

## OSPA VIRTUAL FALL SUMMIT 2020

# Title IX Compliance Certification Training: Investigator Training

**October 26-27, 2020**

**Presented by Jackie Gharapour Wernz ,Partner**

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## Your Host

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## Agenda

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

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## Ask Questions

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## What is Sexual Harassment under Title IX?

Unwanted conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies access to a school's programs or activities

Employee quid pro quo

Sexual assault, domestic violence, dating violence, and stalking

All of the above

None of the above

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### Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA "Big 4"

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**Which of these should be reported to the Title IX Coordinator to consider potential dismissal?**

All parties agree that the conduct did not occur in the United States

All parties agree that the conduct occurred off campus, outside of school time, and without use of school resources

The Respondent's employment or enrollment ends

The Complainant's employment or enrollment ends

All of the above

None of the above

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**When must a school respond to Title IX sexual harassment?**

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A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the united States must respond

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## DISMISSALS

<b>Mandatory if conduct alleged:</b>	<b>Permissive if:</b>
Not Title IX Sexual Harassment	Complainant requests to withdraw in writing
Did not occur in the school's program or activity	Respondent's enrollment or employment ends
Did not occur in the United States	Specific circumstances prevent school from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)

\*\*can still address under non-Title IX policy

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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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## Serving Impartially

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## Who should investigate?

- Trained
- No: bias, conflict of interest, prejudgment
- Appeal: can be based on improper, biased/conflicted investigator

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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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## Cameron's Complaint

- Cameron, a freshman, claims that another student, a senior, Parker, sexually assaulted Cameron
- You are assigned the formal complaint and send the written notices of Title IX allegations to the parties

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**IS IT IMPERMISSIBLE BIAS OR  
CONFLICT?**

Think to yourself...

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# **You signed the Formal Complaint as the Title IX Coordinator or designee?**

Think to yourself...

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# **You attend the same place of worship with Parker?**

Think to yourself...

18

**You have a history of working as  
a victim advocate (or an accused  
advocate)?**

Think to yourself...

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**You have had training on trauma  
informed interviewing practices?**

Think to yourself...

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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
- Placing the burden of proof on one party
- 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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## Investigation: Required Elements

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## Investigation

- Occurs when there is a “formal complaint”
- Must treat parties equally
- **Must contain specific elements**

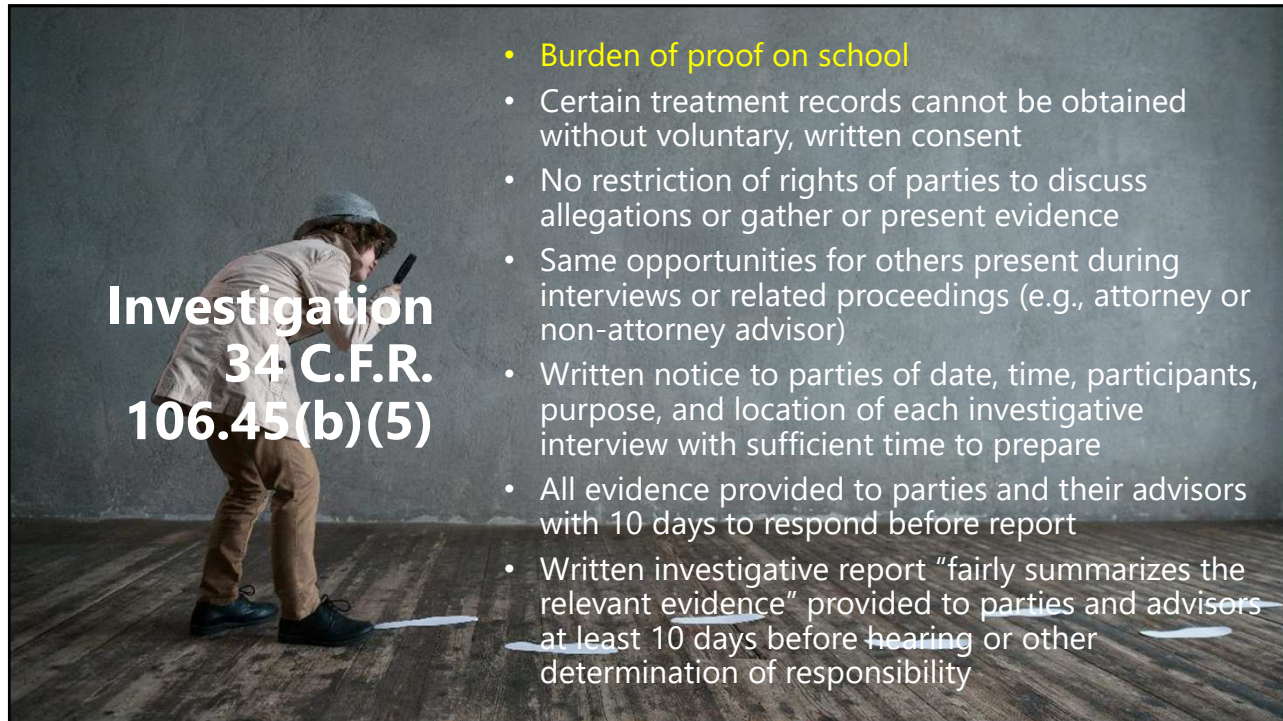
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**True or False:  
During the investigation,  
Cameron is responsible for  
providing evidence to support  
the complaint.**

Think to yourself...

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

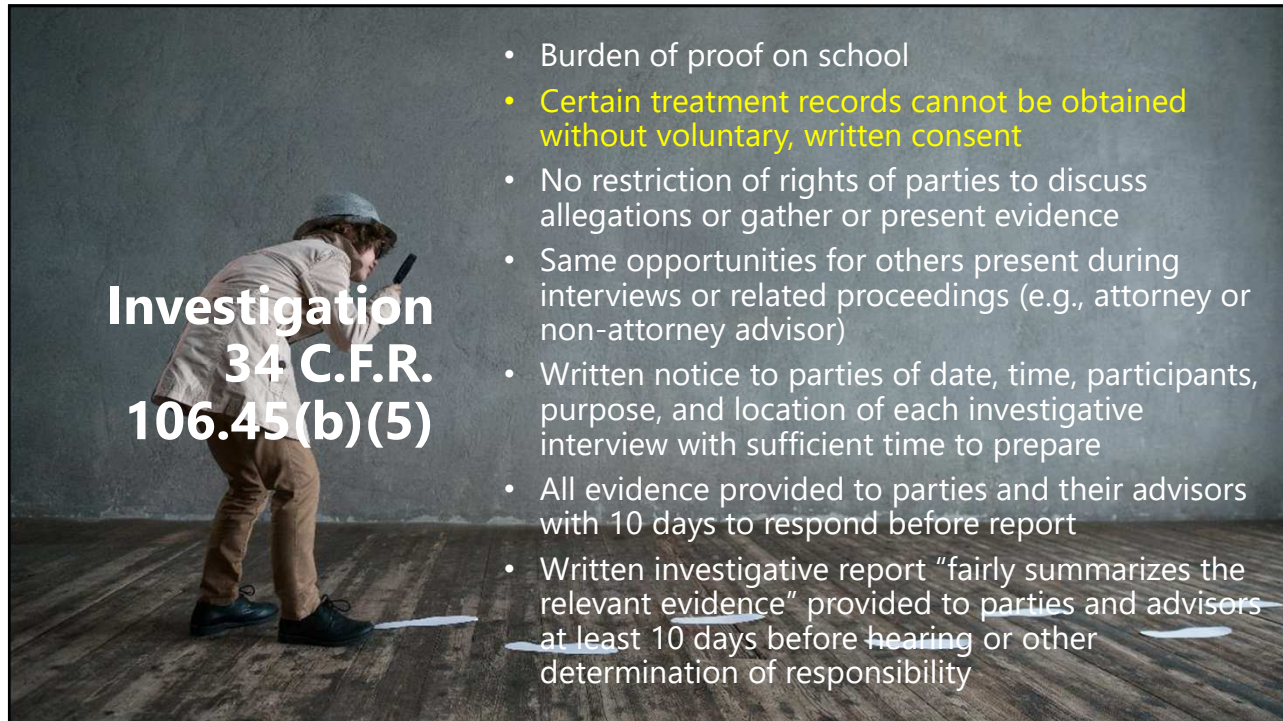
- **Burden of proof on school**
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney 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 if this is true?**

Think to yourself...

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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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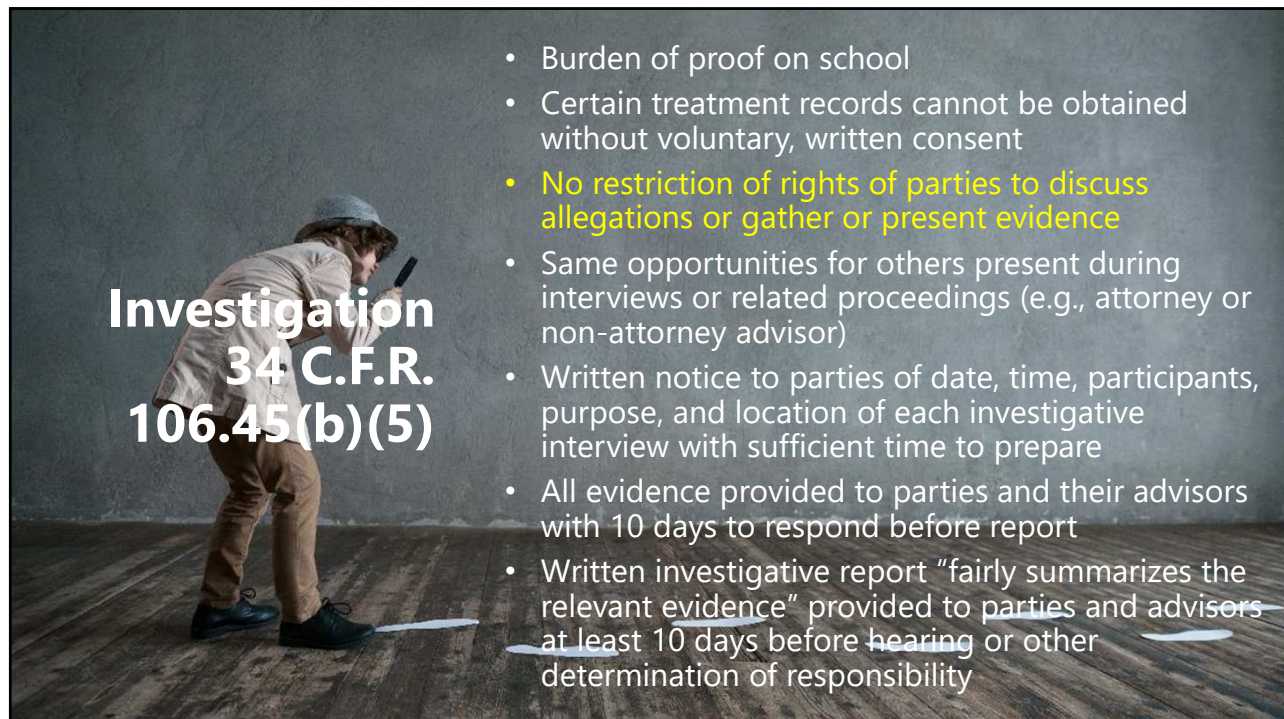
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# True or False? You can tell Cameron and Parker not to talk to other students or members of the school community during the investigation?

Think to yourself...

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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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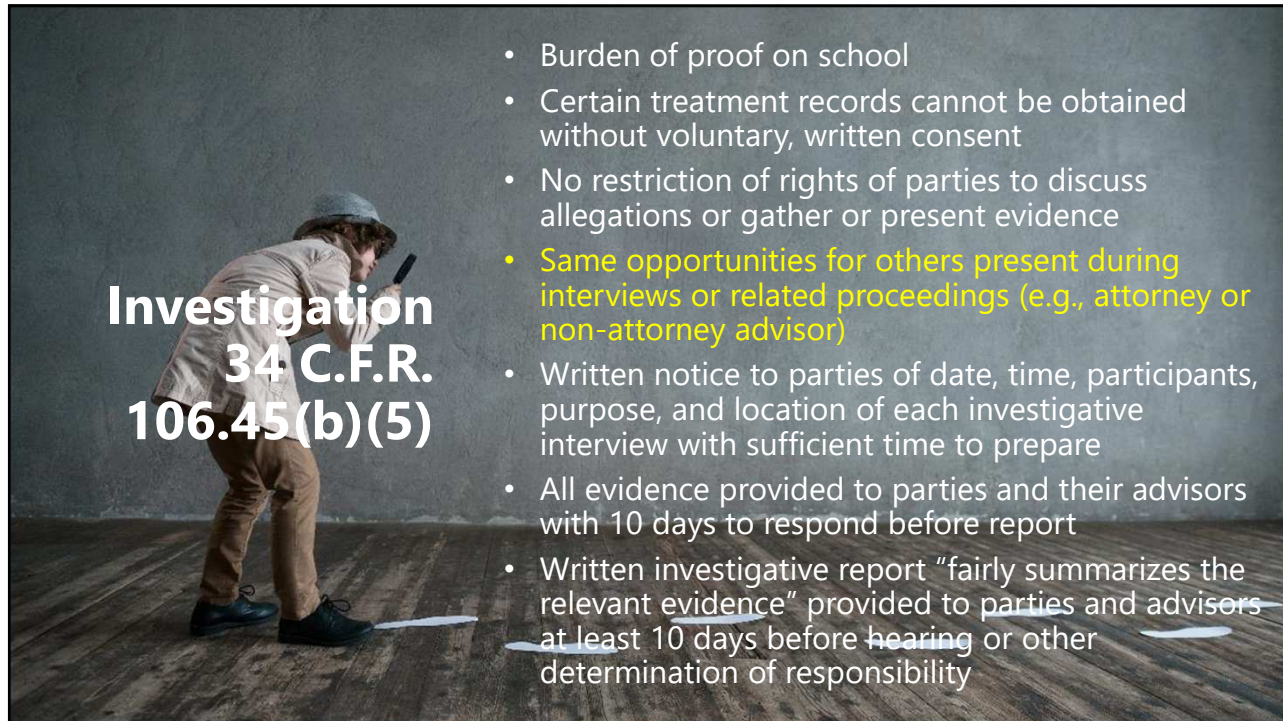
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**True or False: Parker can bring a friend/classmate/witness as an “advisor” to investigatory meetings?**

Think to yourself...

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

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**True or False:**  
**Parker brings a loud attorney to meetings and the attorney jumps in even after being asked to stop. Can you remove the attorney and proceed with the interview?**

Think to yourself...

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## Forms/Notices

### Notice to Advisors

Advisor  
Conduct  
Expectations

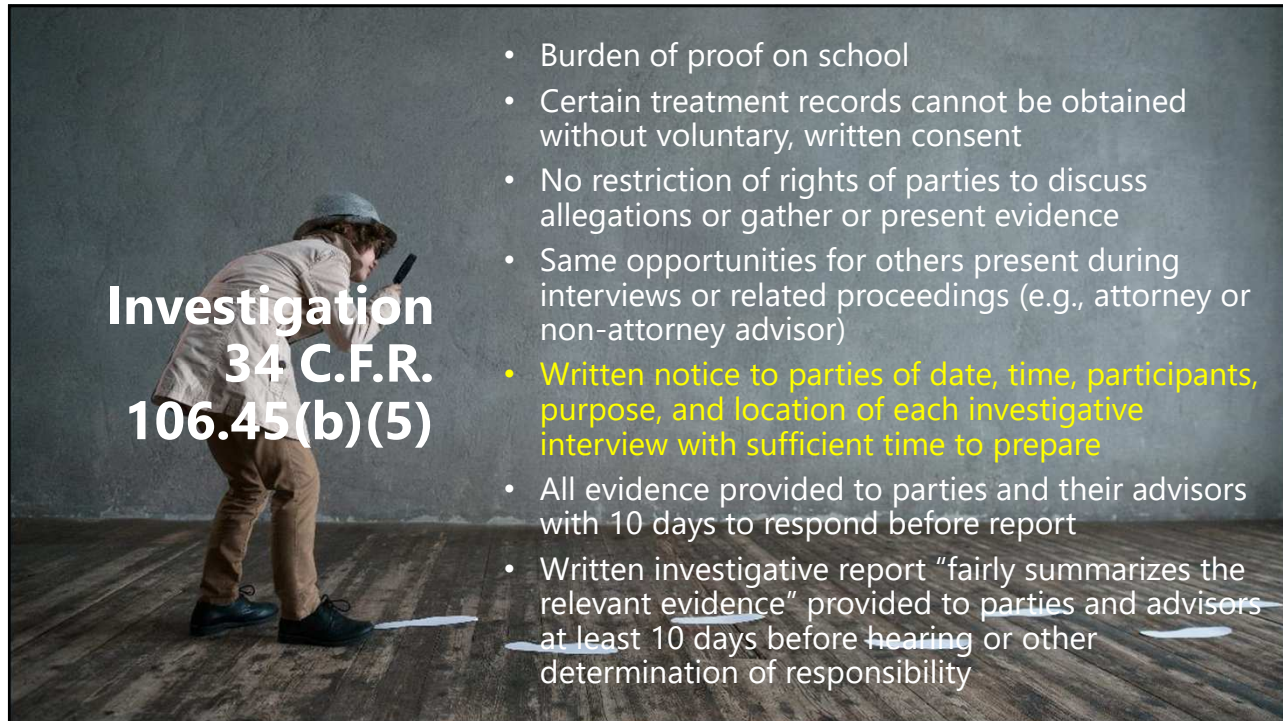
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**After receiving Cameron's report,  
can you go down and pull Parker  
out of class to be questioned?**

Think to yourself...

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

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## Before Party Interviews

Communicate in Writing:

- Date, time, location, participants, purpose
- With sufficient time to prepare

Recommend same for witnesses (not required)

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## Forms/Notices

### Notice of Interview

Notice of Title IX  
Interview or Meeting  
with Title IX Party  
(Franczek Notice 6(a))

Notice of Title IX  
Interview or Meeting  
with Non-Party  
Witness (Franczek  
Notice 6(b))

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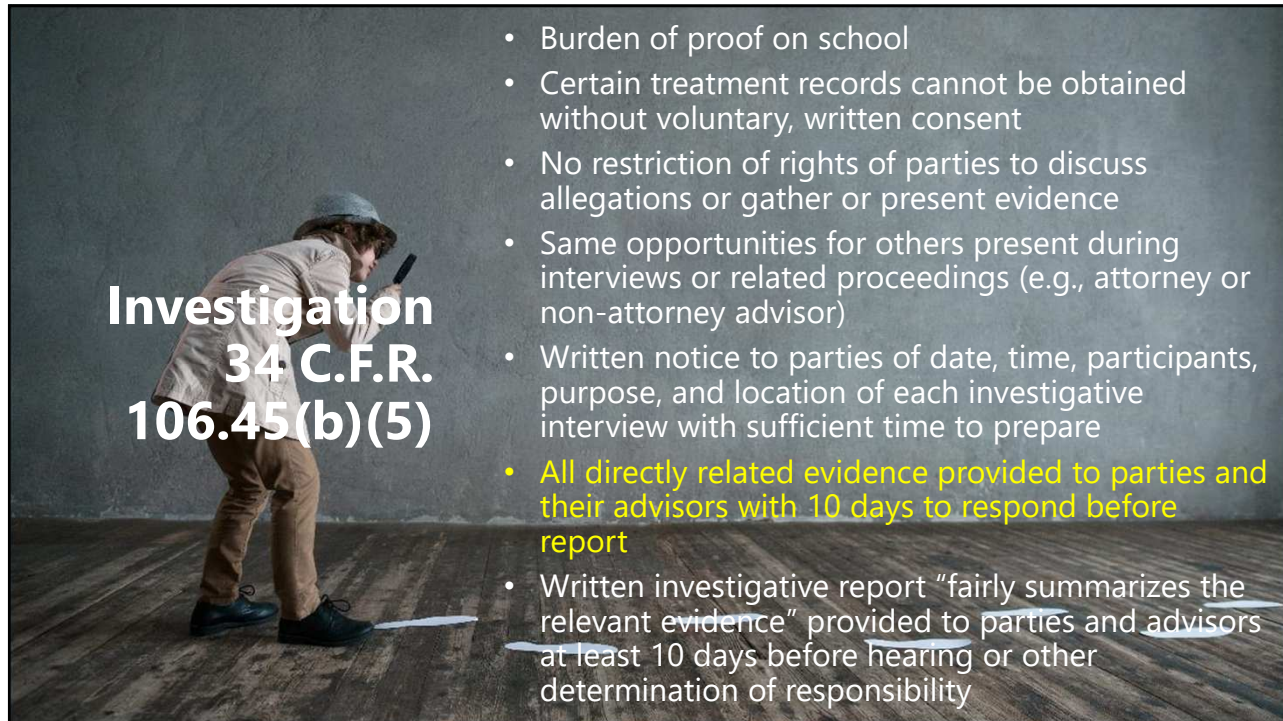
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**True or False:  
Before finalizing the investigative  
report, I must give both parties and  
their advisors a summary of all  
evidence and an opportunity to  
respond.**

Think to yourself...

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

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- 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 directly related 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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## 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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## Which of these is NOT directly related evidence in Cameron's formal complaint?

- Email messages from Cameron to Parker earlier in the school year in which Cameron and Parker seem to be flirting
- Draft interview notes from interviews with parties and witnesses (final version was created)
- Text messages from Parker to another female student with similar conduct
- Facebook messages between Cameron and another student with raunchy sexual language
- Rumors from a witness of something another witness (not available to interview) said about Parker engaging in similar conduct with the unavailable witness
- None of the above (they all are directly related)zoom login

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## Forms/Notices

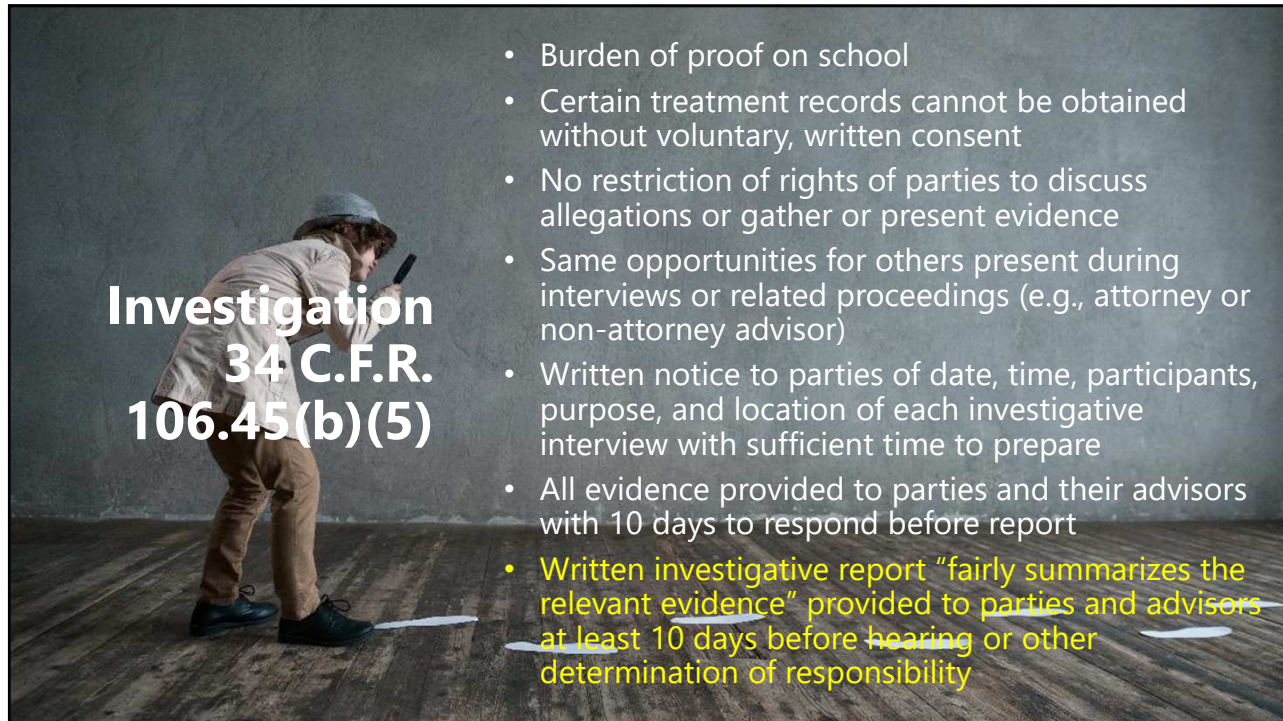
### Sharing of Evidence

Notice of Directly Related Evidence  
(Franczek Letter 7(a))

Notice of Other Party's Written Response to Evidence  
(Franczek Letter 7(b))

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**Investigation**  
**34 C.F.R.**  
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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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## Forms/Notices

### Investigative Report

Title IX Investigative  
Report Template  
(Franczek Form B)

Notice of Investigative  
Report (Franczek  
Notice 8(a))

Notice of Other Party's  
Written Response  
(Franczek Notice 8(b))

Transmittal Cover  
Letter to Decision-  
maker at Conclusion of  
Investigation (Franczek  
Letter 8(c))

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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 (except in limited situations)
  - Legal privilege
  - Treatment records

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## Rape Shield Law

- 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
  - Confidentiality and trade secrets

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## Which of these is NOT relevant evidence?

Email messages from Cameron to Parker earlier in the school year in which Cameron and Parker seemed to be flirting

Draft interview notes from interviews with parties and witnesses (a final version was created)

Text messages from Parker to another female student with similar conduct

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# Investigation: Techniques & Best Practices

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## The Investigation Plan

- Witness List
- Order of Interviews
- Questions for Witnesses
- Physical Evidence Needed, e.g., records, documents, reports, photos, and letters



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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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## What must you do while delaying for law enforcement reasons?

Indefinitely suspend Parker because of the violent nature of the alleged offense

Provide equal supportive measures to the parties

Comply with timelines in other laws, if applicable

Require Parker to sit for an interview

None of the above

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## Concurrent Law Enforcement

- Police plan to release evidence on a specific timeframe that is material to investigation
- Only "temporary" or "limited" allowed
- Not "more than briefly" beyond timeframes
- Not required

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## Order of Interviews

- Cameron (Complainant)
- Parker (Respondent)
- Ali and Bobbie (Student Outcry Witnesses for CP)
- Teacher Smith (Staff Outcry Witness for CP)
- Police
- Medical Witnesses

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## Party Interview Tips

- Describe allegations
- Avoid discussing theories or assessment of evidence
- Obtain account of events in detail (within reason)

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## Prefaces for Witnesses

- Your Identity and Role as a Neutral
- Notes and Records
- Allegations (if necessary)
- Role of Advisor (if allowed)
- Confidentiality
- Retaliation
- Rapport Building

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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

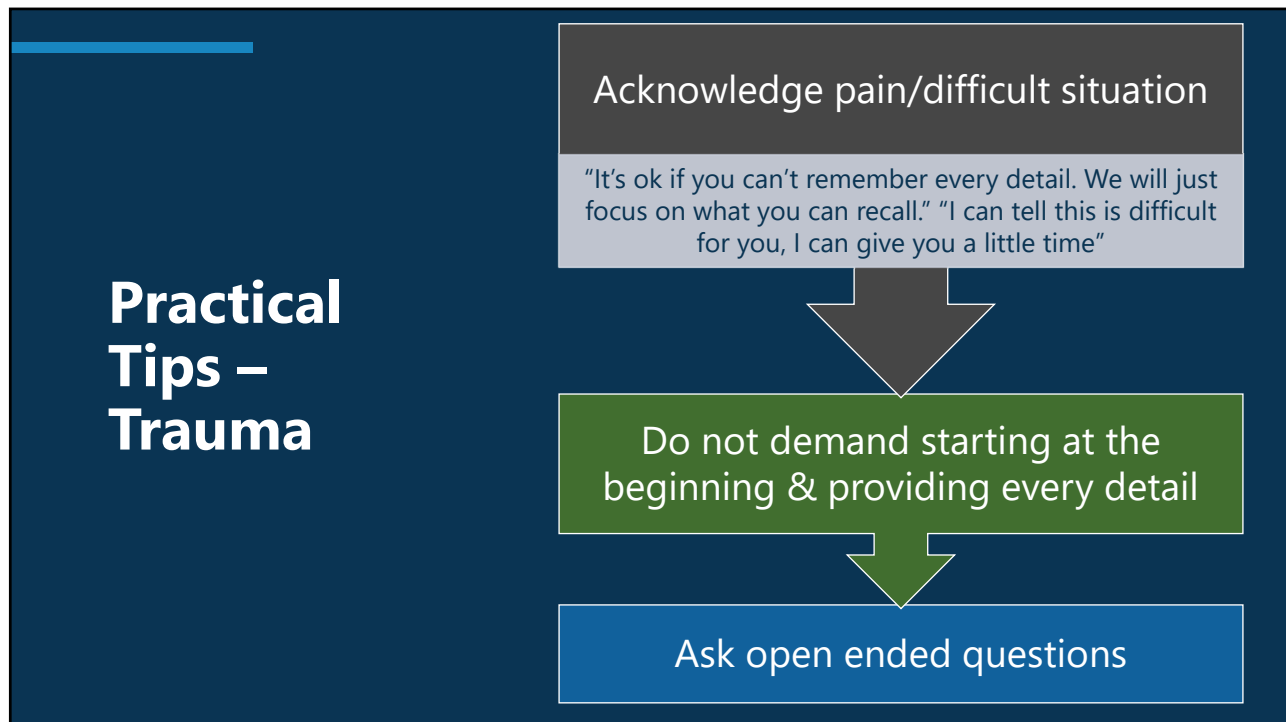
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- Anything else?
- Any questions?
- Advisor questions (if allowed)
- Encourage follow-up
- Process (again for parties)

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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?

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How did the conduct affect you?

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

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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?”

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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

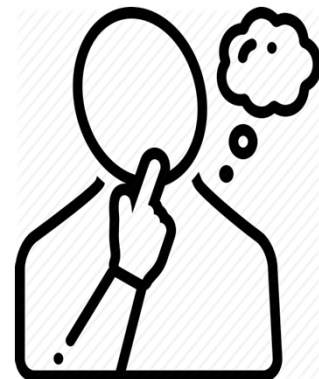
- Follow up in writing to summarize any points that might need confirmation
- Clean up notes
- Document less formal interactions
- Send links/copies to policies if relevant
- REASSESS allegations, investigation plan, and supportive measures

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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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## Gathering Other Evidence



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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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