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Agenda - Investigators

- Investigator Responsibilities
- Serving Impartially
- Investigation Requirements & Best Practices
- Sharing Evidence and the Investigative Report
- Understanding “Relevant Evidence”
- Recordkeeping

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Agenda - Coordinators

- Coordinator Responsibilities, Including Delegation
- Key Terms

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Title IX Investigator Responsibilities

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Investigator Responsibilities

1
Identify and interview parties and witnesses

2
Gather and assess evidence

3
Share evidence with parties and provide for written response

4
Write and share investigative report

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Title IX Coordinator Responsibilities

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Title IX Coordinator Responsibilities

- Must be called Title IX Coordinator and “authorized”
- Must be identified (with name or title, address, phone, and email) in policy and on website

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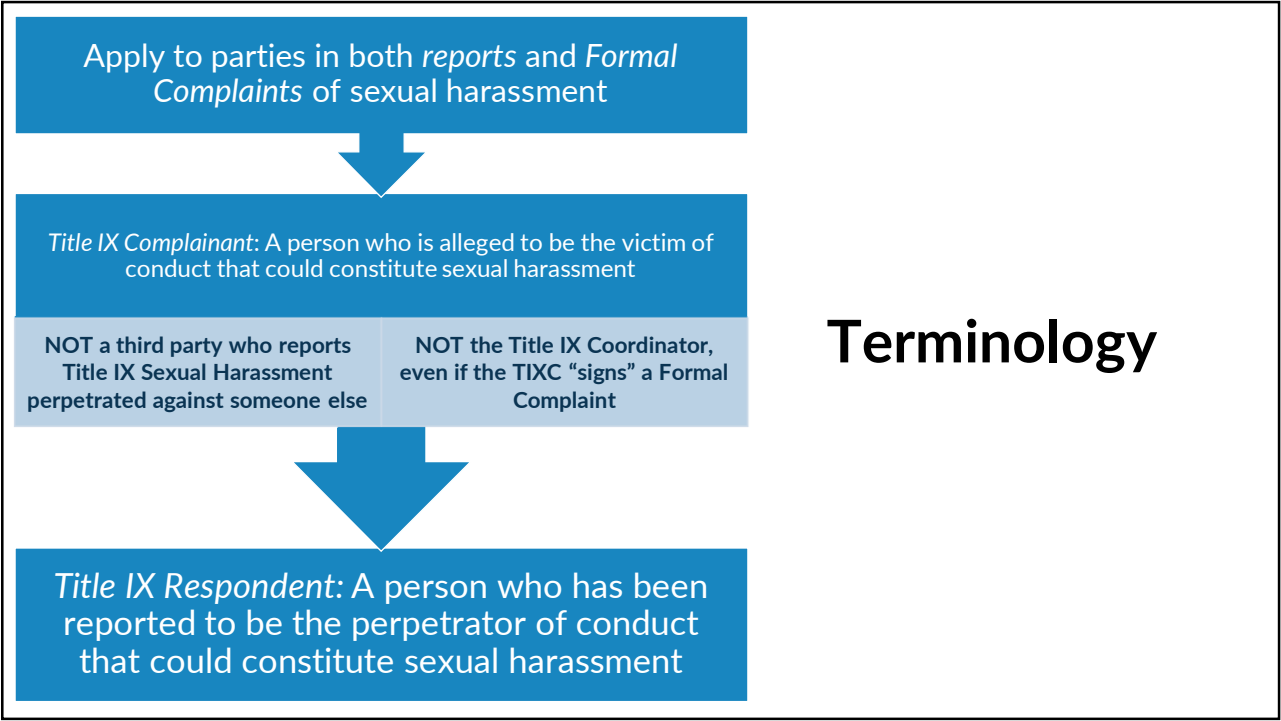
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Title IX Coordinator (or designee) must promptly, **even if no Formal Complaint is filed:**

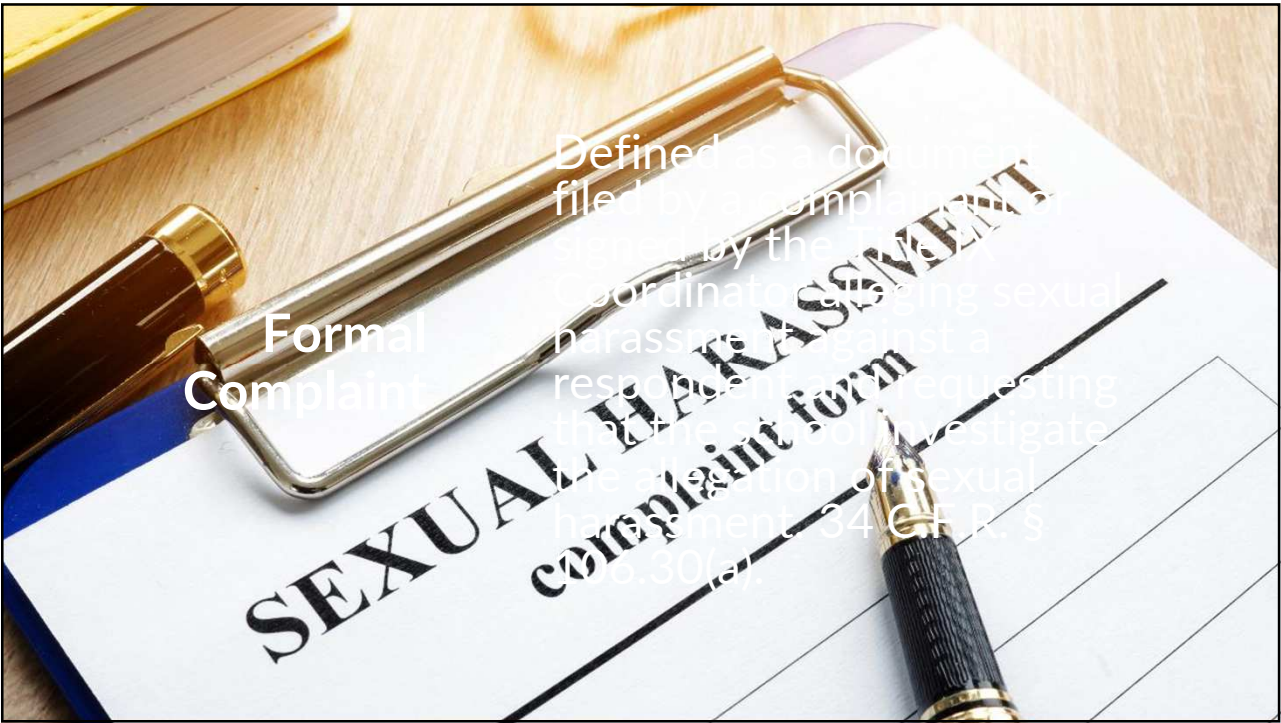
- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

**Initial
Response**

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9



10



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Delegation

- Can delegate responsibilities
- Delegate should be trained (can be by you)
- Examples:
 - Evaluate reports
 - Determine what reports require formal proceedings
 - Coordinate responses to reports
 - Sign a formal complaint

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Delegation

BUT the recipient itself is responsible for ensuring that the recipient's obligations are met, including the responsibilities specifically imposed on the recipient's Title IX Coordinator under these final regulations, and the Department will hold the recipient responsible for meeting all obligations under these final regulations

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Supportive Measures

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).
- **Should be designed to restore or preserve equal access to the education program or activity without "unreasonably" burdening the other party**
- **Should be confidential**

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Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees

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Serving Impartially

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Who should be on the team?

- Trained, unbiased
 - No actual or perceived conflict of interest
 - Check “institutional interests”
 - No presumption for or against any party
- Appeal: bias and conflict of interest that affected the outcome of the matter

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Bias

The Title IX Team Member must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.

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What Might be Bias, Conflict, Prejudgment?

- Discouraging a party from submitting certain evidence
- Using terms like “victim” and “perpetrator”
- Permitting credibility inferences or conclusions based on party status

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What Might be Bias, Conflict, Prejudgment?

- Using sex stereotypes
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- Unauthorized interim suspensions or other penalties before conclusion of grievance process

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What Likely Is Not...

- Deciding an allegation warrants an investigation
- Being an employee (and even attorney)
- Finding in favor of one party over another

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Key Terms

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“Actual Knowledge”

Definition (106.30(a)):

- To the TIXC or OWA (including through a “report” to the TIXC)
- Vicarious liability/constructive notice insufficient
- Not met when only OWA is the Respondent
- Mere ability to report sexual harassment or inform a student about how to respond (or be trained to do so) not = OWA

“Notice” is defined broadly

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OWAs vs. Responsible Employees

- New definition eschews two prongs of the “responsible employee” rubric (“duty to report” and “student could reasonably believe”)
- Goal: Respect control of Complainant by encouraging confidential reporting options

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OWAs vs. Responsible Employees

- *Ability or obligation or training* to report
- Informing a Complainant how to report

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“Deliberate Indifference”

Response must

- Be prompt
- Offer supportive measures
- Include contact from TIXC to CP for supportive measure + formal complaint discussion
- Investigate a Formal Complaint
- Contain specific requirements

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“Deliberate Indifference”

- Mandatory, proactive, and interactive process
- Must treat parties equitably
 - For CPs, means offering supportive measures
 - For RPs, means no disciplinary sanctions until completion of compliant grievance process
 - For CPs, remedies if RP found responsible for Title IX Sexual Harassment including discipline for RP

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Investigation

- Must contain specific elements
- Must treat parties equally
- Must end in a report, followed by a hearing with live cross, a written decision from the decisionmaker, and the opportunity to appeal

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Example Report

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Robin's Report

- Report from an RA
- Robin, a freshman, rooms with Cameron, another freshman. Cameron told Robin that another student, a senior, Parker, had been sending inappropriate email messages to Cameron.

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Robin's Report

- Robin encouraged Cameron to report, but Cameron refused
- Robin was talking to another student, Peyton, at a party last weekend. Peyton reported also receiving inappropriate messages from Parker.

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Robin's Report

- Because this seemed like a pattern, Robin felt the need to report.
- The messages began with requests for dates but evolved into name calling (slut, skank), rambling comments about the recipient's "obvious" desire for Parker, and incessant requests for connection.

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VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

Dating Violence 34 U.S.C. 12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)

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Quid Pro Quo

Definition: An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual’s participation in unwelcome sexual conduct

New: Only an employee (not a volunteer, another student, etc.)

Codified: Severity and harm presumed

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Hostile Environment

Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person's equal access to the school's education program or activity

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You think it's TIX SH.... What do you do next?

Contact Robin to obtain more information

Contact Robin to offer an opportunity to file a formal complaint and supportive measures

Contact Cameron to offer an opportunity to file a formal complaint and supportive measures

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Title IX Coordinator must promptly, even if no Formal Complaint is filed:

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***New:
Initial
Response***

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Meeting with Cameron

- Cameron confirms all the allegations
- Cameron does not want to be named to Parker

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Can you honor Cameron's confidentiality request?

No, names must always be provided to the Respondent when a Complainant reports Title IX Sexual Harassment

No, because this situation warrants "signing" a formal complaint and Cameron must therefore be named

Yes, because respecting the autonomy and wishes of the Complainant is paramount under the new regulations

None of the above

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Can you remove Parker using an "Emergency Removal"?

Yes

No, Because Cameron has not filed a formal complaint

No, Because the standards for emergency removal have not been met

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Emergency Removal/
Admin Leave

Immediate emergency removal
(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal

Employee administrative leave
(34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements

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Your institution offers face-to-face restorative justice. Can this be done with Cameron?

Yes, because the new Title IX regs now clearly allow informal resolution

Yes, as long as the facilitator has been trained on Title IX

No, because Cameron has not filed a formal complaint

No, because sexual harassment cannot be addressed through face-to-face informal resolution

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Informal Resolution

INFORMAL RESOLUTION IS NOT REQUIRED	NOT ALLOWED FOR EMPLOYEE -STUDENT	TIMING
<ul style="list-style-type: none">• Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure• Both parties must voluntarily consent in writing	<ul style="list-style-type: none">• Not available to resolve allegations that employee sexually harassed a student	<ul style="list-style-type: none">• Cannot offer informal resolution process until formal complaint is filed• Any time prior to reaching a determination, either party may request informal resolution• Any party has a right to withdraw prior to agreement

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Back to Robin

- Let’s assume Cameron doesn’t want to file a complaint....

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Can Robin file a complaint?

Yes, Robin's education could have been impacted by the climate of sexual harassment

No, because Robin would have to have Cameron's permission to file a complaint on Cameron's behalf

No, because there is no allegation of Title IX Sexual Harassment perpetrated against Robin

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“Signing a Complaint”

- Consider:
 - Pattern of alleged conduct
 - Involvement of violence, weapons, etc.
 - Seriousness of alleged conduct
 - Relative ages of individuals involved
- Decision to sign or not to sign a Formal Complaint reviewed for “deliberate indifference”

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Formal Complaint – Next Steps

- Written notice to all known parties
 - Grievance process
 - Allegations
 - Respondent presumed not responsible
 - Right to advisor
 - Right to inspect/review evidence
 - Notice of provision on false statements

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NEW: Cameron's Formal Complaint

- Cameron, a freshman, claims that another student, a senior, Parker, sexually assaulted Parker in on-campus housing two weeks ago
- You receive the formal complaint and the written notices of Title IX allegations to the parties

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You (the investigator) signed the Formal Complaint as Title IX Coordinator or designee. Is that a conflict of interest?

Yes

No

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You (the investigator) attend the same church as Parker. Is that a conflict of interest?

Yes

No

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You have a history of working as a victim advocate. Is that a conflict of interest?

Yes

No

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You (the investigator) have had training on trauma informed interviewing practices. Does that create bias or the risk of prejudice?

Yes

No

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Standard

- Declined to define “bias,” “conflict of interest,” “prejudge”
- The Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists....

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What Might be Bias, Conflict, Prejudgment?

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What Likely Is Not...

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Investigation Requirements & Best Practices

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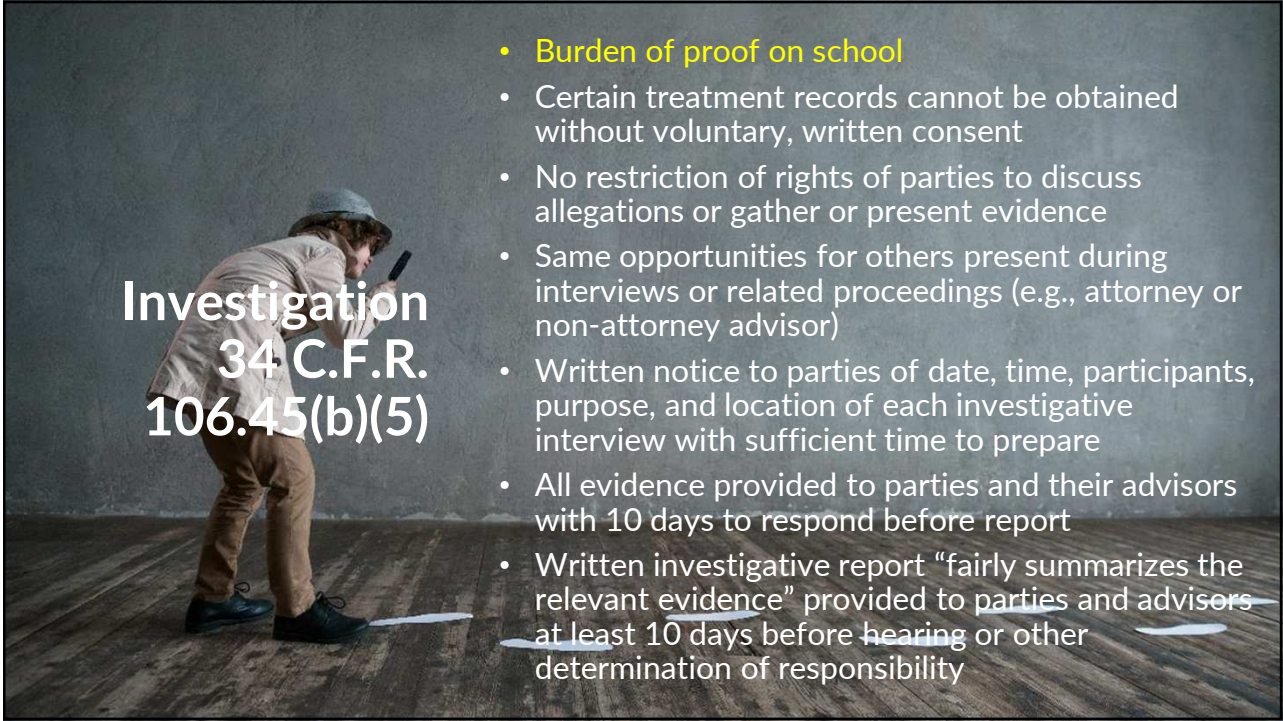
Investigation

- Must contain specific elements
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Investigation
34 C.F.R.
106.45(b)(5)



- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

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Parker claims that Cameron was diagnosed with bipolar disorder and is lying. Can you ask Cameron whether this is true?

True

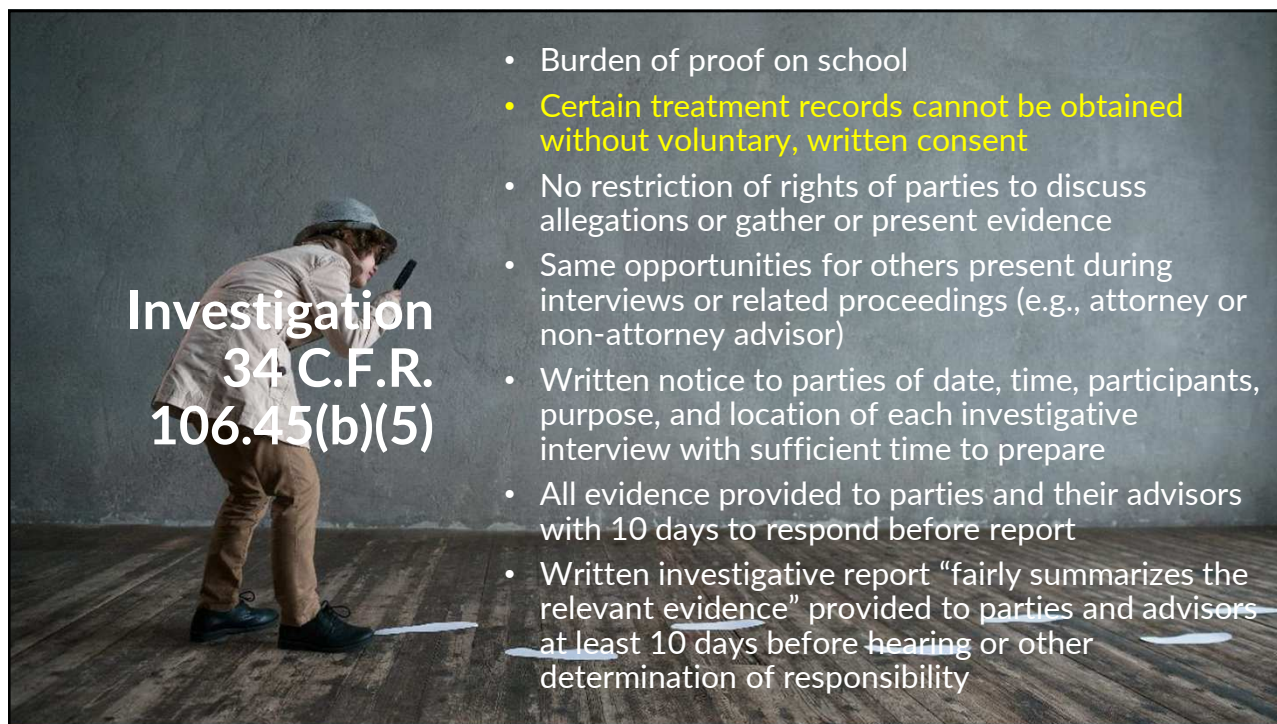
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Investigation
34 C.F.R.
106.45(b)(5)

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Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

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During the investigation, the investigator can tell Cameron and Parker (or an employee if involved in a complaint) not to talk to others about the complaint or investigation

True

False

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

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Retaliation and Gag Orders

- Gag order not allowed
- Warn of risks from speaking about the complaint
- Notify all parties and witnesses of retaliation rights and encourage follow up

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Parker wants to bring a classmate, who is also a witness, as the "advisor" during investigation meetings. Is that allowed?

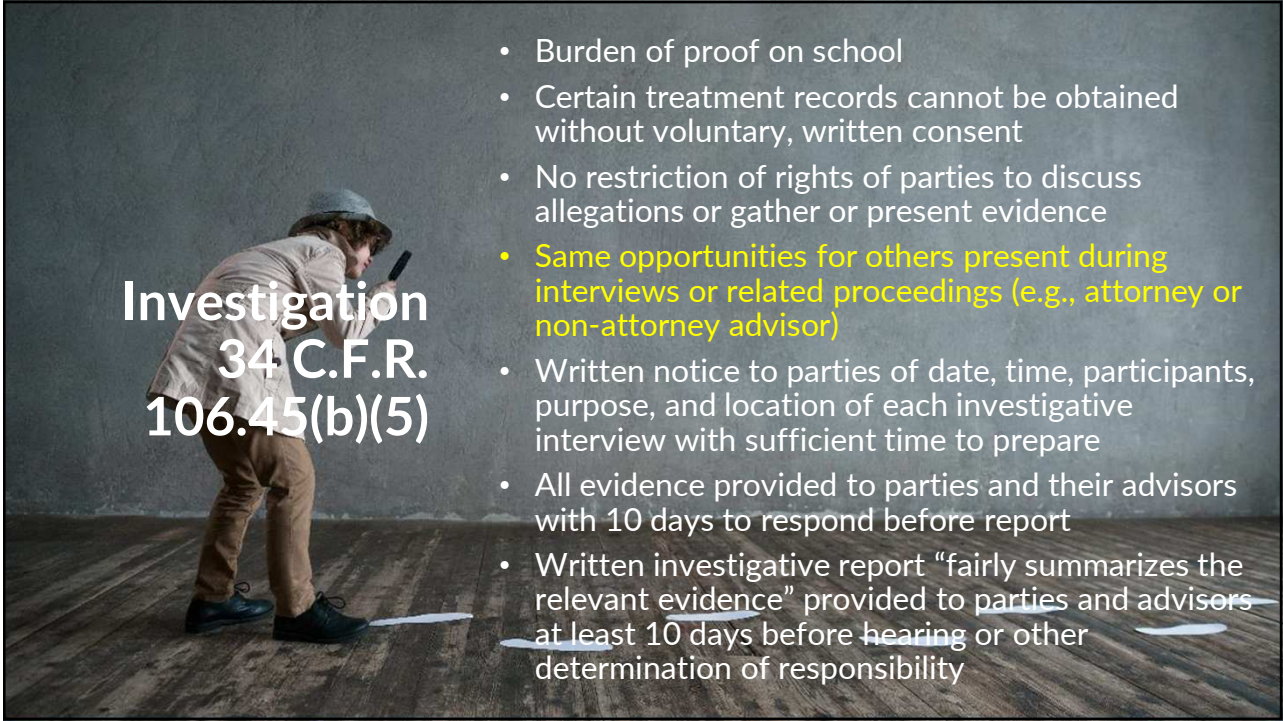
Yes, parties can bring the advisor of choice to a meeting

No, Parker can bring a parent or attorney as an advisor, but not a witness

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



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Parker brings an attorney to an investigative interview, and the attorney jumps in every time a question is asked. Can you kick out the advisor and continue the meeting?

No, parties in Title IX matters have the absolute right to an advisor of their choice at every meeting

No, you should remind the advisor of the rules of decorum in place and warn that the advisor will be removed if the rules are not followed again

Yes, because you are allowed to have rules of decorum and if an advisor will not follow them there is no requirement to give a warning or delay the investigation

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After receiving notice of the reported misconduct, you can walk down to Parker's classroom, pull Parker out, and question Parker immediately

True

False

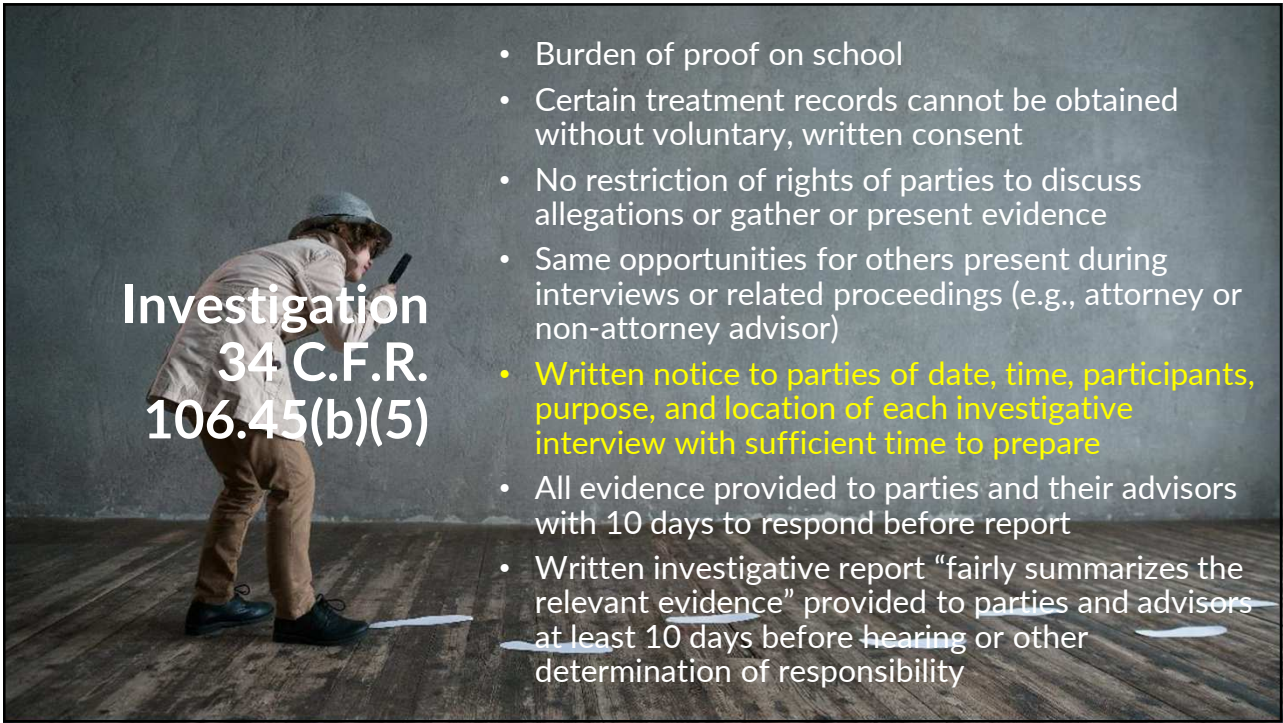
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Investigation

34 C.F.R.

106.45(b)(5)



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Before finalizing the investigative report, I must give both parties and their advisors a summary of all evidence and an opportunity to respond

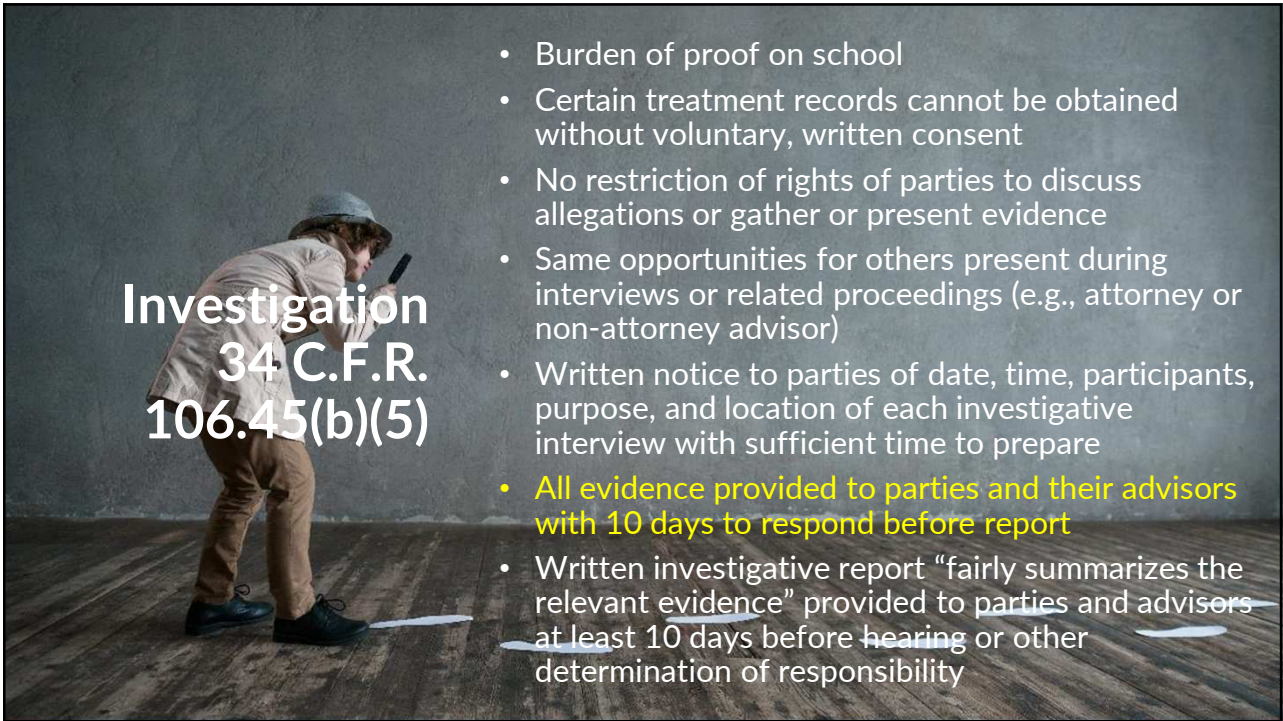
True

False

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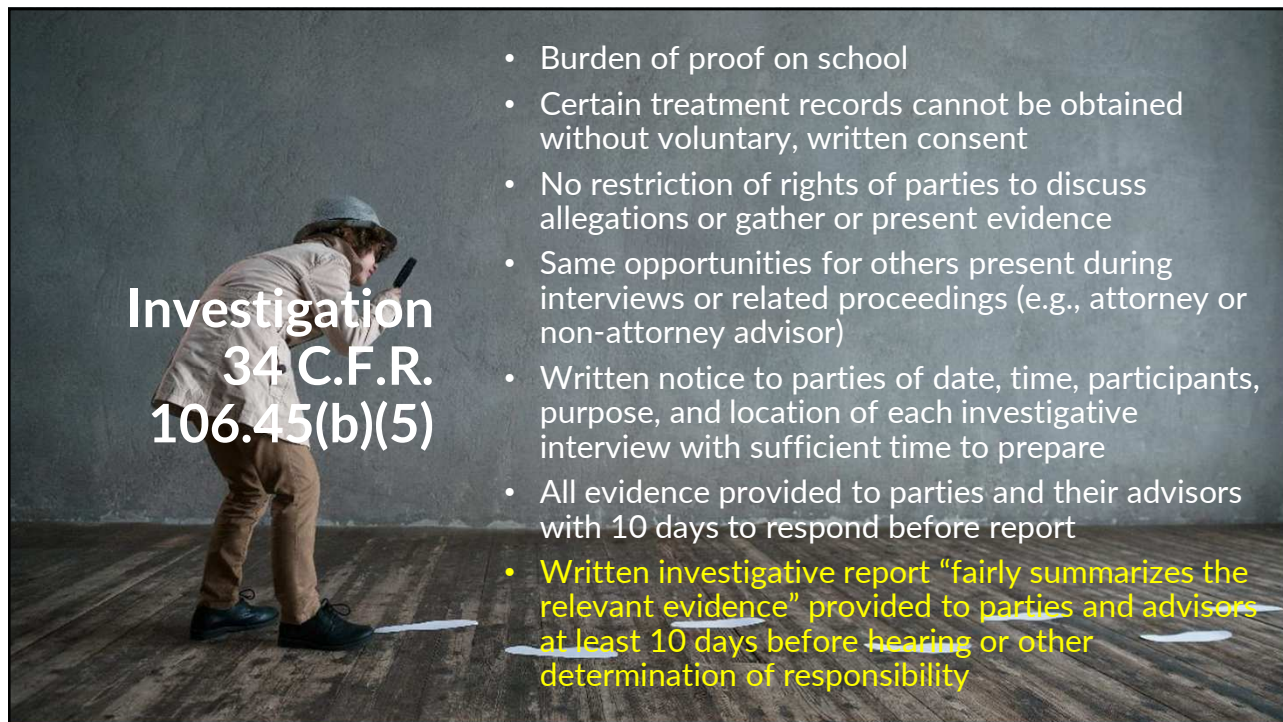
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Investigation
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Investigation Report

- Must fairly summarize all relevant evidence
- Relevant evidence is different from evidence “directly related to the allegations”

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Determining Relevance

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
- Exceptions
 - Sexual behavior of CP (except in limited situations)
 - Legal privilege
 - Treatment records

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Rape Shield

- Exclude evidence of Complainant's sexual behavior or predisposition
- Two narrow exceptions
 - Someone other than RP committed conduct
 - Past conduct between CP & RP to show consent
- Does not apply to Respondent

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Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

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Legally Privileged Information

- Cannot use questions or evidence that seek disclosure of legally privileged information, unless waived
- Consider:
 - Attorney-client communication
 - Privilege against self-incrimination
 - Confessions to a clergy member or religious figure
 - Spousal privilege

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Investigation: Techniques & Best Practices

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Cameron's Formal Complaint

- Cameron reports that the sexual assault occurred after a party. Bobbie and Ali (students) were at the party.
- After the party, Cameron told Robin, Cameron's roommate, what happened. Cameron also talked to a teacher, Mr. Smith.
- Cameron submitted to a police interview and SANE exam shortly after the incident.

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Concurrent Law Enforcement

- Only “temporary” or “limited” allowed
 - Not “more than briefly” beyond timeframes
 - Not required
- Reasons: Impact on police fact gathering; RP self incrimination privilege; police plan to release evidence that is material to investigation on a specific timeframe

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Questions

- Relationships
- Identities of Parties
- Details of Conduct Between the Parties
- Effect of Alleged Conduct on the Parties
- Outcry/Reports
- Other Responses of Parties
- Documentary and Other Evidence
- Identities of Witnesses

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Avoid

- Discussing theories or assessment of the evidence
- Suggesting agreement or outcome
- Pressuring for more information on irrelevant incidents
- Body language or words suggesting judgement

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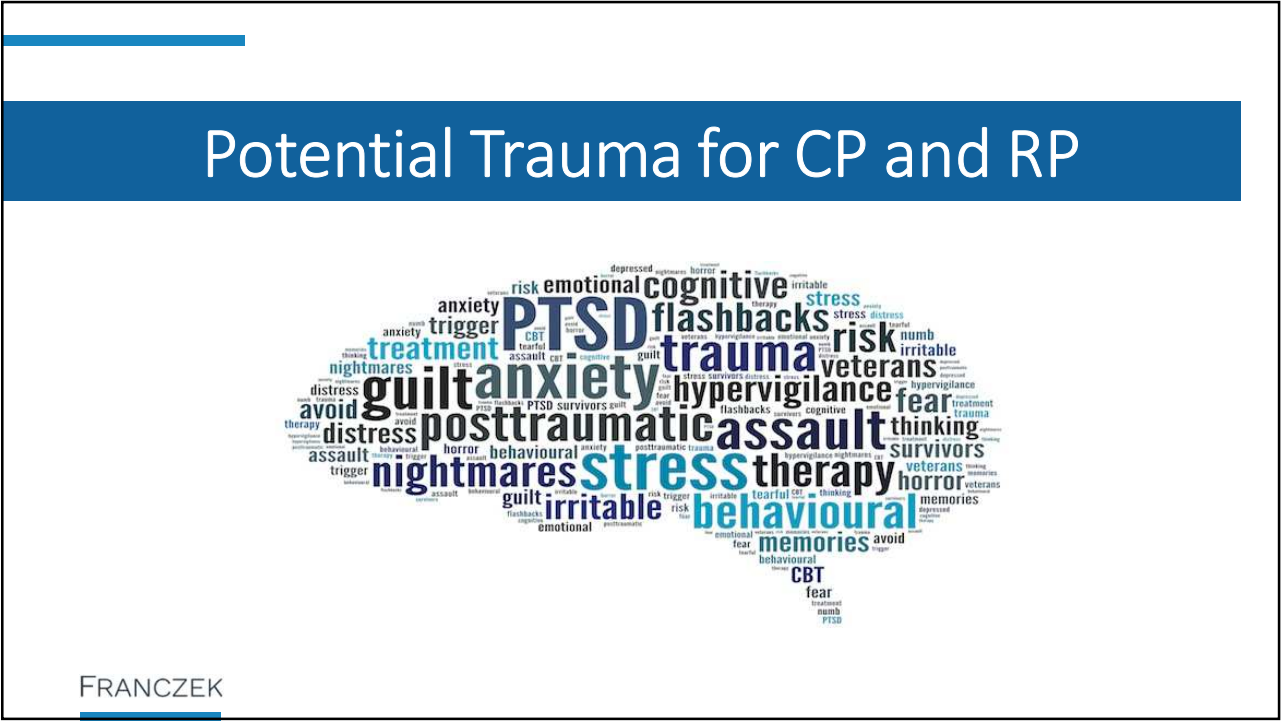
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Closing

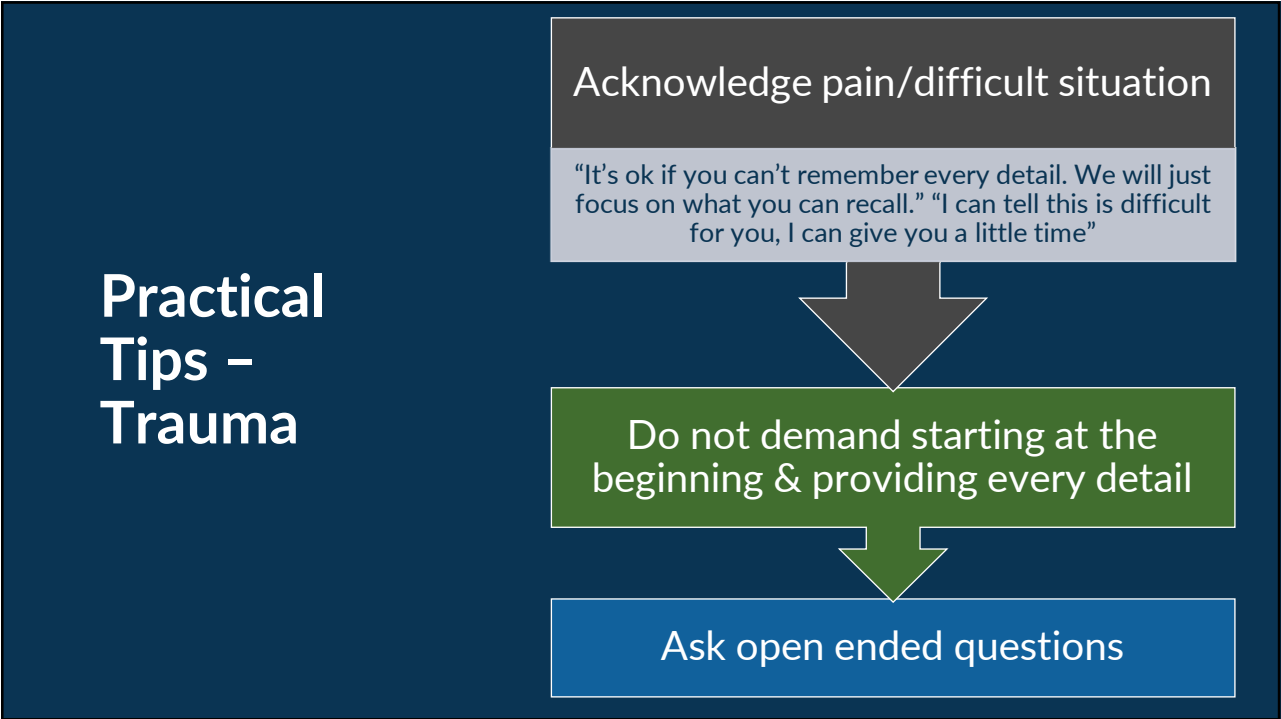
- Anything else?
- Any questions?
- Advisor questions (if allowed)
- Encourage follow-up
- Process (again for parties)

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Emotions

- Silence is ok
- Sympathy is ok (within reason/neutral) – “I can tell this is hard” “I’m sorry this is difficult”
- Allow breaks
- Remember equality not equity is goal for processes

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Cardinal Sins of Interviewing

- Questions that are evaluative
- Long, confusing questions
- Sticking blindly to a script
- Using undefined terms (witness can define)
- Interrupting and rushing

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In your own words, what happened?

What did you witness?

Did you respond? If so, how?

For all: where, when, who present?

94

How did the conduct affect you?

Parties: What would you like to see as an outcome? (avoid making any promises)

95

Consider whether appropriate to ask for more incidents than offered

Perhaps instead, focus on repeating “Is there anything else you’d like to tell me or for me to look into?”

96

Parker's Interview

Parker reports the intention during the interview to withdraw from the institution that day.

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What can the institution do?

Nothing; regardless of whether Parker is leaving, there is a risk to the community

Dismiss the complaint once Parker withdraws

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Retaliation

IN EVERY INTERVIEW, warn about retaliation and explain that a complaint can be filed if someone retaliates.

Watch for different treatment

Actions by staff in avoiding complainant

Harassment by the Respondent or their friends



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After Interviews

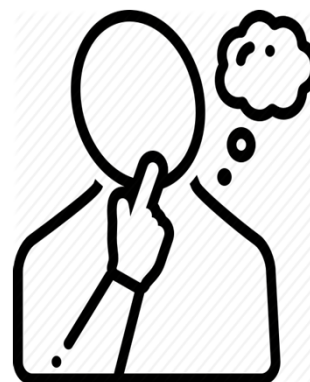
- Follow up in writing to summarize any points that might need confirmation
- Clean up notes
- Document less formal interactions
- Send links/copies to policies if relevant
- REASSESS allegations, investigation plan, and supportive measures

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Scope of the Investigation

Must be “thorough,” but not required to review all potential sources of evidence parties or witnesses identify



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Sharing Evidence and the Investigative Report

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Directly Related Evidence

- Must share evidence directly related to the allegations with both parties and advisors simultaneously with 10 days to respond before writing the report
 - Review/consider responses
 - Share responses with the other side

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Investigation Report

- Applicable policies and procedures
- Timeline of investigation
- Description of allegations
- Unbiased summary of evidence gathered, including interviews
- Credibility determination(s)

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Investigation Report

- Must fairly summarize all relevant evidence
- Relevant evidence is different from evidence “directly related to the allegations”

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Determining Relevance

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
- Exceptions
 - Sexual behavior of CP (except in limited situations)
 - Legal privilege
 - Treatment records

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Rape Shield

- Exclude evidence of Complainant's sexual behavior or predisposition
- Two narrow exceptions
 - Someone other than RP committed conduct
 - Past conduct between CP & RP to show consent
- Does not apply to Respondent

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Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

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Legally Privileged Information

- Cannot use questions or evidence that seek disclosure of legally privileged information, unless waived
- Consider:
 - Attorney-client communication
 - Privilege against self-incrimination
 - Confessions to a clergy member or religious figure
 - Spousal privilege

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Hearing and Decision

- Transfer investigation report and relevant evidence to decisionmaker for review prior to the live hearing

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Appeal Notice

- Upon receipt of an appeal, the Title IX Coordinator must notify the other party/parties of the appeal
- Both parties must be given an opportunity to submit a written statement for or against the appeal

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Recordkeeping

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Investigation File

- What should be in the investigation file?
 - Complaint
 - Applicable Policies
 - Investigation Plan (can be a living document)
 - Records of Communications
 - Interview Notes
 - Evidence Collected
 - Report

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Interview Notes

- Include: Facts + Statements (consider quotes)
- Don't Include: Conclusions + Judgements
- Label: Name of Witness, Date, Time, Interviewer, Location, Method, Those Present

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Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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Questions



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