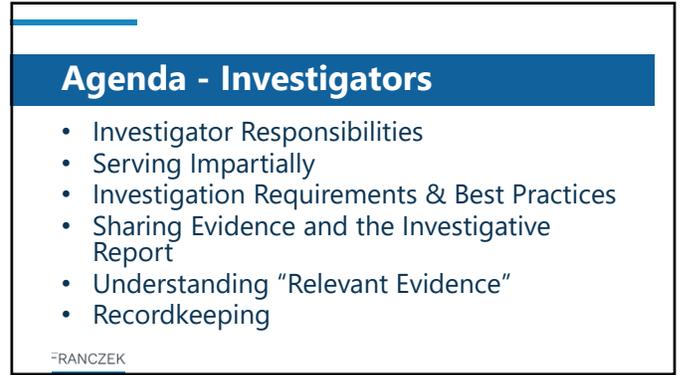




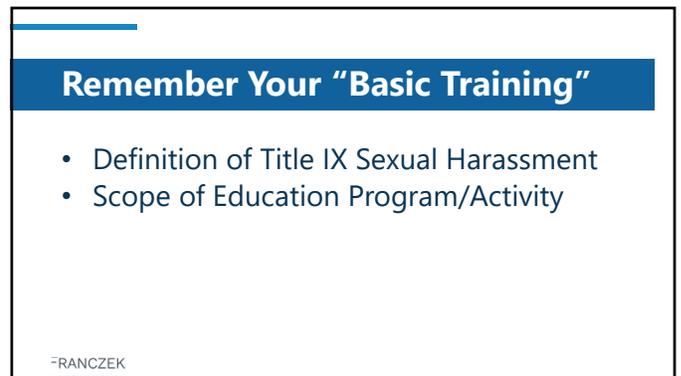
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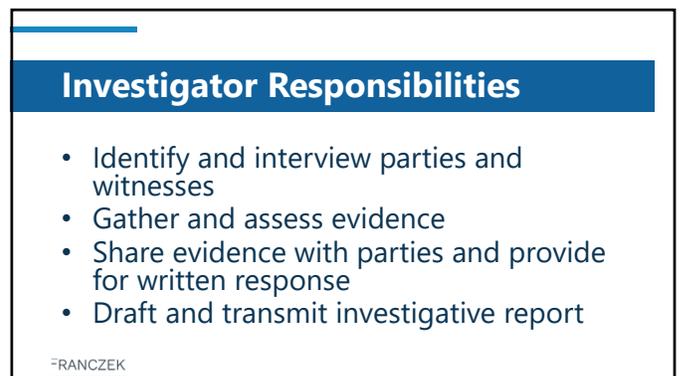
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6

Title IX Coordinator Responsibilities

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Title IX Coordinator Responsibilities

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

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Title IX Coordinator Responsibilities

- Must meet with alleged victims of Title IX Sexual Harassment – Supportive Measures + Formal Complaint process
- Can "sign" a complaint when the CP doesn't want to file

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Title IX Coordinator Responsibilities

- Coordinates implementation of Supportive Measures
- Ensures effective implementation of remedies
- Monitors ongoing compliance with Title IX

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Delegation

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

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Delegation

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

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Serving Impartially

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Who should be on the team?

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

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Bias

The Title IX Team Member must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudice 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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Key Terms

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"Actual Knowledge"

Definition (106.30(a)):

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

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OWAs vs. Responsible Employees

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

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OWAs vs. Responsible Employees

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

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Inquiring is Bad?

- Inquiring about possible sexual harassment could invade the privacy and autonomy of students and employees
- Not necessary because of clear, accessible reporting options

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Who Should be an OWA?

- Is wide-net/universal mandatory reporting system beneficial?
- Respecting autonomy, giving control, and offering clear reporting options help recover, avoid increasing trauma, "institutional betrayal"

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"Deliberate Indifference"

- Two response paths
 - Investigation to determine how to adequately respond
 - Investigation for the purpose of potential punishment for RP

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"Deliberate Indifference"

Response must

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

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"Deliberate Indifference"

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

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"Deliberate Indifference"

- No "second guessing" of institutional decisions by OCR
- Read: SHOW YOUR WORK

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Investigation

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

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Example Report

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VAWA "Big Four"

- Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)
- Domestic Violence 34 U.S.C. 12291(a)(8)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Stalking 34 U.S.C. 12291(a)(30)

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Sexual Assault under VAWA

- Sexual Assault:
 - Penetration without consent (rape)
 - Fondling without consent
 - Incest
 - Statutory rape

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Don't Forget – TIX Quid Pro Quo

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

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

Codified: Severity and harm presumed

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

- Contact Robin to obtain more information
- Contact Robin to offer an opportunity to file a formal complaint and supportive measures
- Contact Cameron to offer an opportunity to file a formal complaint and supportive measures **100%**

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Title IX Coordinator 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

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Meeting with Cameron

- Cameron confirms all of the allegations
- Cameron wants a No Contact Order against Parker
- Cameron does not want to be named to Parker

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Can you honor Cameron's confidentiality request ?

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

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

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

None of the above

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Can you honor the request for a No Contact Order

Yes, even if it's unilateral

Yes, but only if it's mutual

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Forms/Notices

Initial Contact and Meeting with the CP

- Notice to Complainant of Report of Title IX Sexual Harassment (Franczek Notice 1(a))
- Summary of Supportive Measures Meeting with the Title IX Complainant (Franczek Notice 1(b))
- Title IX Formal Complaint (Franczek Form A)

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Can you remove Parker using an "Emergency Removal"?

Yes

No, Because Cameron has not filed a formal complaint

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

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Forms/Notices

Notice of Emergency Removal

- Notice of Title IX Emergency Removal of Student (Franczek Letter 4(a))
- Notice of Title IX Emergency Removal of Student (Franczek Letter 4(b))

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

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

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

No, because Cameron has not filed a formal complaint

No, because sexual harassment cannot be addressed through informal resolution

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Cameron and Parker reach an agreement in informal resolution. Can the Title IX process ever recommence?

Yes, if Parker fails to comply with the terms

Yes, but only for allegations not resolved in informal resolution

No, because you can only recommence an investigation before a resolution is reached

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Forms/Notices

Informal Resolution Process

Offer of Title IX Informal Resolution Process (Franczek Notice 5(a))

Notice of Closure of Title IX Informal Resolution Process (Franczek Notice 5(b))

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Back to Robin

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

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Can Robin file a complaint?

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

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

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

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"Signing a Complaint"

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

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Formal Complaint – Next Steps

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

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Forms/Notices

Notice of Allegations

Notice of Allegations of Title IX Sexual Harassment by a Complainant (Franczek Notice 2(a))

Notice of Allegations Upon Signing of Formal Complaint by the Title IX Coordinator (Franczek Notice 2(b))

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NEW: Cameron's Formal Complaint

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

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

Yes No

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

Yes No

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

Yes No

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Standard

- Declined to define "bias," "conflict of interest," "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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What Might be Bias, Conflict, Prejudgment?

- Discouraging a party from submitting certain evidence
- Using terms like "victim" (even if used in Clery)
- 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 Requirements & Best Practices

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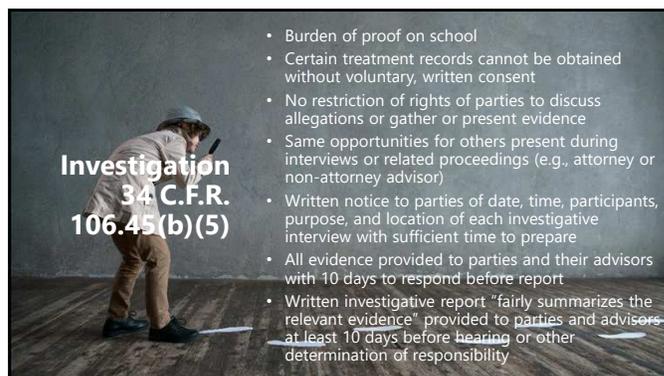
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Investigation

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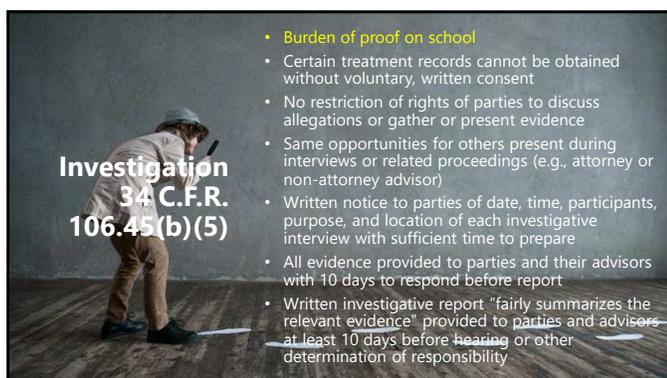
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Investigation 34 C.F.R. 106.45(b)(5)

- 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

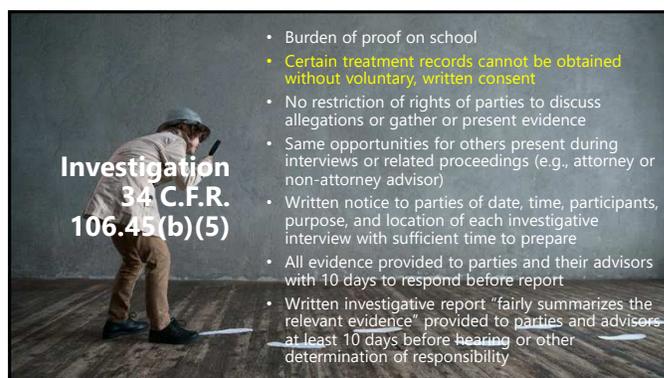
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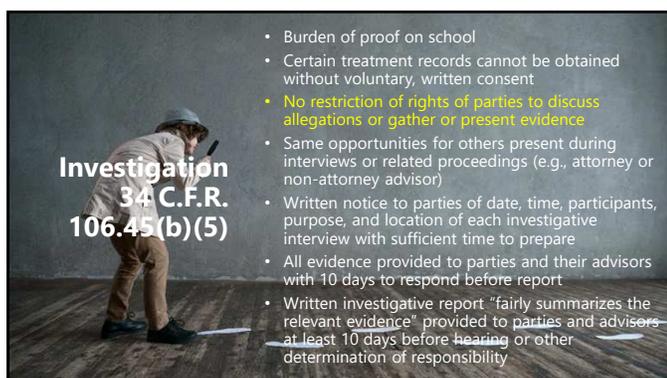
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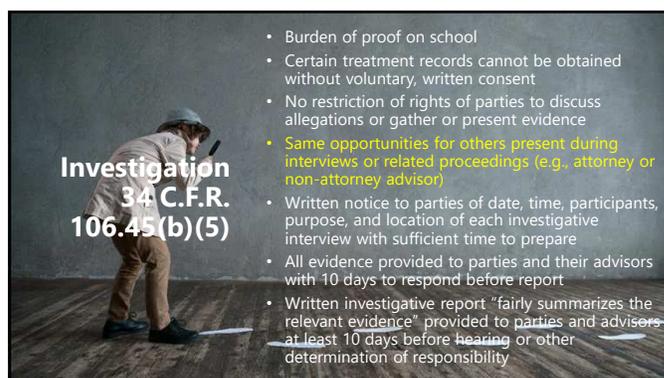
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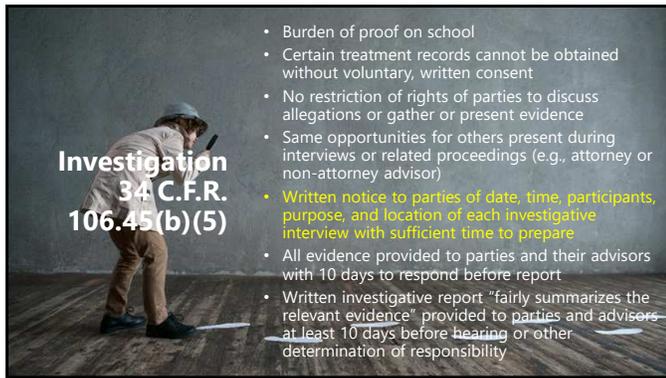
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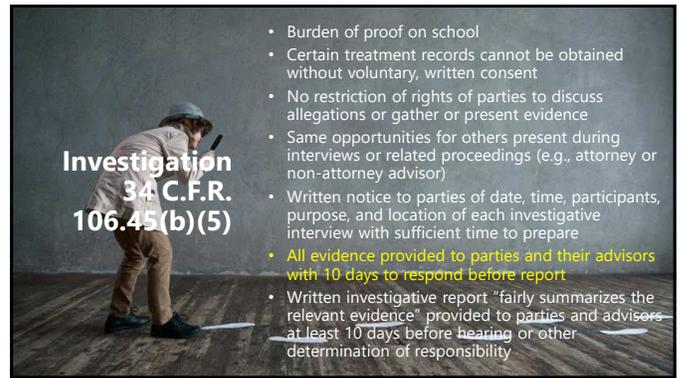
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Investigation
34 C.F.R.
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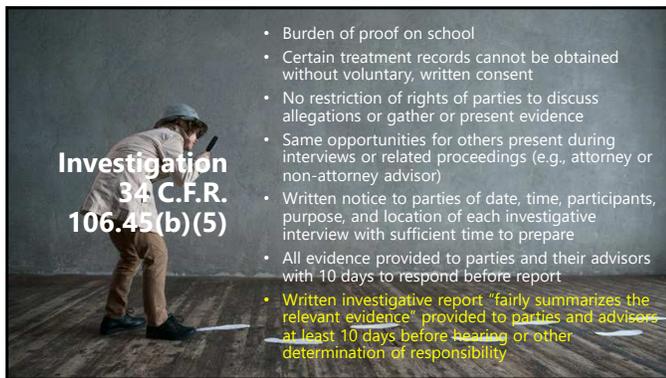
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Investigation
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The Investigation Plan

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

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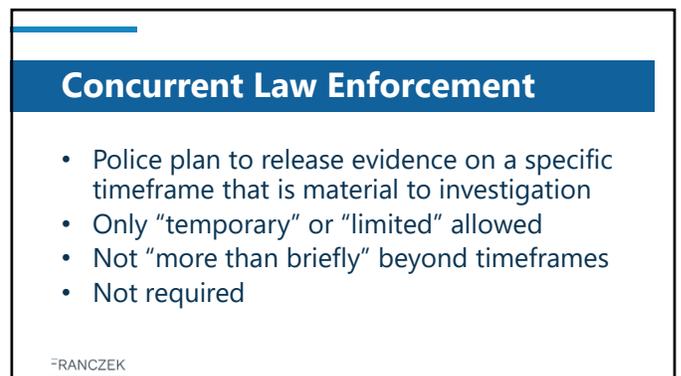


Cameron's Formal Complaint

- Cameron reports that the sexual assault occurred after a party. Bobbie and Ali, both students and were at the party.
- After the party, Cameron told Robin, Cameron's roommate, what happened. Cameron also talked to a professor, Dr. 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
- Dr. Smith
- Parker
- Police Witness
- Medical Witness

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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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Forms/Notices

Notice to Advisors

- Advisor Conduct Expectations

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Prefaces for Parties

- Your Identity and Role as a Neutral
- Notes and Records
- Allegations
- Process
- Role of Advisor
- Confidentiality
- Retaliation
- Rapport Building

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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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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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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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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?

96

How did the conduct affect you?

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

97

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?"

98

Parker's Interview

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

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What can the institution do?

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

Dismiss the complaint once Parker withdraws

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How do you respond if no jurisdiction?

Consider other code of conduct or policy violations

Send both parties a formal dismissal notice

Meet with Cameron to discuss supportive measures for the remainder of time at the school

All of the above

None of the above

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It turns out that the incident occurred two years ago, before Cameron was a student. What CAN'T you do?

Dismiss the complaint because of the difficulty in gathering enough evidence to reach a determination

Continue with the complaint because Parker was attending the school at the time of the incident

Dismiss the complaint because Cameron was not a student at the time conduct occurred

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Forms/Notices

Notice of Dismissal

Notice of Mandatory Dismissal of Allegations of Title IX Sexual Harassment (Franczek Letter 3(a))

Notice of Permissive Dismissal of Allegations of Title IX Sexual Harassment (Franczek Letter 3(b))

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If the Respondent is an employee and you lack Title IX jurisdiction, what can you do?

- You can provide Supportive Measures to Cameron
- You can put the employee on administrative leave
- You can discipline the employee for a violation of another policy
- None of the above
- All of the above

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Remember – Employees

- Whether or not you have jurisdiction over an employee you can remove the teacher while you investigate
 - Administrative leave (can be used with or in lieu of emergency removal)
 - Check your policies/procedures, agreements and contracts, laws, etc.

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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



108

Sharing Evidence and the Investigative Report

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So the investigation is done....

- 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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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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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 relevant evidence**
- Relevant evidence is different from evidence "directly related to the allegations"

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Hearing and Decision

- Notice of Hearing
- Written determination (Franczek Form C - Written Determination Template)

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Appeal Notice

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

(Franczek Notices 11(a) and (b))

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Understanding Relevant Evidence

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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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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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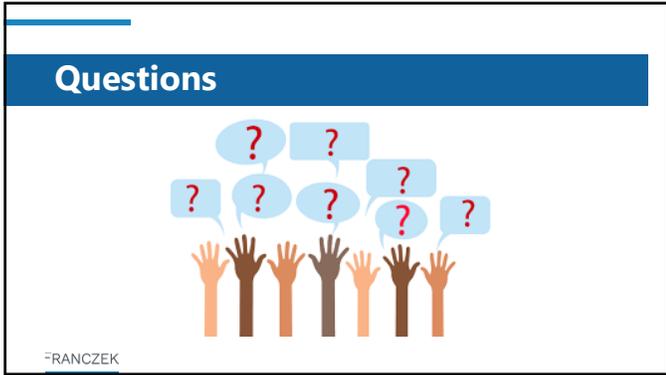
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Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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