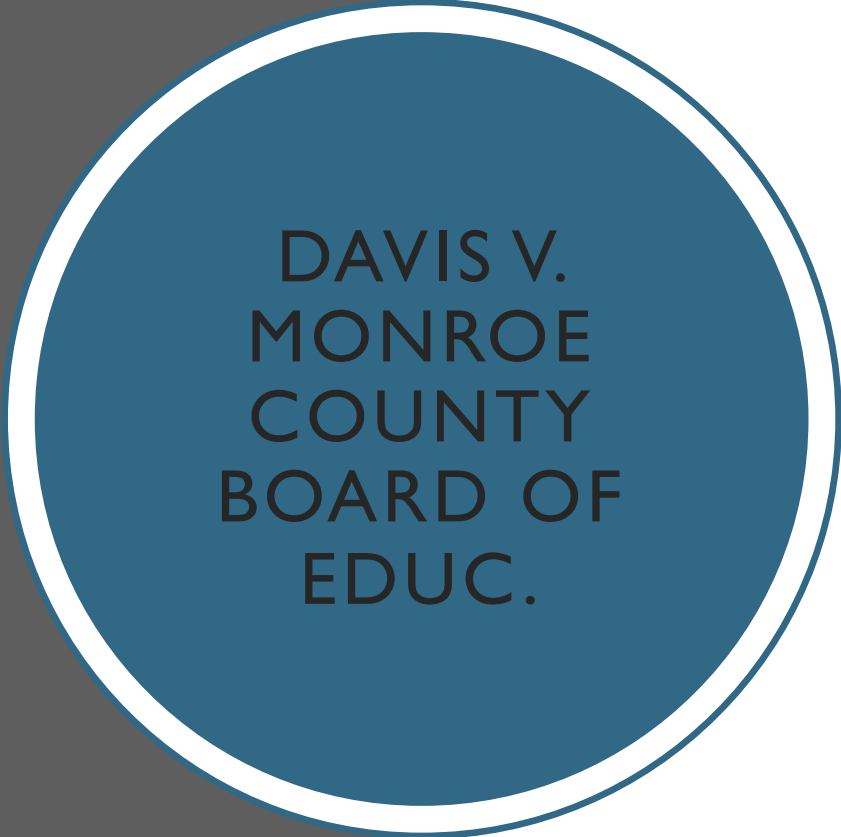
DAVIS V.
MONROE
COUNTY
BOARD OF
EDUC.

- Facts
 - Prolonged pattern of student-student sexual harassment
 - In December 1992, a fifth-grade boy attempted to touch LaShonda Davis's breasts and genitals and made statements such as "I want to get in bed with you," and "I want to feel your boobs."
 - Similar conduct occurred on January 4 and 20, 1993.



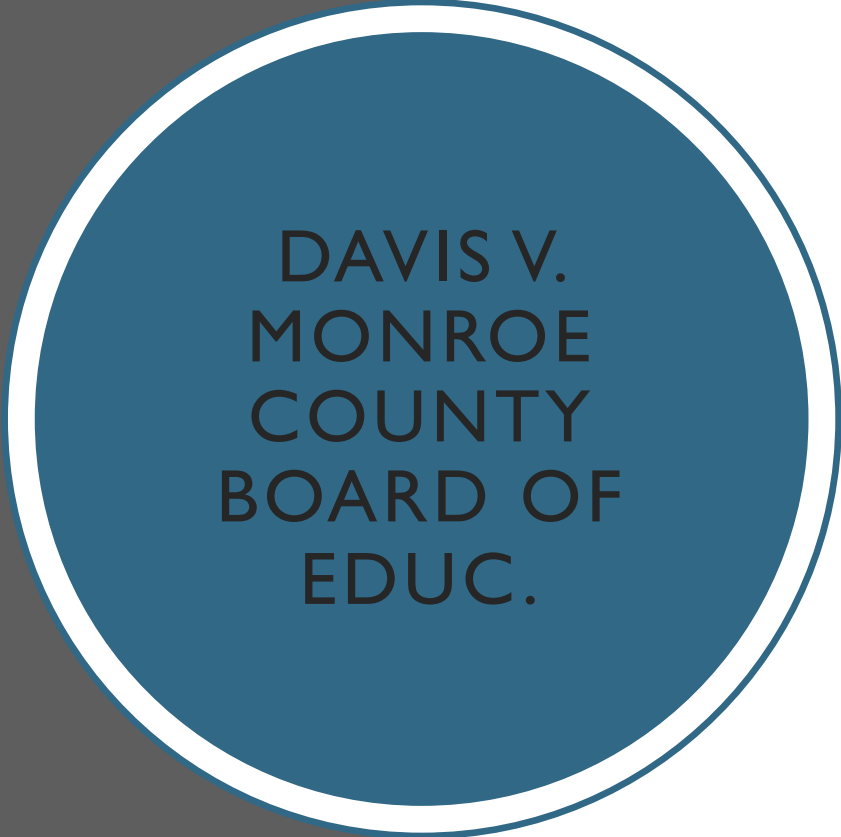
DAVIS V.
MONROE
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- Series of incidents in February-May 1993 in P.E. and other classes, e.g.:
 - The same male student stuck a doorstop in his pants and acted in a sexually suggestive manner towards Davis;
 - He rubbed up against her in a suggestive manner;
 - Touched her breasts and genitals.
- Davis's grades declined and her father found a suicide note his daughter had written; Davis told her mother she "didn't know how much longer she could keep [the male student] off her."



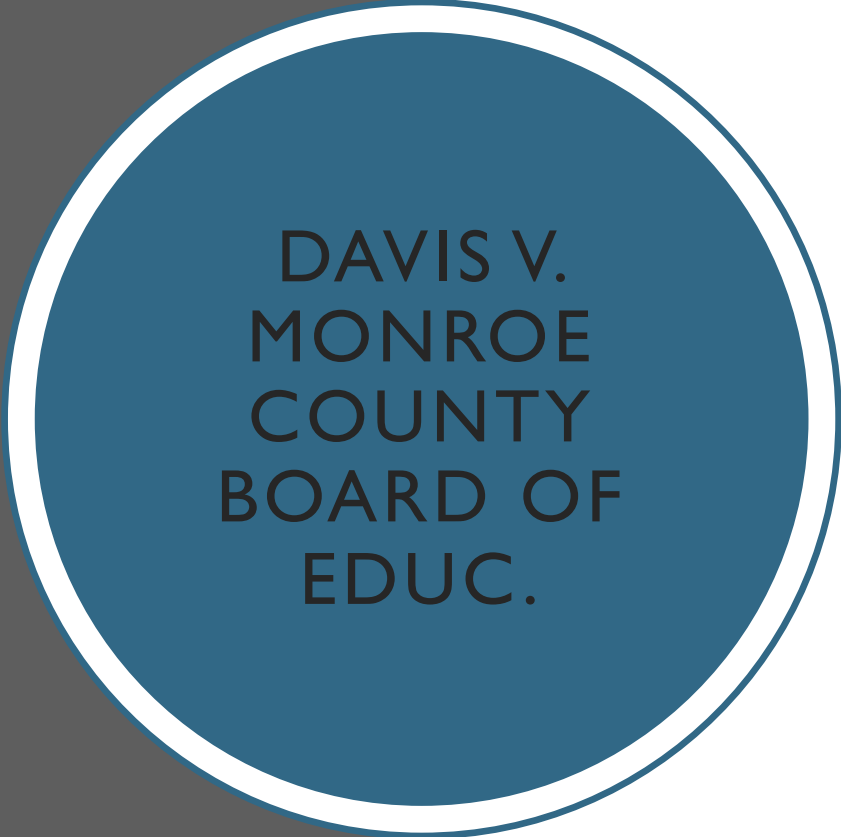
DAVIS V.
MONROE
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- Parents complained to three teachers and principal.
 - Davis repeatedly reported incidents to teachers; Davis's mother also contacted teachers multiple times; no disciplinary action was taken.
 - Davis's assigned seat was next to the male student throughout the harassing behavior; not allowed to change seats for over three months.
 - Others in class also faced harassment; group of students tried to complain to the principal, but were allegedly prevented from doing so and told, "If [the principal] wants you, he'll call you."



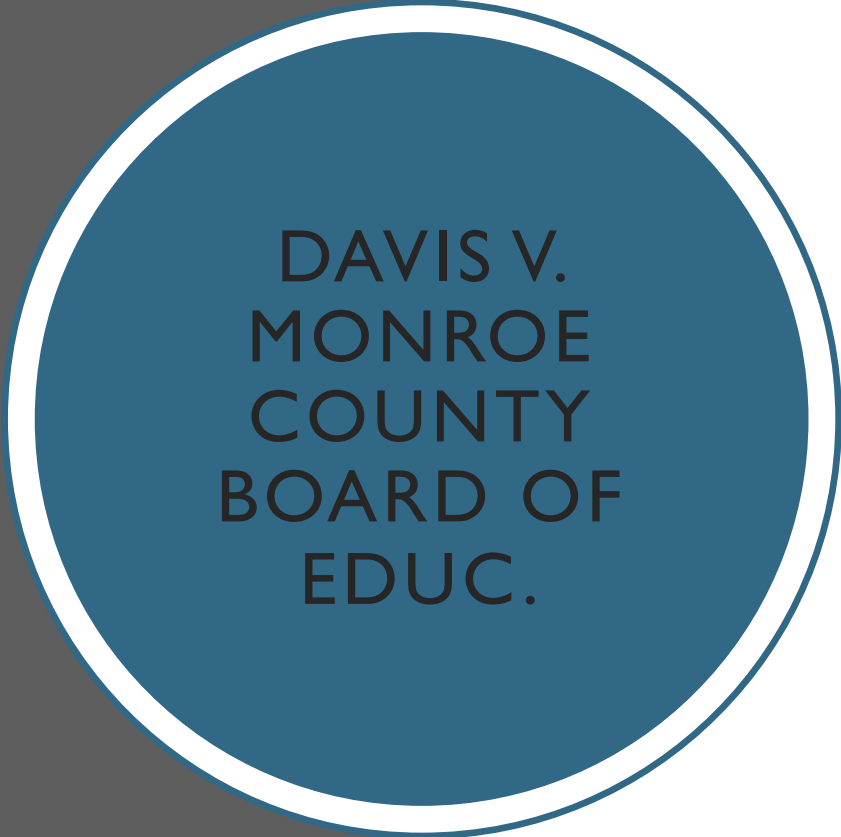
DAVIS V.
MONROE
COUNTY
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EDUC.

- In May 1993, principal told Davis's mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.
- Davis's parents finally reported the harassment to the local sheriff; male student charged with and plead guilty to sexual battery.
- The abuse finally stopped; male student ultimately moved away.



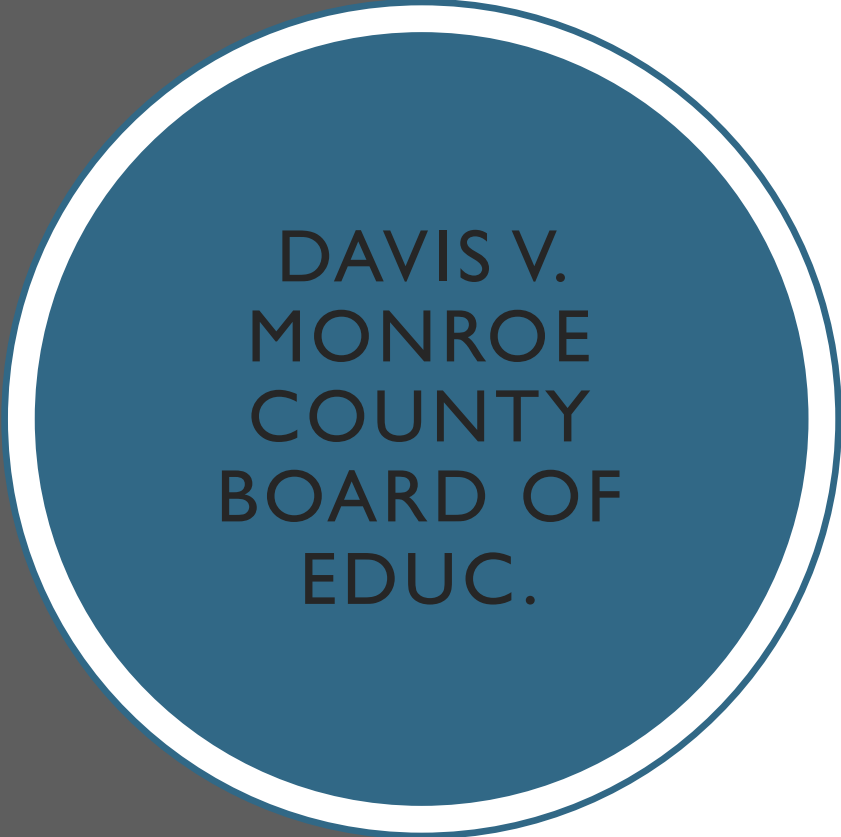
DAVIS V.
MONROE
COUNTY
BOARD OF
EDUC.

- The school took no action until the boy was charged with, and pled guilty to, sexual battery.
- Davis's mother filed a Title IX action, alleged that persistent harassment and deliberate indifference resulted in her daughter's inability to attend school and participate in activities.



DAVIS V.
MONROE
COUNTY
BOARD OF
EDUC.

- Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in the *Gebser* case:
 - The institution must have “actual notice” of the harassment; and
 - the institution must have responded to the harassment with “deliberate indifference.”



DAVIS V.
MONROE
COUNTY
BOARD OF
EDUC.

- Additionally, court held:
 - Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.
 - Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”



THE OFFICE FOR CIVIL RIGHTS

OFFICE FOR CIVIL RIGHTS



Complaints: Filed by an individual, a representative, or a group.



Compliance Reviews: OCR targets resources on class-wide compliance problems that appear particularly acute.



Technical Assistance: To help institutions, students, and parents understand their rights and responsibilities.

COMPLAINTS FILED WITH OCR

- When received by an office, the complaint is evaluated.
- OCR will open an investigation if:
 - OCR has jurisdiction over the institution.
 - The allegation alleges a violation of one of the laws enforced by OCR.
 - The complaint is timely (180 days).
 - The allegation contains sufficient detail to raise an inference of discrimination or retaliation.

COMPLAINTS FILED WITH OCR



Notification letters - to the reporting party and recipient informing them that OCR is opening an investigation.



Data request – written request for documents and narrative responses to questions.



Scheduling Interviews: telephone or in-person.



On-site visit.



RESOLUTION TYPES

- **Early Complaint Resolution (ECR)**
 - A form of alternative dispute resolution facilitated by OCR.
 - Reporting party and recipient voluntarily participate in the resolution of the complaint.
- **Investigation and Voluntary Resolution (“302 Letter”)**
 - At any point before the conclusion of an investigation, a recipient may express to OCR that it is interested in resolving the complaint through a voluntary resolution agreement.



RESOLUTION TYPES

- **Investigation and Findings (“303 Letter”)**
 - Compliance determination; agreement if non-compliance.
- **Insufficient Evidence Determination**
 - OCR may also determine that the evidence was insufficient to support finding a violation. In that case, OCR will send letters to both parties explaining the decision.
 - The complainant may appeal this decision.

OCR GUIDANCE DOCUMENTS

- Since OCR is the department that enforces Title IX and its regulations, knowledge of and compliance with its guidance on the Title IX regulations are of utmost importance
- OCR has released several guidance documents on sexual harassment over the years (1997, 2001, 2005, 2011, 2014 and 2017)
- Each of these documents has added to or subtracted from the requirements of previous guidance.



REMEMBER!

- OCR's guidance establishes a higher standard for responding to sexual harassment than that espoused by the courts.

2001 REVISED SEXUAL HARASSMENT GUIDANCE

- This document was the foundational sexual harassment document for several years.
- Several other supplementing policy documents were released from 2005-2017.
- The current administration revoked some of those documents but designated this document as the primary Title IX regulatory compliance document.

<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>



2001 GUIDANCE

- This guidance provides a detailed definition of sexual harassment:
 - “Sexual harassment is unwelcome conduct of a sexual nature.”
 - “Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”
 - “Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school’s educational programs

200 I GUIDANCE

Employee-student

- If employee, while carrying out responsibilities to students, engages in sexual harassment, *and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex*, the district is responsible for the conduct.
- Upon learning of the conduct, the recipient is responsible for ending the harassment, preventing its recurrence, and remedying its effects.

Student-student

- If student (or third party) harasses another student, and
 - is sufficiently serious to deny or limit student's ability to participate in or benefit from the program, and
 - School knows *or reasonably should have known*,
- Must take immediate effective action to eliminate the hostile environment and prevent its recurrence.



2001
GUIDANCE

- A school has notice if a “responsible employee” *knew or reasonably should have known* about the harassment.
- Responsible employee: any employee who has the authority to take action to redress the harassment, who has the duty to report misconduct to appropriate school officials, or who a student could reasonably believe has this authority and responsibility.

2001 GUIDANCE

- Types of notice
 - Student files grievance
 - Student complains to teacher or other responsible employee
 - Parent contacts school official
 - School employee witnesses conduct
- Indirect notice
 - Member of educational or local community
 - Media

OCR GUIDANCE - 2011 AND 2014

2011 Dear Colleague Letter

- Emphasized that sexual violence is a violation of Title IX
- Established response protocol for allegations of sexual harassment and sexual violence
- Required schools to use “preponderance of the evidence” evidentiary standard

2014 Q&A

- Further clarified the 2011 guidance, including with regard to:
 - Obligation to respond
 - “responsible employees”
 - interim measures
 - remedies

OCR GUIDANCE - 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT

- Released in September of 2017
- New current standard
- Revoked 2011 and 2014 guidance
- Allows schools to choose between “preponderance of the evidence” and “clear and convincing” standards
- Leaves 2001 guidance intact

DIFFERENCES BETWEEN CASE LAW AND OCR GUIDANCE (EMPLOYEE – STUDENT)

***Gebser* (employee – student)**

- Actual knowledge
- Fail to respond adequately
- Deliberate indifference

OCR (employee – student)

- If employee harasser commits acts while carrying out responsibilities over students, district has notice)
- Prompt and effective action to stop harassment and prevent recurrence

DIFFERENCES BETWEEN CASE LAW AND OCR GUIDANCE (STUDENT – STUDENT)

***Davis* (student – student)**

- Actual knowledge
- Deliberate indifference
- Effectively bars access to educational benefits

***OCR* (student – student)**

- School knew or reasonably should have known (broader definition of responsible employee)
- Must eliminate the harassment
- Interferes with or limits participation

QUESTIONS