

Select Education Group

2020 Title IX Regulations: Coordinator Training

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Agenda

- Coordinator Responsibilities, Including Delegation
- Key Terms
- Example Report

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

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

Title IX Coordinator Responsibilities

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

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

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

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

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

OWAs vs. Responsible Employees

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

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

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”

“Deliberate Indifference”

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

“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

“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

“Deliberate Indifference”

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

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

Example Report

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Robin's Report

- Report from an RA
- Robin, a freshman, rooms with Cameron, another freshman. Cameron told Robin that another student, a senior, Parker, had been sending inappropriate email messages to Cameron.

Robin's Report

- Robin encouraged Cameron to report, but Cameron refused
- Robin was talking to another student, Peyton, at a party last weekend. Peyton reported also receiving inappropriate messages from Parker.

Robin's Report

- Because this seemed like a pattern, Robin felt the need to report.
- When asked for details about the types of messages, they began with requests for dates but evolved into name calling (slut, skank), rambling comments about the recipient's "obvious" desire for Parker, and incessant requests for connection.

Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA "Big 4"

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)

Sexual Assault under VAWA

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

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

You Think Its Title IX SH – Now What?

- A - Contact Robin to contain more information?
- B - Contact Robin to offer an opportunity to file a formal complaint and supportive measures?
- C - Contact Cameron to offer an opportunity to file a formal complaint and supportive measures?

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

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

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

Can you honor the request for a No Contact Order

Yes, even if
it's unilateral

Yes, but only
if it's mutual

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

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)

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

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))

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

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

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

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))

Back to Robin

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

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

“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”

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

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))

Let the investigation begin....

- The Title IX Investigator is ready to investigate
- Wants to interview parties and witnesses

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))

Parker's Interview

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

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

How do you respond if no jurisdiction?

Send to another department to consider other policy violations

Send both parties a formal dismissal notice

Meet with Cameron upon receipt of the formal complaint to discuss supportive measures for the remainder of time at the school

All of the above

None of the above

It turns out that the emails were sent two years ago, before Cameron was a student. What can 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

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))

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 under existing non-Title IX policies while investigating non-Title IX complaints

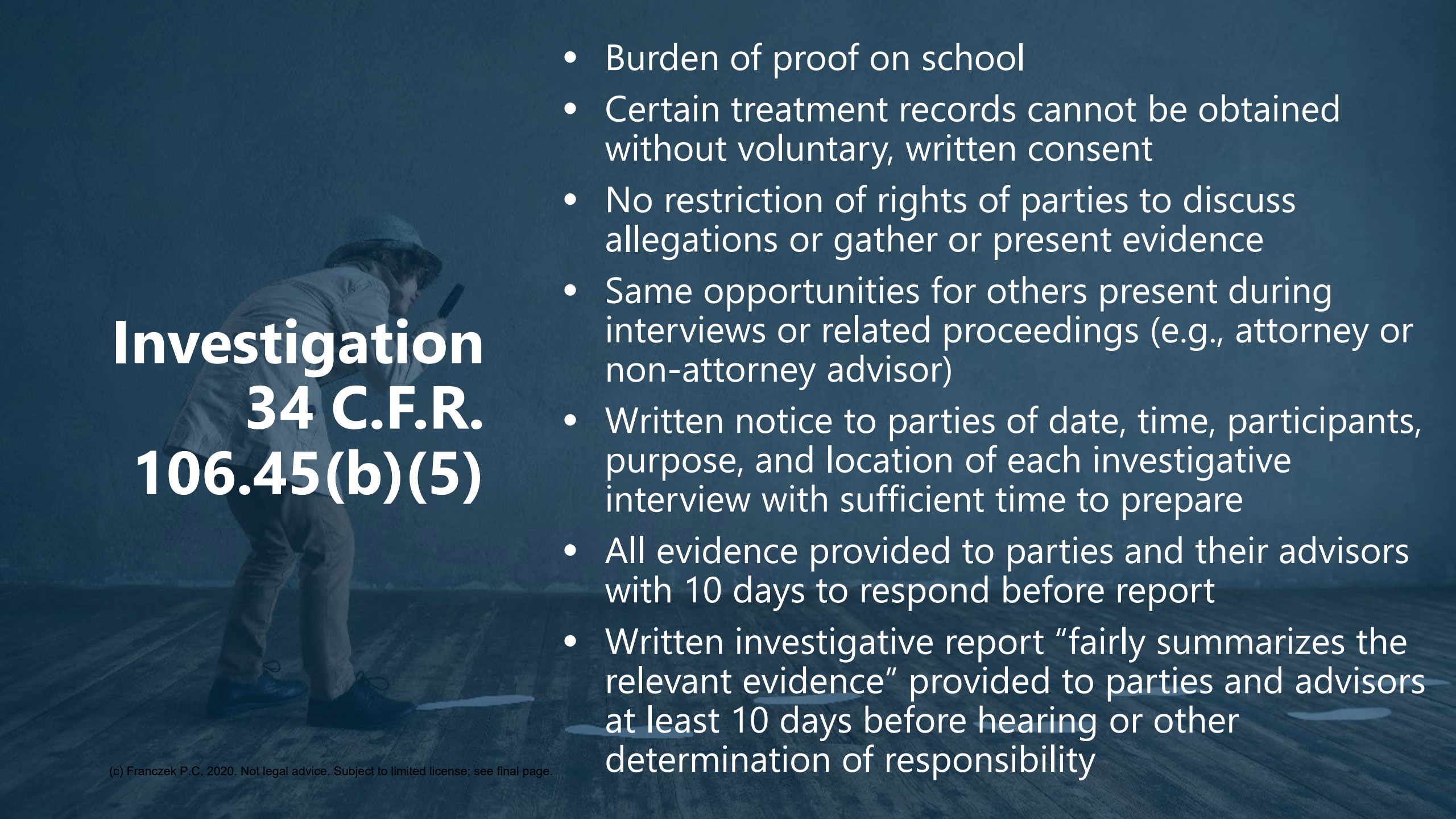
You can discipline the employee for a violation of another policy

None of the above

All of the above

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.

A person wearing a white lab coat and a white cap is looking at a smartphone in a dark room. The person is standing on a wooden floor. The background is dark and blurry.

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

So the investigation is done....

- Must share evidence with both parties and advisors simultaneously with 10 days to respond before writing the report
 - Review/consider responses
 - Share responses with the other side

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))

The investigative report

- Must fairly summarize relevant evidence
- Must be provided to both parties and their advisors simultaneously at least 10 days prior to a hearing (if applicable) or other time of determination
- Transmit report and any party written response(s) to the Decisionmaker

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))

Hearing and Decision

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

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))



Bias, Conflicts of Interest, and Other Fairness Concerns



Bias

The Title IX Decision-maker 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.

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

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

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



Recordkeeping/File Maintenance



Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

Questions?



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