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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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What is Title IX Sexual Harassment

- Unwelcome sexual conduct that is sufficiently severe, persistent, or pervasive to limit a person's ability to participate in or benefit from an educational program or activity.
- Quid pro quo by an employee
- Sexual assault, dating violence, domestic violence, and stalking.

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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

**can still address under non-T9 SH policy

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)

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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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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 contain specific elements**
- Must treat parties equally for any additional elements

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Step One: Notice of Allegations

- By Title IX Coordinator or Investigator
- Promptly upon receipt of a formal complaint
- To all known parties

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Step One: Notice of Allegations

Include

- Notice of grievance process
- Notice of allegations, including sufficient details
- Statement that respondent is presumed not responsible until end of process

With sufficient time to prepare a response before any initial interview

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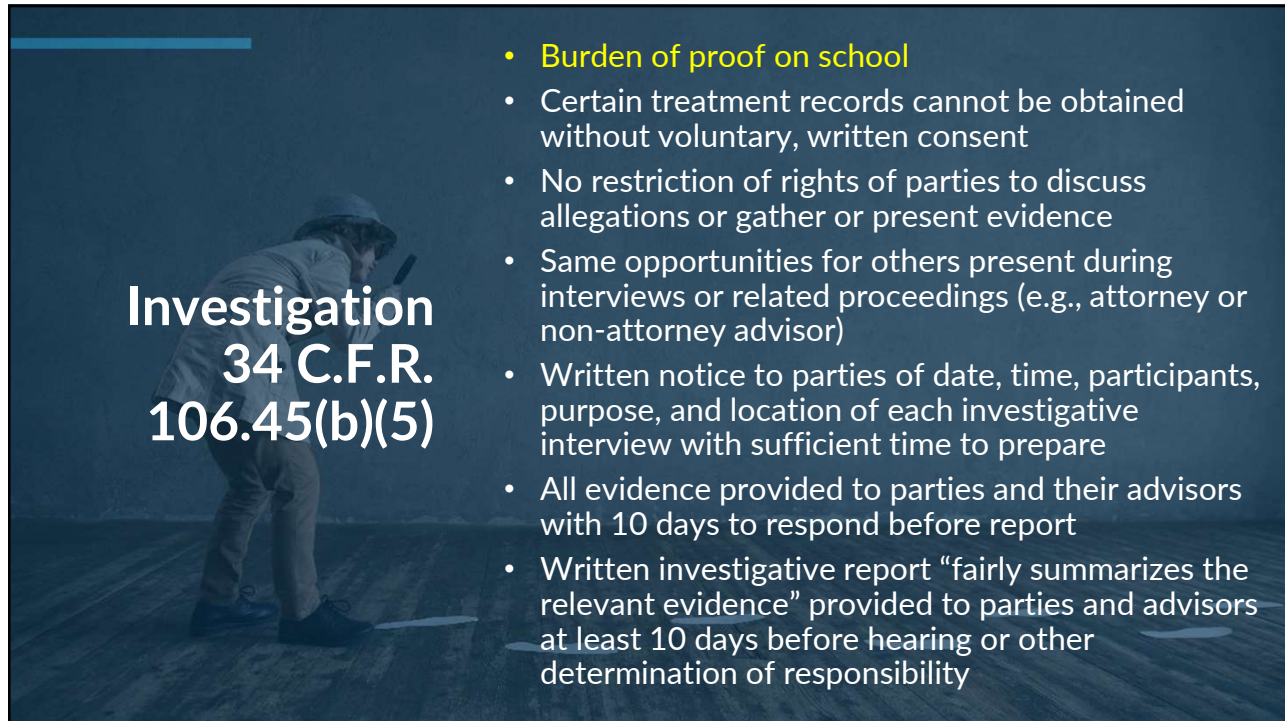
Step One: Notice of Allegations

Sufficient details include:

- Identities of the parties involved in the incident, if known
- The conduct allegedly constituting sexual harassment under Title IX
- The date and location of the alleged incident, if known

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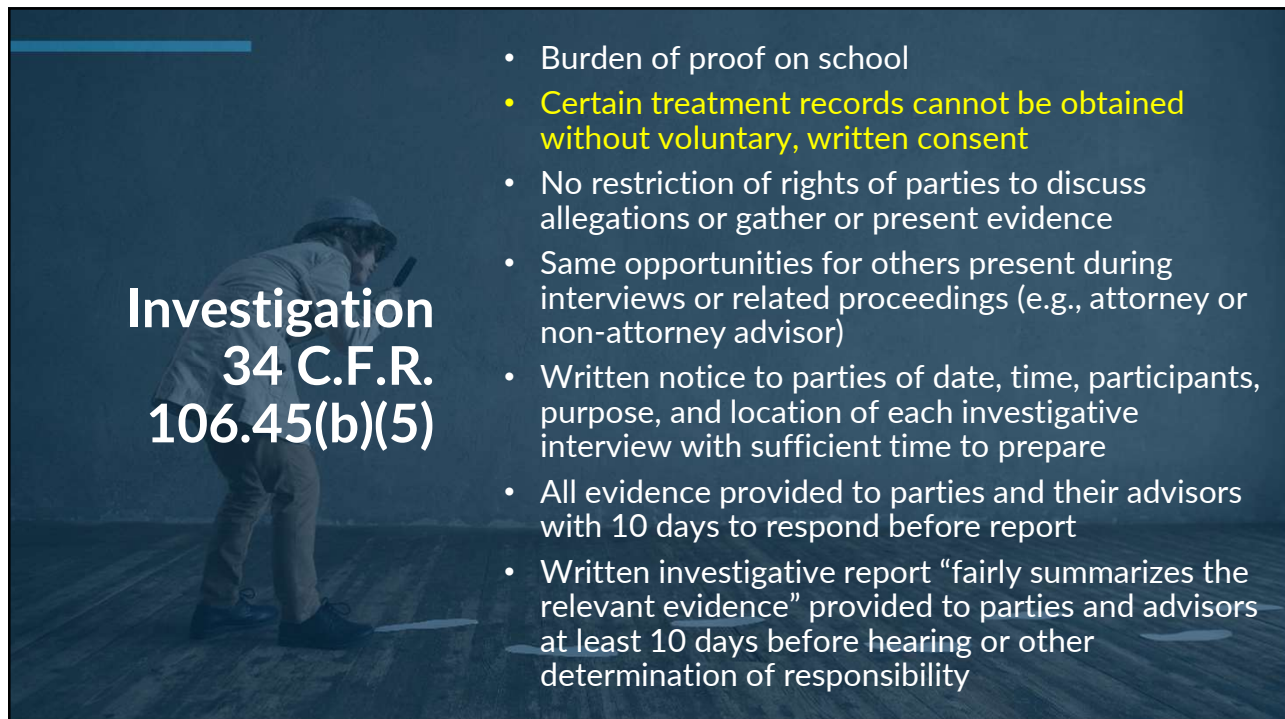
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Investigation
34 C.F.R.
106.45(b)(5)

- **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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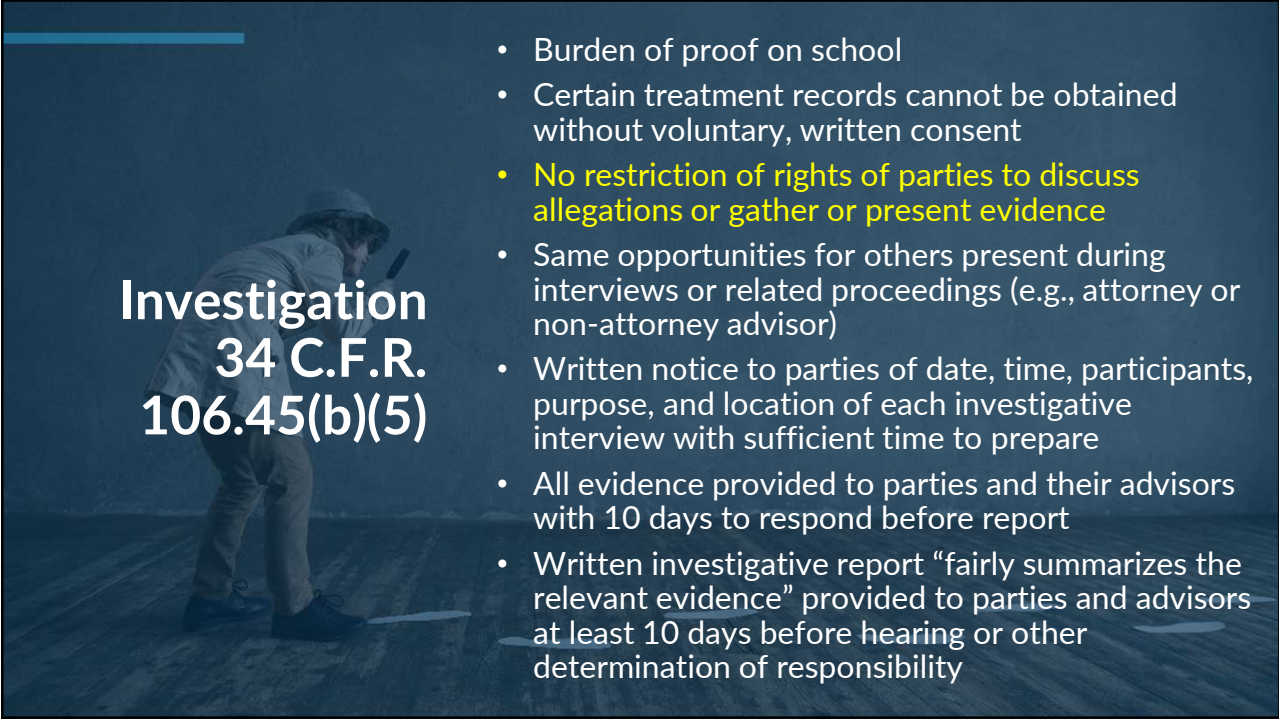
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Treatment Records

- 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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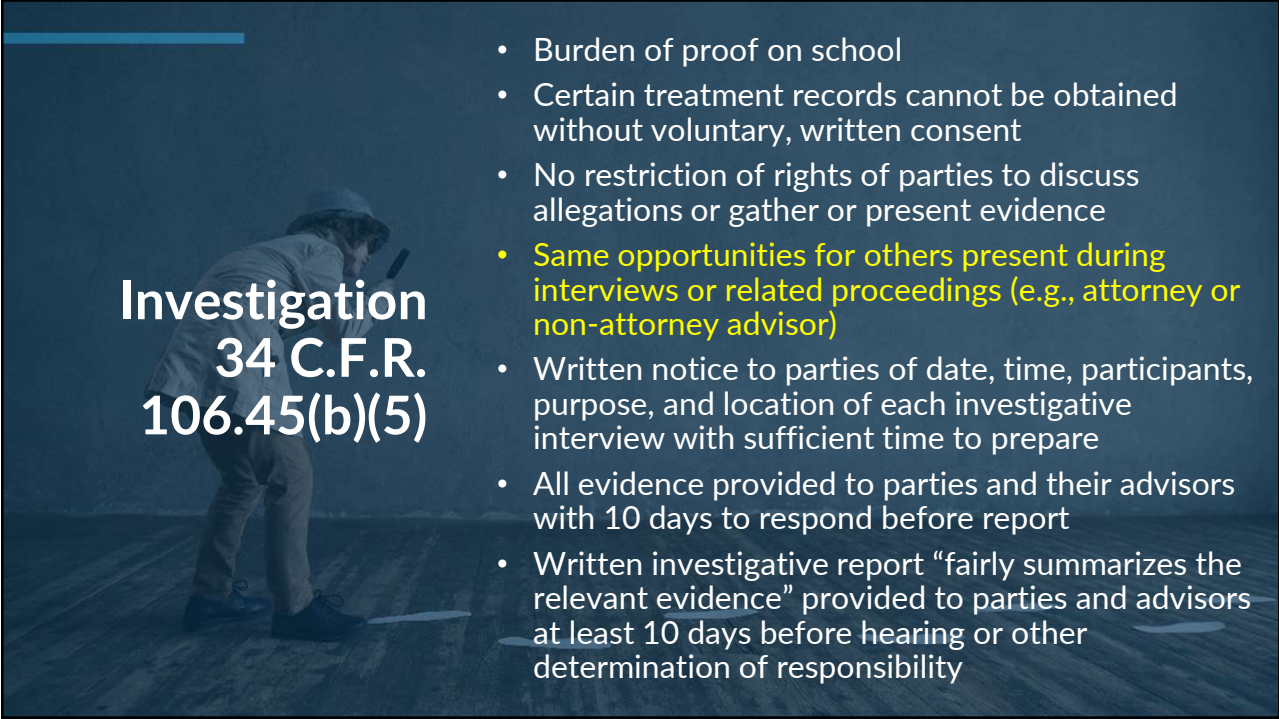
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Retaliation and Gag Orders

- 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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Forms/Notices

Notice to Advisors

Advisor
Conduct
Expectations

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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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Hypothetical

- Before finalizing the investigation report, both parties and their advisors must receive a summary of all evidence and have an opportunity to respond

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- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- **All directly related evidence provided to parties and their advisors with 10 days to respond before report**
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

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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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Examples of Directly Related Evidence

- Emails and text messages between complainant and respondent
- Interview notes
- Information relevant to credibility of witnesses

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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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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 of CP (except in limited situations)
 - Legal privilege
 - Treatment records

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Rape Shield

- 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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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

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Investigation Report

- Applicable policies and procedures
- Timeline of investigation
- Description of allegations
- Unbiased summary of relevant 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: Techniques & Best Practices

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Order of Interviews



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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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Practical Tips – Trauma

Acknowledge pain/difficult situation

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

Do not demand starting at the beginning & providing every detail

Ask open ended questions

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Emotions

- Silence is ok
- Sympathy is ok (within reason/neutral) – “I can tell this is hard” “I’m sorry this is difficult”
- Allow breaks
- 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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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 + Judgments
- 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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