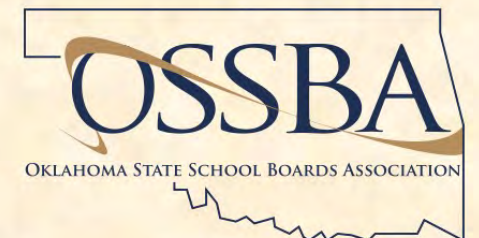


# Title IX: Sexual Harassment

Training Presented by Brandon Carey, OSSBA Staff Attorney

September 15, 2022

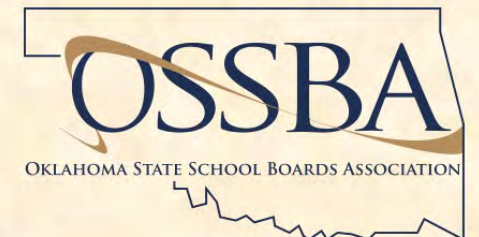


# A Quick History



# Franklin v. Gwinnet County Public Schools (1992)

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



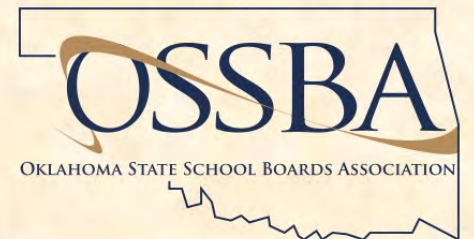
# Gebser V. Lago Vista Independent School (1998)

- Case involved teacher-student sexual harassment
- Importance
  - Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against institutions when an employee/student consensual relationship is basis of claim.



# Gebser V. Lago Vista Independent School (1998)

- Court said you cannot recover monetary damages against the school unless the behavior has been reported to someone with power to alter the situation (“actual notice”) and “deliberate indifference” has been demonstrated by the school.



# Gebser, continued

Three-part standard:

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.”





# Davis V. Monroe County Board Of Education (1999)

- Prolonged pattern of student/student sexual harassment of a fifth-grade girl by a classmate.
- Importance
  - Created a standard for harassment
  - Defined “deliberate indifference”



## Davis, continued

- 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, continued

- Additionally, the 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.



## Davis, continued

- 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.”



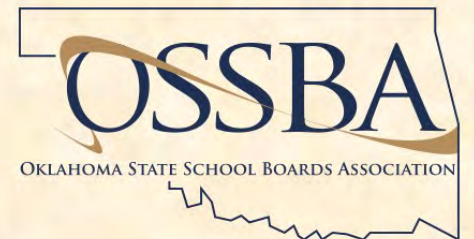
## And Then OCR Said, “Our Turn”

- 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, 2017 and 2020)



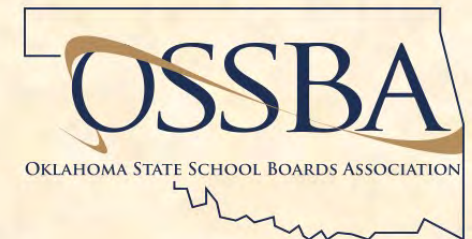
# New Title IX Regulations

- The new regulations were released as final rules on May 6, 2020 (34 C.F.R. Part 106)
- Districts were to have implemented them by August 14, 2020



# New Title IX 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 required amount of due process to be provided to the responding party, and
  - Steps to take during an investigation.





# Coordinator, Policies and Procedures

- Section 106.8 requires schools to:
  - Designate at least one employee to coordinate compliance with Title IX
  - Adopt a policy and disseminate to applicants, students, parents/legal guardians, employees, etc.
  - Adopt a grievance procedure in compliance with regulations





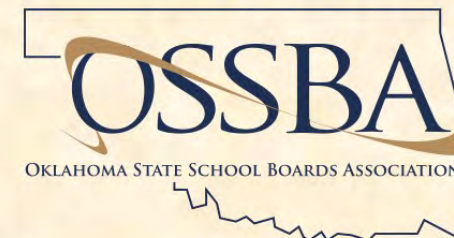
# Definition of Sexual Harassment

Sex-based conduct that meets the following definitions:

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

# Definition of Sexual Harassment

*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



# Breaking Down “Hostile Environment”

## The Elements



# Severe

- “The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”
  - Non-consensual sexual contact or intercourse is 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

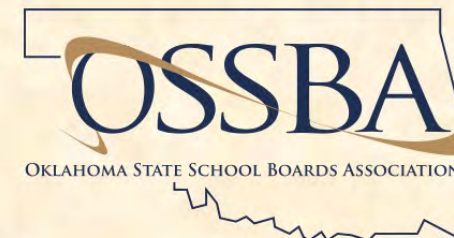
- “Harassment is pervasive when it ‘occurs either in concert or with regularity.’”
  - Pattern or practice
  - Widespread
  - Well-known among students and employees (Source – ATIXA: PreK-12 Title IX Course)
  - Occurring in public spaces





# Objectively Offensive

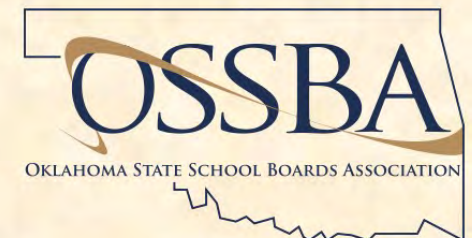
- To determine whether conduct is objectively offensive, many factors may be considered, including:
  - Age and relationships of the claimant and respondent
  - Number of persons involved
  - Frequency
  - Severity
  - Humiliation
  - Intimidation
  - Abuse
  - Etc.





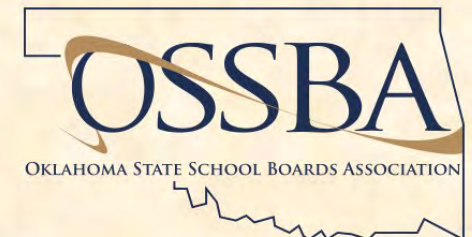
# Consider All Relevant Circumstances

- 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
  - 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.*



# Definition of Sexual Harassment

3. Sexual Assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)



# 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
  - 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.
  2. Suffer substantial emotional distress.

## 1. Notice/Report to Title IX Coordinator



When is a district required to respond to violations of the above-referenced standards?

# Institutional Notice

- Actual notice (proposed regulations generally state “actual knowledge”)
  - K-12 actual knowledge = knowledge by any employee of the school district
  - Postsecondary = *Gebser* definition





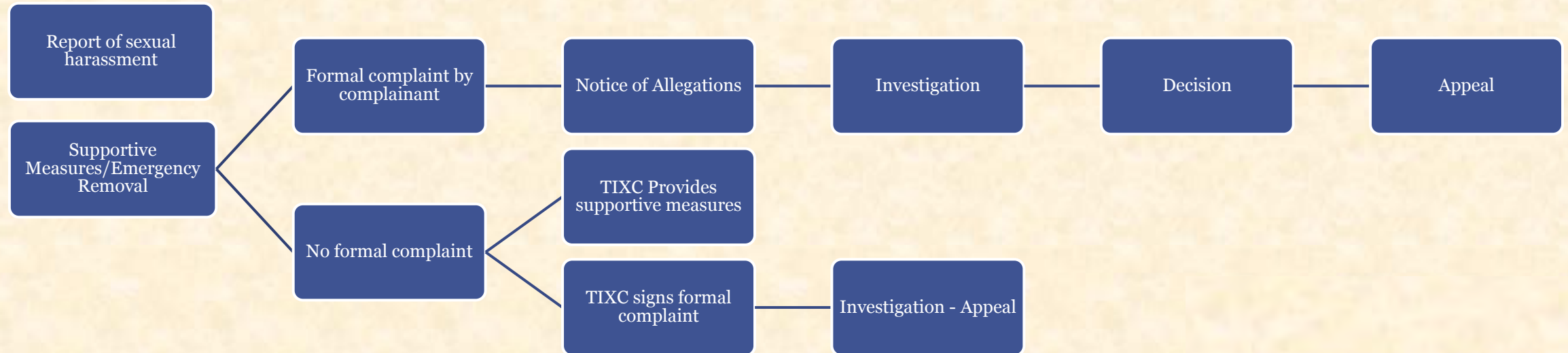
## The Response



What is a district required to do when it has “notice”?

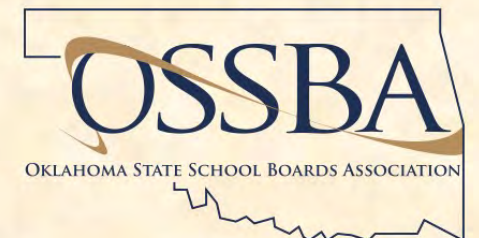


# Flowchart of Overall Process



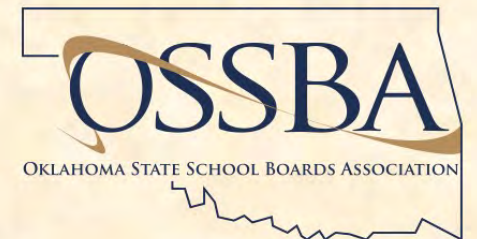
## 2. Initial Discussion/Supportive Measures

- Title IX coordinators must contact the alleged victim and:
  - Explain how to file a formal Title IX complaint.
  - Offer supportive measures, regardless of whether a complaint is filed.



# Supportive Measures

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



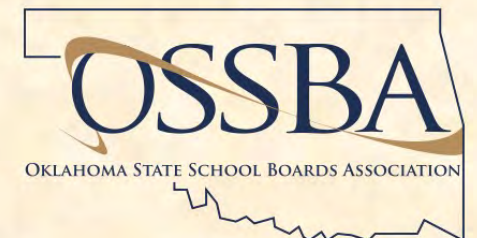
## 3. Law Enforcement/DHS Referral

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



## 4. Formal Complaint

- 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.





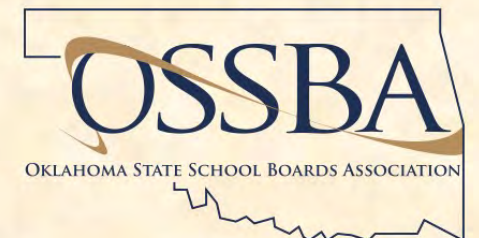
# The Complaint

- A formal complaint may be filed with the Title IX Coordinator either:
  1. In person
  2. By mail
  3. By electronic mail
  4. Any additional method designated by the recipient



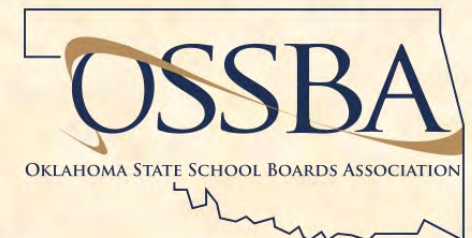
# No Complaint

1. Provide supportive measures if alleged conduct covered under Title IX
2. Title IX Coordinator initiates Title IX complaint (see next slide)
3. If alleged conduct would not be covered under Title IX, address under student code of conduct.



# The Complaint – Coordinator Initiated

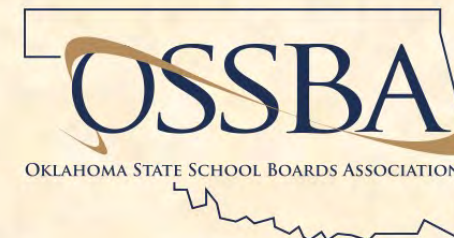
- Title IX coordinator may file a formal complaint when she/he determines that “a non-deliberately indifferent response to the allegations requires an investigation” (Final Rule, pg. 386).
  - Example: A serial offender.



## The Complaint: Coordinator 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).



# DANGER!

- This is a dangerous phase of the process. If you believe the alleged conduct would be a Title IX violation, and a complaint is not filed, you may need to file on behalf of the alleged victim.





## 5. Jurisdictional Determination

- Must respond when having 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”?

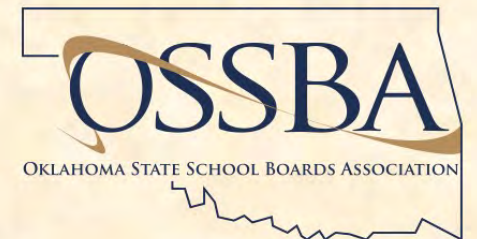
- Basically, to investigate under Title IX, you must have jurisdiction over the subject matter, the people and the place, event or activity.

34 C.F.R. 106.44



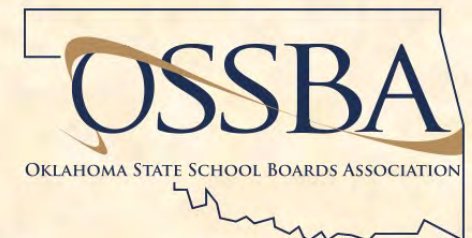
# Subject Matter

- 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.



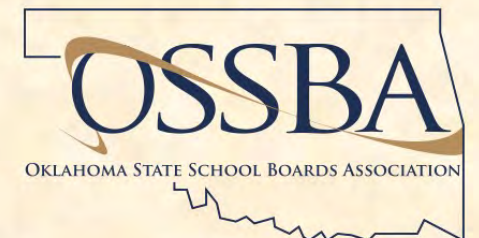
# People (Complainant)

- Must be participating, or attempting to participate, in the district'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 district 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).





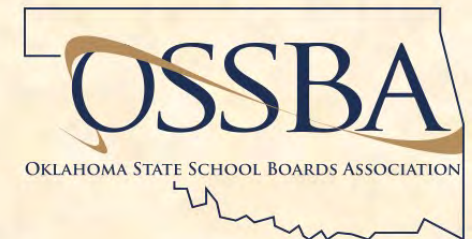
## Place or Event

- 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 locations that are owned or controlled by the school district
  - Off campus but a school sponsored event
- If yes, jurisdiction. If no, not a Title IX case



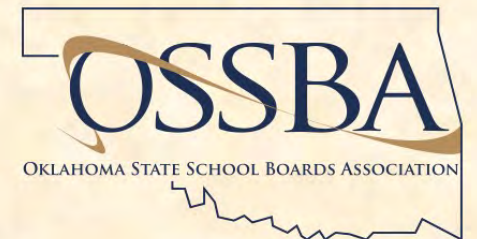
# Downstream Effects?

- What about the “downstream effects” of harassment that occurred off-campus?
  - Although districts 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.



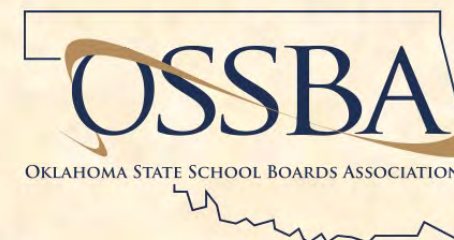
# You're Now in a New Zone

## The Grievance Procedures



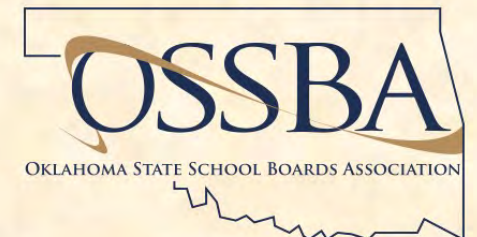
# Title IX Grievance Procedures

- If the district answers the jurisdictional questions in the affirmative, the complaint must be investigated in accordance with the grievance process outlined in 34 U.S.C 106.45.
- If the institution follows OCR's procedures, then it will not be found "deliberately indifferent."



# 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)).



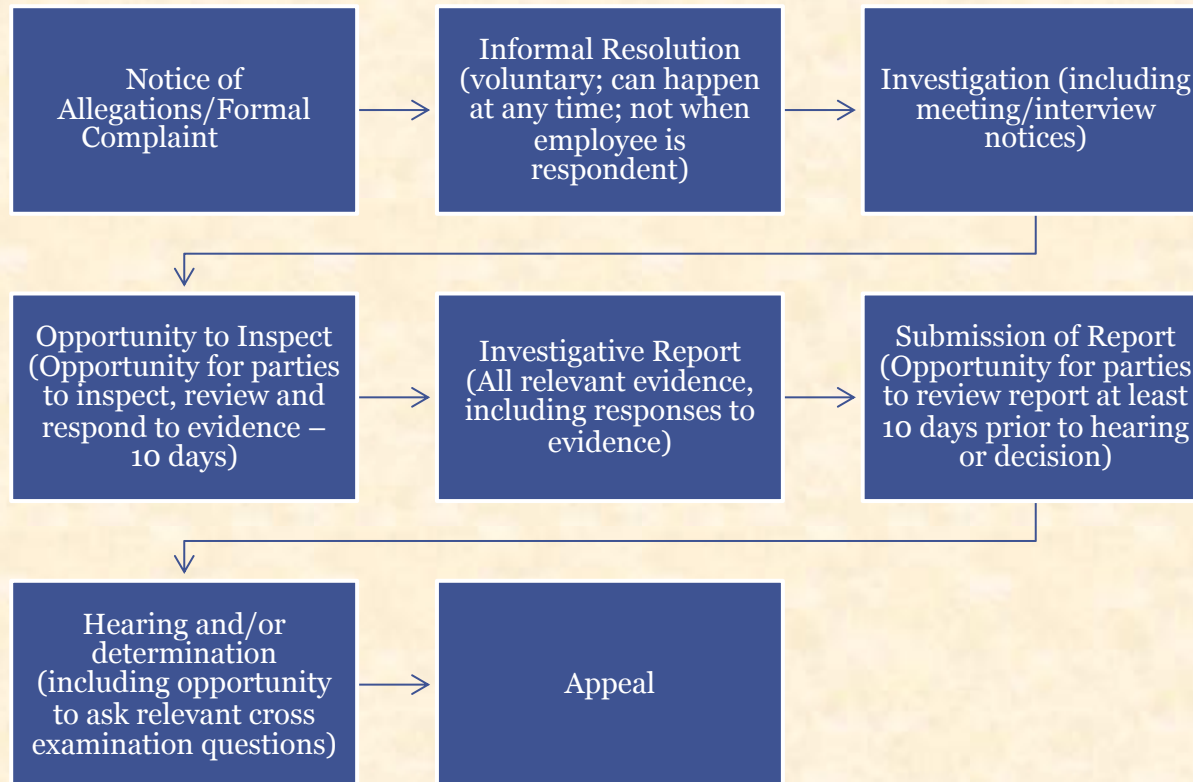


# Standard of Proof

- 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



# Flowchart



## 6. Notice to Parties/Assign Investigator

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



# Notice to Parties

- 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



# Notice to Parties

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





# Assign Investigator

- Once an investigation begins, ensure an investigator is assigned to investigate the allegations.



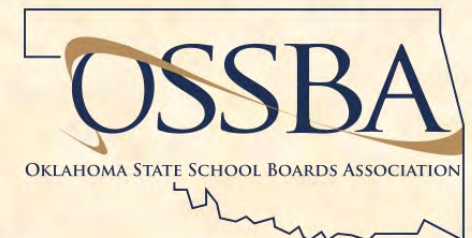
# Delays or Extensions

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



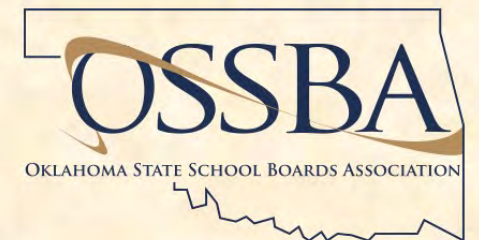
# Law Enforcement Report

- Must be
  - Reasonably short – preferably no longer than two weeks.
  - 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.



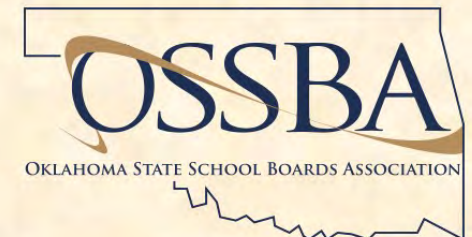
## 7. Supportive Measures

- Now that you have more information, determine whether initial measures were adequate.
- Offer to both parties.



## 8. Emergency Removal

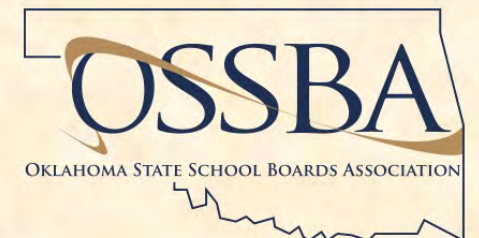
- Before emergency removal of a student, district must:
  - Perform individualized risk analysis;
  - Determine that an immediate threat to the health or safety of students or employees justifies removal; and
  - Provide respondent with notice and an opportunity to challenge the decision immediately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





## 9. Informal Resolution

- School 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 an employee harassing a student



# Informal Resolution, continued

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



# 10. Investigation

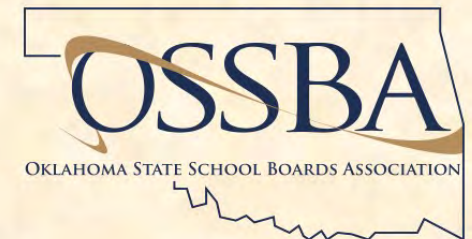
In general:

- 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



## 10 (a). Notice of Interviews

- The institution must provide written notice to the interviewee of:
  - Date
  - Time
  - Location
  - Participants
  - Purpose of all hearings, investigative interviews or other meetings.



# Notice of Interviews

- 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



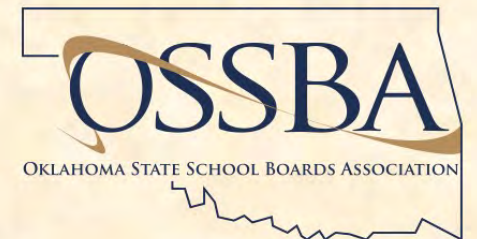
## 10 (b). Interviews

- Record: Take notes, record the interview, or use both methods
- Develop a usable transcript of the interview
- Attach as an exhibit



## 10 (c). Evidence Gathering

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



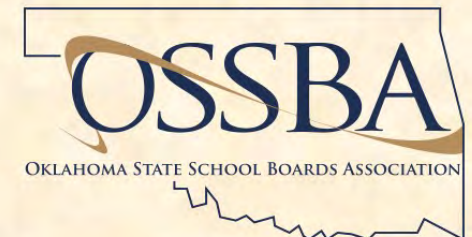
# Evidence Gathering - Searches

- 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.



# 11. 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.





# Opportunity to Inspect, continued

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



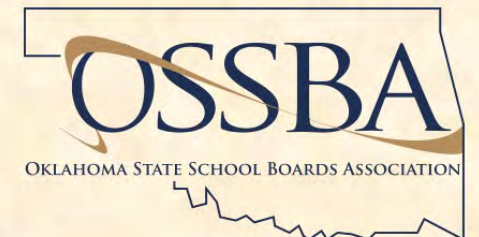
## 12. Investigative Report

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



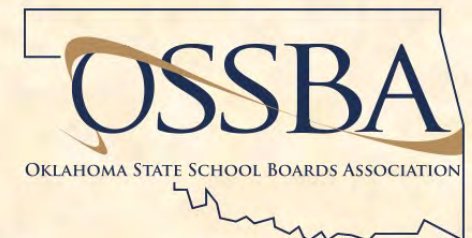
# Investigative Report, continued

- Party information
- Jurisdiction
- 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.)
- Analysis of allegations
- Attach exhibits



## 13. Submit Investigative Report to Parties & Decision-Maker

- The report must be submitted to the parties and their advisors at least 10 days prior to a hearing or determination.
- The parties may provide responses to the report, and the decision-maker should consider the responses prior to making a decision.



# 14. Live Hearing and/or Follow-up Questions

- 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.



# Follow-up Questions

- 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.



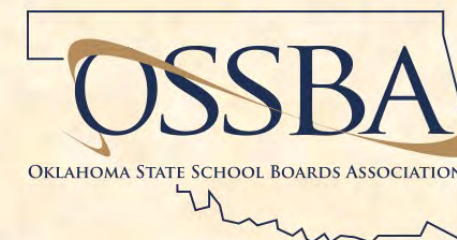
# Certain Questions Are Not Appropriate

- 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 the respondent committed the alleged conduct; or
  - When specific incidents of reporting party's sexual behavior with responding party are offered to prove consent.



# 15. Written Determination

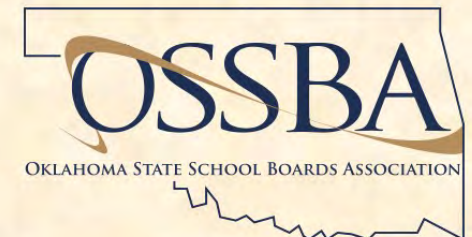
- School must issue written determination that includes the following:
  - A list of the allegations
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination (notices, interviews, methods of evidence gathering, hearings, etc.)
  - Findings of 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



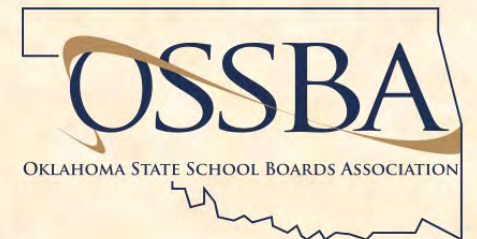


# 16. Appeal

- 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; or
  - 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



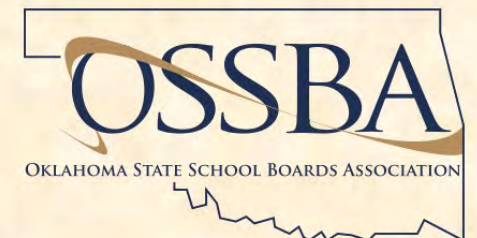
# Training

- 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.;



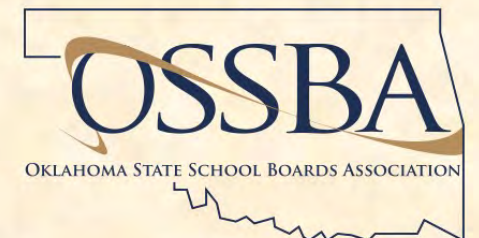
# Training

- 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”



# 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.”



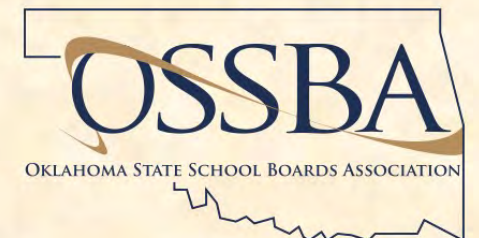


# Retaliation



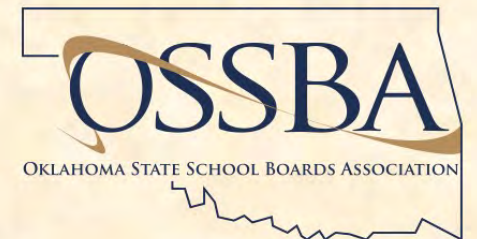
# Retaliation

- 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 it is false and made in bad faith (in other words, knew it was false).*

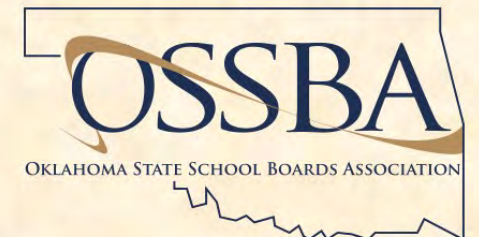


# Record Keeping



# Record Keeping

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





# Questions?

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