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## Agenda

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

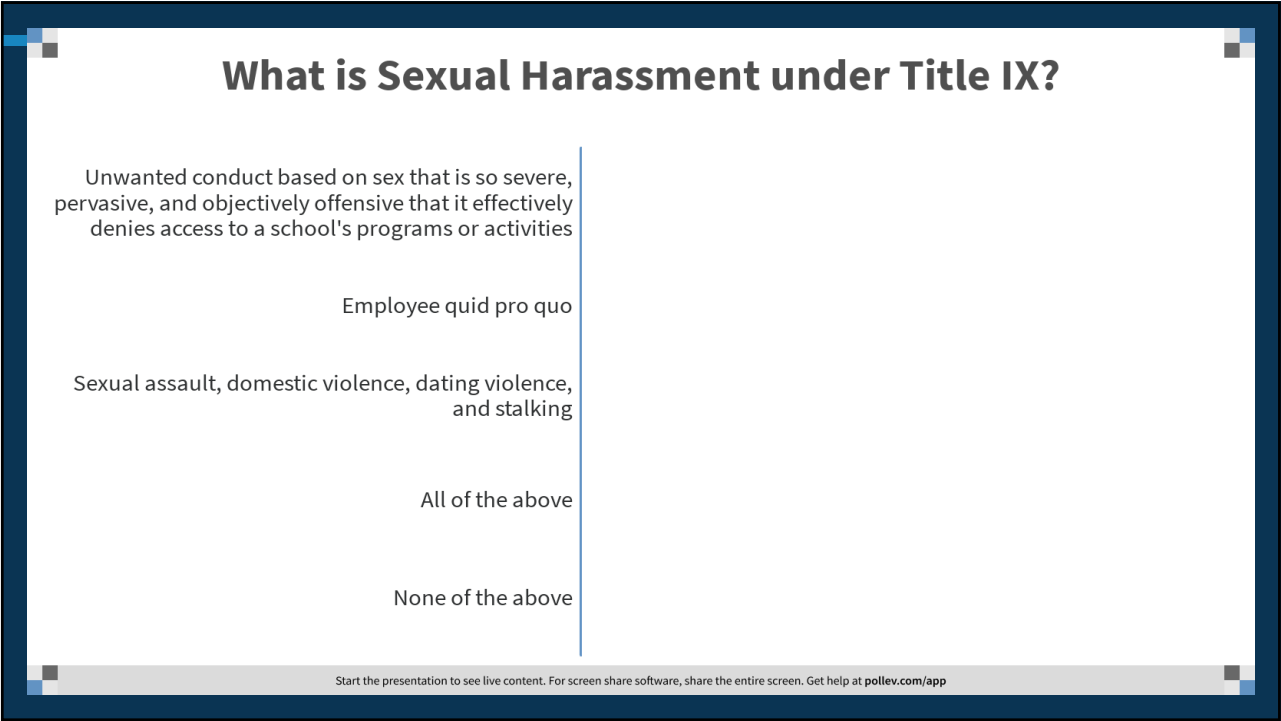
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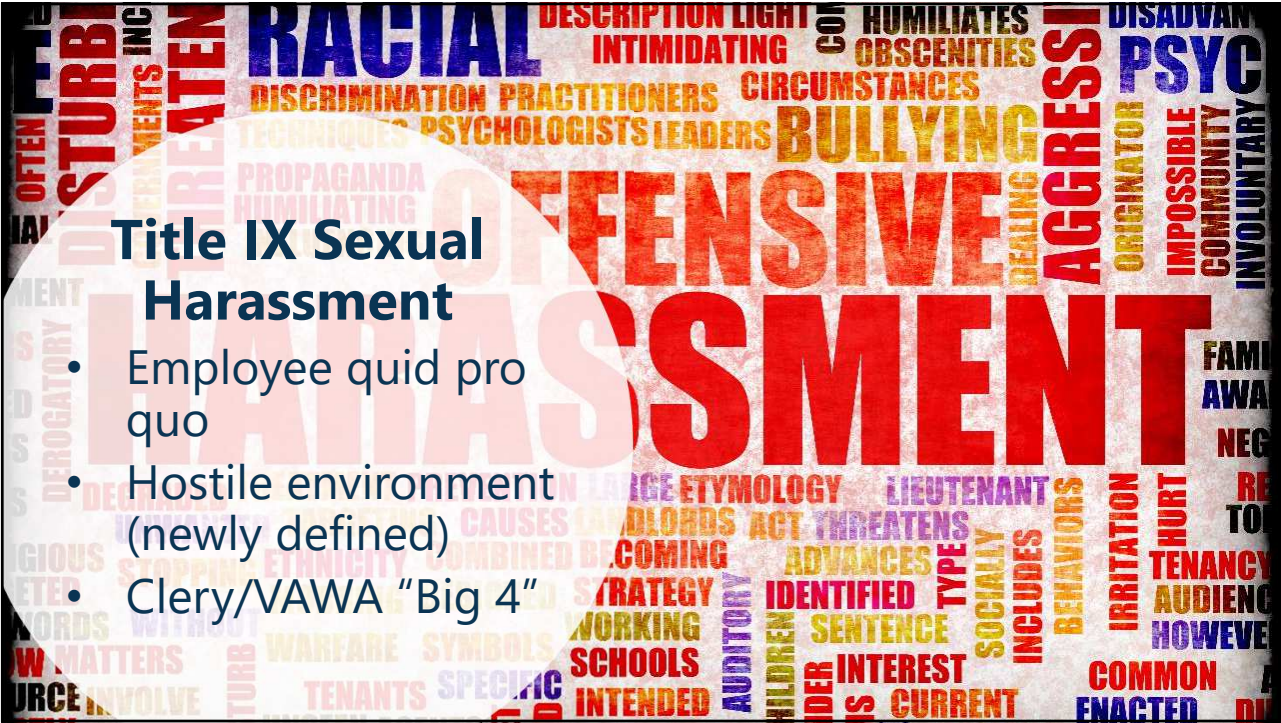


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Which of these should be reported to the Title IX Coordinator to consider potential dismissal?

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

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

The Respondent's employment or enrollment ends

The Complainant's employment or enrollment ends

All of the above

None of the above

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When must a school respond to Title IX sexual harassment?

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

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DISMISSALS

**Mandatory if conduct alleged:**

Not Title IX Sexual Harassment

Did not occur in the school's program or activity

Did not occur in the United States

**Permissive if:**

Complainant requests to withdraw in writing

Respondent's enrollment or employment ends

Specific circumstances prevent school from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)

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

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# Title IX Investigator Responsibilities

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## Investigator Responsibilities

1

Identify and interview parties and witnesses

2

Gather and assess evidence

3

Share evidence with parties and provide for written response

4

Write and share investigative report

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# Serving Impartially

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## Who should investigate?

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

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## Standard

- Declined to define "bias," "conflict of interest," "prejudge"
- The Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists....

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## Cameron's Complaint

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

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## What Might be Bias, Conflict, Prejudgment?

- Discouraging a party from submitting certain evidence
- Using terms like “victim” and “perpetrator”
- Permitting credibility inferences or conclusions based on party status

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## What Might be Bias, Conflict, Prejudgment?

- Using sex stereotypes
- Placing the burden of proof on one party
- Unauthorized interim suspensions or other penalties before conclusion of grievance process

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## What Likely Is Not...

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

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## Investigation: Required Elements

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## Investigation

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

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

True **A**

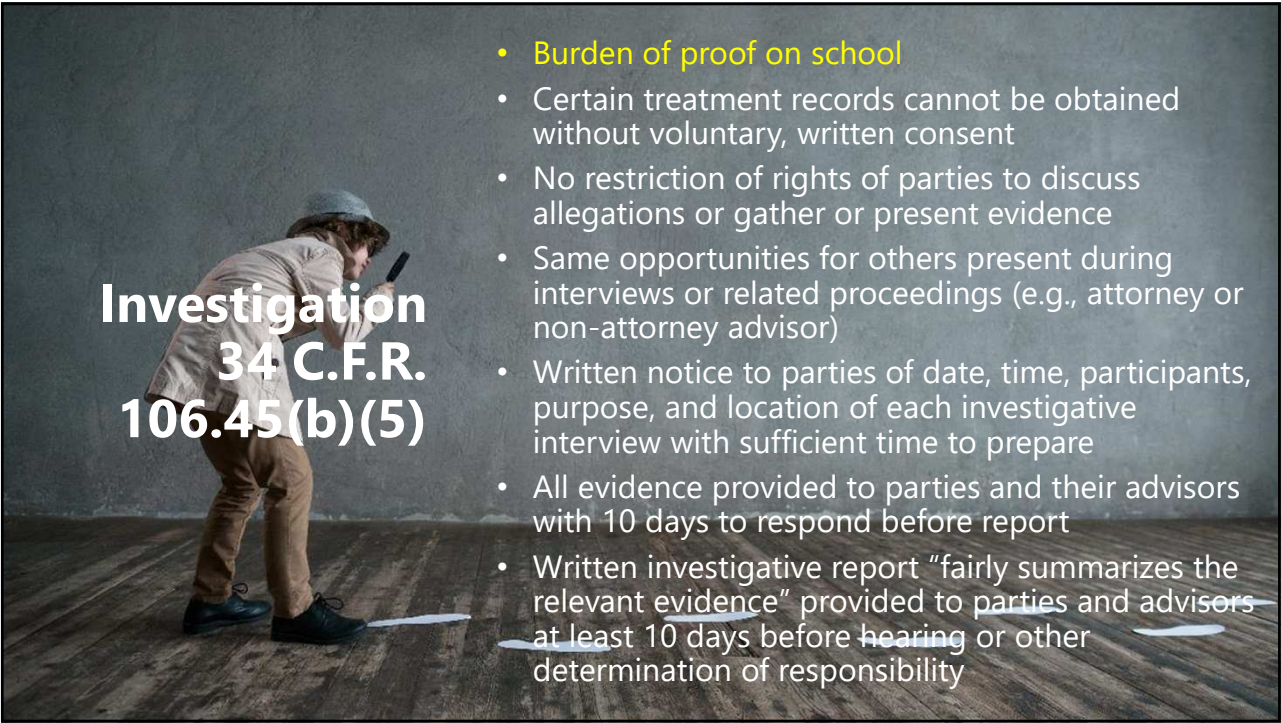
False **B**

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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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The Respondent claims that the Complainant was diagnosed with bipolar disorder and is lying. Can you ask the Complainant whether this is true?

True

False

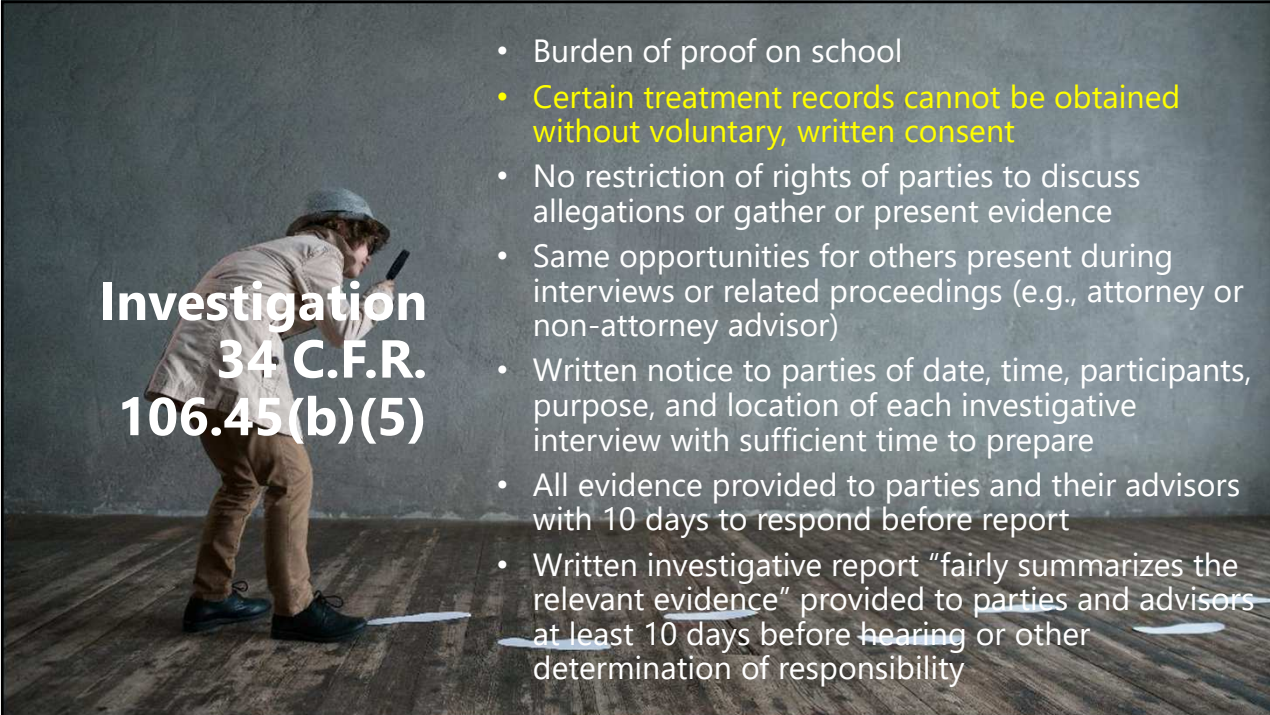
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**Investigation**  
**34 C.F.R.**  
**106.45(b)(5)**

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## Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

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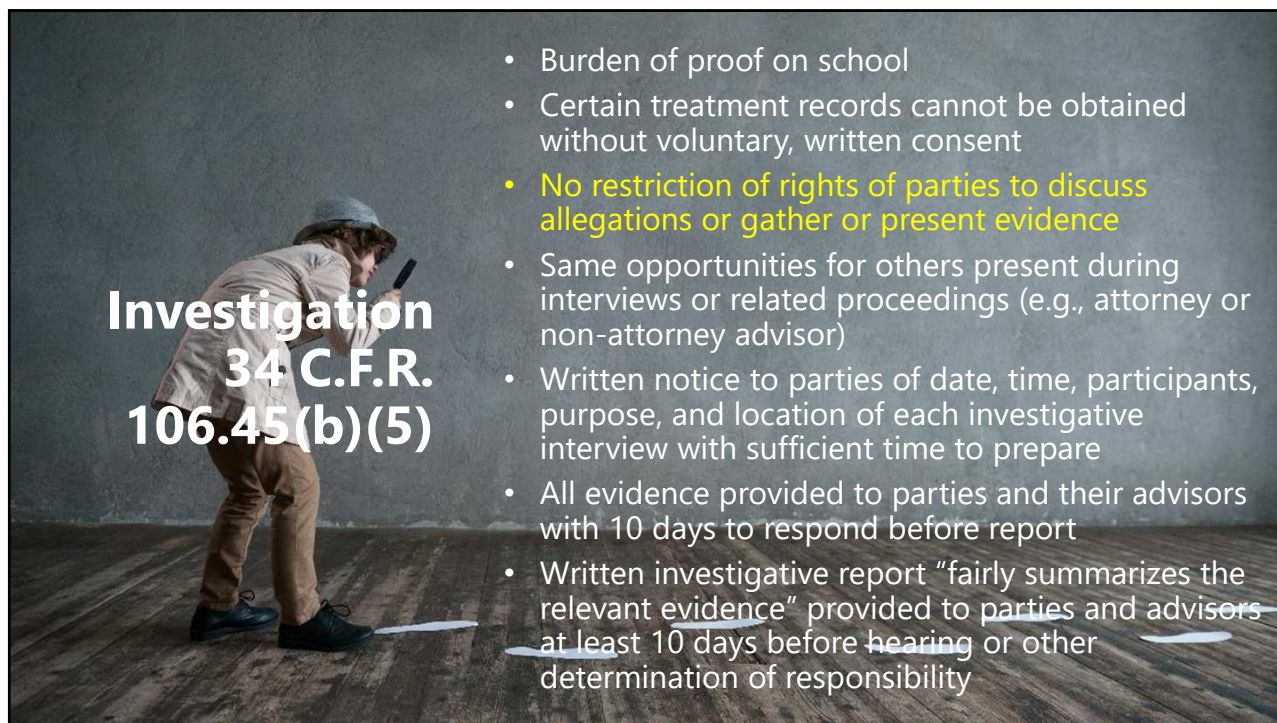
**During an investigation, the investigator can tell an employee Respondent not to talk to coworkers, parents, or other members of the school community about the complaint.**

True

False

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A person wearing a trench coat and a hat is looking at a smartphone. The background is a dark, textured wall and floor.

**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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**Parker wants to bring a classmate, who is also a witness, as the "advisor" during investigation meetings. Is that allowed?**

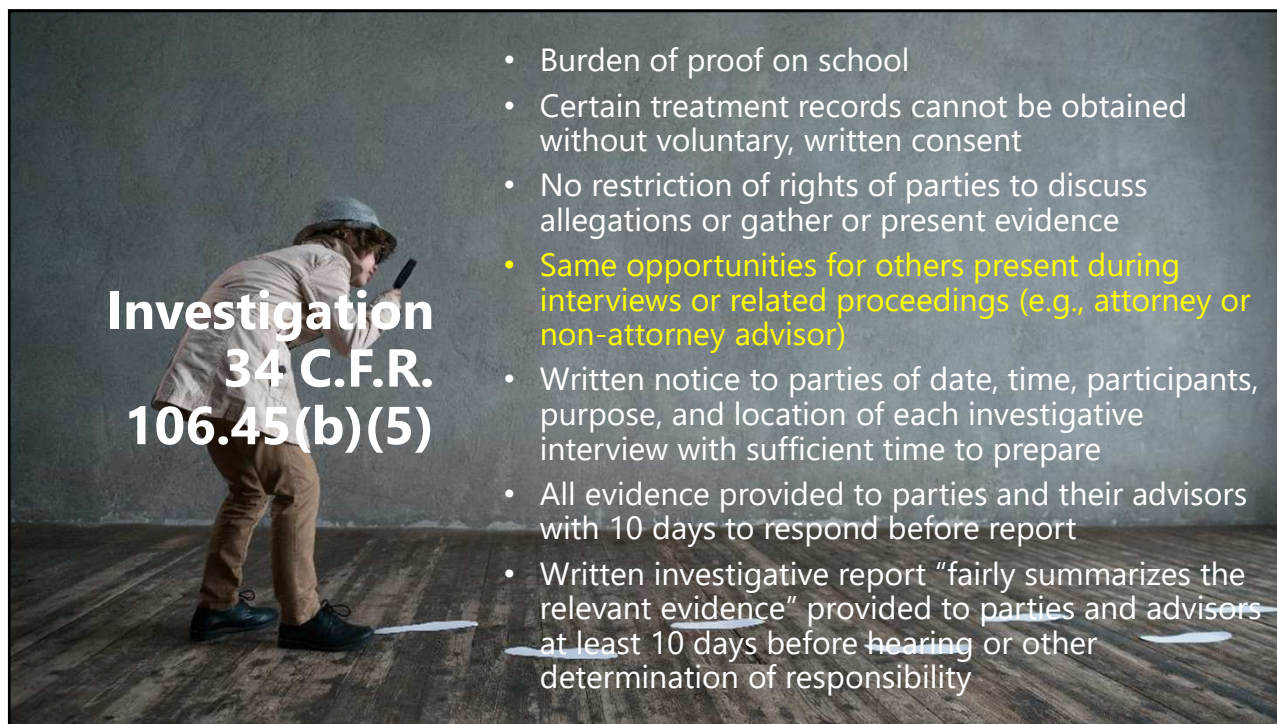
Yes, parties can bring the advisor of choice to a meeting

No, Parker can bring a parent or attorney as an advisor, but not a witness

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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.

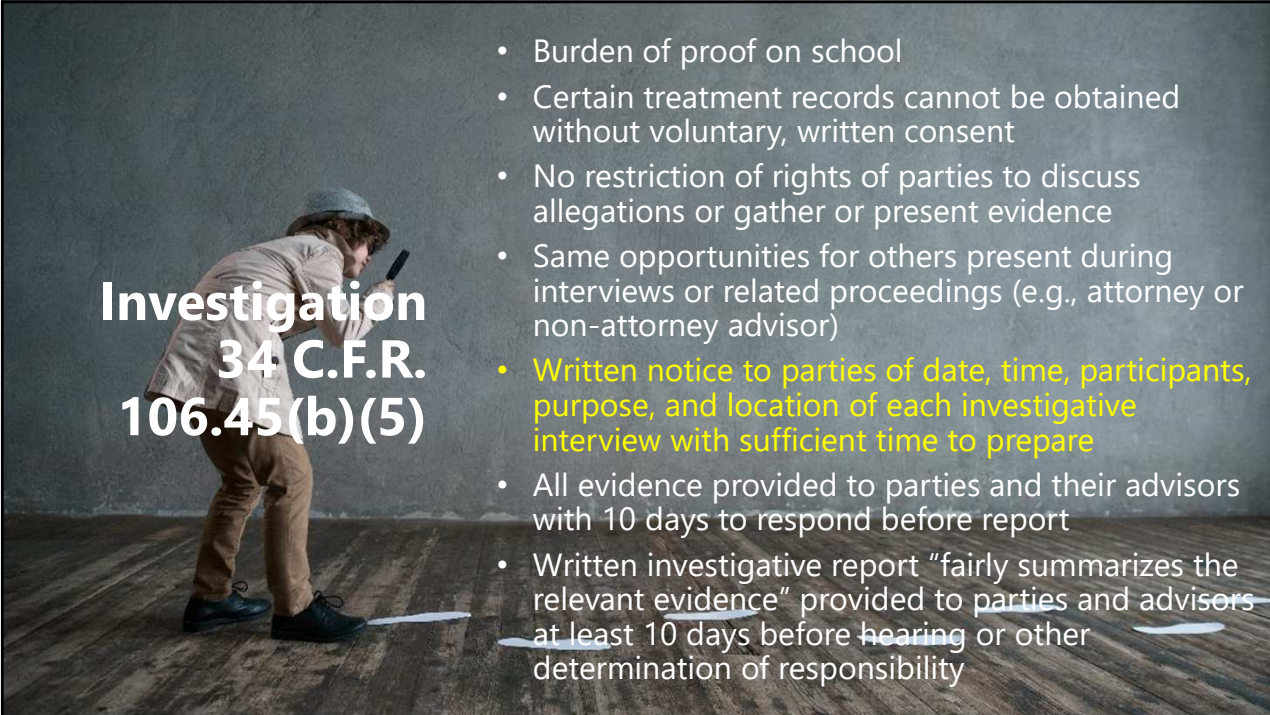
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## Before Party Interviews

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.

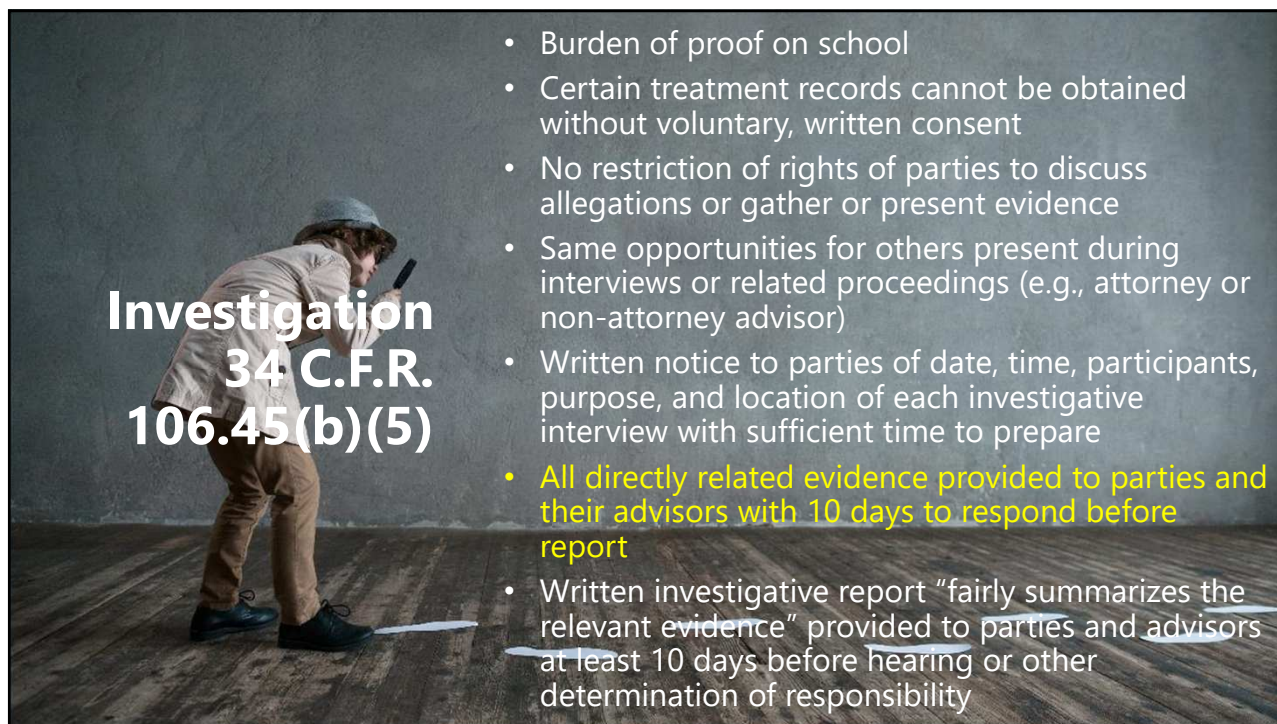
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- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All directly related evidence provided to parties and their advisors with 10 days to respond before report
- 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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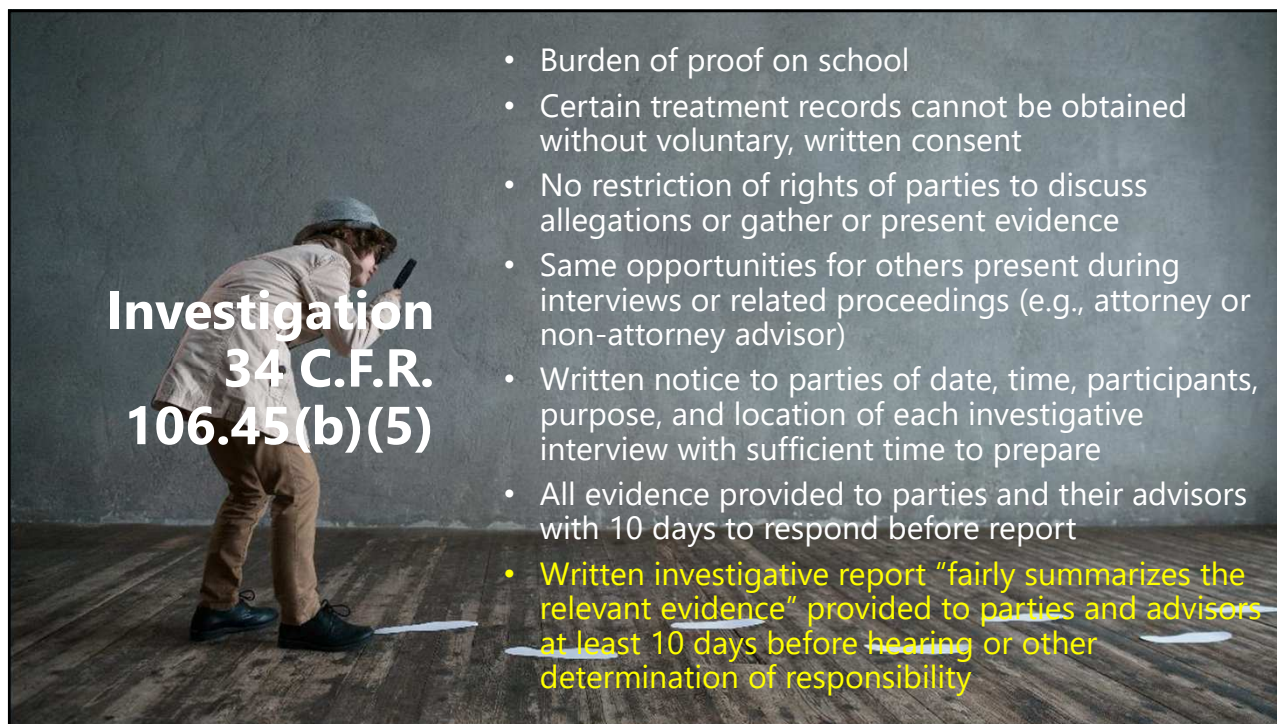
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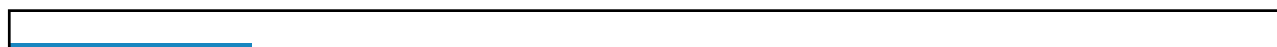




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## Investigation Report

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

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# Forms/Notices

## Investigative Report

Title IX Investigative Report Template (Franczek Form B)

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

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

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

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# Investigation Report

- Must fairly summarize all **relevant evidence**
- Relevant evidence is different from evidence "directly related to the allegations"

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## Determining Relevance

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

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## Rape Shield Law

- Exclude evidence of Complainant's sexual behavior or predisposition
- Two narrow exceptions
  - Someone other than RP committed conduct
  - Past conduct between CP & RP to show consent
- Does not apply to Respondent

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## Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

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## Legally Privileged Information

- Cannot use questions or evidence that seek disclosure of legally privileged information, unless waived
- Consider:
  - Attorney-client communication
  - Privilege against self-incrimination
  - Confessions to a clergy member or religious figure
  - Spousal privilege
  - Confidentiality and trade secrets

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Which of these is NOT relevant evidence?

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

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

Text messages from Parker to another female student with similar conduct

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

- Indefinitely suspend Parker because of the violent nature of the alleged offense
- Provide equal supportive measures to the parties
- Comply with timelines in other laws, if applicable
- Require Parker to sit for an interview
- None of the above

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## Concurrent Law Enforcement

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

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## 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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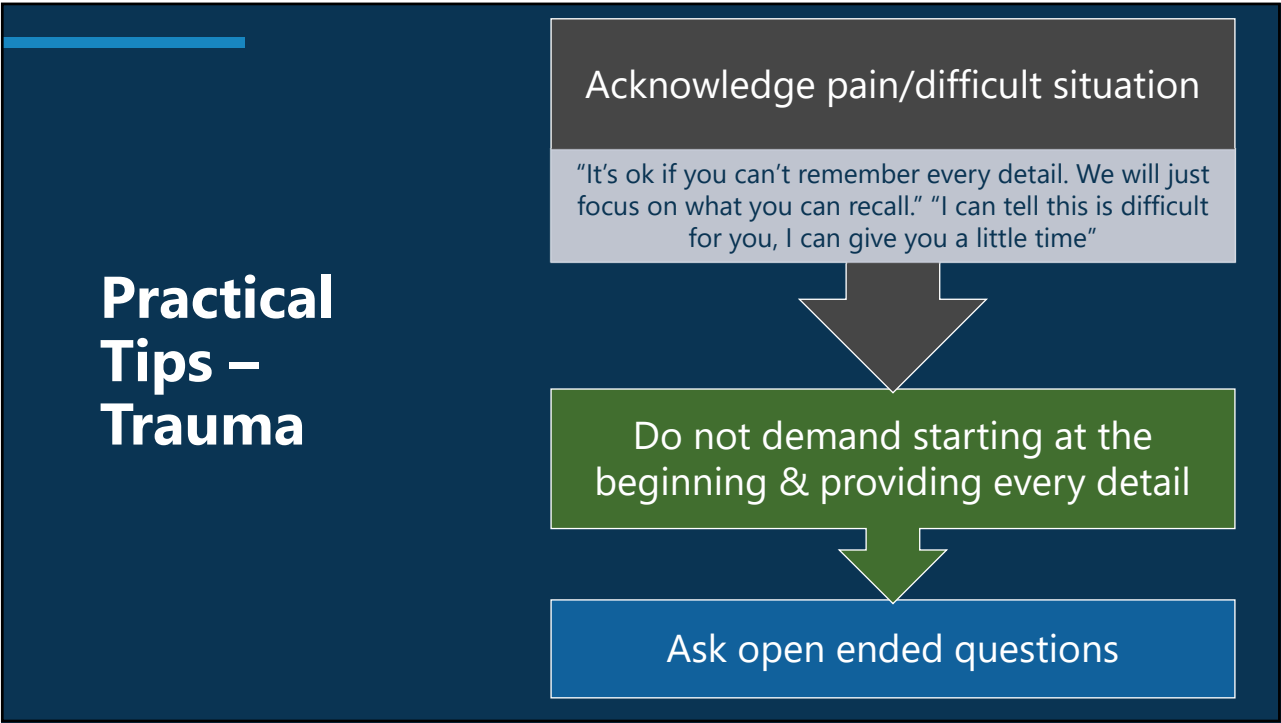
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Potential Trauma for CP and RP

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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

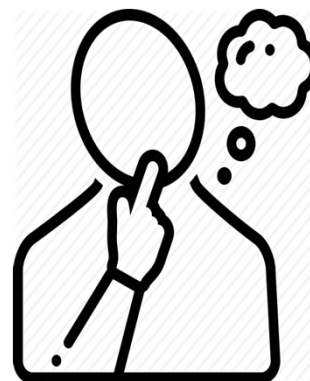
- Follow up in writing to summarize any points that might need confirmation
- Clean up notes
- Document less formal interactions
- Send links/copies to policies if relevant
- REASSESS allegations, investigation plan, and supportive measures

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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

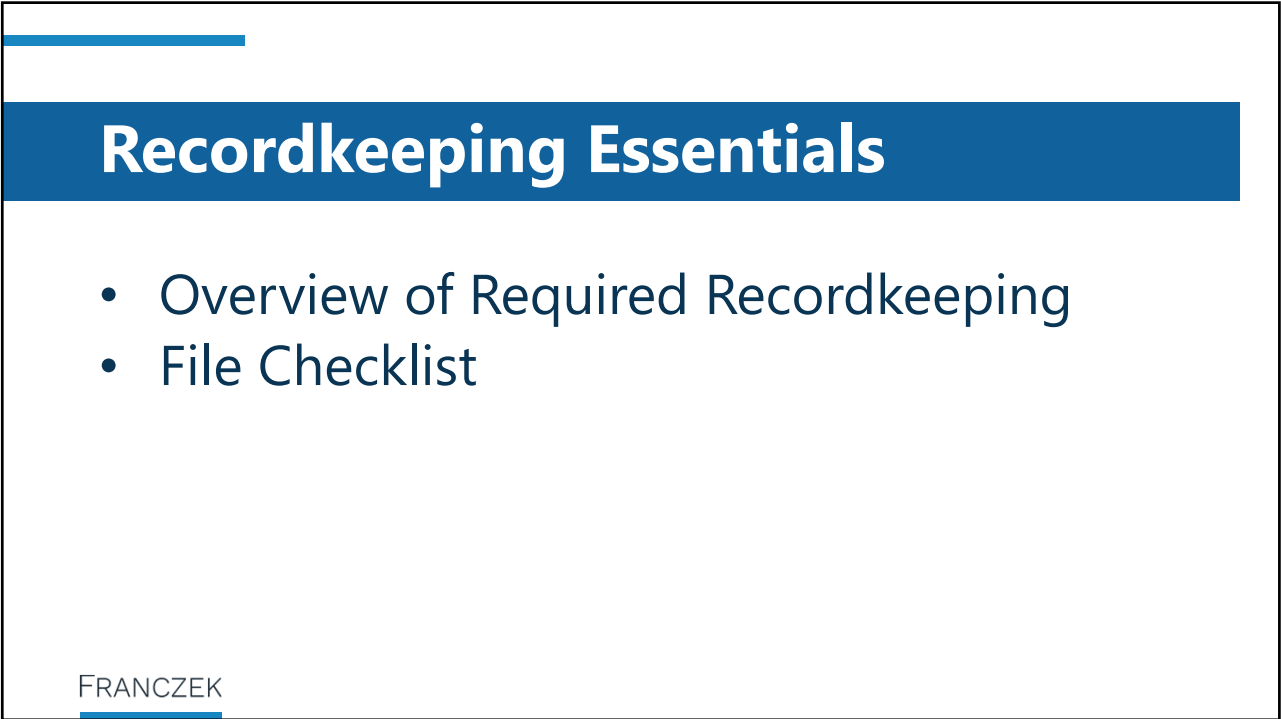
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Questions



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