



Fagen Friedman & Fulfroft LLP

# 2020 Title IX Regulations: Investigator Training

**Alejandra Leon**



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# Agenda

- Investigator responsibilities
- Conducting Impartial Investigations
- Relevancy
- Requirements & Best Practices
- Sharing Evidence
- Preparing Investigative Report



# Initial Training Recap

- Definition of Title IX sexual Harassment
- Scope of Education Program/Activity



# Title IX Sexual Harassment

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



# Title IX Quid Pro Quo

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

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

**Codified:** Severity and harm presumed



# Title IX Sexual Harassment 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**





# **TITLE IX INVESTIGATOR RESPONSIBILITIES**



# 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





# Investigator SKILLS



- Avoid Bias
- Preparation
- Consistent Application of Procedures



# CONDUCTING IMPARTIAL INVESTIGATIONS



# Who should investigate?

- Trained, unbiased investigator
  - No actual or perceived conflict of interest
  - Check “institutional interests”
  - No presumption for or against any party
- Appeal can be based on bias or conflict of interest that affected the outcome



# Neutrality Required

The Title IX Investigator 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.

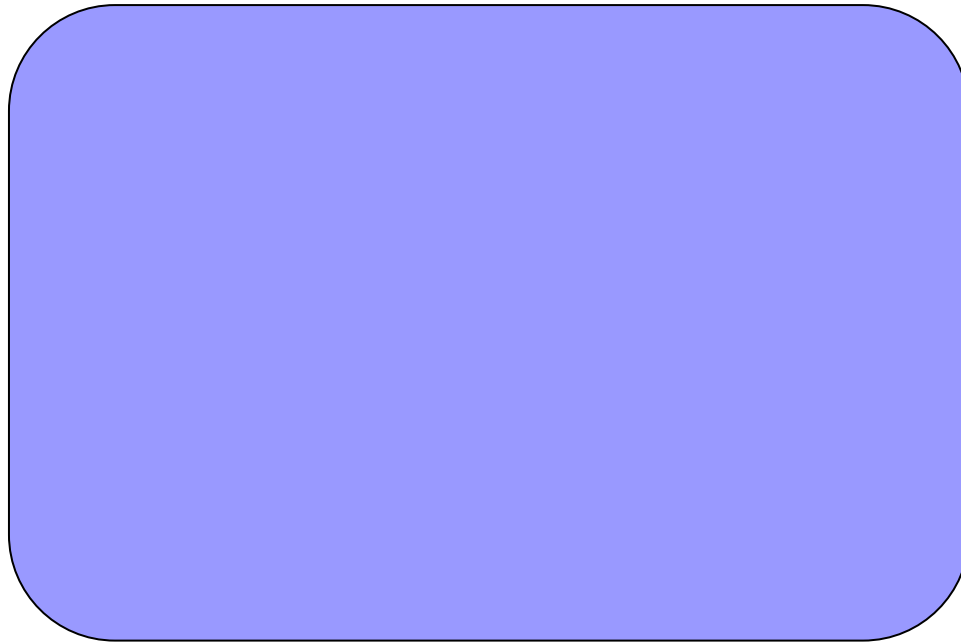


# Investigator Skill – Avoiding Bias

- Implicit Bias – unconscious & unintentional
- Awareness to Combat Bias
- Check thought process and decisions for bias
  - Take notes
  - Articulate reasoning



# Confirmation Bias



# Priming



So\_p



# Anchoring

**Together, a bat and a ball cost \$1.10.**

**The bat costs \$1 more than the ball.**

**How much does the ball cost? \_\_\_\_\_**





# Investigator Skill – Avoiding Bias

- Intuition vs. Deliberation
- Other
- Changing Bias



# Conflict of Interest

- Flexibility to choose employees or outsource adjudication functions
- No *per se* prohibited conflicts of interest when using school employees or individuals with histories of working in field of sexual violence as decisionmaker
- Caution against using generalizations to identify conflict of interest



**Investigator signed the formal complaint as Title IX Coordinator.**

**Is that a conflict of interest?**



**Investigator attends the same church as Respondent.**

**Is that a conflict of interest?**



**Investigator previously  
worked as a victim advocate.**

**Is that a conflict of interest?**



**Investigator serves as ADA  
compliance officer.**

**Is that a conflict of interest?**



# 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



# Sex Stereotypes

- Must not rely on sex stereotypes such as:
  - Women are “asking for it” based on actions or clothing
  - Men cannot be sexually assaulted
  - Women only decide they were assaulted after the fact due to regret or embarrassment
  - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity





# What Likely Is Not...

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



# Standard

- The Department declined to define “bias,” “conflict of interest,” “prejudice”
- 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....



# Formal Complaint

- 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
  - Informal resolution process, if offered



# Gathering Evidence



# Issues of Relevance



# Issues of Relevance

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



# Determining Relevance

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



# Rape Shield Law

- Exclude evidence of Complainant's sexual behavior or predisposition
- Two narrow exceptions
- Does not apply to Respondent





# 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



# 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



# Steps to Consider Relevancy

- Review all gathered evidence
- Review the allegations under investigation
- Does the evidence have the potential to prove/disprove an allegation in the investigation?
- Does an exception apply that would otherwise make evidence not relevant – rape shield?



# **INVESTIGATION: REQUIRED ELEMENTS**



# Investigation

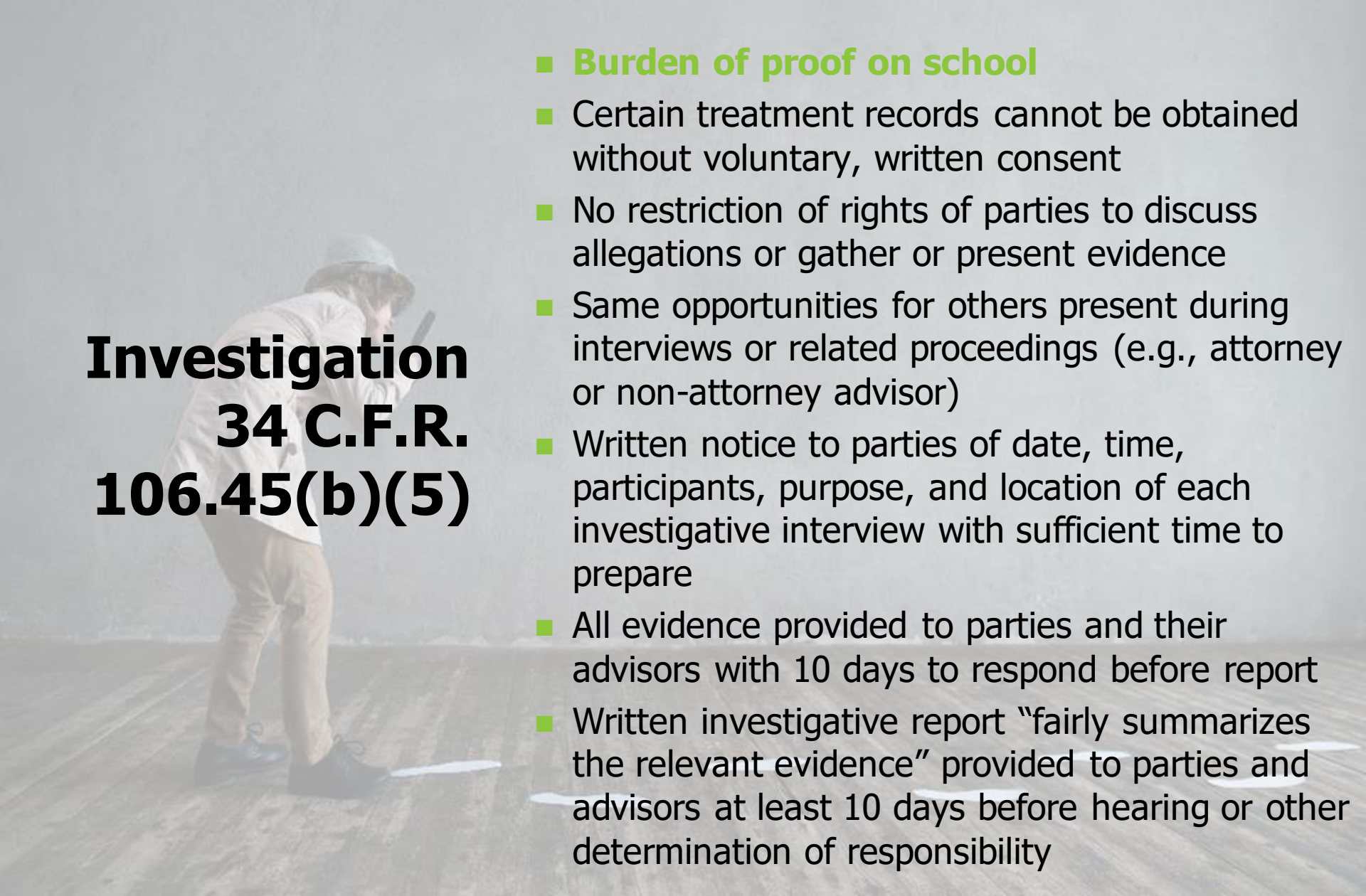
- Must contain specific elements
- Must treat parties equally
- Must end in a report, a written decision from the decisionmaker, and the opportunity to appeal



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

**True or False?**





# 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

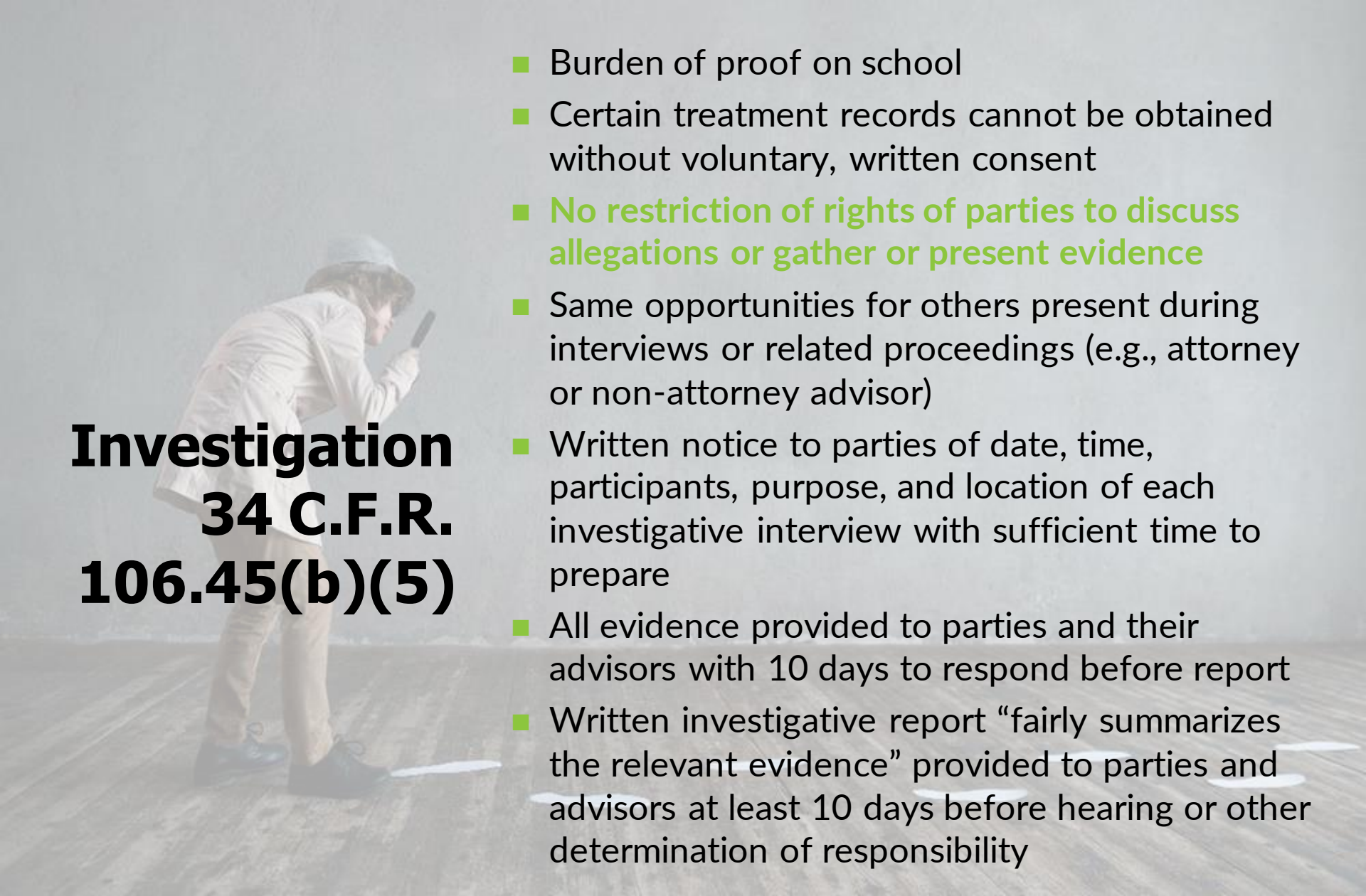


**During an investigation, the investigator can tell an employee Respondent not to talk to coworkers, parents, or other members of the school community about the complaint.**

**True or False?**







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

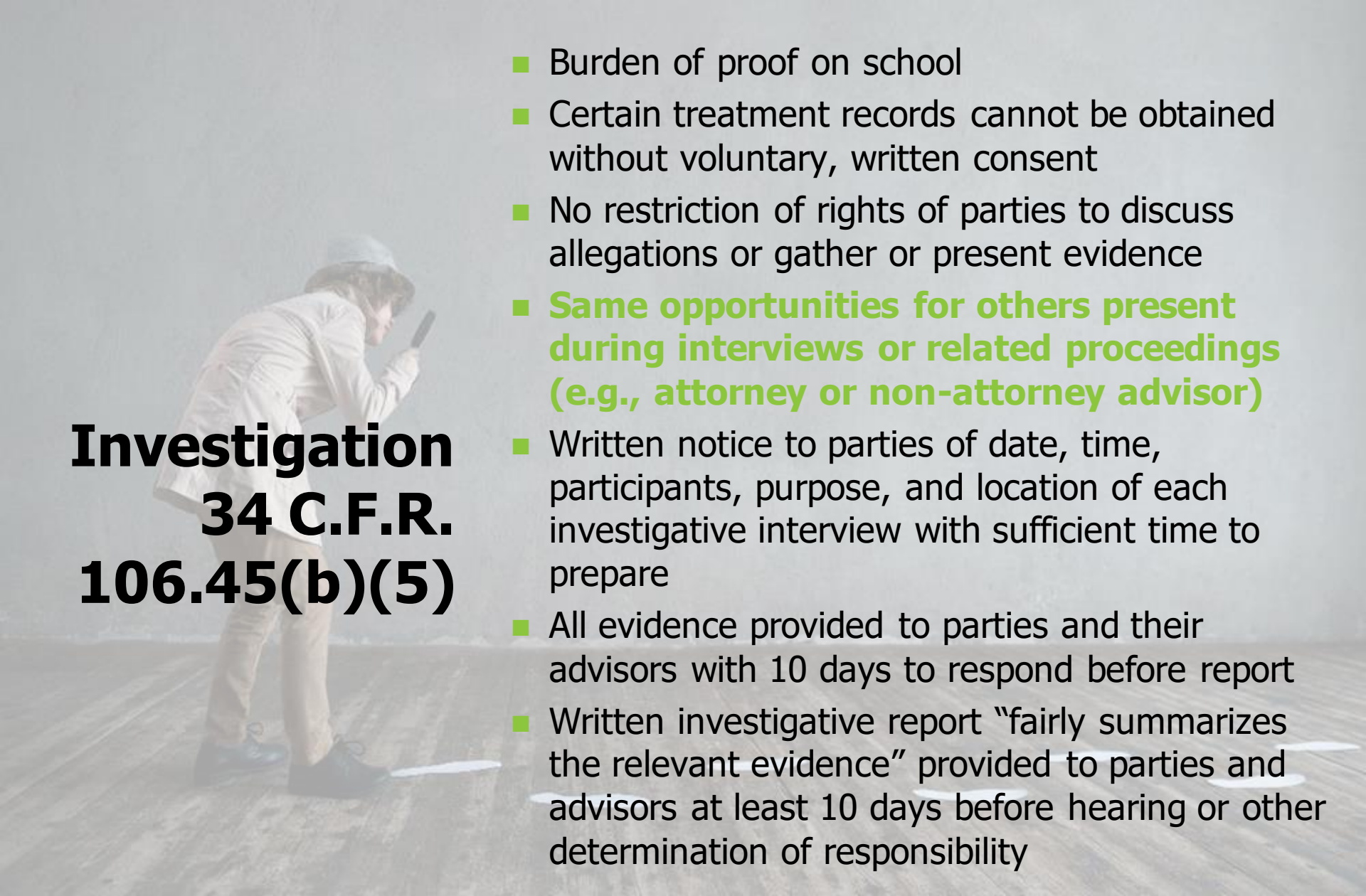
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# Retaliation and Gag Orders

- 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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# What if the teacher wants to bring a priest to investigation meetings?

- The teacher can bring any advisor to any investigatory meeting.
- The teacher can bring an advisor, but it must be a union rep or a lawyer.



# POLLING

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

- No, parties in Title IX matters have the right to an advisor 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.**
- Yes, because you are allowed to have rules of decorum and if an advisor will not follow them there is no requirement to delay the investigation.**



# Notices – Advisor Conduct

## Notice to Advisors



Advisor  
Conduct  
Expectations



# The Investigation Plan

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



# 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 friend, what happened. Cameron also talked to a teacher, Mr. Smith.
- You are assigned the formal complaint and send the written notices of Title IX allegations to the parties





# Concurrent with Law Enforcement

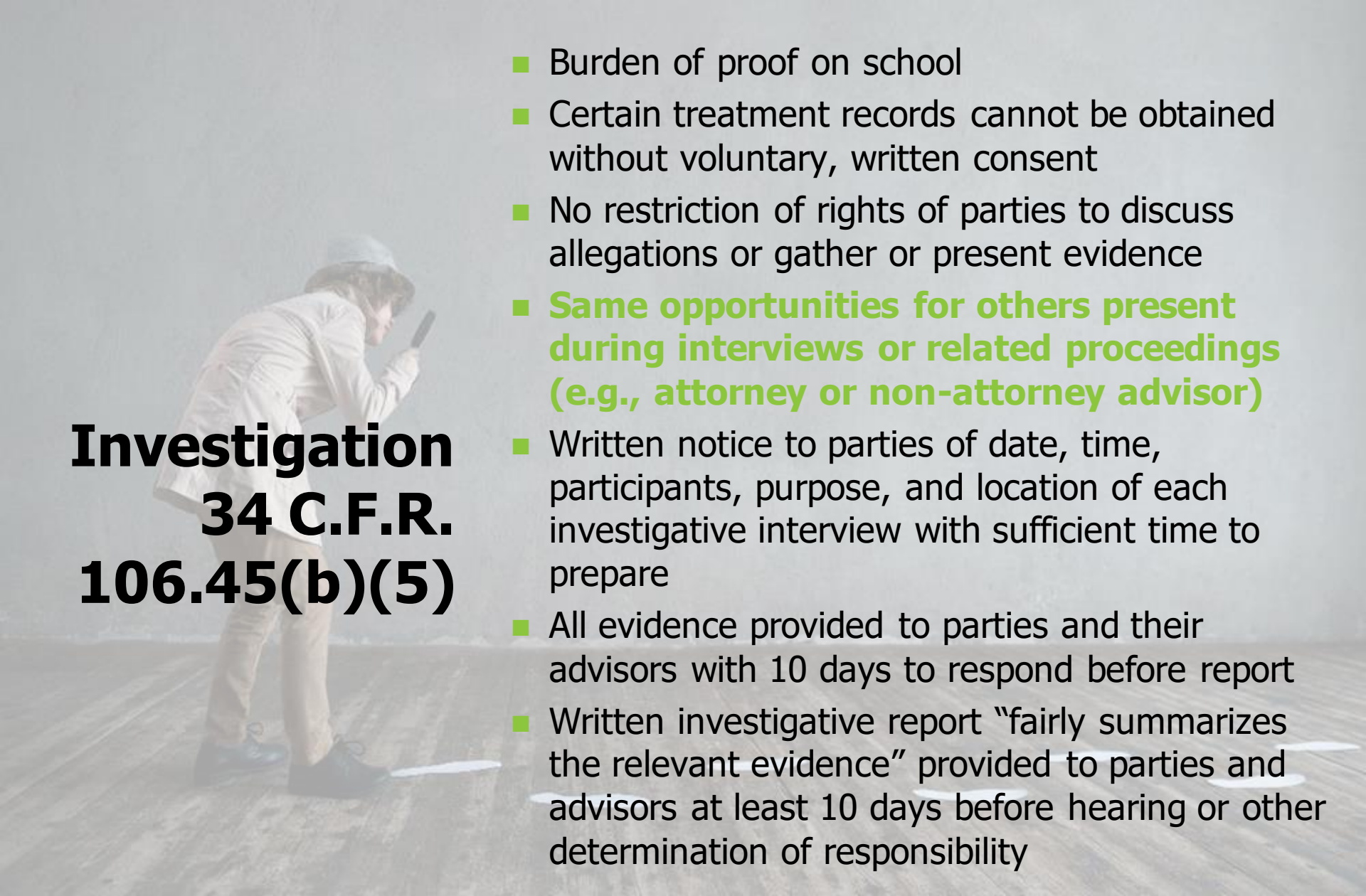
- Police plan to release evidence on a specific timeframe that is material to investigation
- Only “temporary” or “limited” allowed
- Not “more than briefly” beyond timeframes
- Not required





# Order of Interviews





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

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# Before Party Interviews

Written notice:

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



# **INVESTIGATION: CONDUCTING INTERVIEWS**



# Investigator Skill - Consistency

- Consistent Application of Procedures
  - Introduction
  - Representatives present
  - Concluding remarks
- Consistent Method of Notations
  - Exact words
  - Avoid assumptions or conclusions
  - Positive and negative comments



# Interviewing Parties

- Have a purpose for each question
- Ask questions about allegations, evidence, and policy elements
- Don't be accusatory or argumentative
- Questions should not be long or confusing
- If you regret a question or comment, acknowledge, apologize, and rephrase



# Interviewing Parties

- Avoid responses that are evaluative, if possible
- Listen carefully and adapt questions as needed
- Clarify colloquial terms or terms that have multiple meanings
- Be cautious about phrasing







**Victim  
blaming**

**Accusing**

**Judging**

**AVOID**



# Interviewing Witnesses

- Respect
- Avoid discussing theories or assessment of evidence
- Obtain account of events in detail
- Consistent procedure



# Interviewing Witnesses

- Do not interview witnesses in groups
- Questions can shape answers
- Ask open-ended questions and listen
- Ask judgment free questions
- Avoid pronouns
- Avoid compound questions
- Ask follow-up questions



In your own words, what happened?

What did you witness?

Did you respond? If so, how?

For all: where, when, who present?



How did the conduct affect you?

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



Consider whether appropriate to ask for more incidents than offered

Instead, give options repeatedly “is there anything else you’d like to tell me or for me to look into?”

Ask parties what would you like to see as an outcome (but avoid making any promises)



# More Interview Tips

- Allow ample time
- NEVER interrupt
  - “Flag” system for follow-up questions
- “Is there anything else?” – ask repeatedly



# Interviews

- Ask for other sources of information (other witnesses or reviewable communications)
- Explain retaliation (both as potential retaliator and retaliatee)





# Interviews

- What to expect about future contact (timing, updates, encourage follow-up to you)
- Follow up in writing to summarize any points that might need confirmation
- Send links/copies to policies if relevant



# Interviewing the Respondent

- Avoid “guilty” or “innocent” language
- Acknowledge “pain”
- Define retaliation with specific examples
- Warn of risks speaking about the Complaint (avoid “gag order”)



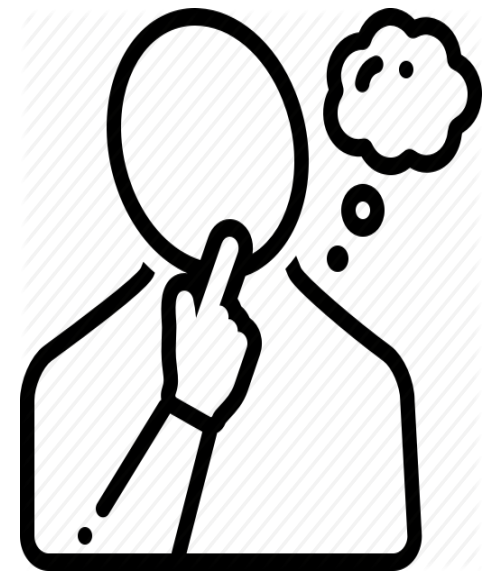
# Interviewing Difficult Witnesses

- Explain interview is opportunity to discuss events AND clear up misinformation
- Inform that refusal to cooperate may result in discipline
- Continue asking open ended questions
- **Don't** show frustration
- **Don't** assume why they are being difficult

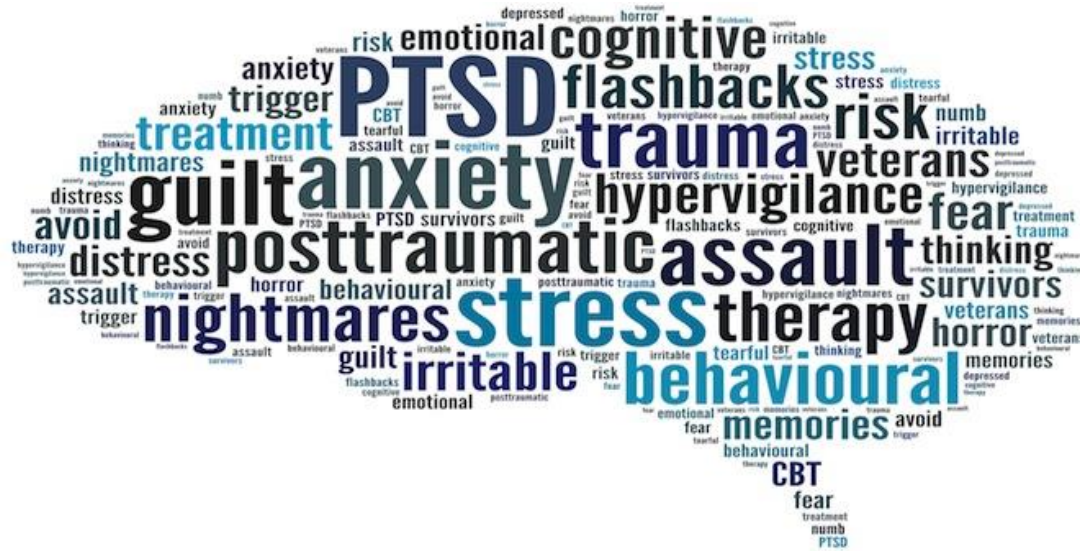


# Interviewing Other Witnesses

- Fairness to Respondent and Complainant
- Must be “thorough,” but not required to review all potential sources of evidence Complainant or Respondent identify



# Potential Trauma for CP and RP



# 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



# Emotions

- Silence is ok
- Empathy 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



# 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





# 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 Complainant or their friends



# After Interviews

Reassess plan for  
investigation after  
Complainant  
interview



# Devon's Allegations

- Sexual assault by classmate on spring break trip last year
- Sexual harassment by classmate via Snapchat over the summer (off-campus, not on school tech or hours)
- A teacher asked Devon for a naked photo and Devon shared one



**You're investigating Devon's complaint, when Devon ghosts you completely. Do you have to continue the complaint?**

**Yes**

**No**



# So the investigation is done....

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



# Notices – Review of Evidence

## Sharing of Evidence

Notice of  
Directly Related  
Evidence

Notice of Other  
Party's Written  
Response to  
Evidence



# Investigation Report

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



# Notices – Investigative Report

## Investigative Report

Title IX  
Investigative  
Report

Notice of  
Investigative  
Report

Notice of Other  
Party's Written  
Response

Transmittal Cover  
Letter to Decision-  
maker at  
Conclusion of  
Investigation





# Recordkeeping/File Maintenance



# Investigation File

- What should be in “the file”?
  - Complaint
  - Applicable Policies
  - Investigation Plan
  - Records of Communications
  - Documents Collected
  - Report/Recommendations



CONFIDENTIAL



# 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



# 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



# Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist



# QUESTIONS?





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Charter School  
eMatters  
Governance & Leadership  
Labor & Employment  
Litigation  
Student Services & Special Education  
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