

Community High School District 99

2020 Title IX Regulations: Investigator Training

August 31, 2020
Presented by Jackie Wernz

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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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Remember Your “Basic Training”

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

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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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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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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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Serving Impartially

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Who should investigate?

- Trained, unbiased investigator
 - No actual or perceived conflict of interest
 - Check “institutional interests”
 - No prejudice
- Appeal: bias and conflict of interest that affected the outcome of the matter

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Robin's Report

- July 29, 2020
- Email from Dean
- Robin, a first-year soccer player, reported conduct that occurred against Robin's friend, Cameron, also a first-year soccer player

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Bias

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.

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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

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Pre-Judgment

Tips for avoiding pre-judgment of facts:

- Each case is fact-specific
- Keep an open mind
- Listen to facts presented
- Statements by parties that do not submit to cross-examination cannot be considered

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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

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Cameron's Formal Complaint

- Cameron, a freshman, claims that another student, a senior, Parker, sexually assaulted Parker 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 (the Investigator) signed the Formal Complaint as Title IX Coordinator or designee. Is that a conflict of interest?



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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) are the ADA compliance officer. 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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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," "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....

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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 a hearing with live cross, 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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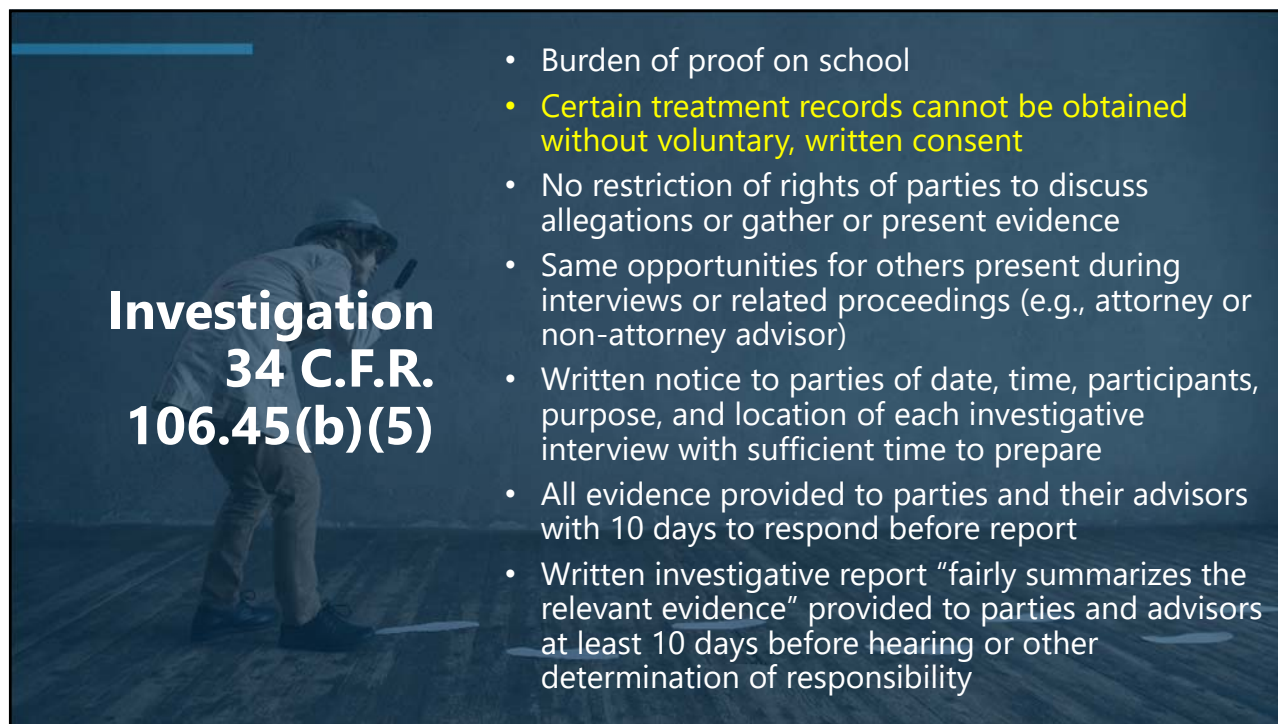
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Investigation
34 C.F.R.
106.45(b)(5)

- **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

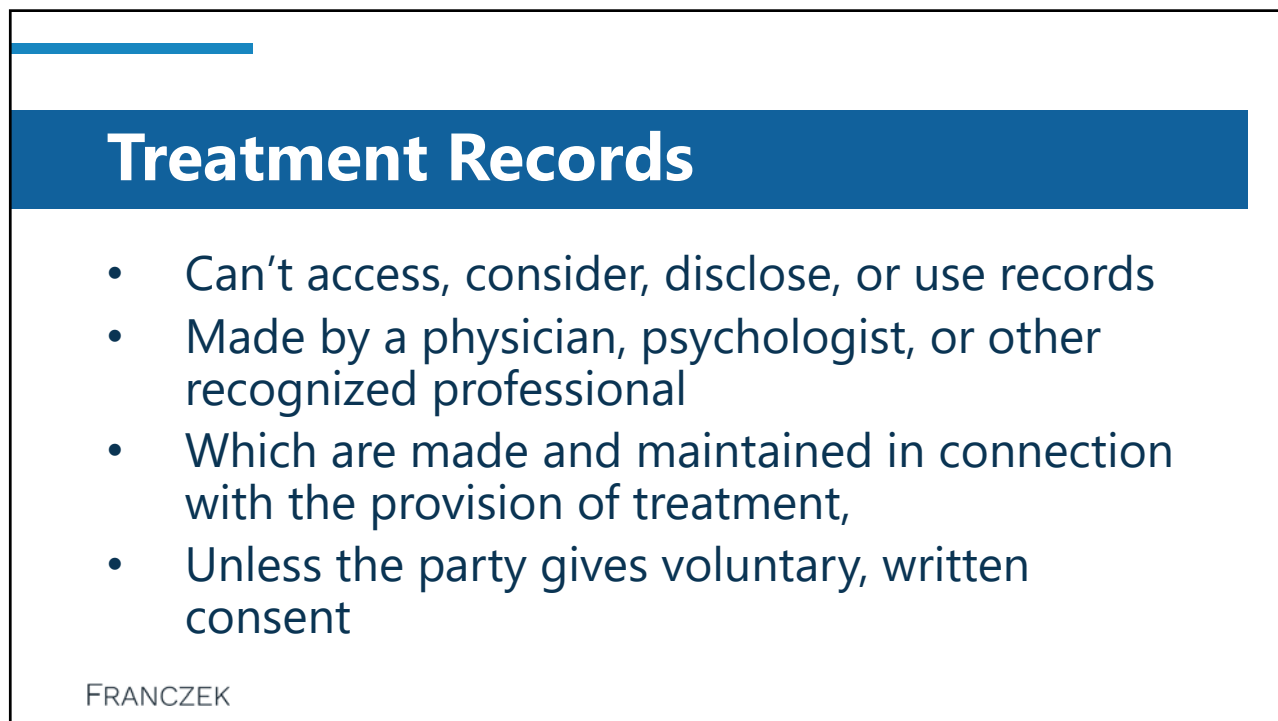
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A slide with a dark blue background and a faint image of a person in a white lab coat and cap, possibly a forensic investigator, looking at the ground. The text is white and yellow. The title is 'Investigation 34 C.F.R. 106.45(b)(5)'. The list contains seven items, with the second item highlighted in yellow.

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 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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Investigation
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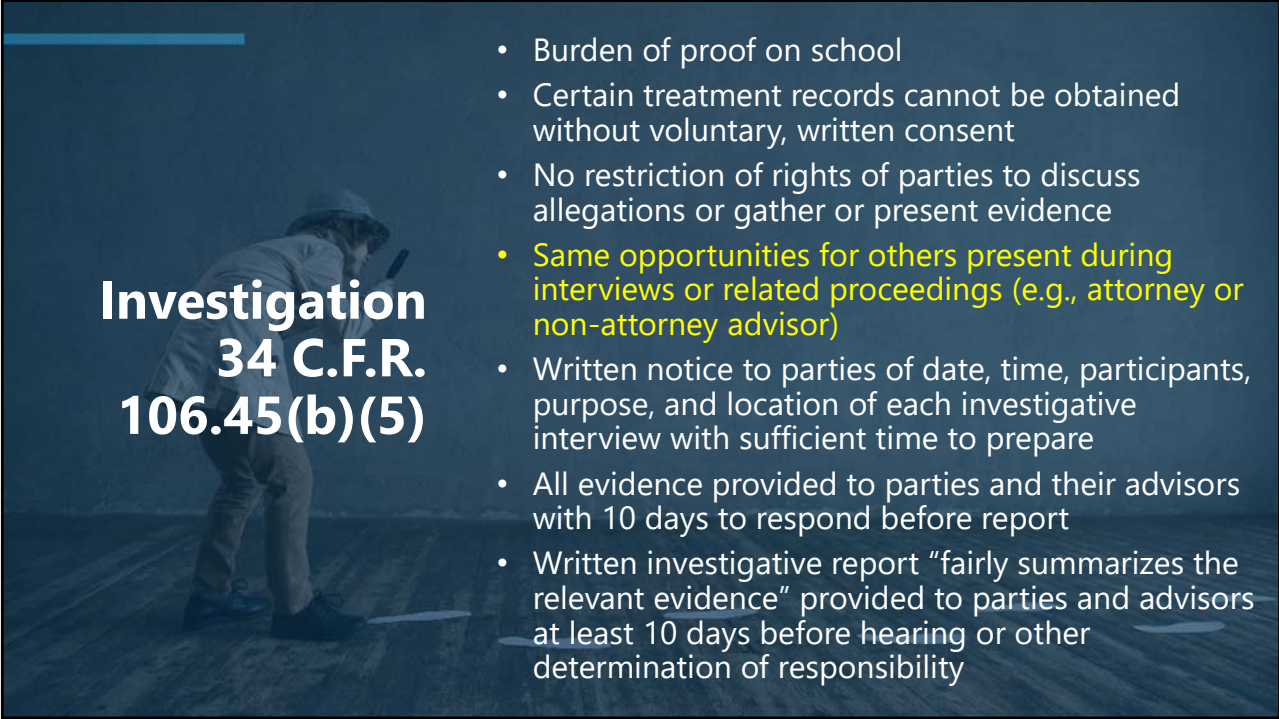
Retaliation and Gag Orders

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

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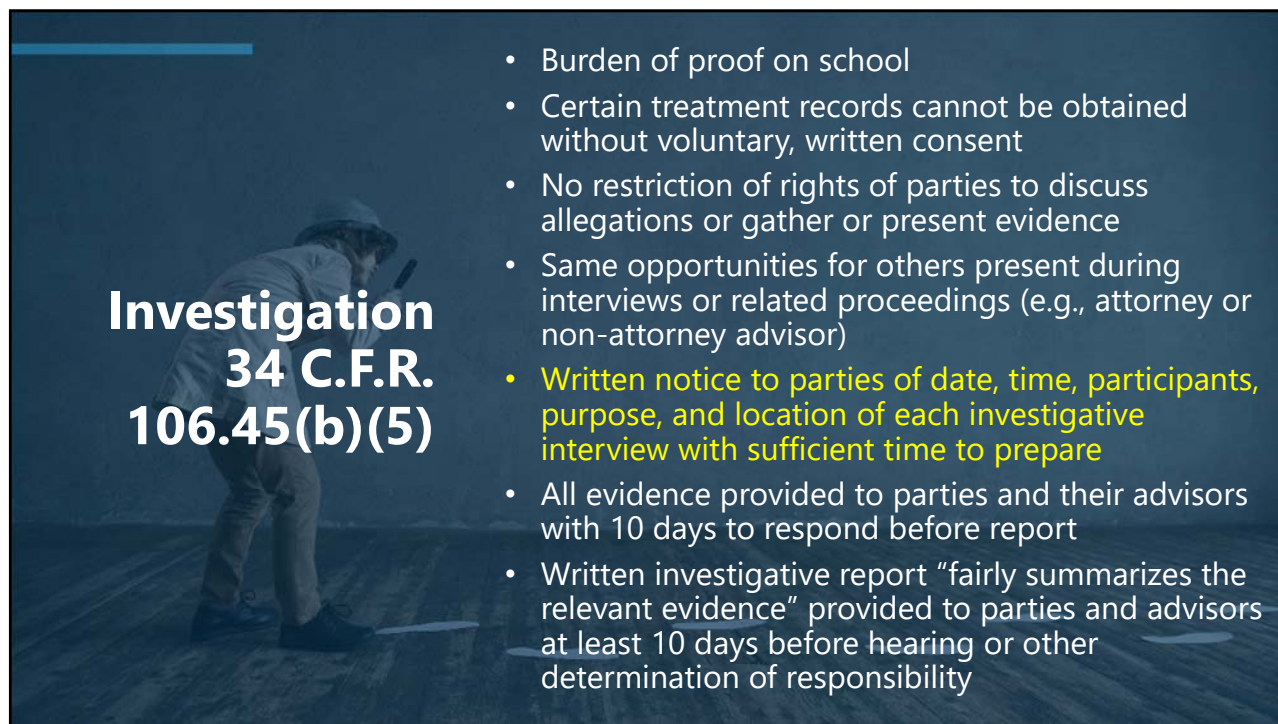
You receive notice that a student is alleged to have engaged in sexual harassment. You can walk down to the classroom and pull the student out to question the student in the office immediately.

True

False

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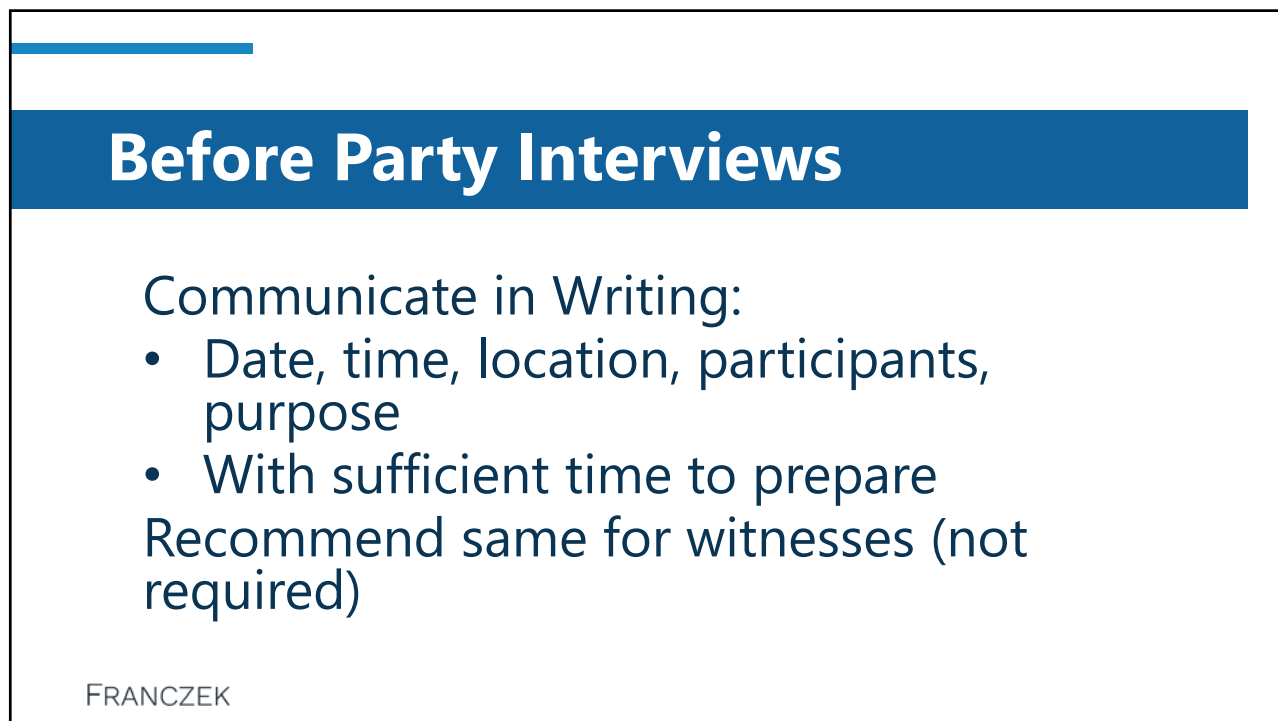
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A slide with a white background and a blue header bar. The header bar contains the text 'Before Party Interviews'. Below the header, the text 'Communicate in Writing:' is followed by a list of two bullet points. Below the list, the text 'Recommend same for witnesses (not required)' is displayed. The Franczek logo is in the bottom left corner.

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

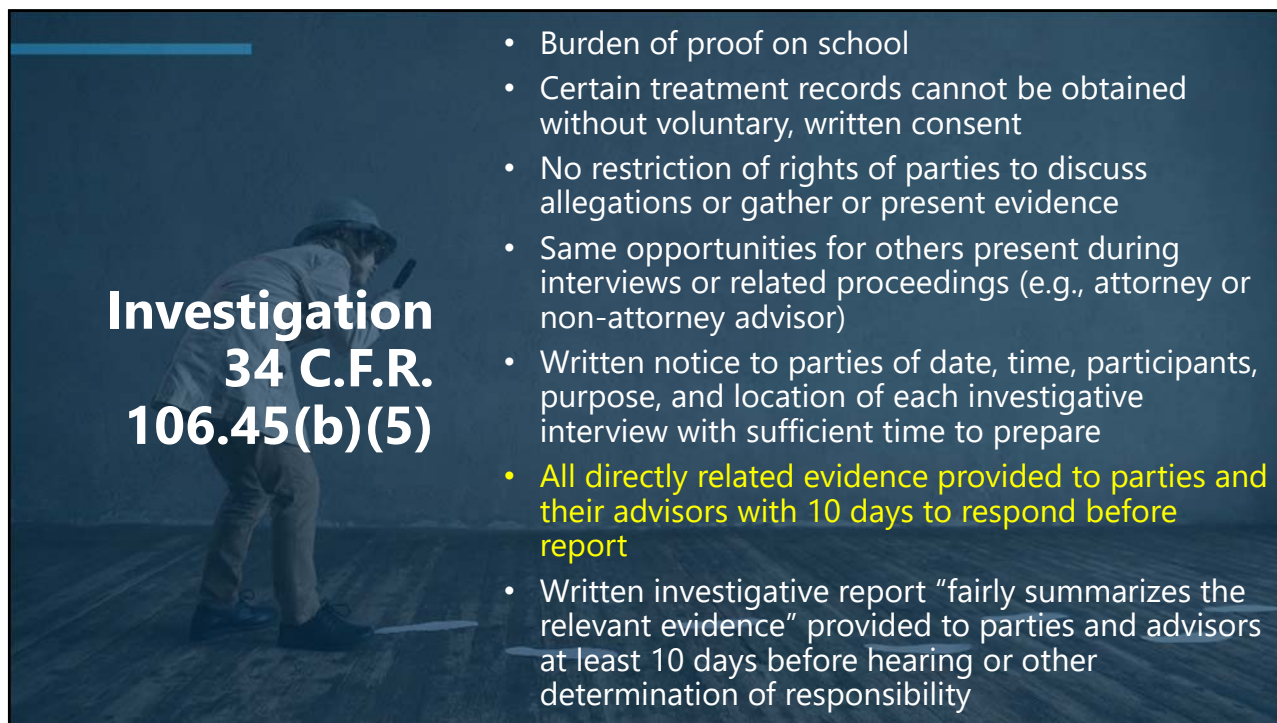
Notice of Interview

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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The slide features a dark blue background with a faint image of a person in a white protective suit and mask, possibly a forensic investigator, in the lower-left corner. The text is white and yellow. The title 'Investigation 34 C.F.R. 106.45(b)(5)' is prominently displayed on the left. A bulleted list of seven items is on the right, with the third item highlighted in yellow.

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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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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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 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
- 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

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Forms/Notices

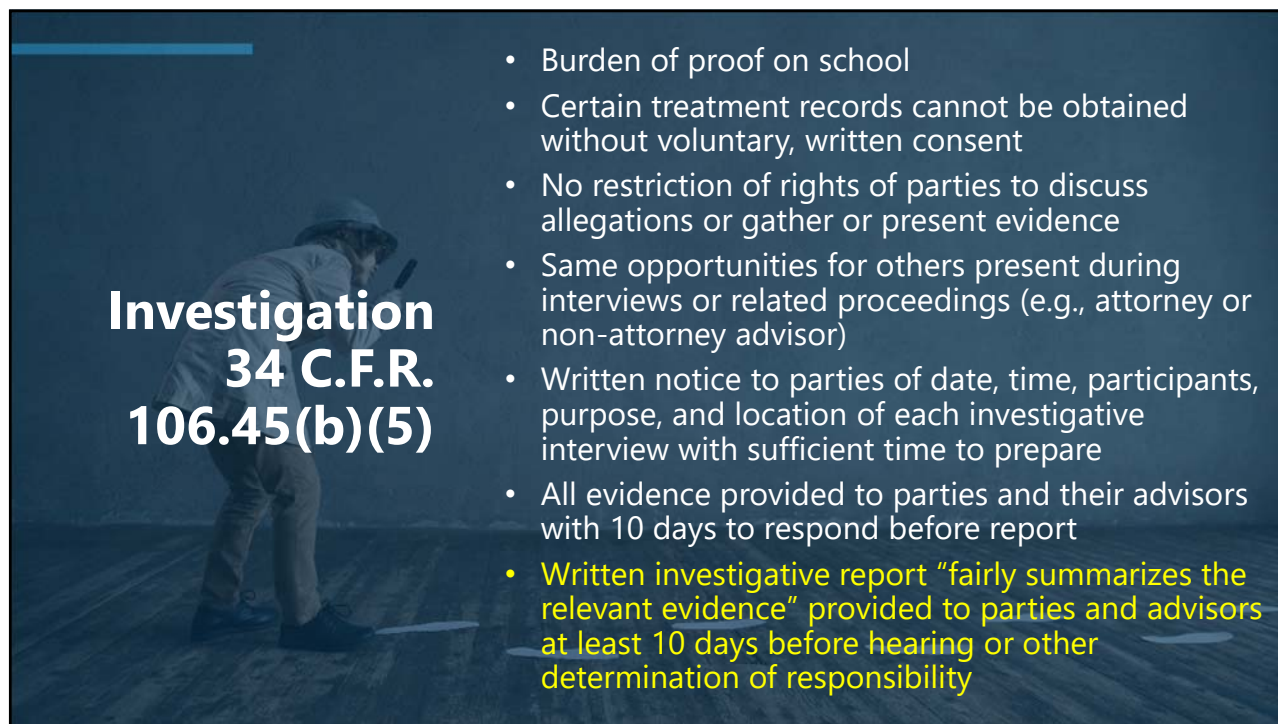
Sharing of Evidence

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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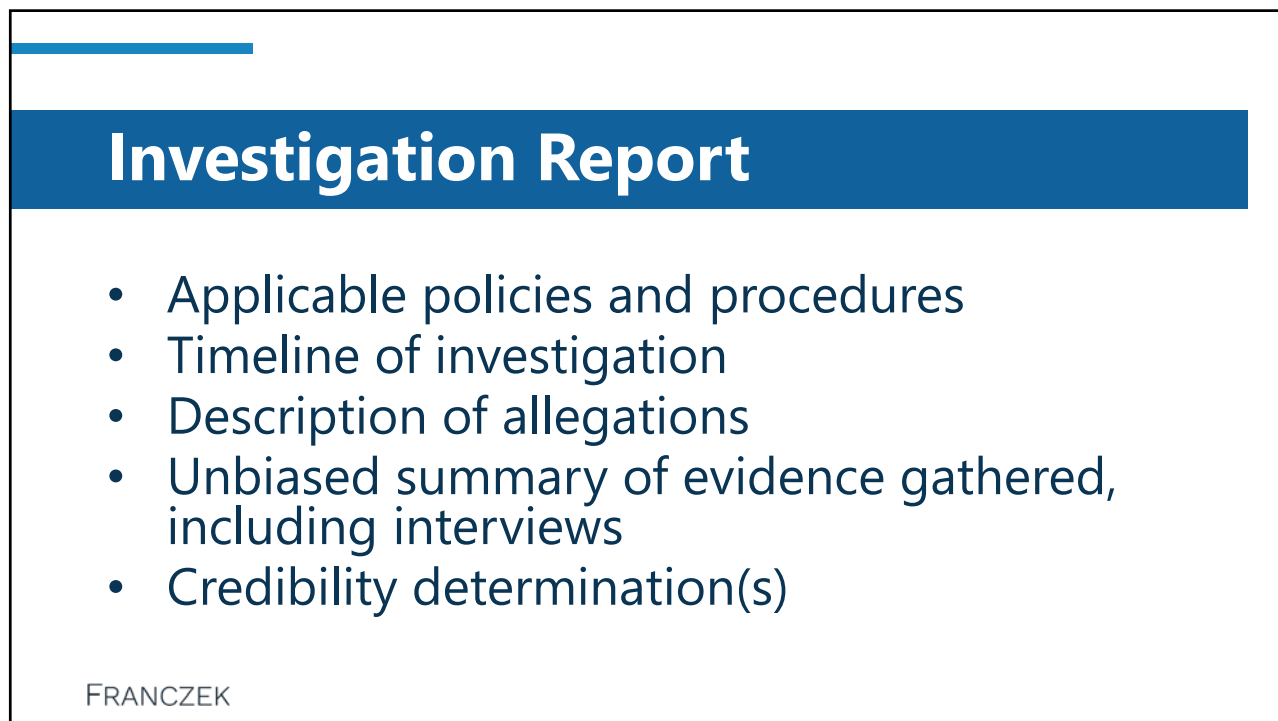
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A slide with a dark blue background. On the left, there is a silhouette of a person in a white protective suit and mask, looking down at the ground. To the right of the silhouette, the text "Investigation 34 C.F.R. 106.45(b)(5)" is written in white. Further to the right, there is a bulleted list of seven items. The last item is highlighted in yellow.

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A slide with a white background. At the top, there is a blue horizontal bar with the text "Investigation Report" in white. Below the bar, there is a bulleted list of five items. At the bottom left, the word "FRANCZEK" is written in blue.

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
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- 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

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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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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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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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What is your order of interviews?

- Ali
- Bobbie
- Cameron
- Teacher - Smith
- Parker
- Police Witness
- Medical Witness

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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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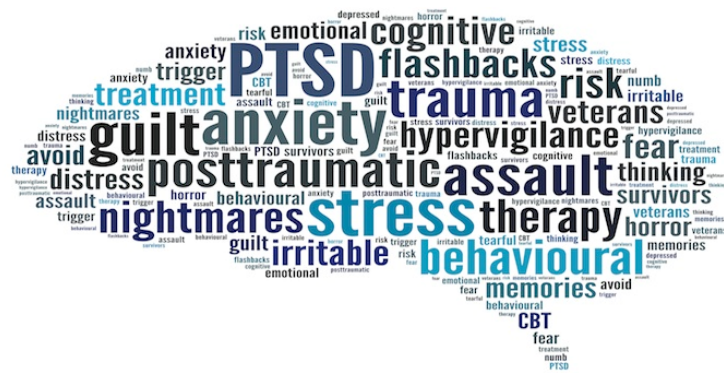
Closing

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

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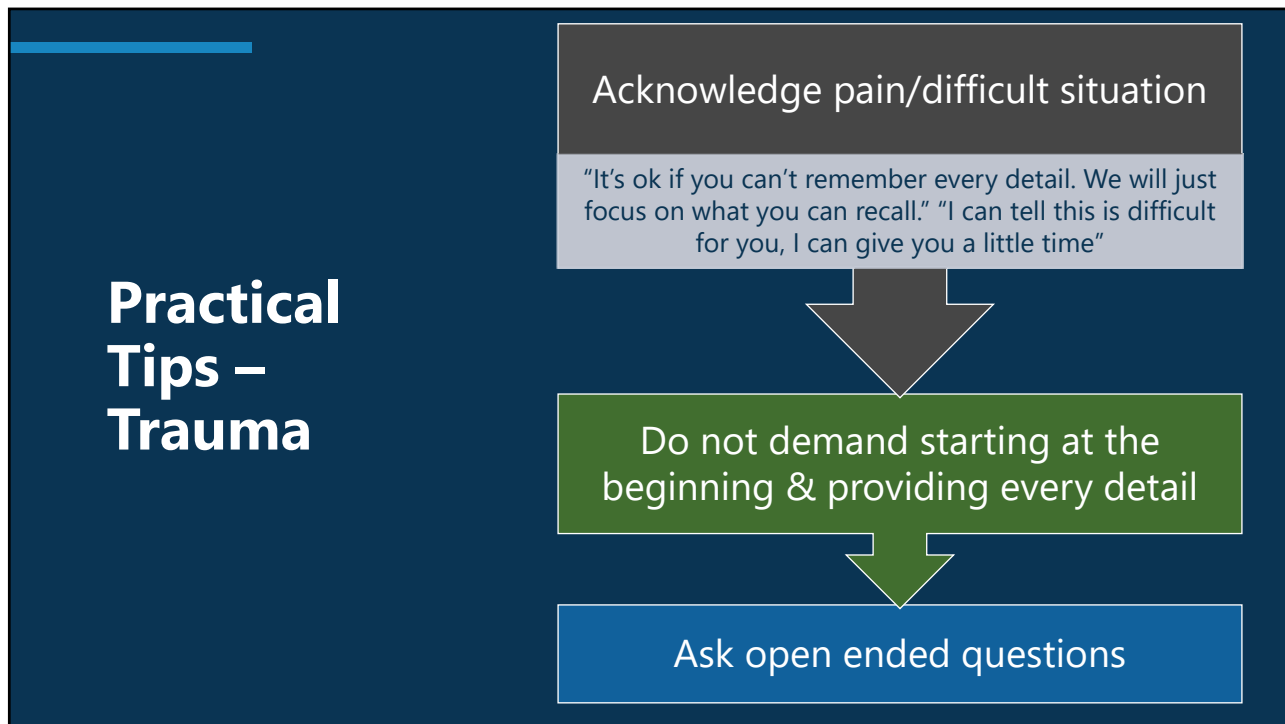
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Potential Trauma for CP and RP



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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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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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