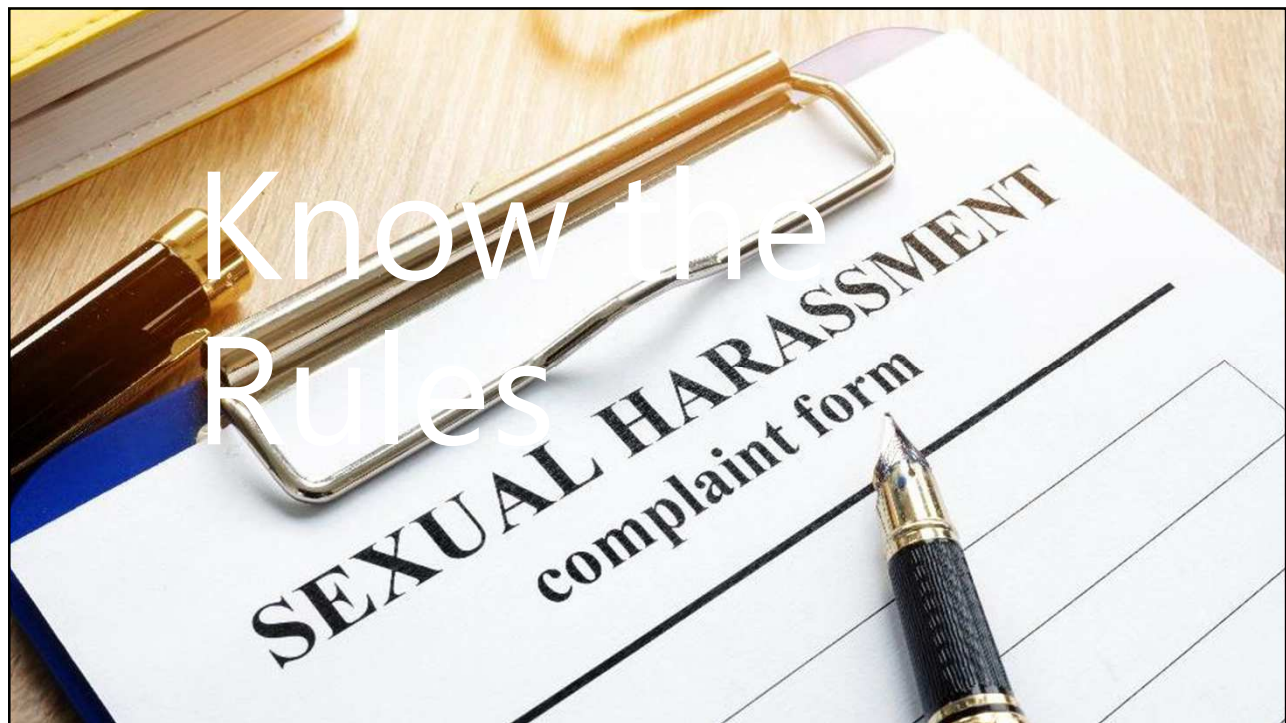


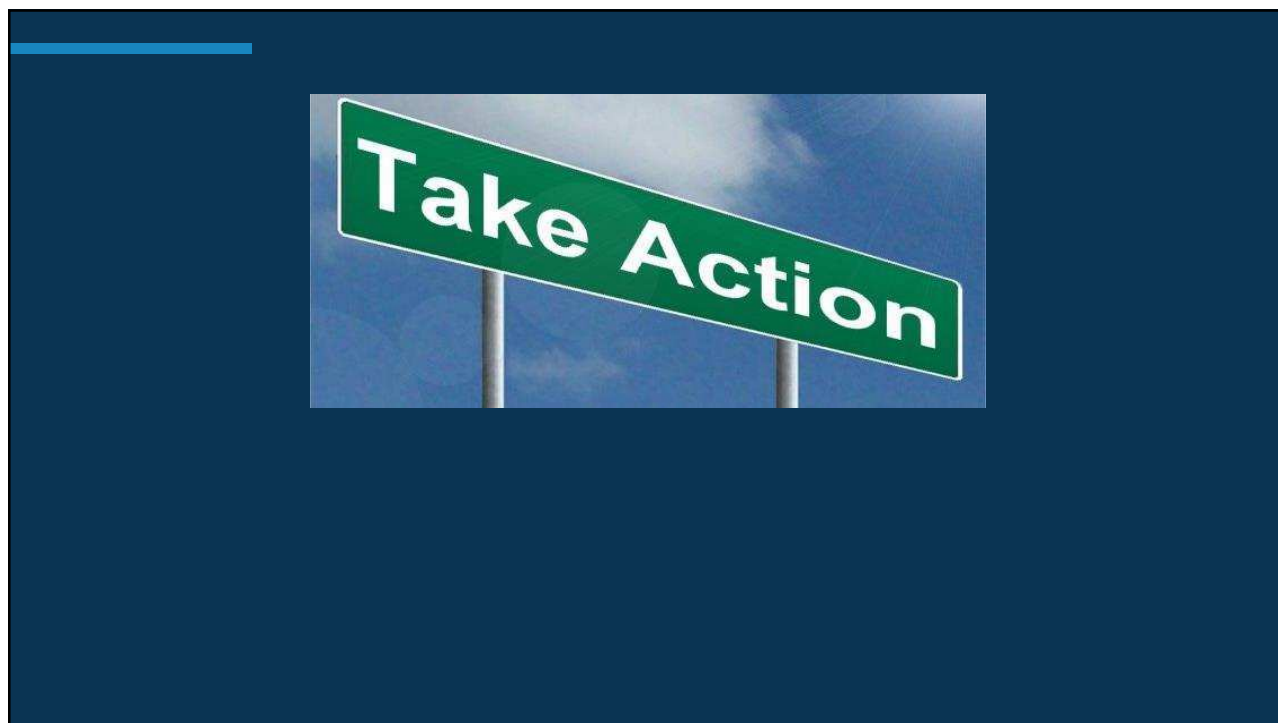
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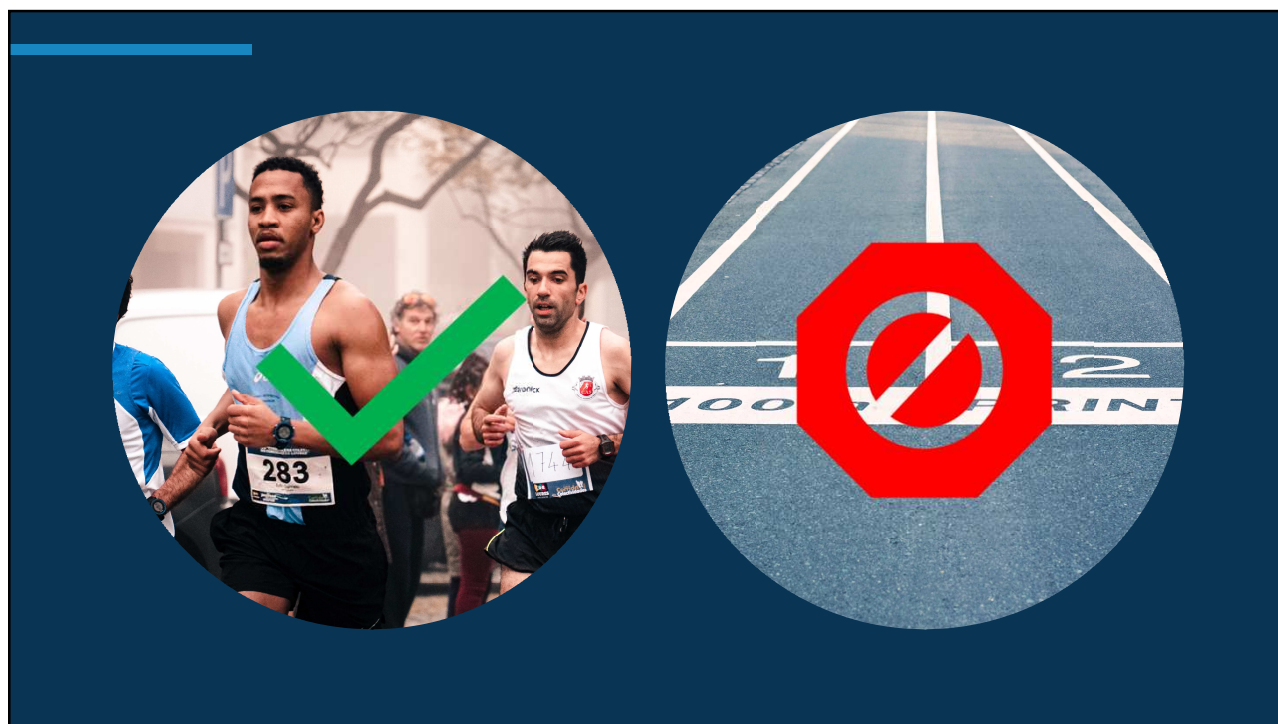
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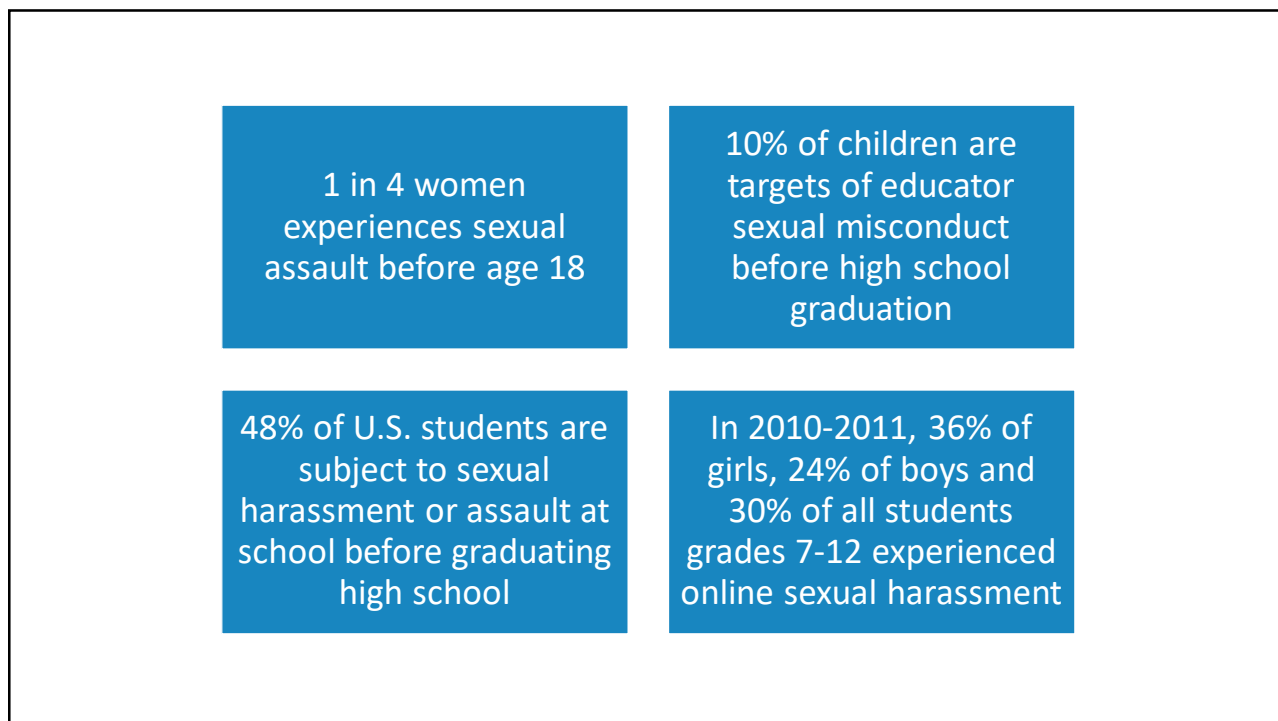
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4



5



6





7

## Responding to Harassment

*Is required by the law*

8





9

## Title IX Statute

(20 U.S.C. §§ 1681–1688)

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

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## What falls under Title IX?



11

## Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)

- Prohibit discrimination on the basis of sex
- Establish procedural requirements
  - Policy + detailed grievance procedure
  - Designation of Title IX coordinator(s)
  - And many more requirements!

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## Title IX Coordinator Responsibilities

- Must be called Title IX Coordinator
- Must be identified (with name or title, address, phone, and email) in policy and on website
- Must meet with alleged victims of Title IX Sexual Harassment

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## Title IX Coordinator Responsibilities

- Informs CP of availability of supportive measures and formal complaint process
- Decides whether to “sign” a complaint when the CP doesn’t want to file
- Coordinates implementation of supportive measures
- Ensures effective implementation of remedies
- Monitors ongoing compliance with Title IX

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# When Must the School Respond to Sexual Harassment?

15

**It Depends  
Who [Well,  
Which Law]  
You Ask**

## Employment

- Illinois Human Rights Act
- Title VII
- Title IX

## Students

- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX

16

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

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

17



### **Actual Knowledge**

1. Sense
2. Report

18

## Official with Authority



- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures by the school district
- K-12: All employees

19

## Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator

20



## Key Word: “Allegation”

Once a school has notice of **an allegation** that, **if true**, would constitute Title IX Sexual Harassment, it must respond

“Well, we didn’t believe there was enough evidence it happened” does not get you past your responsibility to use your Title IX Sexual Harassment grievance process

21

## Issue Spotting

**Order of protection:** Principal served with order of protection requiring student to have no contact with another student due to alleged sexual assault

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22

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

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

23

## What is Sexual Harassment?

24

# It Depends Who [Well, Which Law] You Ask

## Employment

- Illinois Human Rights Act
- Title VII
- Title IX

## Students

- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX

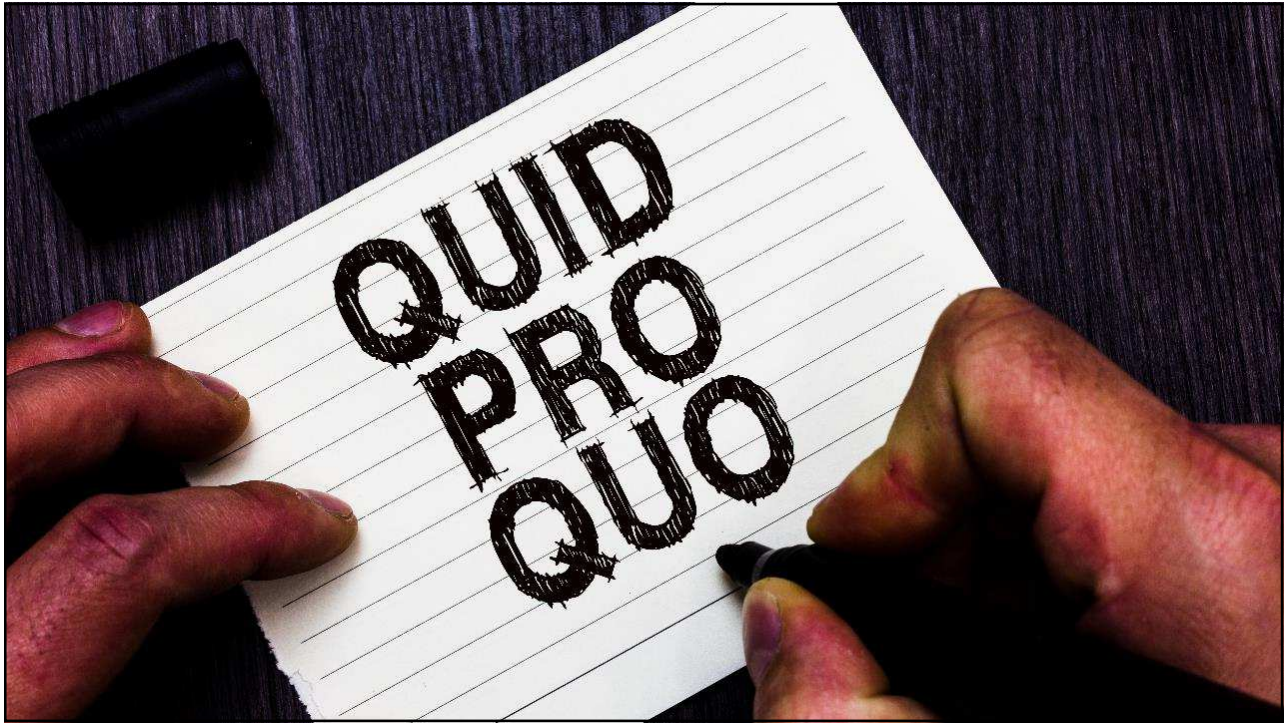
25

# Title IX Sexual Harassment

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

26





27

## Quid Pro Quo

Quid = Something

Pro = For

Quo = Something

28

## Title IX Quid Pro Quo

**Definition:** An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on participation in unwelcome sexual conduct

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

**Codified:** Severity and harm presumed

29

## Clery Act/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)

30



31

## Title IX – What is a Hostile Environment

### Old Definition

Unwelcome conduct determined by a reasonable person to be **severe, pervasive or persistent as to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities**

### New Definition (8/14)

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**

32



## Unwelcome Conduct

- Not **Consent**
- Not **Participation**
- Not **Silence**
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters

\*\*subjective + reasonable person

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## Severe

- Something more than juvenile behavior
- Something more than antagonistic, non-consensual, and crass conduct
- Simple acts of teasing and name-calling are not enough, even when comments are based on sex
- It is not enough to show that a student has been teased or called offensive names

34

## **Pervasive**

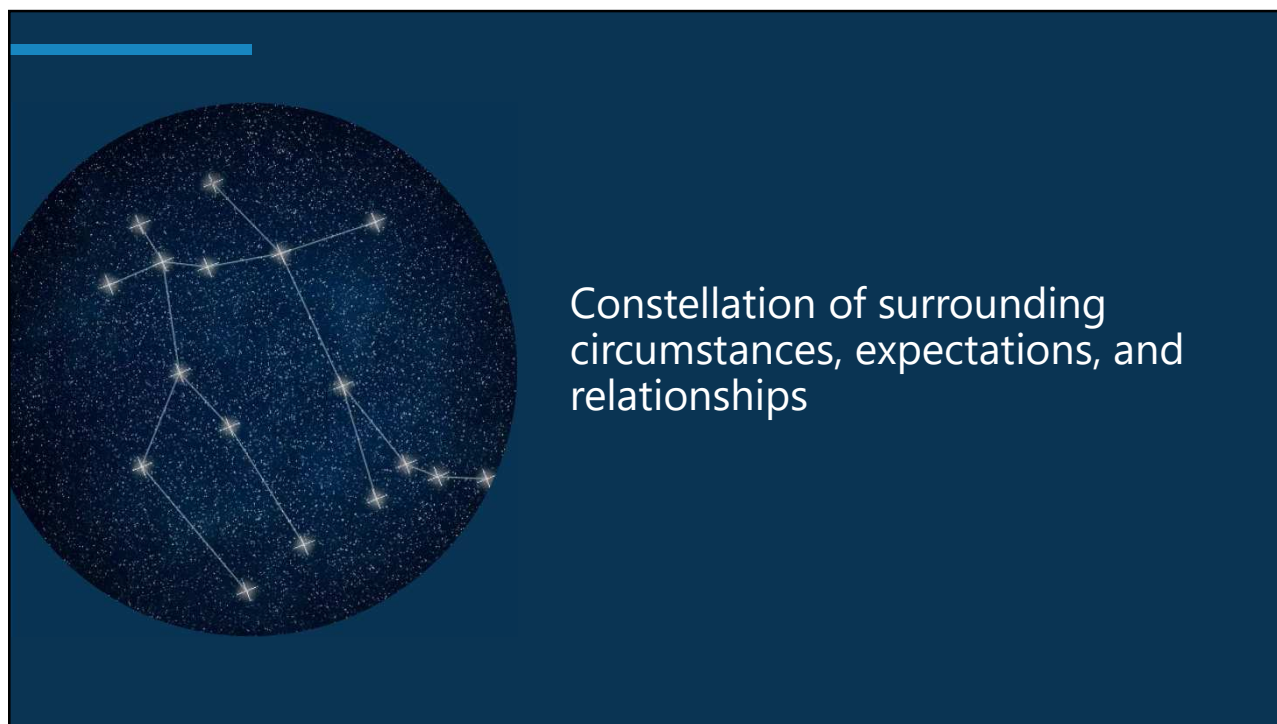
- Systemic or widespread
- Multiple incidents of harassment
- One incident is not enough, even if very severe

35

## **Objectively Offensive**

- Behavior that would be offensive to a reasonable person under the circumstances
- Not just offensive to the victim, personally or subjectively
- Consider ages, numbers, relationships

36



37

## Hostile Environment Factors

Context, Nature, Scope, Frequency, Duration, and Location of the Incidents

Identity, Number, Ages, and Relationships of the Persons involved

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39

# Yes or No?

Is this "Title IX Sexual Harassment"?

40

**A student makes multiple insensitive jokes to another student?**

Yes

No

Need more information

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41

**A teacher makes a sexually inappropriate comment to a student in class?**

Yes

No

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**One student grabs another student's breasts during a soccer game.**

Yes

No

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**A student "uses tongue" during an acting scene without the other student's permission.**

Yes

No

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44

**A group of students (one sex) make a Facebook post rating students (another sex) by attractiveness and share with school community**

Yes

No

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information

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**A teacher (one sex) tells a student (another sex) to trade a back rub in the classroom for a good grade on a test**

Yes

No

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information

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**Students incessantly mock a female student for not wearing makeup saying she looks "like a boy"**

Yes

No

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information

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47

**A student sends a completely nude picture to the student's significant other (another student)**

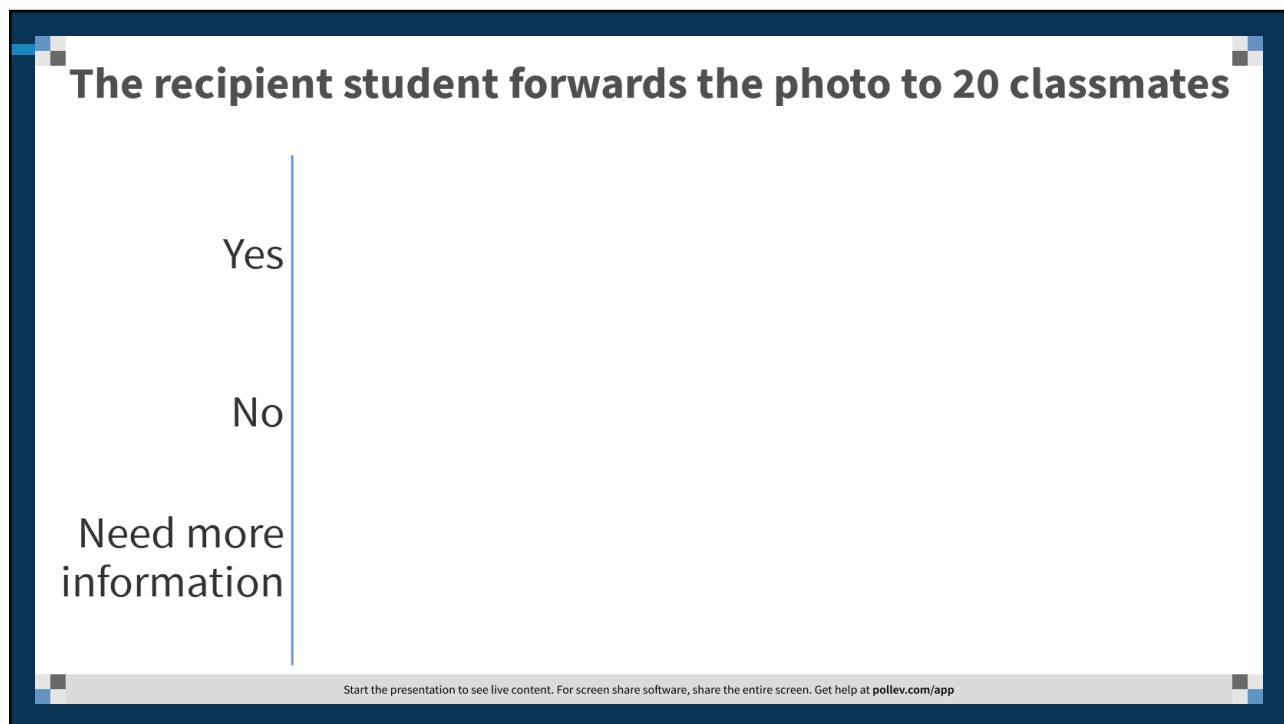
Yes

No

Need more  
information

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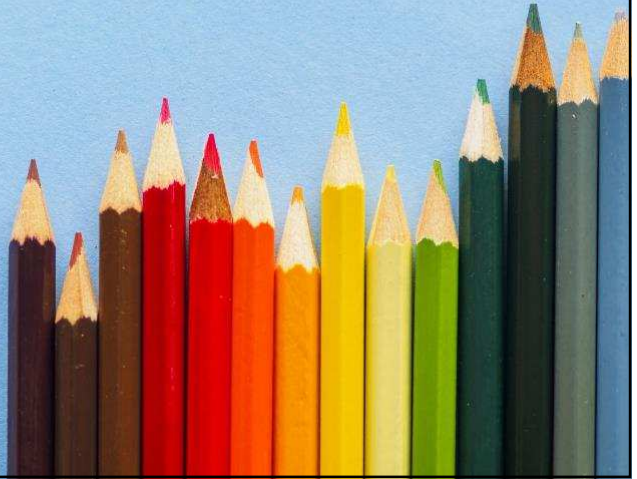


49

<b>When must a school respond to Title IX sexual harassment</b>	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
---	---

50

## Title IX Sexual Harassment Must Be “In a Program or Activity”



51



**Program or Activity:** Any location, events, or circumstance over which the school exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

52



# Online & Off Campus

Substantial control over the context?



53

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

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

54



55



## DISMISSALS

<p><b>Mandatory if conduct alleged:</b></p> <ul style="list-style-type: none"> <li>Not Title IX Sexual Harassment</li> <li>Did not occur in the school's program or activity</li> <li>Did not occur in the United States</li> </ul> <p><b>**can still address under non-Title IX policy</b></p>	<p><b>Permissive if:</b></p> <ul style="list-style-type: none"> <li>Complainant requests to withdraw in writing</li> <li>Respondent's enrollment or employment ends</li> <li>Specific circumstances prevent school from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)</li> </ul>
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56

# How Must You Respond

57

## School Policies on Harassment

Option 1: Title IX Sexual Harassment Policy and Procedure (for Title IX Sexual Harassment)

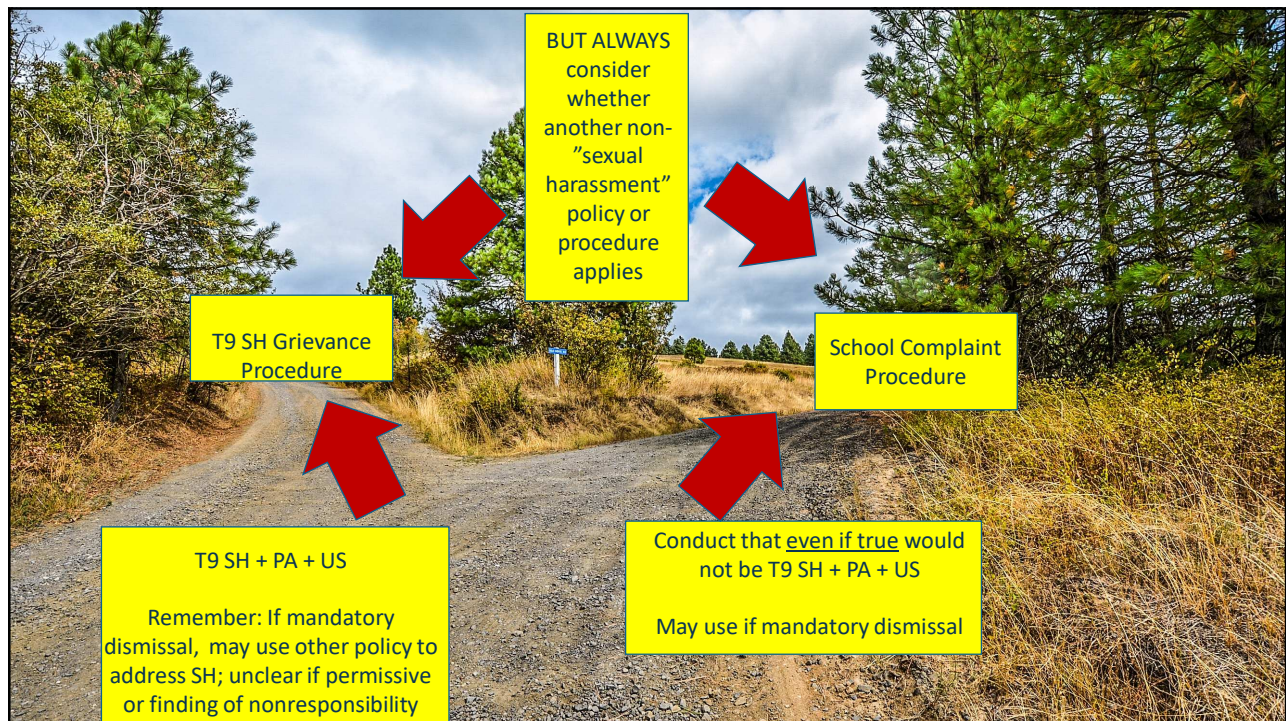
Option 2: Other Complaint Procedure (other sexual harassment, other violations of law and of School policy)

Option 3: Other rules or policies

58



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## Adequate Response

1 Initial Response/Supportive Measures

2 Informal Resolution (Voluntary)

3 Investigation

4 Decision

5 Appeal

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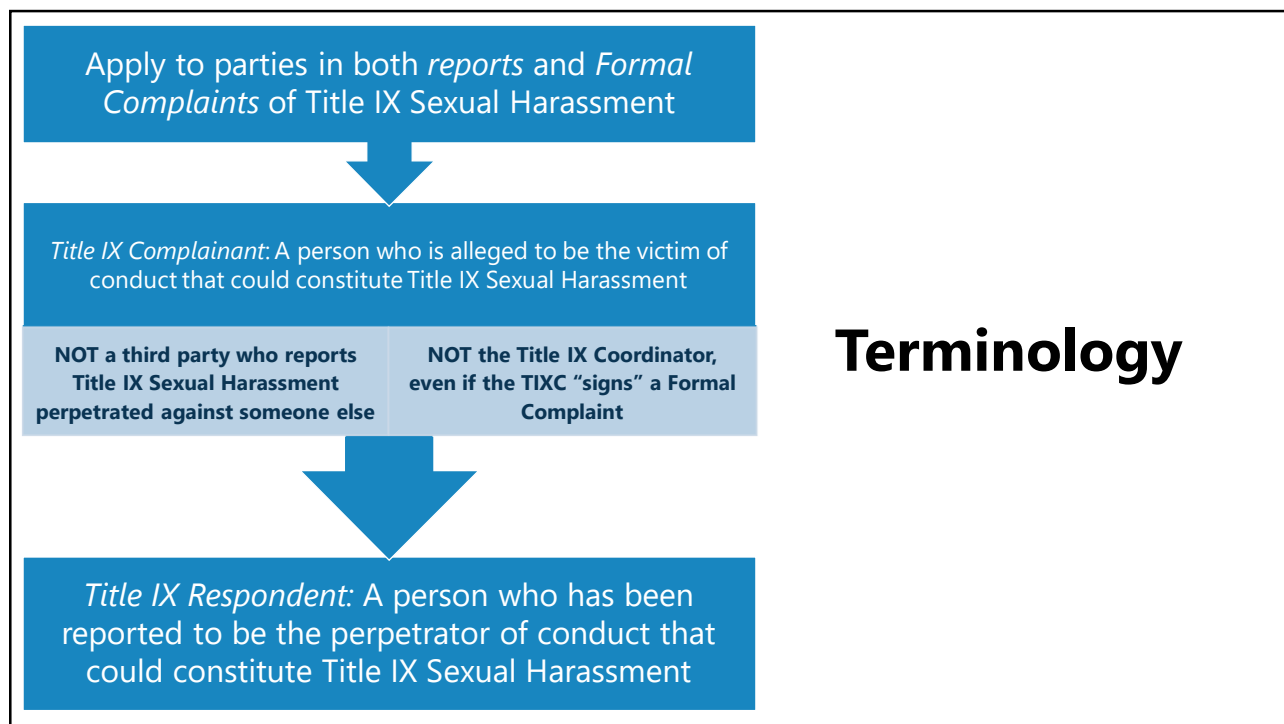
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## 1 Initial Response/Supportive Measures

62





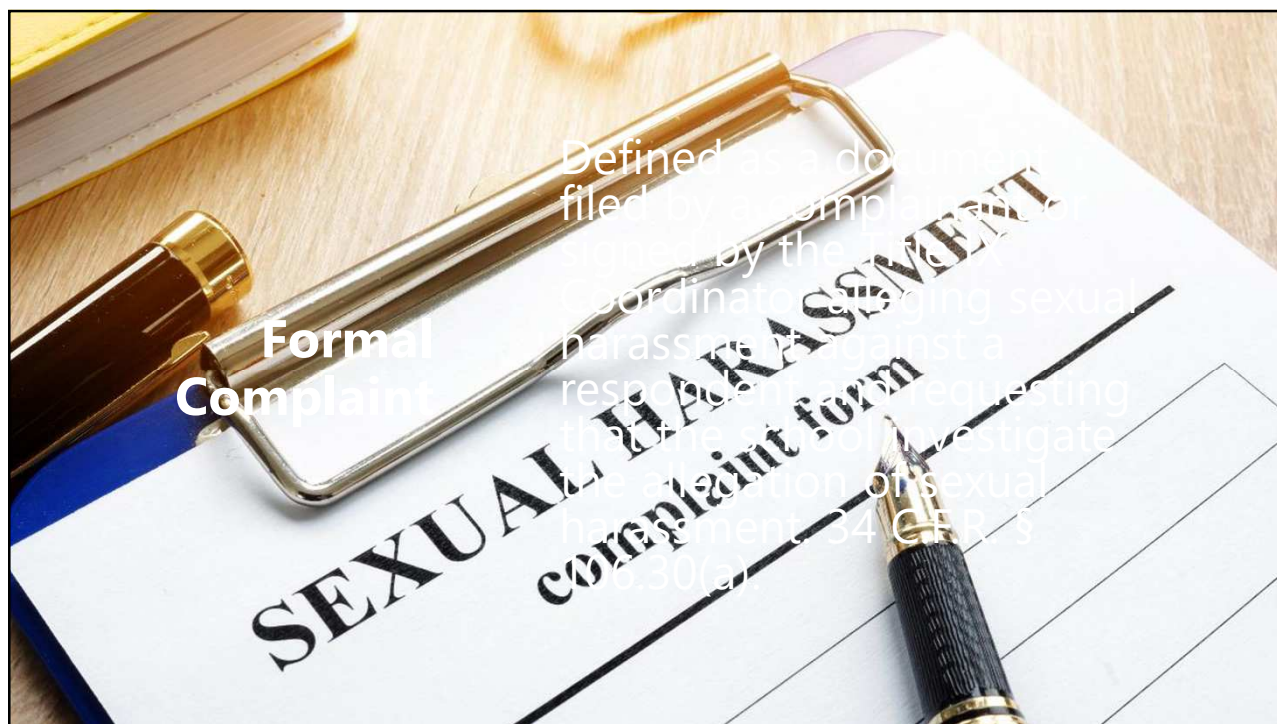
63

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

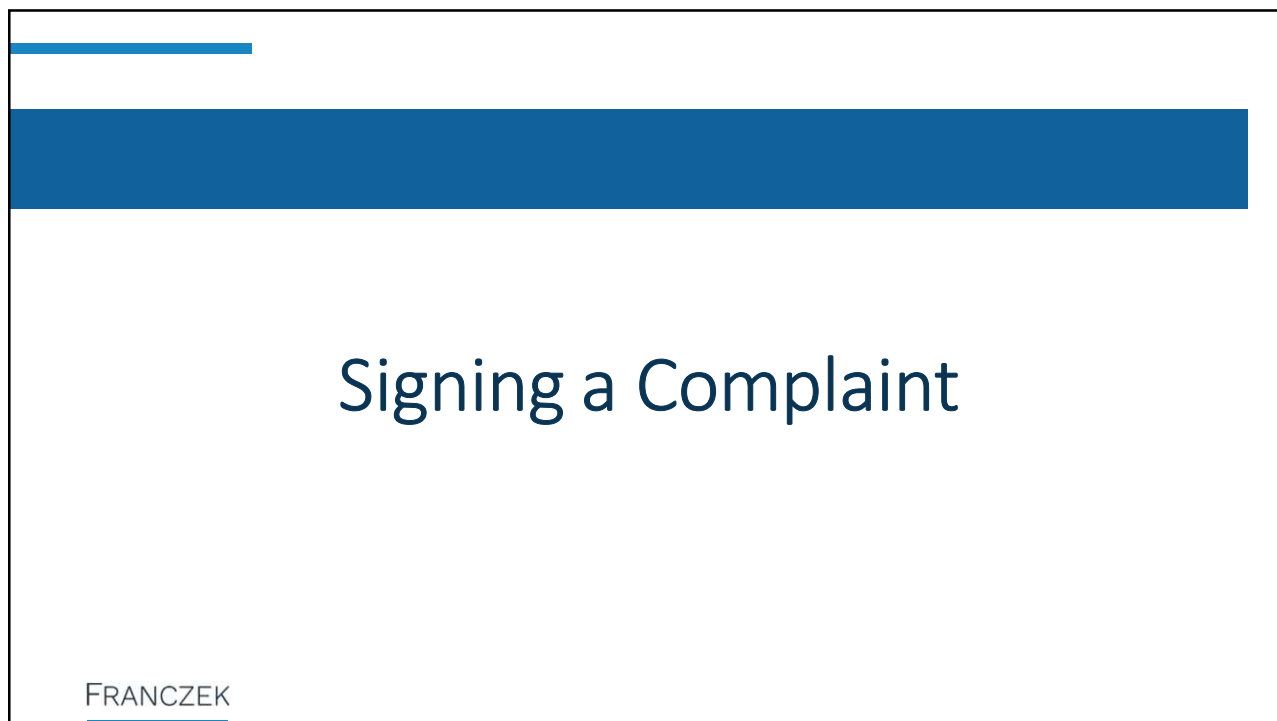
- Contact the Title IX Complainant to discuss the availability of "supportive measures"
- Consider the Title IX Complainant's wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain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

## ***New:*** **Initial Response**

64



65



66

## Supportive Measures

### What Changed?

#### OLD TERM (OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

#### NEW TERM (Final Rule)

- **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**

67

## 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
- Consider other laws, e.g., expulsion laws (SB100), “change in placement” under IDEA or 504

#### Employee administrative leave

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

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

68

## 2

## Informal Resolution (Voluntary)

69

## Informal Resolution

### INFORMAL RESOLUTION IS NOT PERMITTED UNDER THE FOLLOWING CONDITIONS:

- Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure
- Cannot require use of informal resolution process
- Cannot offer informal resolution process until formal complaint is filed
- Not available to resolve allegations that employee sexually harassed a student

### INFORMAL RESOLUTION MAY MOVE FORWARD UNDER THE FOLLOWING CONDITIONS:

- Any time prior to reaching a determination, either party may request informal resolution
- Requires voluntary, written consent from both parties
- Any party has a right to withdraw prior to agreement

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## Informal Resolution Facilitators

- We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers (complaint and appeal)

71

3

## Investigation

72



# **New: Formal Complaint Response**

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution

73



## **Who should investigate?**

- Can be the Title IX Coordinator
- But should it?

74

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any **initial** interview
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

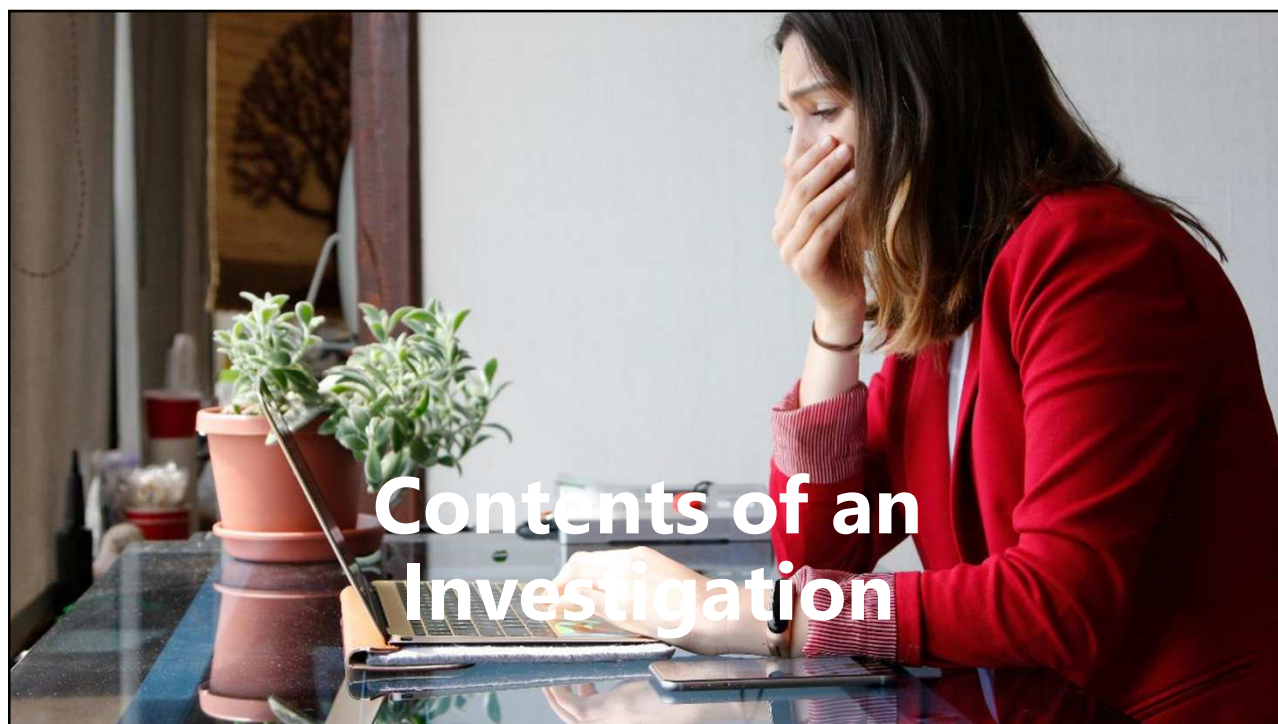
## More Steps: Written Notice

75

- Must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
  - Notice of parties’ rights to have an attorney or non-attorney advisor and to inspect and review evidence
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

## More Steps: Written Notice

76



77

A person wearing a trench coat and a hat is crouching on a wooden floor, holding a magnifying glass and looking at the floor. The text "Investigation 34 C.F.R. 106.45(b)(5)" is overlaid on the image.

- 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 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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# Investigation Plans Aren't Static

Reassess plan for  
investigation  
frequently



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Gathering Other Evidence



80

## Warning! Hands off

- Rape shield (for CP)
  - Unless
    1. Used to prove someone other than respondent committed the conduct or
    2. Specific incidents related to the RP to show consent
- Medical records (treatment)
- Privileged information

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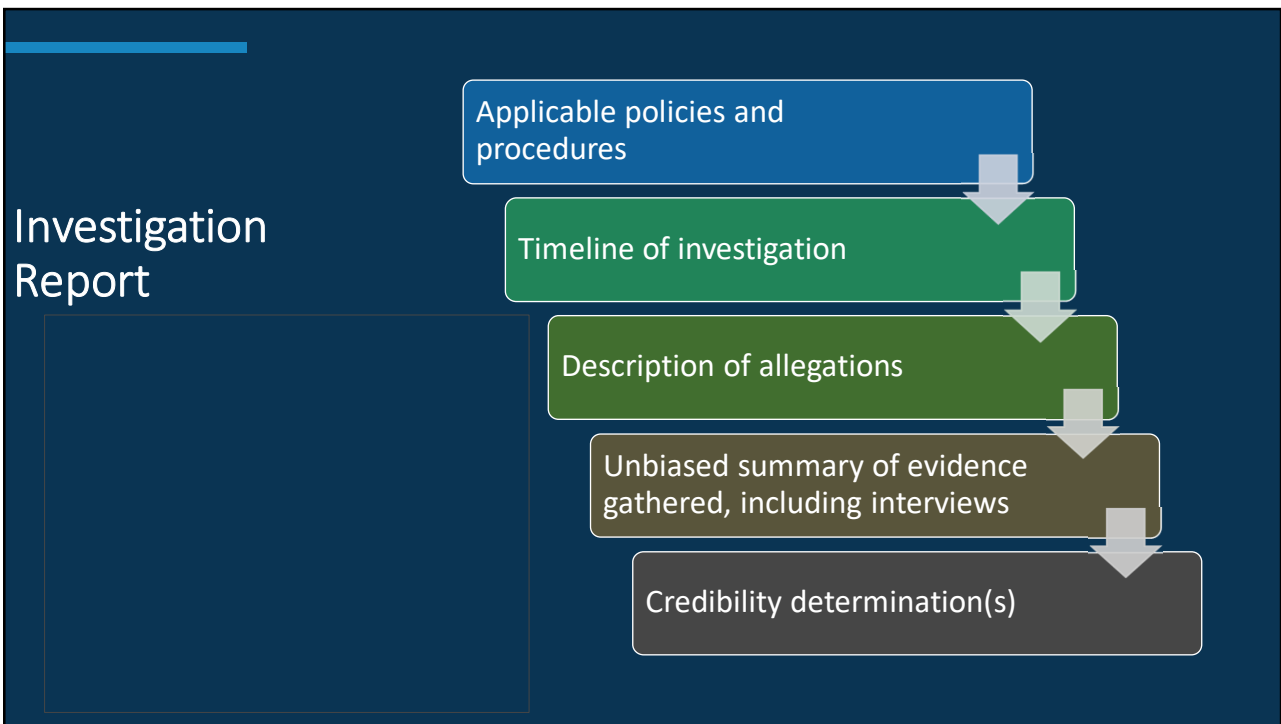
## Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all directly related evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence)
- Parties have 10 days to provide a written response

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## Investigation Report Writing

- Fairly summarizes all relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

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# 4

## Decision

85



### **Decisionmaker(s) (Complaint)**

- Cannot be the Title IX Coordinator or the investigator(s)

86

## Determinations of Responsibility 34 C.F.R. 106.45(b)(6)

- Live hearing with live cross by party advisors required for higher ed, **not K-12**; Hearings permitted for K-12
- Each party allowed to submit written, **relevant** questions to be asked of another party or witness to the decisionmaker, who will provide each party with the answers and the opportunity for follow-up questions

87

## Warning! Hands off

- Rape shield (for CP)
  - Unless
    1. Used to prove someone other than respondent committed the conduct or
    2. Specific incidents related to the RP to show consent
- Medical records (treatment)
- Privileged information

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## Rulings on Relevance in Written “Cross”

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Questions must be appropriate
- Identify exceptions

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90

## Written Determination

Identify	Identify the allegations
Describe	Describe procedural steps taken
Cite	Cite potential policy violations
Summarize	Fairly summarize all relevant evidence
Provide	Provide statement of result, with rationale, for each allegation
Appeal	Appeal procedures

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**Remember the  
Standard of  
Proof**

**Preponderance  
of the Evidence**

92

# Remedies

- Can be punitive/disciplinary
- Can be supportive measures or similar actions as well
- Can address individuals or larger community

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## 5 Appeal

94



## Appeal Process

- Available to both parties
- Can appeal determination regarding responsibility or dismissal
- Three bases for appeal (must impact outcome):
  - Procedural issue;
  - New evidence not reasonably available; or
  - Conflict of interest or bias

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## Appeal Process

- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

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## **Decisionmaker(s) (Appeal)**

Cannot be the Title IX  
Coordinator or the  
investigator(s) or the  
decisionmaker (complaint)

97

## **Bias, Conflicts of Interest, and Other Fairness Concerns**

98

## Bias, Conflict, Prejudgment

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator 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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## Bias, Conflict, Prejudgment

- Consider perceptions, not just reality
  - Institution bias
  - Your friendship or other relationship with the accused or their family
  - Your personal characteristics
  - Your personal conflicts (even if just perceived)
  - Personality conflicts

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# Go Back and Think

What steps can you take to avoid:

- *Prejudgment*
- *Conflict of Interest*
- *Bias*

101

# Recordkeeping

102



## Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Notice why proposed questions not asked on cross and why
- Written determination and notice of appeal rights

103



## Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions

104

## Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
  - Determination regarding responsibility
  - Recordings or transcripts of live hearing
  - Disciplinary sanctions imposed on Respondent
  - Remedies provided to Complainant
- Appeal and result
- Informal resolution and result
- Actions taken in response to a report of sexual harassment
- Actions taken in response to a formal complaint of sexual harassment

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## Recordkeeping

Responses to formal and informal complaints and actions taken in response should include:

- The basis for the school's conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the school's education program or activity
- Supportive measures or if no supportive measures are provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances

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# Title IX Investigator Responsibilities

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## Investigator Responsibilities

- Identify and interview parties and witnesses
- Gather and assess evidence
- Share evidence with parties and provide for written response
- Draft and transmit investigative report

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## Decision-Maker – Complaint

- Review evidence collected during the investigation
- Written Cross (hearing process if elected)
- Make relevancy determinations
- Make independent judgment on responsibility and sanctions

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## Decision-Maker – Appeal

- Review decision-maker on complaint's written determination
- Review appeal document(s)
- Grant parties opportunity to respond
- Review party responses
- Make independent judgment on appeal questions

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# Serving Impartially

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## Who should investigate? Who should decide?

- Trained, unbiased investigator & decisionmakers
  - No actual or perceived conflict of interest
  - Check "institutional interests"
  - No prejudgment
- Appeal: Can be based on bias and conflict of interest that affected the outcome

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## The Rules

The Title IX Investigator & Decisionmakers 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 prejudice any matter before them.

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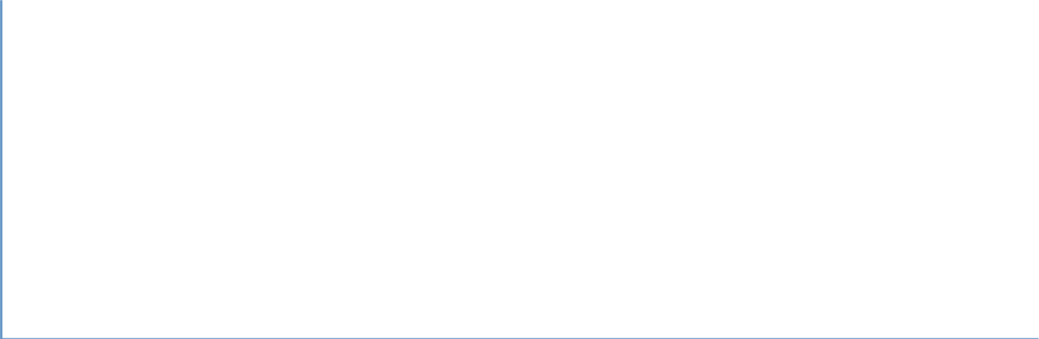
## Cameron's Formal Complaint

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

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

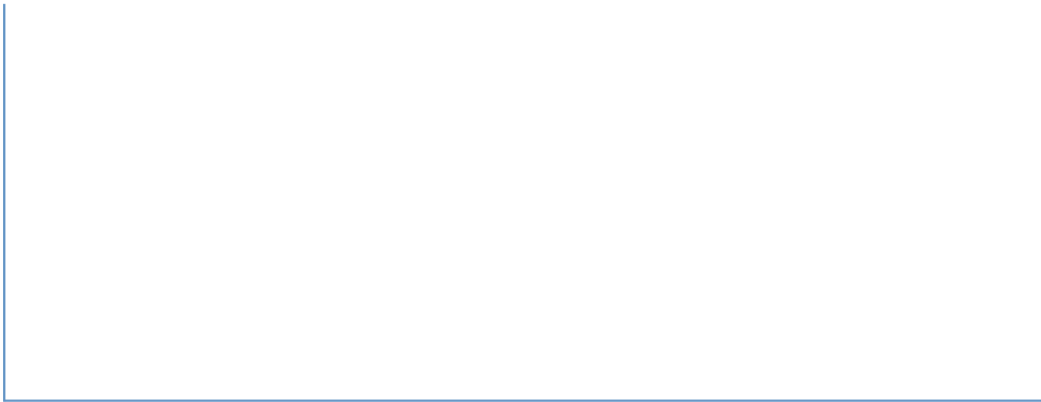


Yes No

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**You attend the same church as Parker. Is that a conflict of interest?**

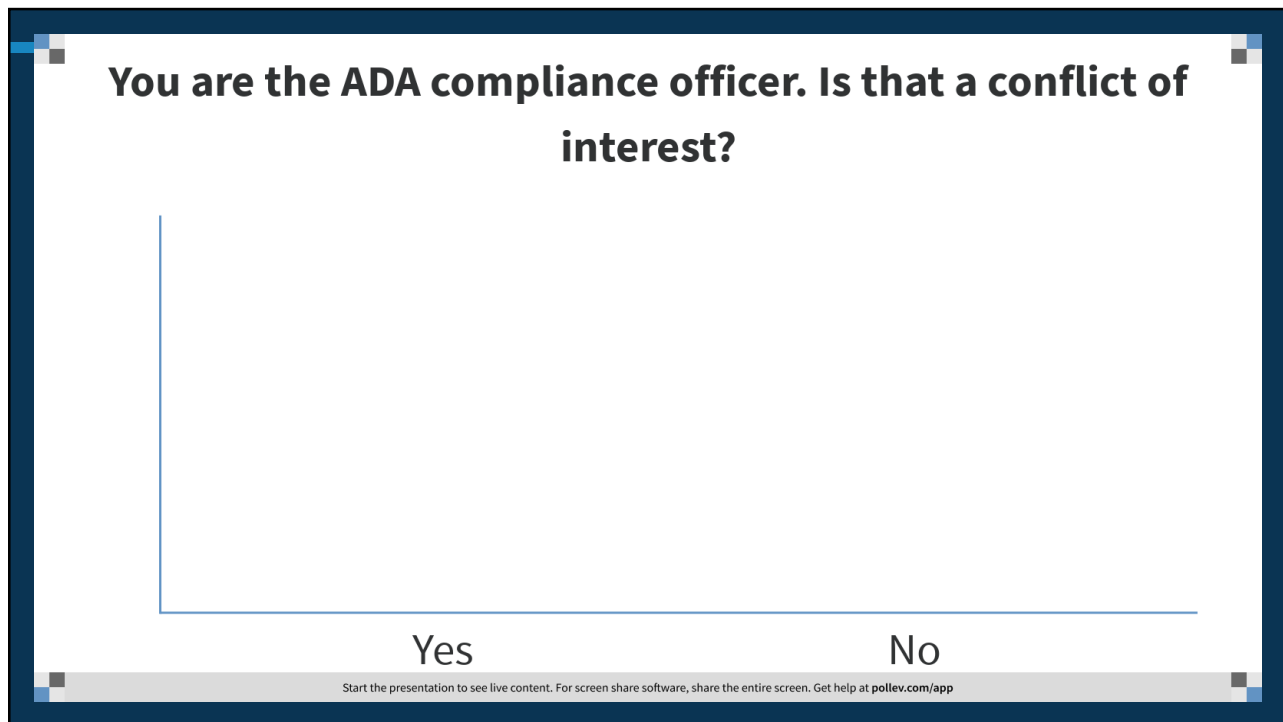


Yes No

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**You are the ADA compliance officer. Is that a conflict of interest?**



Yes No

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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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## 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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## Investigation: Required Elements

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# Investigation

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

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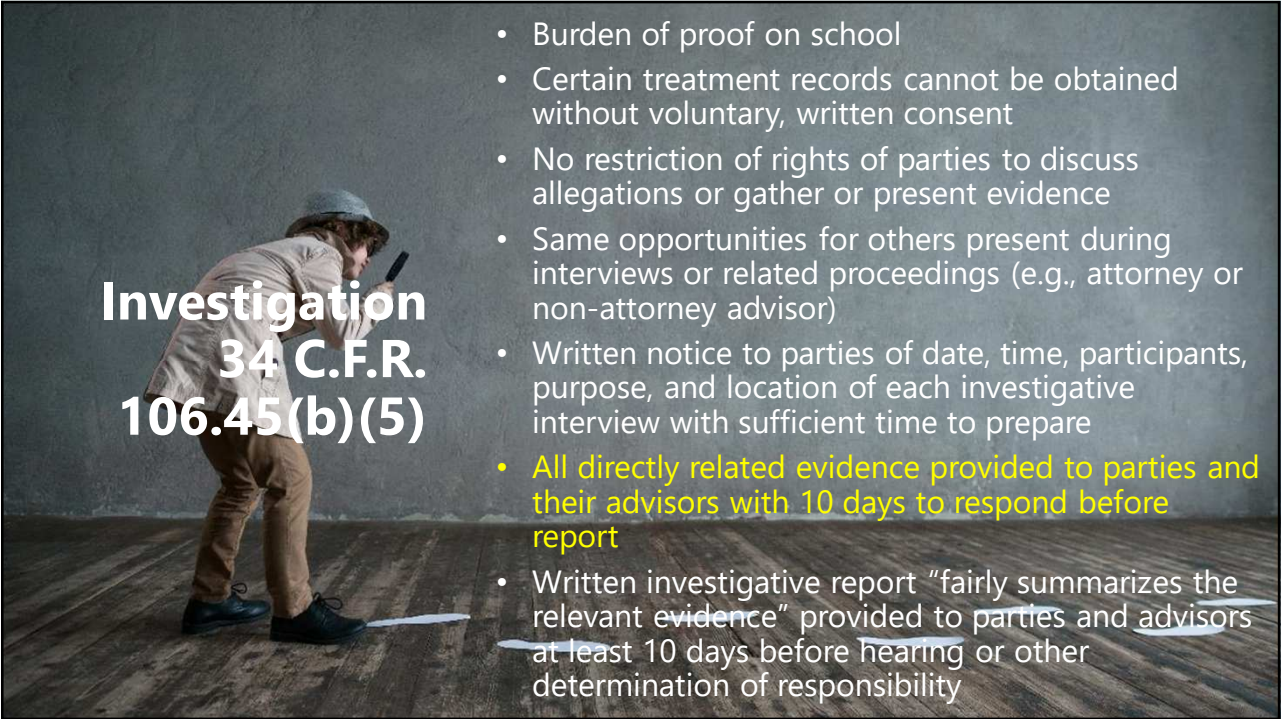
**During the investigation, the Complainant is responsible for providing evidence to support the complaint**

True

False

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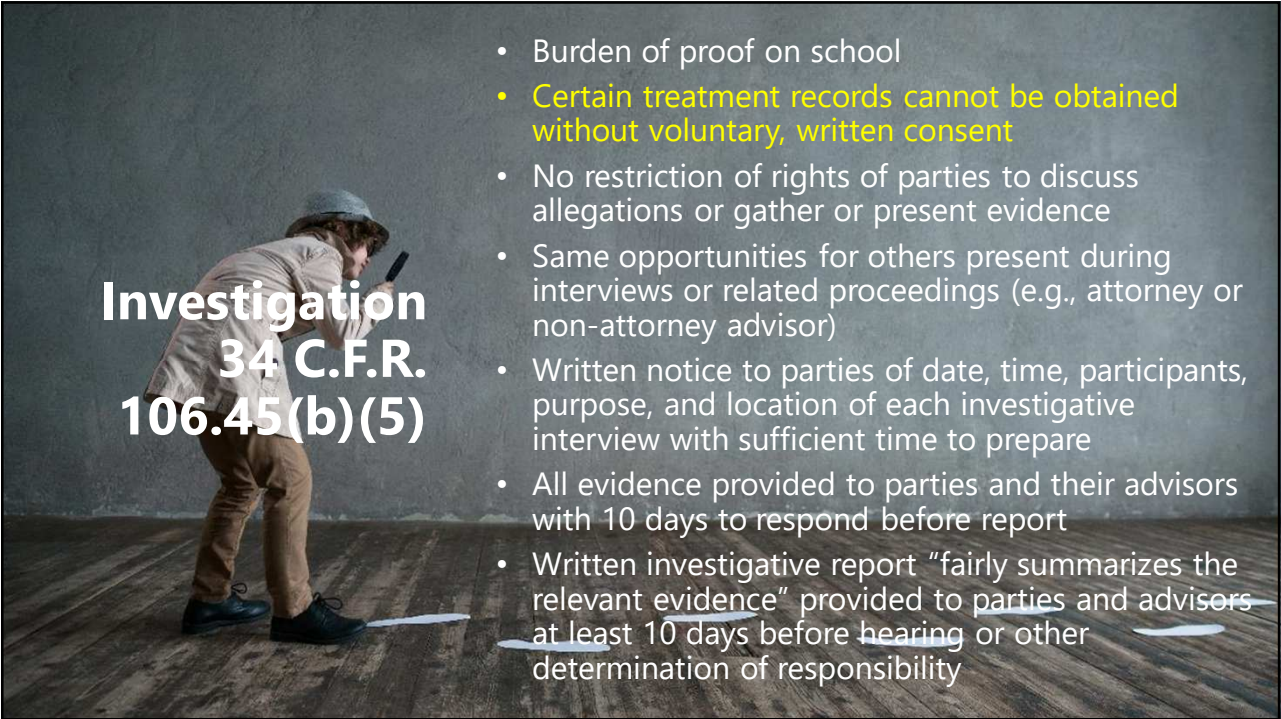
124



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

- Burden of proof on school
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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 an investigation, the investigator can tell an employee Respondent not to talk to coworkers, parents, or other members of the school community about the complaint.**

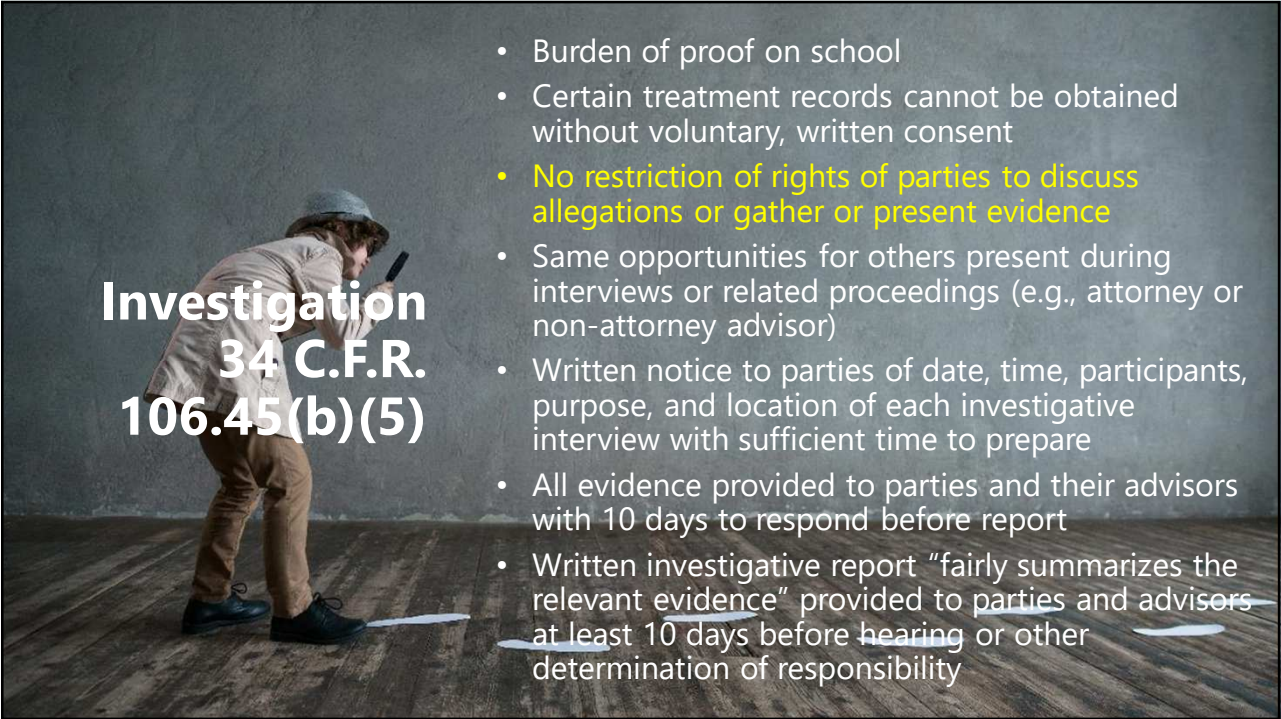
True

False

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128

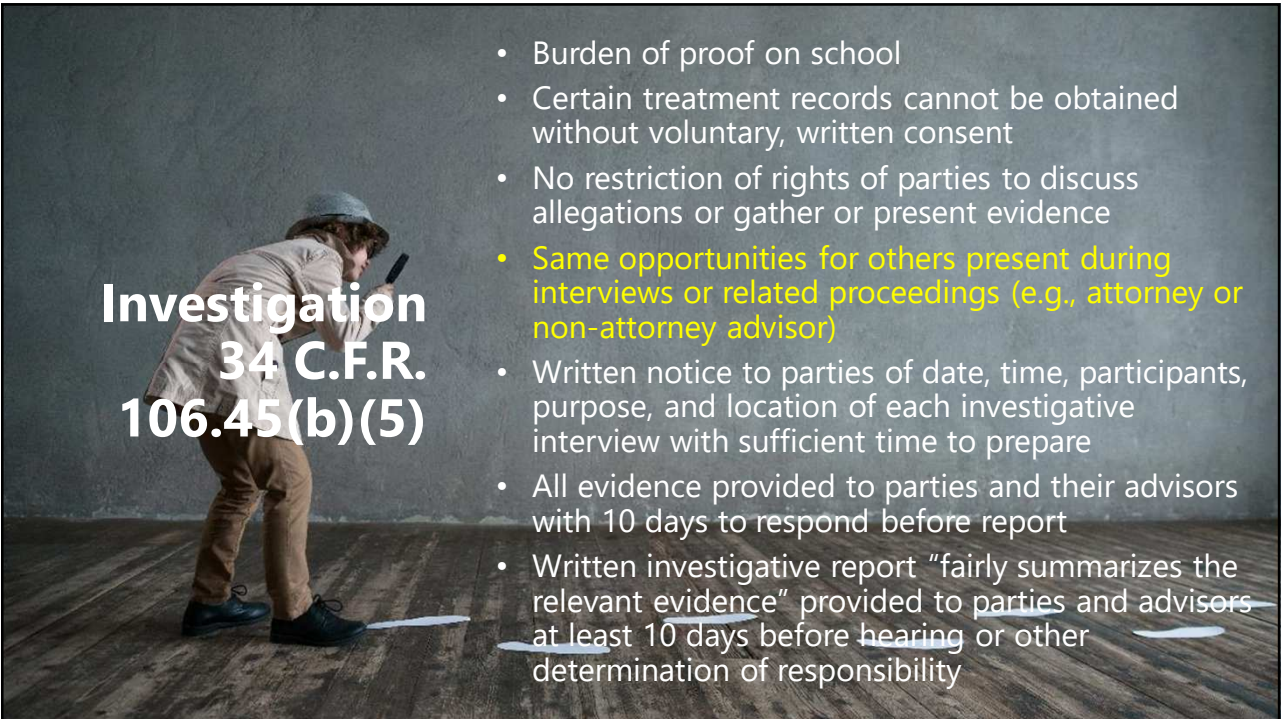




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## **What if a party wants to bring a priest to investigation meetings?**

They can bring any advisor to any investigatory meeting

They can bring an advisor, but it must be a union rep and lawyer for employees or a parent and lawyer for students

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## **A party 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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## Forms/Notices

### Notice to Advisors

Advisor  
Conduct  
Expectations

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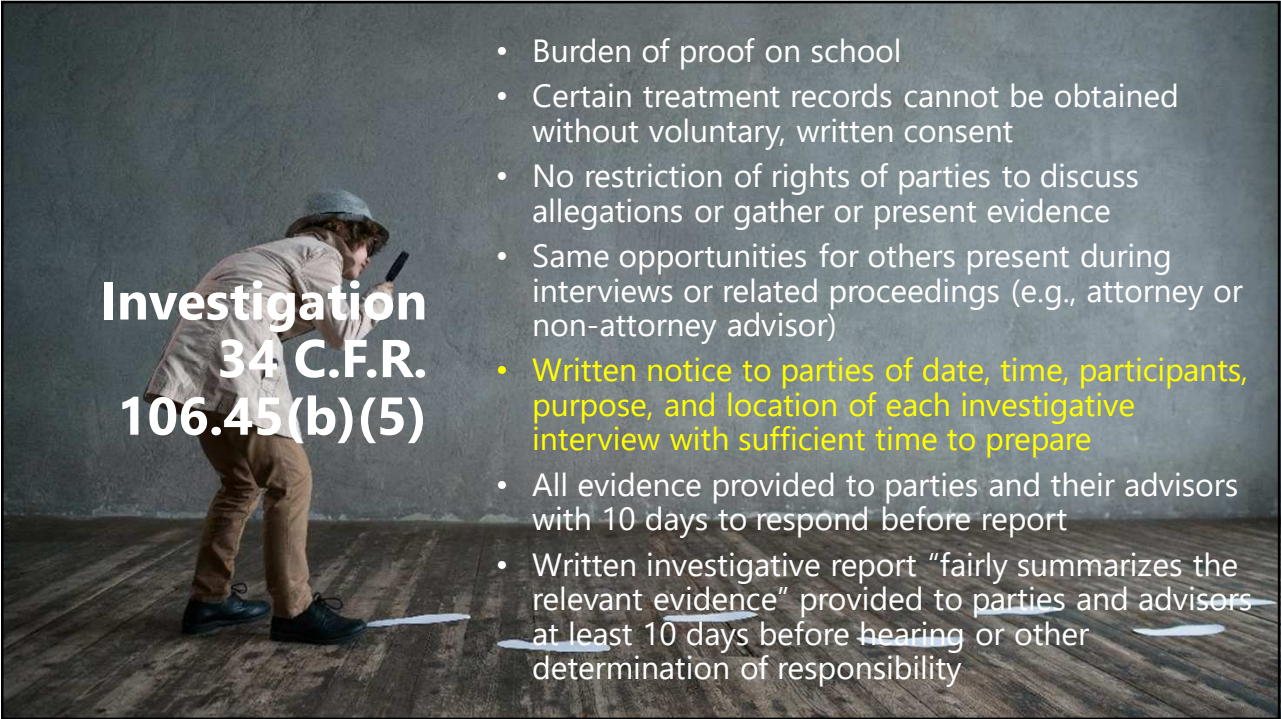
**You receive notice that a student is alleged to have engaged in sexual harassment. You can walk down to the classroom and pull the student out to question the student in the office immediately.**

True

False

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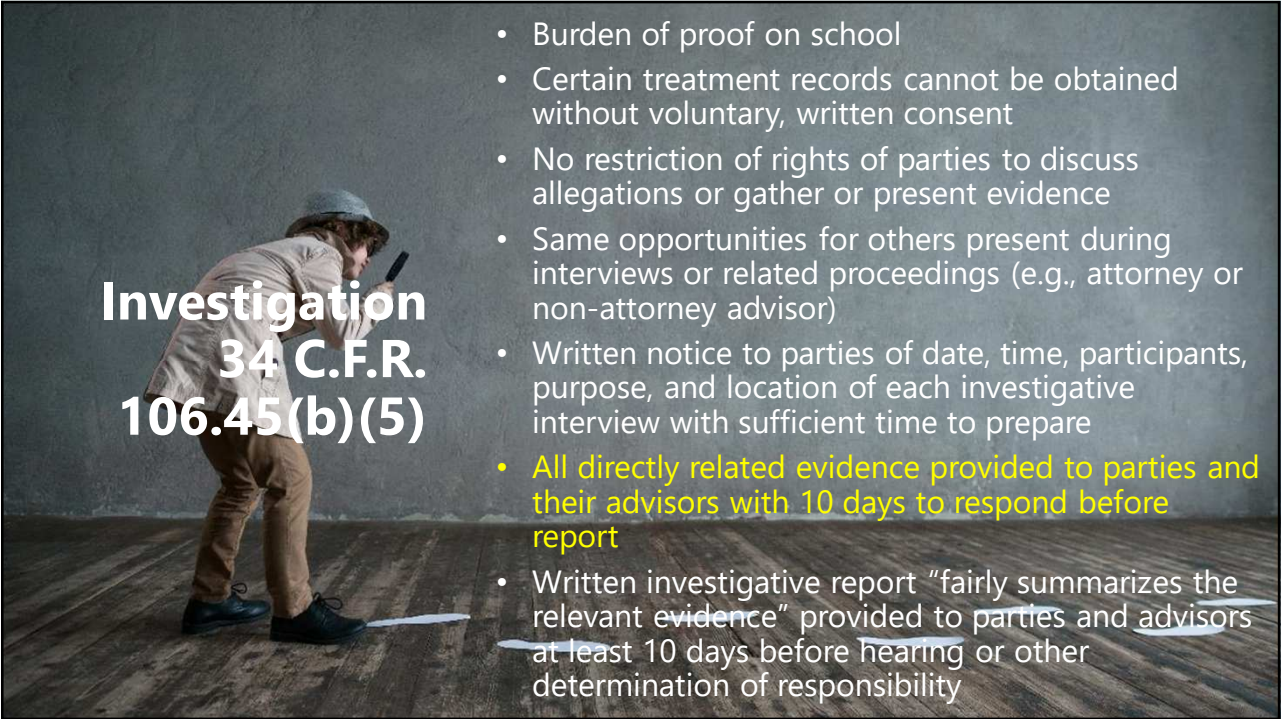
**Before finalizing the investigative report, I must give both parties and their advisors a summary of all evidence and an opportunity to respond.**

True

False

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

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- 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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# 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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- 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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# 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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## 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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# Concurrent Law Enforcement

- Cooperate with law enforcement and DCFS where applicable
- Delay may be permitted to cooperate, e.g.:
  - 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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## 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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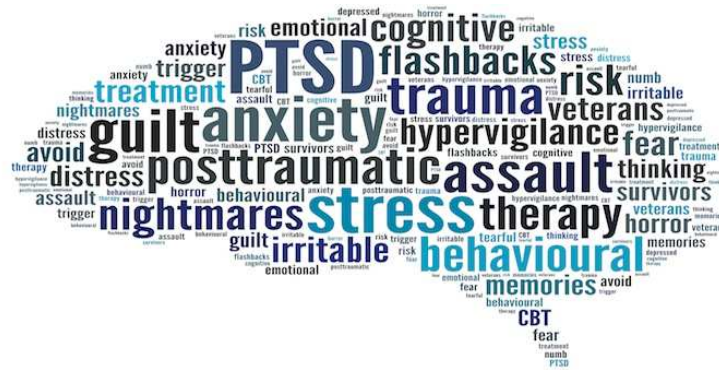
## Closing

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

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# Potential Trauma for CP and RP



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## Practical Tips – Trauma

Acknowledge pain/difficult situation

"It's ok if you can't remember every detail. We will just focus on what you can recall." "I can tell this is difficult for you, I can give you a little time"

Do not demand starting at the beginning & providing every detail

Ask open ended questions

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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

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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)

165

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 + Judgments
- Label: Name of Witness, Date, Time, Interviewer, Location, Method, Those Present

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## Decision-Making Process

### The Complaint

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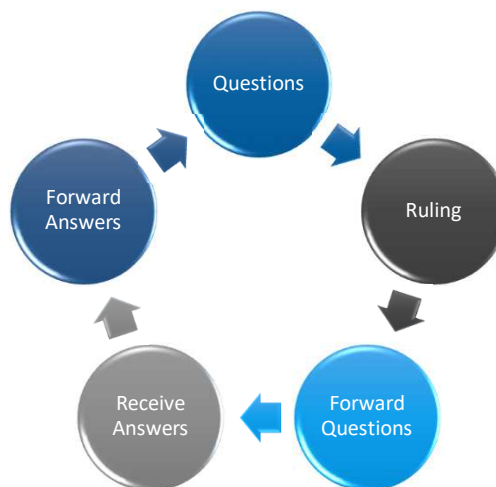
## You Should Review

- Formal complaint
- All relevant evidence gathered during the investigation
- Investigative report
- Written responses submitted by parties

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## Written Cross Examination Process



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# Issues of Relevance and Evidence

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## Issues of Relevance

- Must objectively evaluate questions and make determinations on relevancy
- Includes inculpatory and exculpatory evidence
  - Inculpatory: tends to prove policy violation
  - Exculpatory: tends to exonerate the accused

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## Relevance

- What is relevance?
- Something that makes a fact or issue in dispute more or less likely to be true

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## Rulings on Relevance

- Admit and consider all relevant questions
- Provide reasoning for irrelevance
- Consider exceptions
  - Sexual behavior of CP (except in limited situations)
  - Legal privilege
  - Treatment records

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# Written Determination Regarding Responsibility

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## Making a Determination

- Remain unbiased and impartial
- Render a reasoned decision based on evidence
- Base decisions on relevant evidence alone
- Evaluate witness credibility
- Consider weight of evidence (remember standard: preponderance of the evidence)

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# Forms/Notices

## Determination

Written  
Determination  
Template  
(Franczek Form C)

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## Written Determination

Identify	Identify the allegations
Describe	Describe procedural steps taken
Cite	Cite potential policy violations
Summarize	Fairly summarize all relevant evidence
Provide	Provide statement of result, with rationale, for each allegation
Appeal	Appeal procedures

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## Factual Findings

Separate findings for each alleged policy violation

For any facts in dispute, show your work and reasoning

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## Factual Findings

Consider	Consider both supporting/corroborating and conflicting/inconsistent information for each disputed fact
Make	Make credibility determinations by considering corroborating evidence, inconsistencies, logic of explanation/narrative, impact of trauma
Use	Use words of parties/witnesses
Be	Be detailed and precise

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## **Opportunity to Review**

Document opportunities given to parties to provide information, review evidence, and provide rebuttal

Explain if anything offered/mentioned was not considered/obtained and why.

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# **Decision-Making Process**

## **The Appeal**

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## Appeal Process

- Available to both parties
- Three bases for appeal
- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

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## Appeal Process

- Procedural issue affecting the outcome
- New evidence that wasn't reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome
- TIXC, investigator, or decision-maker had conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

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## Procedural Issue

- Failure to follow the rules in policy/procedure
- Can be intentional or inadvertent
- Resulted in inappropriate decision; not always the case

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## New Information

- New Information
- Not known at the time
- Would change the opinion of the decisionmaker if known at the time
- Not a review of information known at the time

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## Bias/Conflict of Interest

- Bias toward one party or one type of party – personal or institutional
- Conflict of interest – personal or institutional
- Prejudgment of facts (avoid by “showing your work”)

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## Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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# Questions?



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