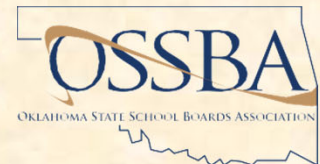


Title IX Regulations: Revisions

Brandon Carey
Staff Attorney
OSSBA



Gebser 3-Part Test

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

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

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

Gebser v. Lago Vista Indep. Sch. Dist. (1998)



New Title IX Regulations

- The new regulations were released as final rules on May 6, 2020
- Institutions were to have implemented them by August 14, 2020

New Regulations

- The new regulations alter core aspects of Title IX regulatory law, such as:
 - How OCR determines whether an institution has notice of sexual harassment;
 - The amount of due process required to be provided to the responding party, and
 - Steps to take during an investigation.

New Definition of Sexual Harassment – 34 C.F.R. 106.30(a)

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) Quid Pro quo

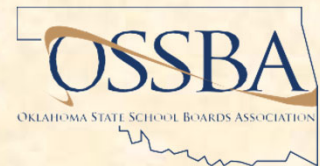
An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or

(2) Hostile Environment

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 recipient's education program or activity; or

Breaking Down “Hostile Environment”

The Elements



Severe

- With more severe conduct, it may not require as many incidents to demonstrate a hostile environment.
 - Non-consensual sexual contact or intercourse almost always sufficiently severe.
 - Was it conduct accompanied by threats of violence?
 - Was it a series of “lesser” incidents that were repetitive?
 - Did it continue despite requests to stop?

Pervasive

- “Harassment is pervasive when it ‘occurs either in concert or with regularity.’”
 - Pattern or practice
 - Widespread
 - Well-known among students and employees (Source – ATIXA: PreK-12 Title IX Course)
 - Occurring in public spaces

Objectively Offensive

- To determine whether conduct is objectively offensive, many factors may be considered, including:
 - Age and relationships of the claimant and respondent;
 - Number of persons involved
 - Frequency
 - Severity
 - Humiliation
 - Intimidation
 - Abuse
 - Etc.

Consider All Relevant Circumstances

- Degree to which conduct affected one or more students' education
- Type, frequency and duration of the conduct
- Relationship between alleged harasser and victim(s)
- Number of individuals involved
- Age and sex of the alleged harasser and victim(s)
- Size of the school, location of the incidents, and context in which they occurred
- Other similar incidents not involving the same individuals
- Incidents of gender-based, but nonsexual harassment

Denial of Equal Access

Does not require complete exclusion from an education, but rather denial of “equal’ access”. Signs may include:

- skipping class to avoid a harasser,
- a decline in a student’s grade point average, or
- having difficulty concentrating in class.

Denial of Equal Access

- However, *no concrete injury is required to conclude that serious harassment would deprive a reasonable person* in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment.

(3) Sexual Assault, dating violence, domestic violence, or stalking

Breaking Down Definition 3

Sexual Assault

- Sexual assault: An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Crime Reporting System.

Domestic violence

- A felony or misdemeanor crime of violence committed by:
 - a current or former spouse or intimate partner of the victim,
 - a person with whom the victim shares a child,
 - a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
 - a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or
 - any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be based upon the reporting party's statement with consideration of the following factors:
 - The length of the relationship,
 - The type of relationship,
 - The frequency of interaction between the persons involved in the relationship.

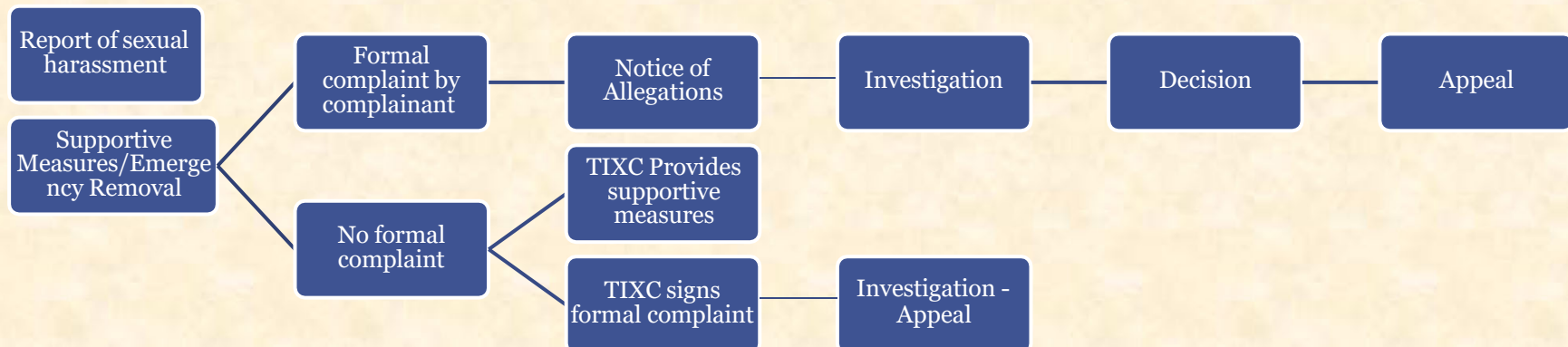
Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - (1) Fear for the person's safety or the safety of others, or
 - (2) Suffer substantial emotional distress.

Institutional Notice, Supportive Measures, & Complaints

Flowchart of Overall Process



Institutional Notice: Old Standard

Case Law

- Actual notice: Director, Assistant Director, or higher-level administrator

OCR

- Constructive: employee harassing student
- Knew or reasonably should have known student or non-employee harassing another student

Institutional Notice: New Standard

- Adoption of Supreme Court standard for notice
 - Case law standard of “actual notice” will be the standard for OCR complaints as well (proposed regulations generally state “actual knowledge”)
 - No more constructive notice or respondent superior

34 C.F.R. 106.30(a)



Institutional Notice: New Standard

- Notice of sexual harassment or allegations of such to the institution's
 - Title IX Coordinator, or
 - any official of the recipient who has authority to institute corrective measures on behalf of the recipient (e.g., Director, Assistant Director).

Institutional Notice: New Standard

- However, actual knowledge/notice for a K-12 school district means knowledge by any employee of the school district that has notice of prohibited sex-based conduct in the institution's "education program or activities."

Actual Notice - Obligations

- Title IX coordinator must contact alleged victim and:
 - explain how to file a formal Title IX complaint, and
 - offer supportive measures, regardless of whether a complaint is filed

34 C.F.R. 106.44(a).

Supportive Measures

- Formerly called “interim measures
- Must be offered upon actual notice
- May be offered during or or in lieu of a formal complaint.
- To restore or preserve access to program without unreasonably burdening other party.

The Complaint – 34 C.F.R. 106.30

- Institutions will only be responsible for investigating a formal complaint, which is a written document
 - (1) signed by either the complainant (definition limited to the alleged victim), the complainant's parents, or the Title IX coordinator,
 - (2) alleging sexual harassment against a respondent, and
 - (3) requesting an investigation.

The Complaint - 34 C.F.R. 106.30

- A formal complaint may be filed with the Title IX Coordinator:
 - (1) in person,
 - (2) by mail,
 - (3) by electronic mail, or
 - (4) any additional method designated by the recipient.

The Complaint – Coord. Initiated

- Title IX coordinator may file a formal complaint when she/he determines that “a non-deliberately indifferent response to the allegations requires an investigation” (Final Rule, pg. 386)
 - Example: A serial offender.

The Complaint: Coor. Initiated

- “if a grievance process is initiated against the wishes of the complainant, that decision should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment” (Final Rule, pg. 387).

Notice but No Complaint

- May investigate the allegations pursuant to other provisions of institution's code of conduct (if applicable), such as an anti-bullying policy, and/or provide supportive measures.

Law Enforcement/DHS Reports

- If the allegations could constitute a crime or child abuse, immediately contact law enforcement and/or DHS.

Title IX Applicability & Jurisdiction



Title IX Applicability & Jurisdiction

- Must respond when have actual knowledge of sexual harassment in
 - (1) an education program or activity of the recipient
 - (2) against a person in the United States,

34 C.F.R. 106.44

What is the “Education Program or Activity”?

- Includes locations, events, or circumstances over which the recipient exercised substantial control over both:
 - the respondent, and
 - the context in which the harassment occurs.

34 C.F.R. 106.44

But what does that mean?

- Basically, to investigate under Title IX, must have jurisdiction over the subject matter, the people, and the place, event or activity.

Subject Matter

- Do the facts as alleged violate one of the definitions of sexual harassment provided in 106.30(a)?
 - If the allegations, even if proven true, would not violate one of those definitions, then the complaint must be dismissed –at least from a sexual harassment perspective.

People (Complainant)

- Must be participating, or attempting to participate, in the institution's programs or activities.
 - Could be a student, faculty, or staff, or at least attempting to be (may also need to investigate if complainant is a volunteer or contractor working on school grounds)?
 - If no, no jurisdiction.

People (Respondent)

- Does the institution have substantial control over the respondent (student, employee, volunteer on campus, contractor working on campus, etc.)?
 - If no, no jurisdiction (although may need to provide supportive measures).

Place or Event

- Does the institution have substantial control over the *context* in which the sexual harassment occurred? For example:
 - On campus or during an online class
 - Off campus location owned or controlled by the institution
 - Off campus but a school-sponsored event
- If yes, jurisdiction. If no, not a Title IX case

Place or Event

- If the harassment occurred on campus or at a school-owned/rented facility, then institution has jurisdiction.

Place or Event (Off Campus)

- If off campus, jurisdiction if:
 - (1) occurs as part of the recipient's "operations"
 - Ex: Classes, online classes, work environments, extracurricular activities, computer and internet networks owned or controlled by the institution, etc.

Place or Event (Off Campus)

- (2) institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.
 - Was the institution funding, promoting, or sponsoring the event at which the behavior occurred?

Place or Event (Off Campus)

- (3) a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution.

Downstream Effects?

- What about the “downstream effects” of harassment that occurred off-campus?
 - Although institutions cannot address behavior over which they did not have substantial control (e.g., at someone’s home on a weekend), they may be responsible for addressing any carryover of the behavior that occurs in areas in which it does have jurisdiction.

If not Title IX

- *Even if not a Title IX issue, you may still need to investigate under other aspects of your student code of conduct.*

The Grievance Procedures



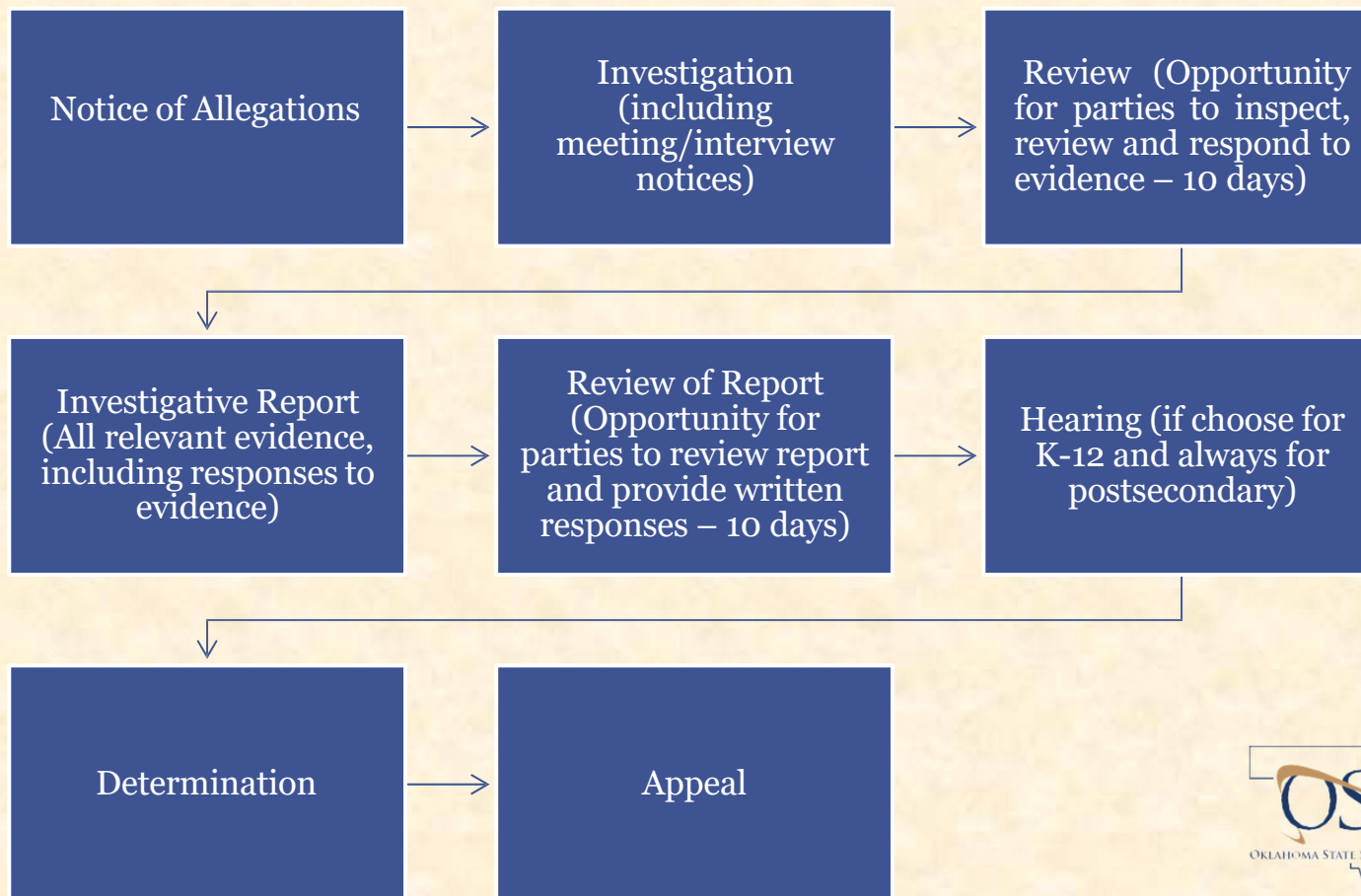
Title IX Grievance Procedures

- If the institution answers the jurisdictional questions in the affirmative, the complaint must be investigated in accordance with the grievance process outlined at 34 C.F.R. 106.45.

Safe Harbor

- If the institution follows OCR's procedures, then it will not be found "deliberately indifferent"

Flowchart



The Investigation - Initial Steps

Notice to parties, timeframes,
standard of proof, supportive
measures, emergency removal,
and informal resolution



Grievance Procedures – In General

- Treat the complainant and respondent equitably, including providing supportive measures to both parties, if necessary;
- Include an objective evaluation of all evidence “-both inculpatory and exculpatory evidence-,” prior to making a determination;
- The Title IX Coordinator, investigator or person making the decision must be free of bias against the complainant or respondent, and appropriately trained on the definition of sexual harassment and how to conduct an investigation;
- Have “reasonably prompt timeframes” for the completion of the investigation 106.45(b)(1)(ii).

34 C.F.R. 106.45(b)(1).



Notice to Parties: Old Standard

- Initial verbal notice followed by written notice of the allegation and investigation
- Written notice often provided after an initial discussion

Notice to Parties: New Standard

- Written notice to parties prior to any discussions or interviews
- Provide sufficient time to prepare response

Notice to Parties: New Standard

- Written notice must include:
 - citations to relevant grievance procedures;
 - allegations with sufficient details (identity of parties, conduct alleged to constitute sexual harassment, date, location, implicated policies);
 - a statement indicating the responding party is “presumed not responsible” until a determination is made;
 - notice of the right to an advisor of their choice, who may be an attorney;
 - notice that parties may request to inspect and review relevant evidence; and
 - a reminder of the institution’s policy not to make false statements or intentionally submit false information

34 C.F.R. 106.45 (b)(1)(x).



Notice to Parties: New Standard

- Must also provide notice of
 - any reasonable delay “for good cause”
 - any additional allegations to be investigated that were not in the original complaint

34 C.F.R. 106.45(b)(1)(v).

Timeframes – Old Standard

- Previous OCR guidance provided a 60-day timeframe for completing a sexual harassment investigation.

Timeframes – New Standard

- No specific timeframe
 - must include “reasonably prompt time frames for conclusion of the grievance process.”
 - All aspects of the investigation must also be resolved in a prompt manner.

34 C.F.R. 106.45(b)(1)(v).

Standard of Proof

- Institutions may use either “preponderance of the evidence” or “clear and convincing evidence”

34 C.F.R. 106.45(b)(1)(vii).

Standard of Proof

- *However*, can only use preponderance of the evidence if that standard is used for other violations in the code of conduct with the same maximum penalty, *and*.
- Must use same standard for employees and students

Emergency Removal

- Before emergency removal of a student, institution must:
 - Perform individualized risk analysis;
 - Determine that an immediate threat to the health or safety of students or employees justifies removal; and
 - Provide respondent with notice and an opportunity to challenge the decision immediately following removal.

34 C.F.R. 106.44(c).

Informal Resolution

- Institution and parties will determine if appropriate.
- Allowed at any time prior to a final determination.
- Must obtain voluntary, written consent.
- Cannot be used if allegation of employee harassing student.

34 C.F.R. 106.45(b)(9).



Informal Resolution

- Must provide detailed notice to parties of:
 - Allegations
 - Requirements of the process
 - Circumstances which would preclude formal resolution
 - Consequences of participation

During the Investigation

*Investigating Allegations of
Sexual Harassment*



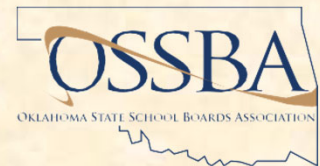
General Principals During Investigation

- the burden of gathering evidence is on the institution;
- equal opportunity to present witnesses and evidence;
- no restrictions on discussing allegations or gathering and presenting evidence;
- equal opportunities to have others present during the grievance process.

34 C.F.R. 106.45(b)(5).

Initial Steps

Strategy, Law Enforcement & Child Protective Services Reports



Strategize Investigation

- who should be interviewed,
- what evidence should be gathered,
- a timeline for the completion of all steps.
- If not already completed, whether the allegations require a report to child protective services or law enforcement.

Delays or Extensions

- Temporary delays in the investigation will only be allowed for “good cause”
- Provide notice to parties explaining reasons for action.

Law Enforcement Report

- Must be
 - reasonably short – preferably no longer than two (2) weeks – and
 - only for the time it takes law enforcement to quickly complete necessary interviewing and evidence gathering.
- Also, when such a delay occurs, the institution must provide written notice to the parties of the delay and the reasons for it.

34 C.F.R. 106.45(b)(1)(v).

The Investigation

Interviews & Evidence Gathering (Including the “Opportunity to Inspect”)

Interviews, Meetings and Hearings

- The institution must provide written notice to the interviewee of:
 - the date,
 - time,
 - location,
 - participants, and
 - purpose of all hearings, investigative interviews, or other meetings.”

34 C.F.R. 106.45(b)(5)(v).



Interviews, Meetings and Hearings

- Written notice must be provided far enough in advance to give the parties sufficient time to prepare to participate.

Advisors

- Cannot restrict either party's ability to have an advisor present at all proceedings
- The advisor can be anyone chosen by the party
- No requirement to pay for a party's advisor.

34 C.F.R. 106.45(b)(5)(iv).

Conduct During Investigation

- Conduct in a manner designed to obtain and document all information necessary to determine whether the allegations are true.

Evidence Gathering

- Be deliberate about gathering any possible evidence that could help in making a determination.

Evidence Gathering - Searches

- Searching personal electronics devices or other belongings:
 - only after establishing and documenting reasonable suspicion for the search, and
 - should comply with any state law or local policy limitations on such searches.

Opportunity to Inspect

- Prior to the completion of the report, must provide both parties:
 - an equal opportunity to inspect all evidence directly related to the allegations, even if the institution does not intend to rely on the evidence, and
 - an opportunity to “meaningfully respond” to the evidence after inspection.

34 C.F.R. 106.45(b)(5)(vi).

Opportunity to Inspect

- Must be provided “in electronic format or hard copy” *prior to* the completion of the investigatory report
- parties must have at least ten (10) days to submit written responses to the evidence, which must be considered prior to completion of the final report

Opportunity to Inspect

Recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

Investigative Report

The regulations also require the creation of a written investigatory report that “fairly summarizes relevant evidence.”

34 C.F.R. 106.45(b)(5)(vii).

Investigative Report

- The report must be submitted to the parties and their advisors at least ten (10) days prior to any hearing or final decision, and they must be given at least ten (10) days to review and provide written responses.
- The investigator must consider the responses and determine whether to add them to the report.

Live Hearing

- K-12 (optional) – postsecondary (mandatory)
 - Hearing officer cannot be Title IX coordinator or investigator.

Live Hearing

The decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

34 C.F.R. 106.45(b)(6)(i).

Live Hearing

- At either party's request, parties can be in separate rooms with technology that has audio and visual feeds.
- At institution's discretion, any or all parties or witnesses may appear virtually.
- Must create an audio or audiovisual recording, or transcript, of hearing and make available to parties.

Prior to Final Report

With or without a live hearing, the decision-maker must ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.

34 C.F.R. 106.45(b)(6)(ii).

K-12 – Prior to Final Report

If no hearing is held, the decision-maker must

- afford each party the opportunity to submit written questions,
- provide each party with the answers, and
- allow for additional, limited follow-up questions from each party.

34 C.F.R. 106.45(b)(6)(ii).

Sexual Behavior or Predisposition

- With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, except in limited circumstances:
 - To prove that someone other than respondent committed the alleged conduct, or
 - When specific incidents of reporting party's sexual behavior with responding party are offered to prove consent.

34 C.F.R. 106.45(b)(6)(ii).

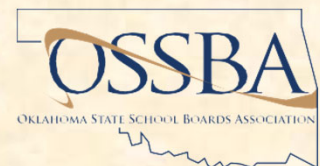


Specifics of Investigative Report/Determination

Written Report/Determination – 34 C.F.R. 106.45(b)(7)

- School must issue written determination that includes the following:
 - A list of the allegations;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination (notices, interviews, methods of evidence gathering, hearings, etc.);
 - Findings of fact supporting the determination;
 - Conclusions;
 - The rationale for the determination regarding each allegation, which should include the disciplinary sanctions imposed and remedies to be provided, if any;
 - Rights of Appeal.

Appeals



Appeal - 34 C.F.R. 106.45(b)(8).

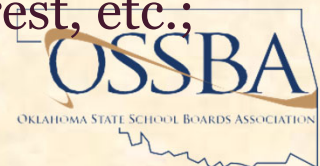
- Opportunity for appeal must be offered to either party on, at the least, the following bases:
 - A procedural irregularity
 - New evidence that was not reasonably available at the time the determination was made and that could affect the outcome;
 - The Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias against one of the parties that affected the outcome

School's Obligations for Title IX Training, Education, and Prevention

Training

- Specifically, Title IX Coordinators, investigators and decision-makers, and any individual that facilitates an informal resolution process, must receive training on the following:
 - The definition of sexual harassment;
 - All activities included in the institution's programs or activities;
 - How to properly conduct an investigation pursuant to the grievance process listed in the regulation, including appeals and informal resolution processes;
 - Investigating allegations impartially, conflicts of interest, etc.;

34 C.F.R. 106.45(b)(1)(iii).



Training

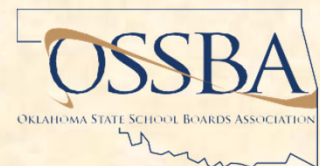
- Technology that may be used to conduct a live hearing (in the institution conducts live hearings);
- Issues of relevance with regard to questions, including being able to determine when questions about the reporting parties' sexual predisposition or prior sexual behavior are irrelevant; and
- How to create a report that “fairly summarizes the relevant evidence.”

34 C.F.R. 106.45(b)(10)(i)(D).

Training Materials – Publicly Available

- The regulation also requires that all materials used to implement the trainings above must be made available on the institution's website or, if the institution does not maintain a website, upon request “for inspection by members of the public.”

Retaliation



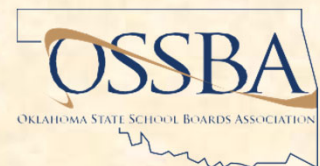
Retaliation – 34 C.F.R. 106.71

- The new regulation prohibits retaliation for filing complaints or otherwise participating, or refusing to participate, in the investigation of an allegation of sexual harassment

Retaliation

- The regulation also indicates that it is not considered retaliation for an institution to provide disciplinary consequences when an individual makes “a materially false statement in bad faith in the course of a grievance proceeding.”
 - *Must have evidence that false and made in bad faith (in other words, knew it was false).*

Record Keeping



Record Keeping

- The following must be created and maintained for three (3) years:
 - Investigation documents including written finding, disciplinary sanctions and remedies implemented
 - Appeal and related results
 - Informal resolution implemented
 - Supportive measures implemented

34 C.F.R. 106.45(b)(10).