

2020 Title IX Regulations: Investigator Training

August 12, 2020
Presented by Emily Tulloch

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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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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 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 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 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 (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 prejudgment?

Yes

No

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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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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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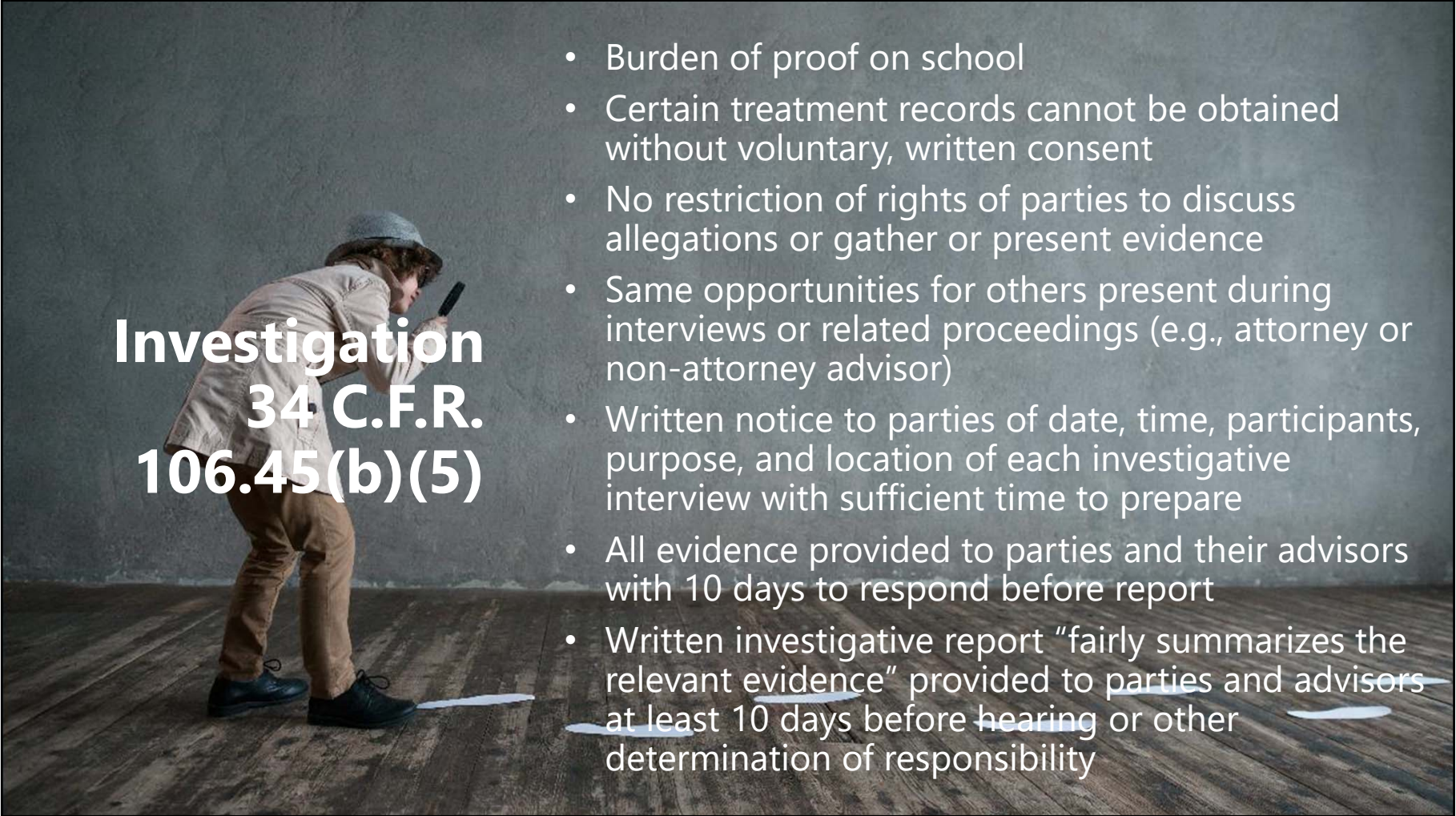
Investigation Requirements & Best Practices

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Investigation

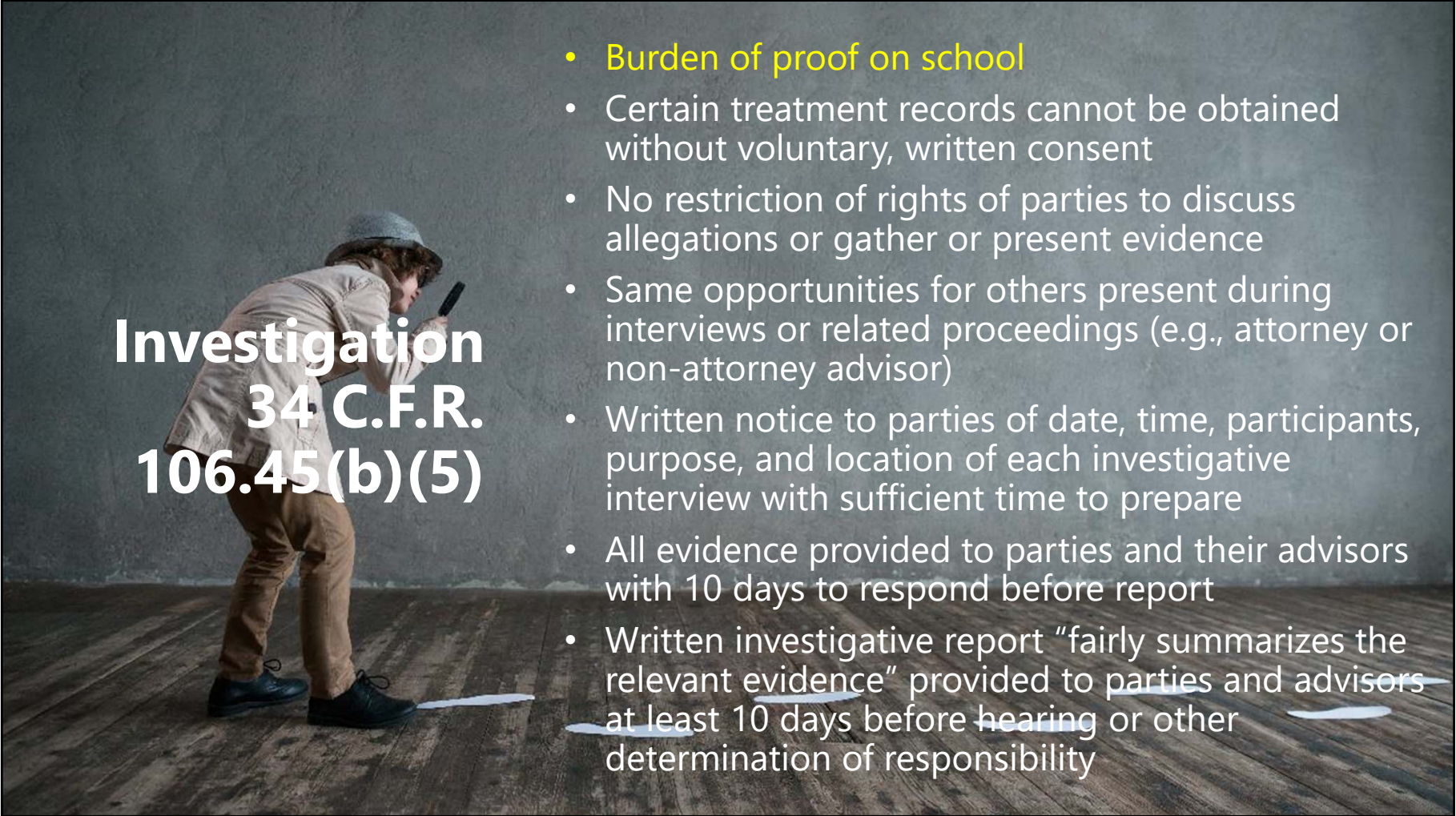
- Must contain specific elements
- Must treat parties equally
- Must end in a report, followed by a hearing with live cross, a written decision from the decisionmaker, and the opportunity to appeal

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A man wearing a light-colored jacket, brown pants, and a grey hat is looking down at a smartphone in his hand. He is standing in a dark room with a wooden floor and a dark wall. The text 'Investigation 34 C.F.R. 106.45(b)(5)' is overlaid on the left side of the image.

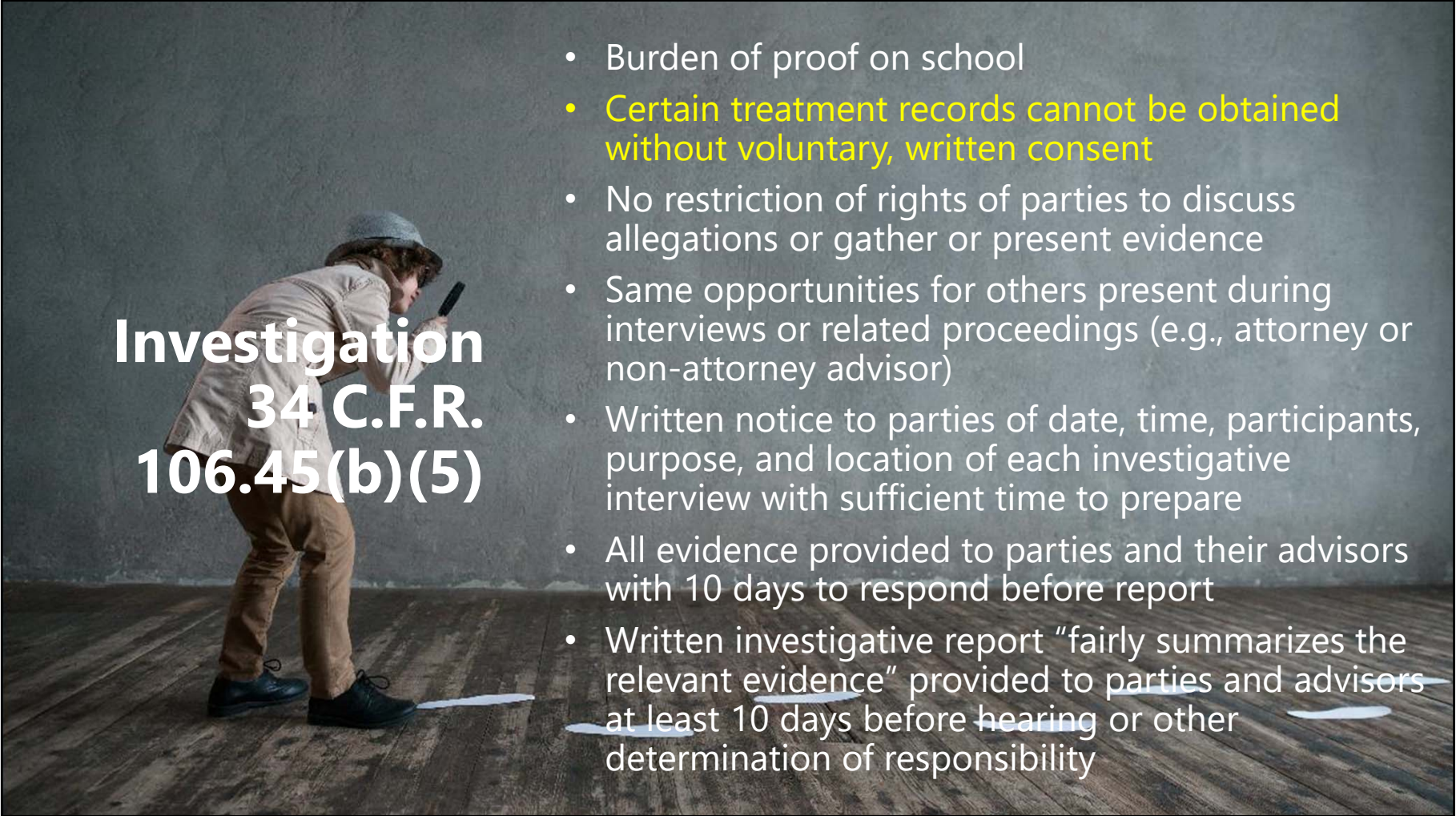
Investigation 34 C.F.R. 106.45(b)(5)

- 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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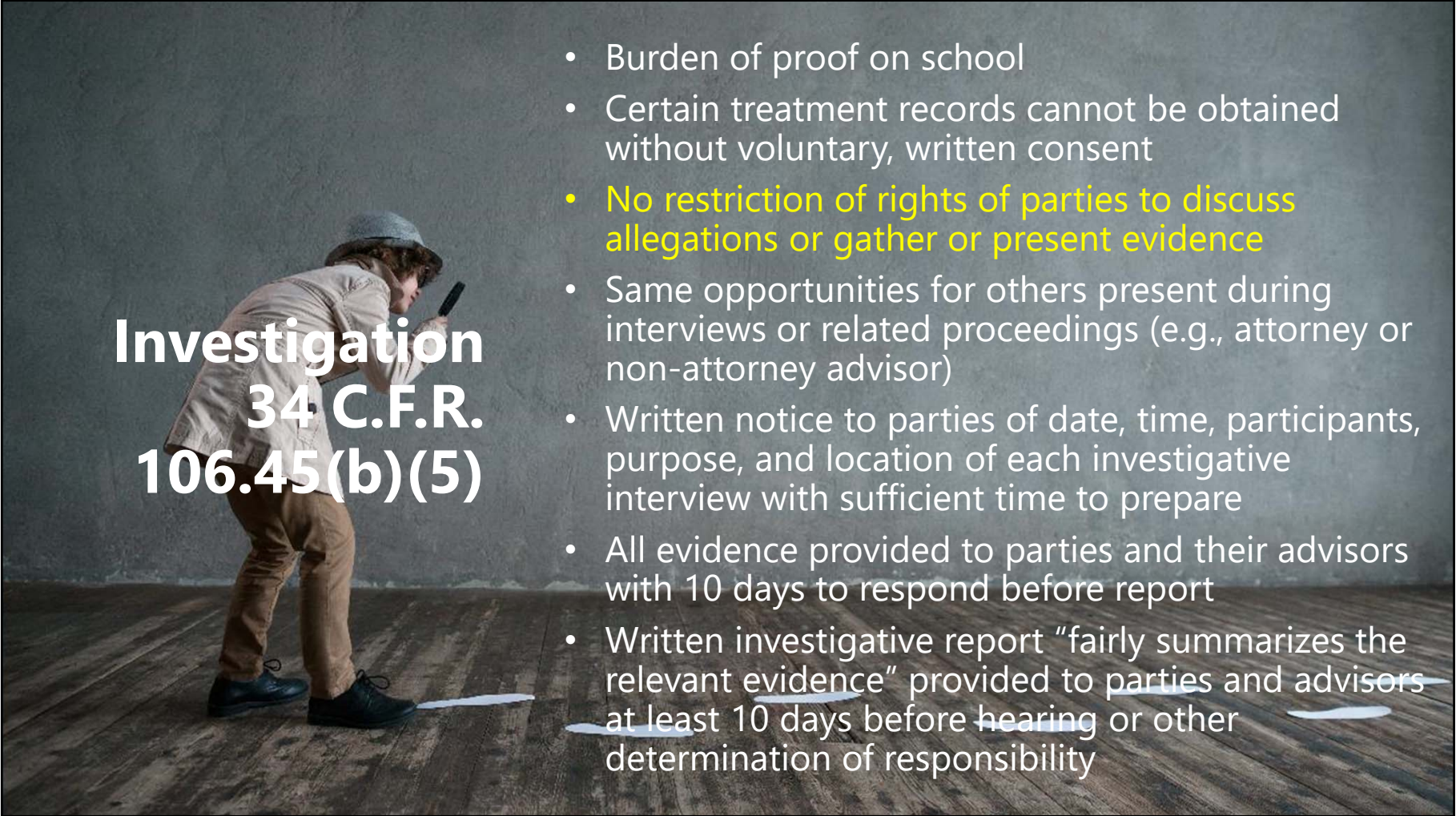
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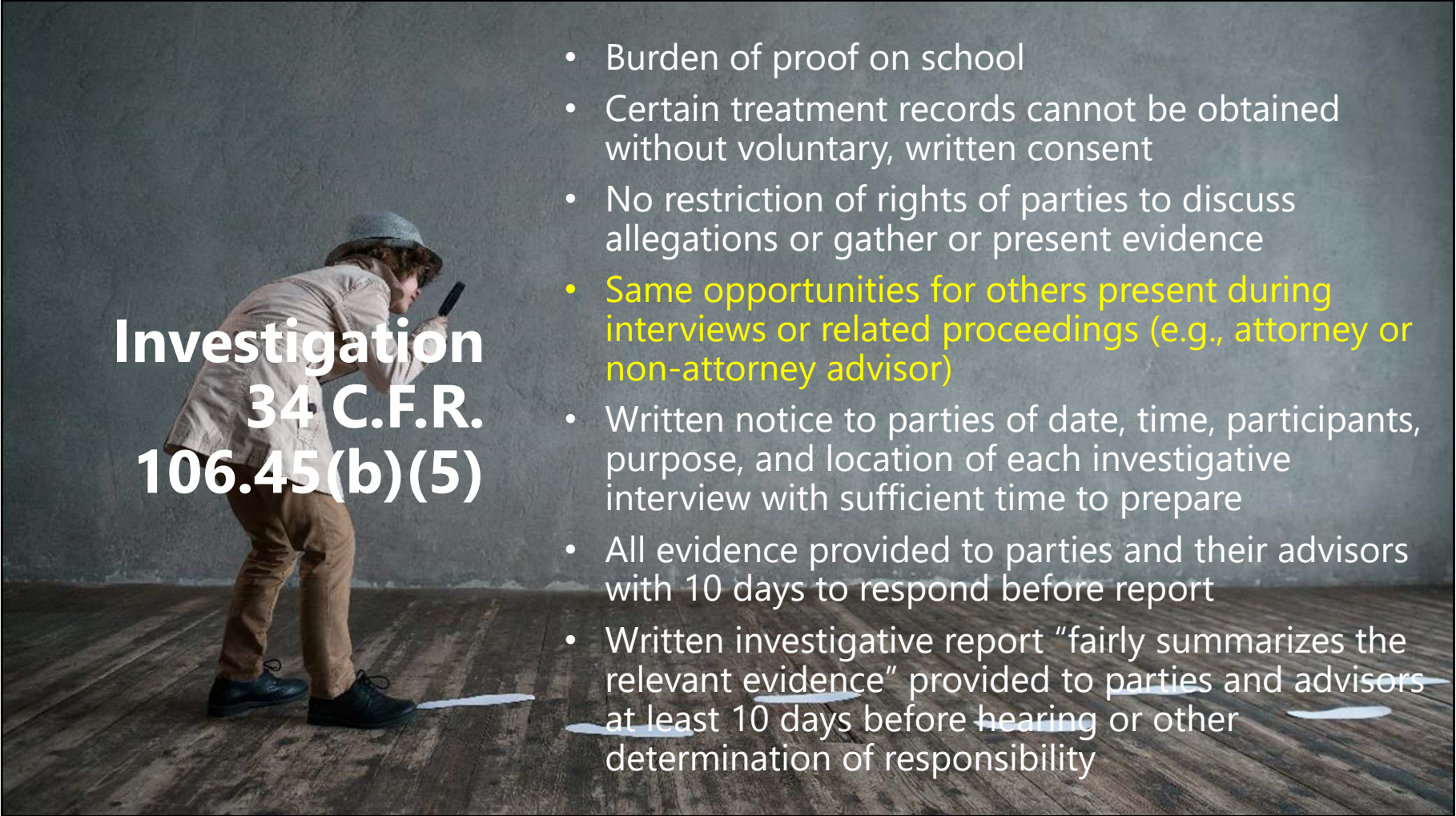
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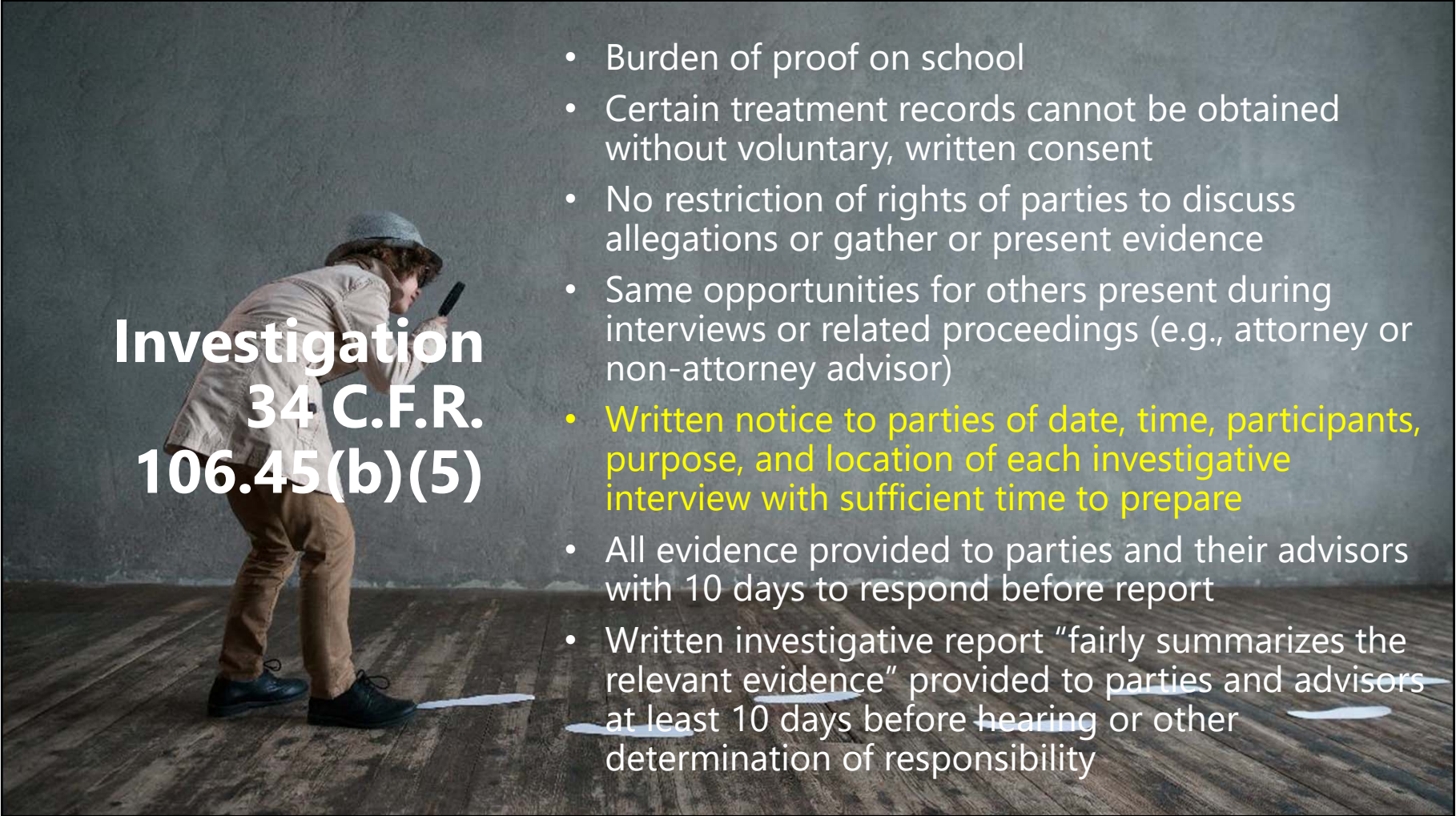
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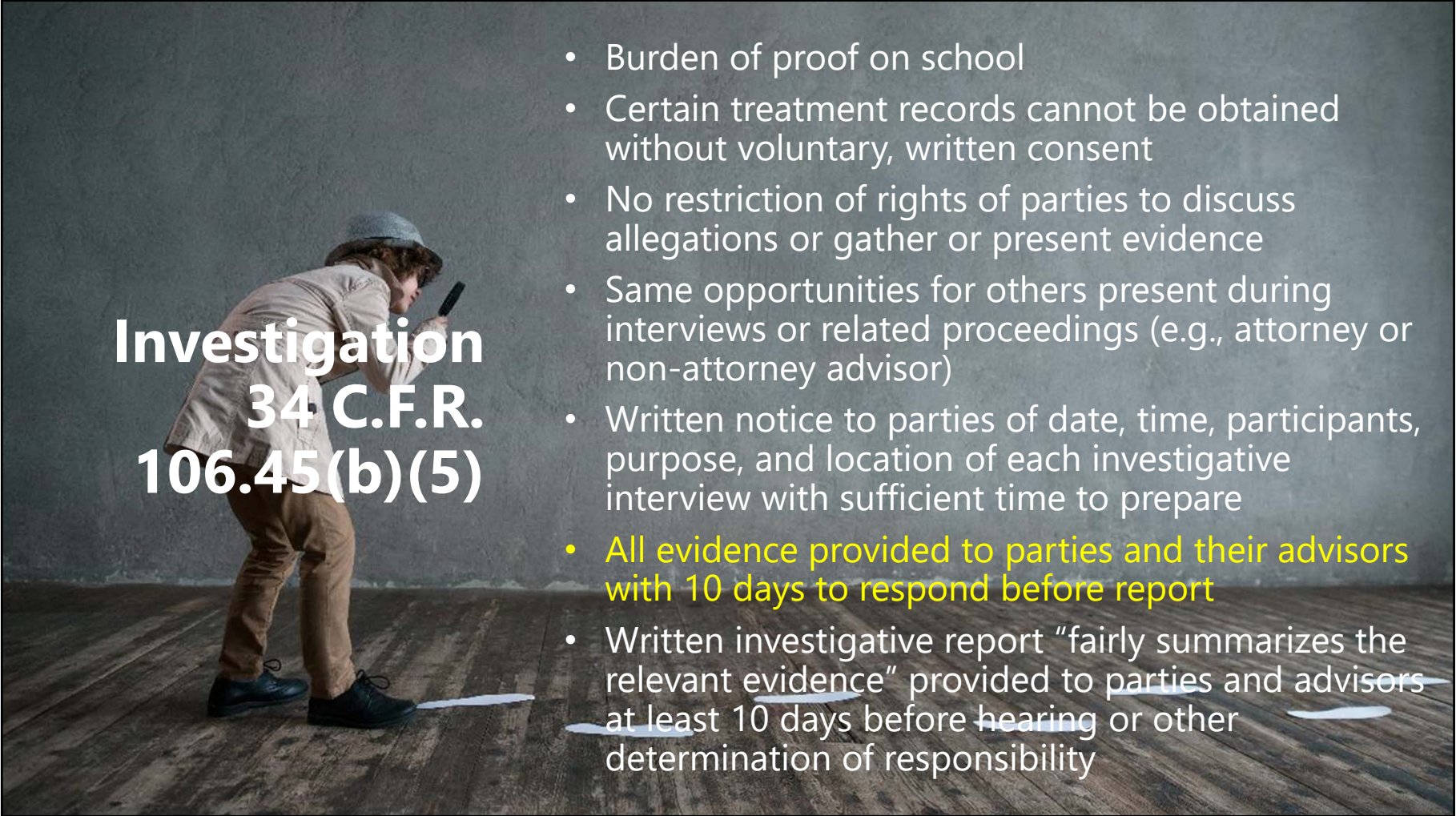
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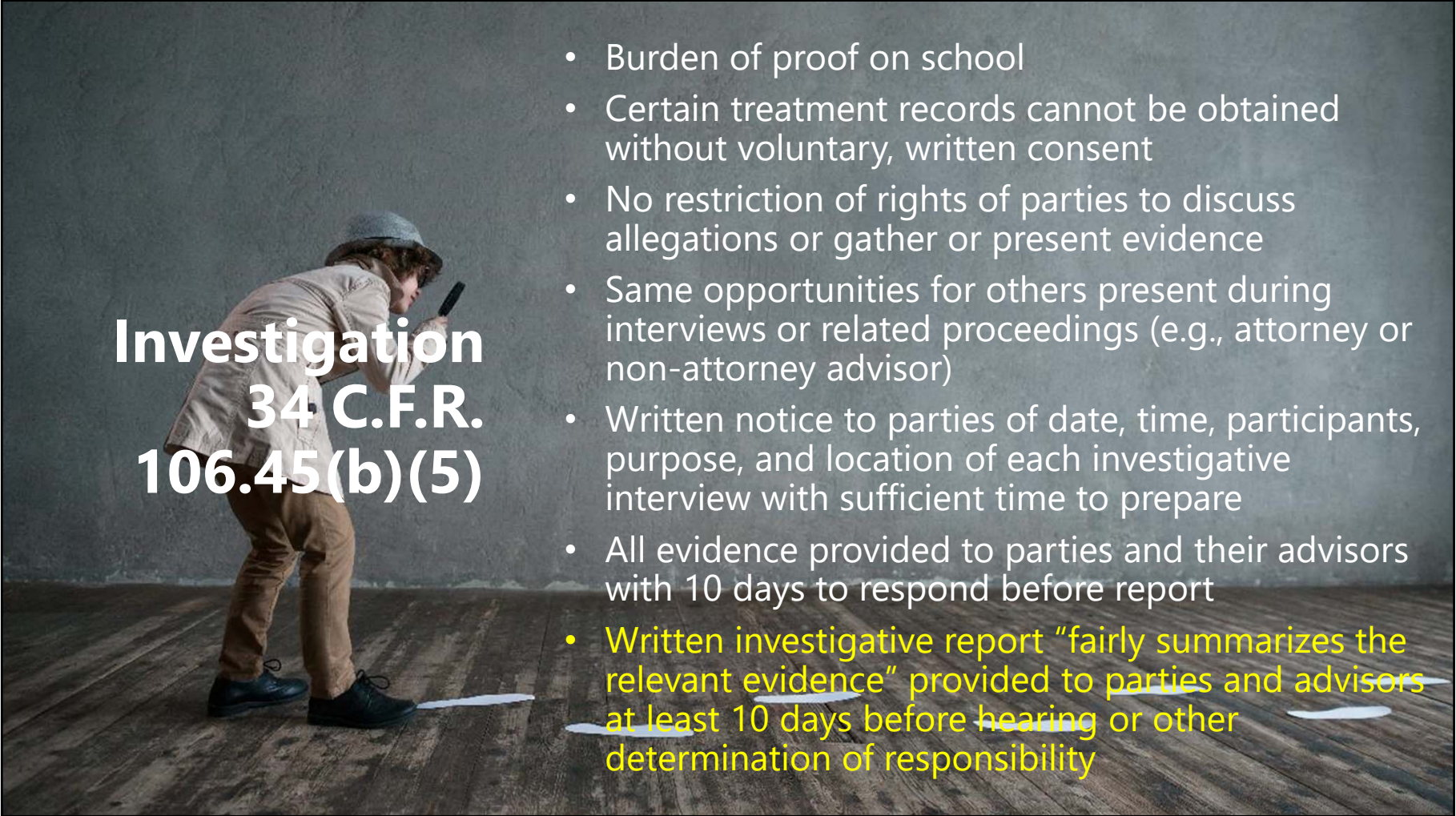
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A man wearing a light-colored trench coat, a hat, and brown pants is standing in a dark room with a wooden floor. He is looking down at a smartphone in his hands. The background is a dark, textured wall. The text 'Investigation 34 C.F.R. 106.45(b)(5)' is overlaid on the left side of the image.

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A man wearing a light-colored trench coat, a hat, and brown pants is standing in a dark room with a wooden floor. He is looking down at a smartphone in his hands. The room is dimly lit, with a few small white spots on the floor.

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

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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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Order of
Interviews

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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Closing

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

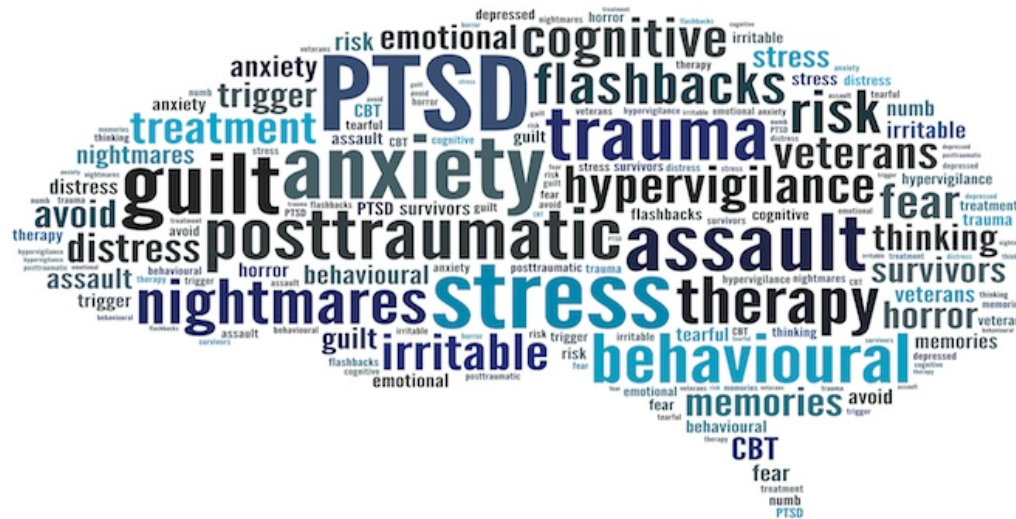
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Avoid

- 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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Potential Trauma for CP and RP



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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



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

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?

How did the conduct affect you?

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

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?”

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



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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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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None of the above (meaning, they all are relevant)

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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

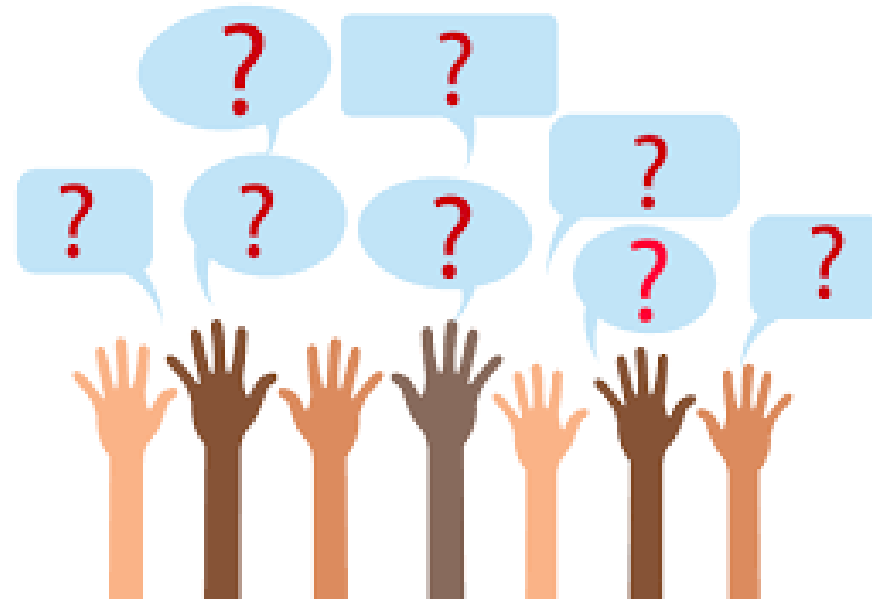
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Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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Questions



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