



1

## Decision-Maker – Complaint

- Review investigative report and written responses
- Conduct “Written Cross Examination” (hearing process if elected)
  - Make relevancy determinations
- Make independent judgment on responsibility and sanctions

FRANCZEK

2

## Decision-Maker – Appeal

- Review appeal and party responses
- Make independent judgment on appeal questions

FRANCZEK

3

## Decision-Making Process

### The Complaint

4

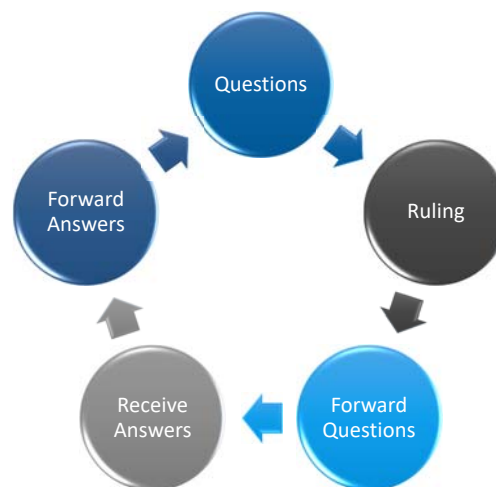
## You Should Review

- Formal complaint
- All relevant evidence gathered during the investigation
- Investigative report
- Written responses submitted by parties

FRANCZEK

5

## Written Cross Examination Process



FRANCZEK

6

# Issues of Relevance and Evidence

7

## Issues of Relevance

- Must objectively evaluate questions and make determinations on relevancy
- Includes inculpatory and exculpatory evidence
  - Inculpatory: tends to prove policy violation
  - Exculpatory: tends to exonerate the accused

FRANCZEK

8

## Relevance

- What is relevance?
- Something that makes a fact or issue in dispute more or less likely to be true

FRANCZEK

9

## Rulings on Relevance

- Admit and consider all relevant questions
- Provide reasoning for irrelevance
- Consider exceptions
  - Sexual behavior of CP (except in limited situations)
  - Legal privilege
  - Treatment records

FRANCZEK

10

## Rape Shield (CP Only)

- Exclude questions related to Complainant's sexual behavior or predisposition
- Does not apply to Respondent
- Two narrow exceptions

FRANCZEK

11

## CP Rape Shield - Exceptions

- Used to prove that someone other than the respondent committed the conduct; or
- Concerns specific incidents of the complainant's sexual behavior with respect to respondent and is offered to prove consent.

FRANCZEK

12

## Treatment Records

- Do not allow questions that would lead to access, considering, disclosing, or using information from medical records made by a physician, psychologist, or other recognized professional made and maintained in connection with the provision of treatment
- Unless the party gives voluntary, written consent
- CONSIDER: What if the party puts their own records in dispute? Must agree to allow limited, relevant questions for decision-maker to consider the evidence?

FRANCZEK

13

## Legally Privileged Information

- Do not allow questions 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

FRANCZEK

14

## Beyond Relevance

- Schools can ensure questions are not harassing
- Might include profane, obscene, repetitious questions
- Tread carefully!

FRANCZEK

15

## Hypothetical

- Two students at a party after school dance
- Drive to campus, "making out" in car
- Sexual activity happens—CP reports that it was sexual assault
- Are these questions proper?

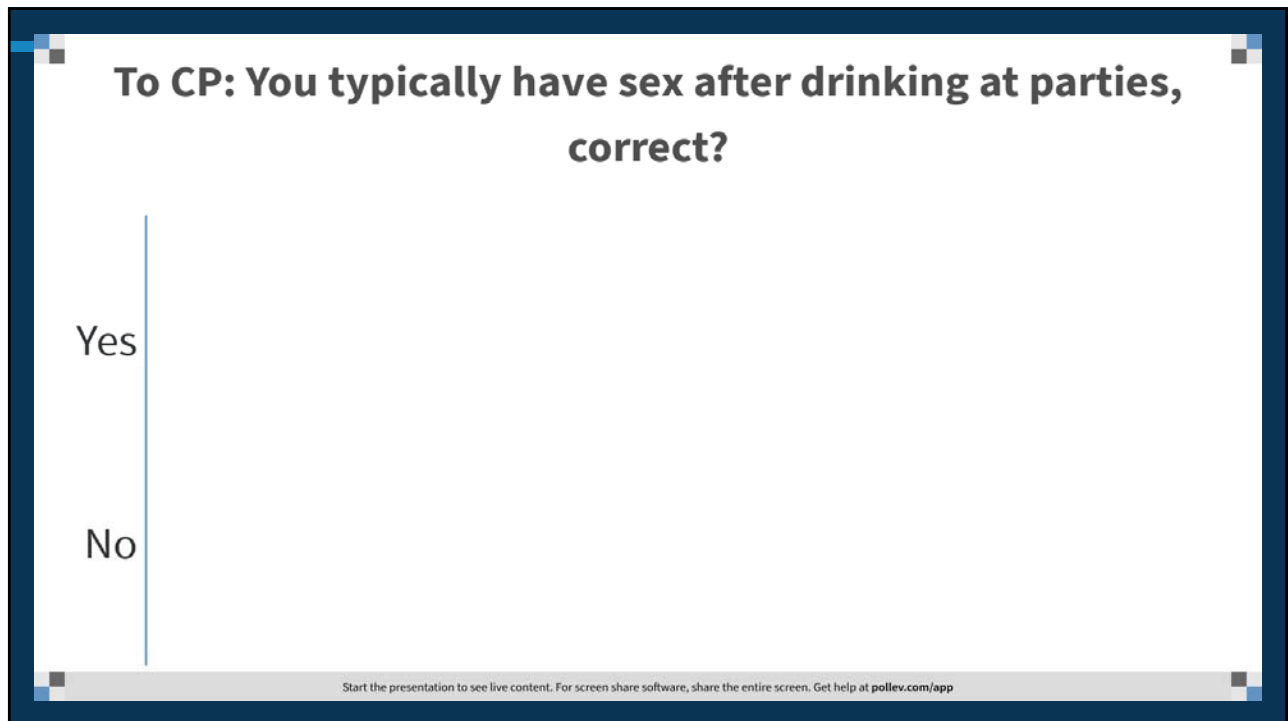
FRANCZEK

16





17



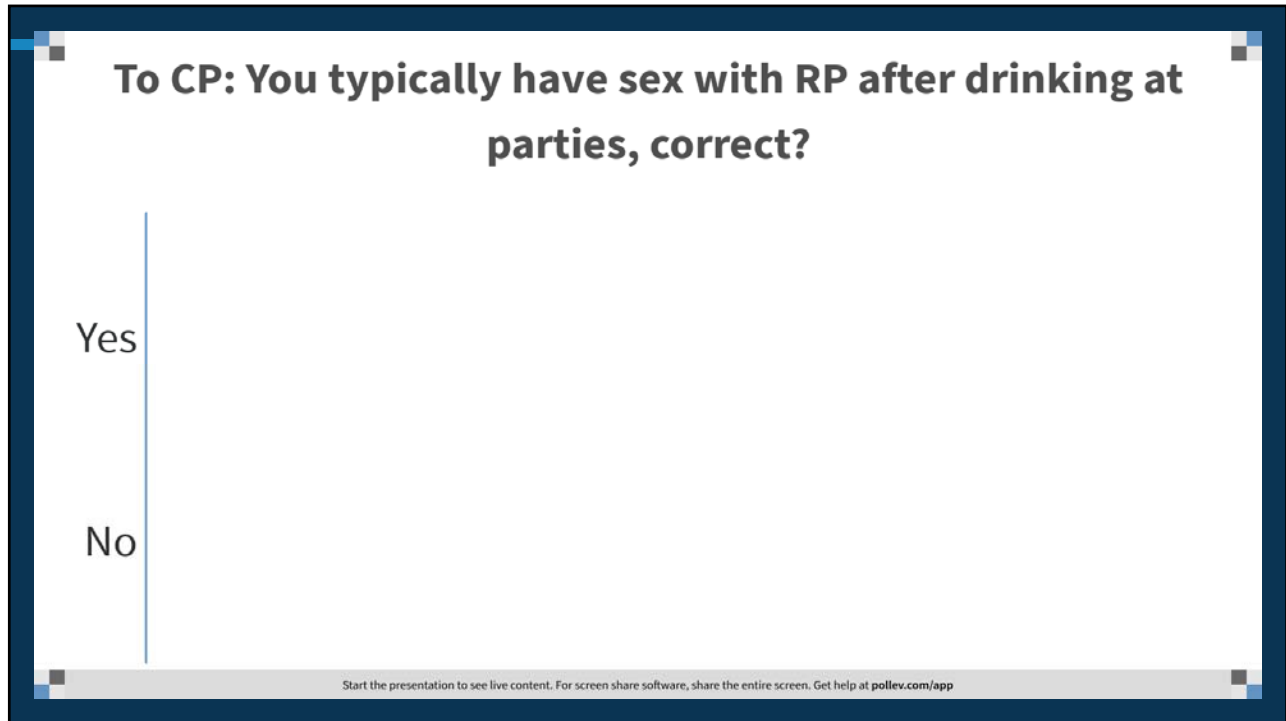
18

**To CP: You typically have sex with RP after drinking at parties, correct?**

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)



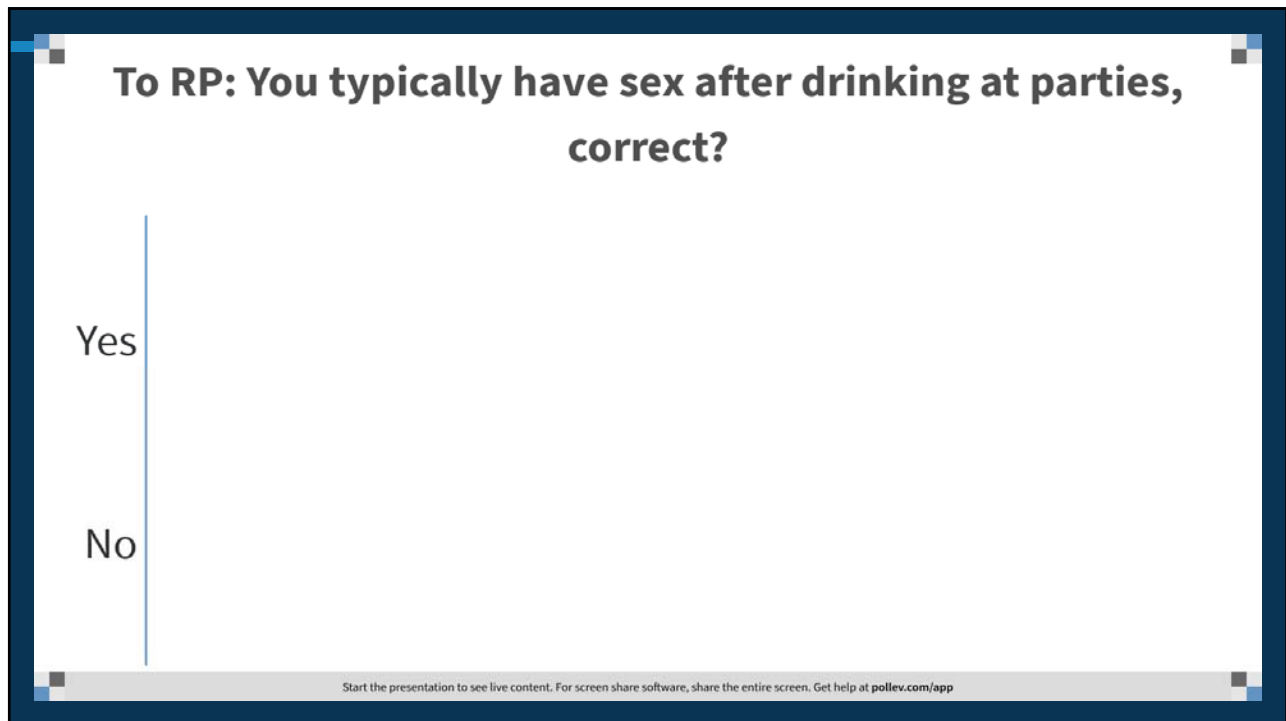
19

**To RP: You typically have sex after drinking at parties, correct?**

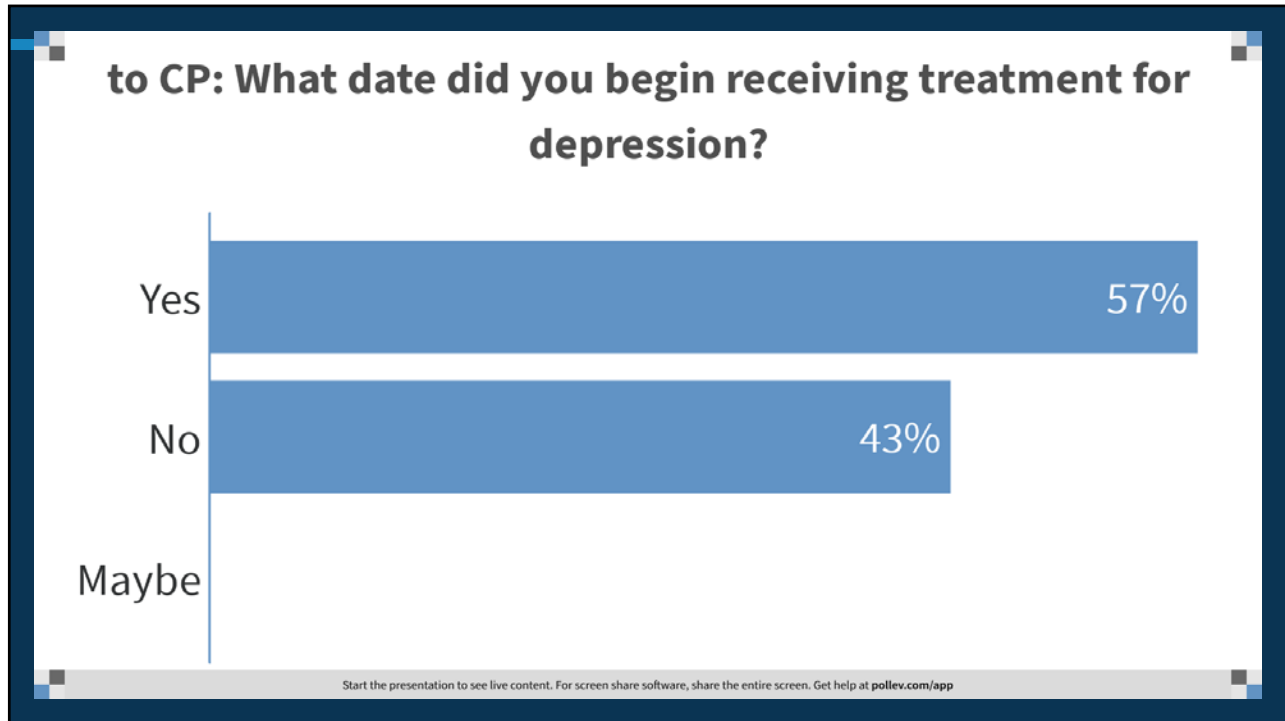
Yes

No

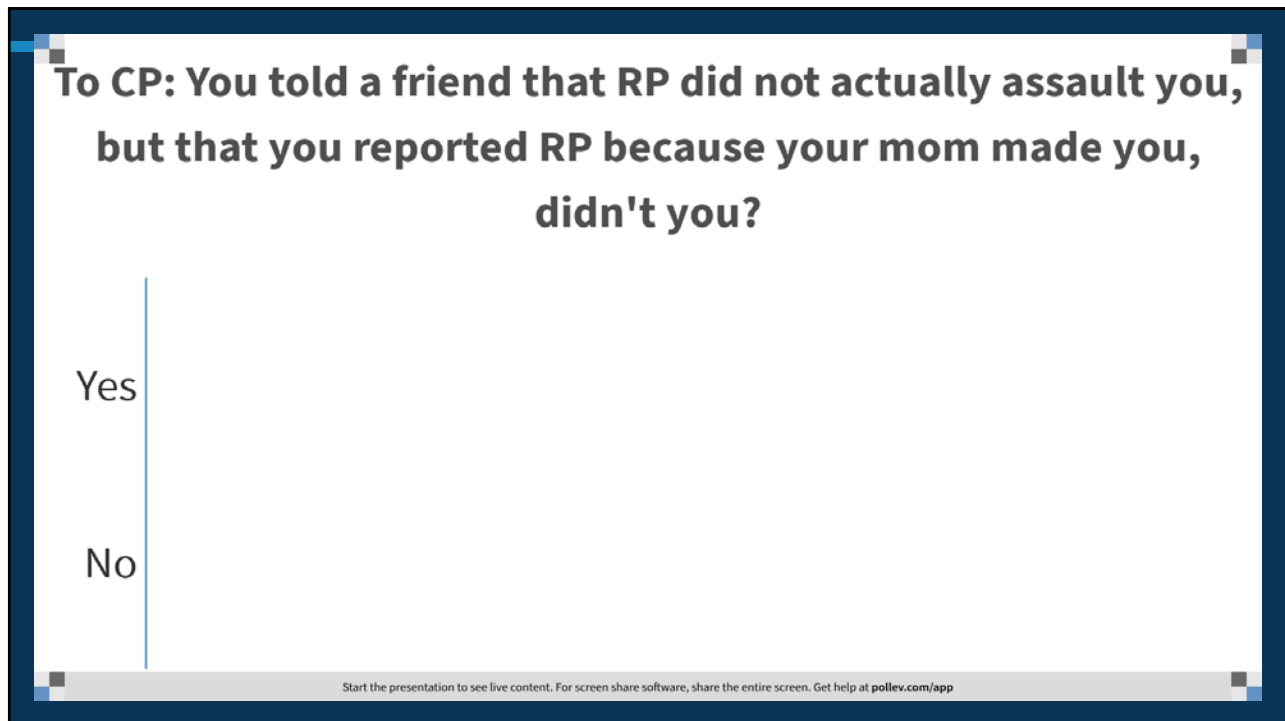
Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)



20



21



22

**You told your attorney that the only reason you made a complaint was because your mom told you to do so, correct? What did you say?**

Yes **A**

No **B**

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

23

**To witness: CP's friend told you that CP said RP did not assault CP, isn't that correct?**

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

24

**You were so drunk that you do not know who sexually assaulted you, correct?**

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

25

**To CP: You and the RP had sex again the week after the alleged incident correct?**

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

26

**To CP: You had sex with your significant other (not RP) the next day, correct?**

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [polllev.com/app](https://polllev.com/app)

27

# Written Determination Regarding Responsibility

28

## Making a Determination

- Remain unbiased and impartial
- Render a reasoned decision based on evidence
- Base decisions on relevant evidence alone
- Evaluate witness credibility
- Consider weight of evidence (remember standard: preponderance of the evidence)

FRANCZEK

29

## Forms/Notices

### Determination

Written  
Determination  
Template  
(Franczek Form C)

FRANCZEK

30

## Written Determination

Identify	Identify the allegations
Describe	Describe procedural steps taken
Cite	Cite potential policy violations
Summarize	Fairly summarize all relevant evidence
Provide	Provide statement of result, with rationale, for each allegation
Appeal	Appeal procedures

FRANCZEK

31

## Factual Findings

Separate findings for each alleged policy violation

For any facts in dispute, show your work and reasoning

32



<b>Factual Findings</b>	Consider	Consider both supporting/corroborating and conflicting/inconsistent information for each disputed fact
	Make	Make credibility determinations by considering corroborating evidence, inconsistencies, logic of explanation/narrative, impact of trauma
	Use	Use words of parties/witnesses
	Be	Be detailed and precise

33

<b>Opportunity to Review</b>	Document opportunities given to parties to provide information, review evidence, and provide rebuttal
	Explain if anything offered/mentioned was not considered/obtained and why.

34

## Cameron's Report

- Lacrosse orientation week
- Park across street from the school
- Two upperclassmen lacrosse players (Parker and Robin) vs. Cameron

FRANCZEK

35

## Cameron's Report

- Verbal harassment
  - Going to violate your mother
  - Want to "smoke" (understood to mean sexual assault), will give starting position on team if do
- Grabbed Cameron by the neck and bent Cameron over; poked Cameron's anus over the clothes

FRANCZEK

36

## Cameron's Report

- Coaches saw the incident
  - Laughed at first
  - Noticed Cameron looked shaken
  - Sternly reprimanded upperclassmen in front of Cameron
  - Told Cameron if it happened again to report it
- Nonetheless, physical incidents kept occurring

FRANCZEK

37

## Cameron's Report

- One (same) coach observed later incident; shook her head and walked away
- Last day of orientation
  - Hazing ritual
  - Multiple upperclassmen grabbed Cameron
  - Pulled down pants, poked anus with broomstick

FRANCZEK

38

## Relevant Evidence

- Cameron (CP) report that the incident occurred
- Parker and Robin (RPs) deny that they engaged in the alleged conduct
- Other classmates, Ali and Jamison report that they did not see anything happen, but they were not close by
- Other classmate, Devon, reports not seeing anything, and says was close by

FRANCZEK

39

## Relevant Evidence

- Coaches acknowledge that on first day, saw conduct, reprimanded; deny laughing
- Text messages from Coach Smith to Coach Brown on day of first incident said "These kids are crazy! I can't believe they're at it again!" Coaches said talking about something unrelated.

FRANCZEK

40

# Discussion

What is your finding?

41

## Credibility

- Cameron recently lost a chess tournament against Parker
- Devon grew up on same street as Robin and Parker
- Coaches did not have a good explanation for the text

FRANCZEK

42

# Decision-Making Process

## The Appeal

43

### Appeal Process

- Available to both parties
- Three bases for appeal
- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

FRANCZEK

44

## Appeal Process

- Procedural issue affecting the outcome
- New evidence that wasn't reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome
- TIXC, investigator, or decision-maker had conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

FRANCZEK

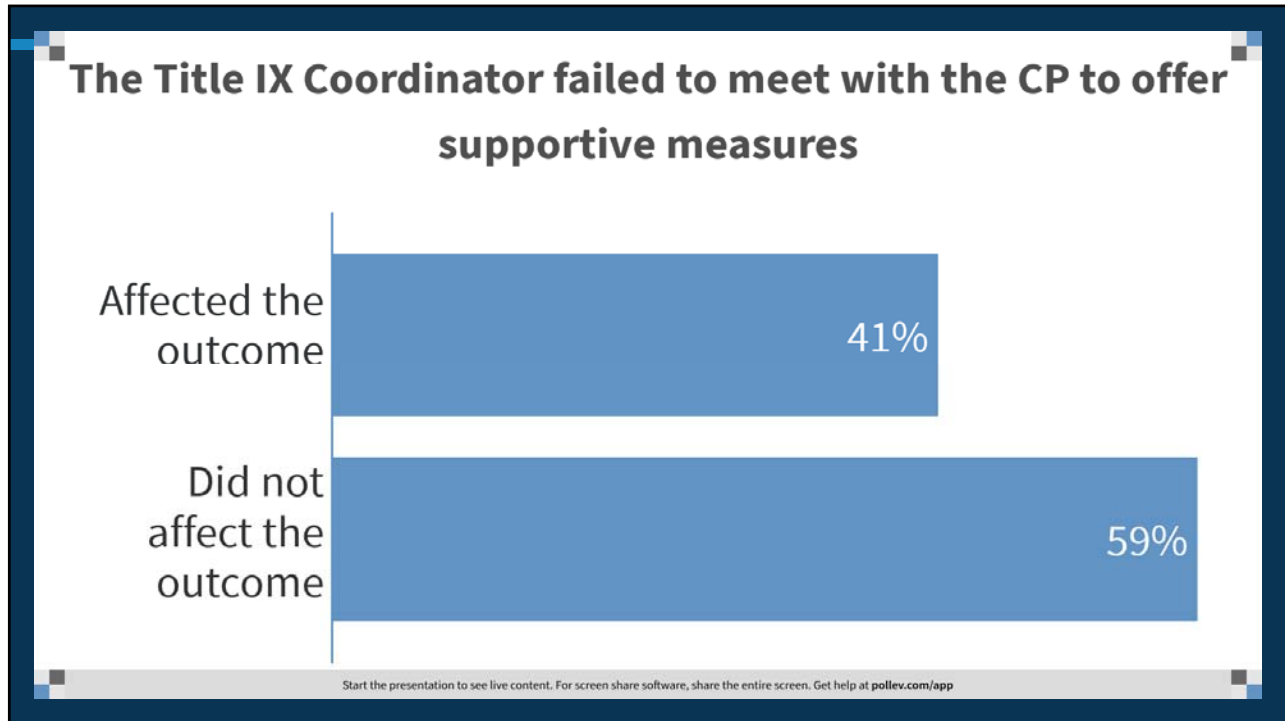
45

## Procedural Issue

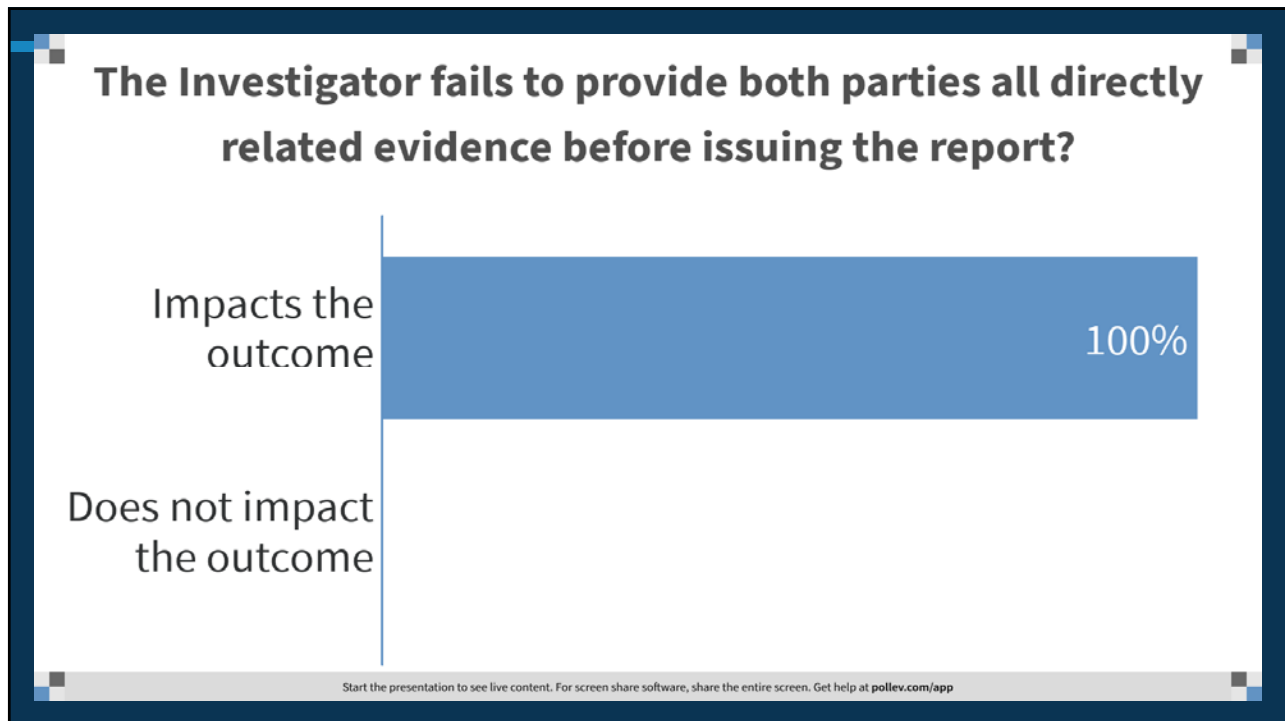
- Failure to follow the rules in policy/procedure
- Can be intentional or inadvertent
- Resulted in inappropriate decision; not always the case

FRANCZEK

46



47



48



## New Information

- New Information
- Not known at the time
- Would change the opinion of the decisionmaker if known at the time
- Not a review of information known at the time

FRANCZEK

49

**The RP was not aware at the time of the investigation that the CP previously made a false report against another student the year before**

New evidence **A**

100%

Not new evidence **B**

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

50

## Bias/Conflict of Interest

- Bias toward one party or one type of party – personal or institutional
- Conflict of interest – personal or institutional
- Prejudgment of facts (avoid by “showing your work”)

FRANCZEK

51

## Recordkeeping/File Maintenance

52

## Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

FRANCZEK

53

Questions?



54

© Franczek P.C. 2021. These materials are not legal advice. These materials are subject to a LIMITED LICENSE AND COPYRIGHT. These materials are proprietary and are owned and copyrighted by Franczek P.C. As training materials used to train Title IX personnel, these materials must be posted publicly by any organization or entity that purchased training for its Title IX personnel using these materials on that organization or entity's website or, if it has no website, must be made available by any such organization or entity for inspection and review at its offices. Accordingly, Franczek P.C. has granted a LIMITED LICENSE to the organization or entity that lawfully purchased training using these materials (the "LICENSEE") to post these materials on its website or otherwise make them available as required by 34 C.F.R. 106.45(B)(10). The LICENSEE and any party who in any way receives and/or uses these materials agree to accept all terms and conditions and to abide by all provisions of this LIMITED LICENSE. Only the LICENSEE may post these materials on its website, and the materials may be posted only for purposes of review/inspection by the public; they may not be displayed, posted, shared, published, or used for any other purpose. Franczek P.C. does not authorize any other public display, sharing, posting, or publication of these materials by the LICENSEE or any other party and does not authorize any use whatsoever by any party other than the LICENSEE. No party, including the LICENSEE, is authorized to copy, adapt, or otherwise use these materials without explicit written permission from Franczek P.C. No party, including the LICENSEE, is authorized to remove this LIMITED LICENSE AND COPYRIGHT language from any version of these materials or any copy thereof. Should any party, including the LICENSEE, display, post, share, publish, or otherwise use these materials in any manner other than that authorized by this LIMITED LICENSE, Franczek P.C. will exercise all available legal rights and seek all available legal remedies including, but not limited to, directing the party to immediately remove any improperly posted content, cease and desist any unauthorized use, and compensate Franczek P.C. for any unauthorized use to the extent authorized by copyright and other law. These materials may not be used by any party, including the LICENSEE, for any commercial purpose unless expressly authorized in writing by Franczek P.C. No other rights are provided, and all other rights are reserved.