

Waukegan School District 60

# 2020 Title IX Regulations: Investigators & Decisionmakers

October 15, 2020  
Presented by Jackie Gharapour Wernz

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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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## Decision-Maker – Complaint

- Review evidence collected during the investigation
- Written Cross (hearing process if elected)
- Make relevancy determinations
- Make independent judgment on responsibility and sanctions

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## Decision-Maker – Appeal

Review	Review decision-maker on complaint's written determination
Review	Review appeal document(s)
Grant	Grant parties opportunity to respond
Review	Review party responses
Make	Make independent judgment on appeal questions

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# Serving Impartially

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## Title IX Team

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

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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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## Cameron's Complaint

- Cameron, a freshman, claims that another student, a senior, Parker, sexually assaulted Cameron
- You are assigned as the investigator or a decisionmaker
- Is there an impermissible bias, conflict?

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**The Investigator signed the Formal Complaint as the Title IX Coordinator or designee. Is there a conflict of interest?**

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Yes No

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**The Decision-maker (on complaint or appeal) can also be the Title IX Coordinator or their designee.**

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True False

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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 have had training on trauma informed interviewing practices. Does that create an impermissible risk of bias or prejudice?**

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Yes No

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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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## Cameron's Complaint

- Cameron, a freshman, claims that another student, a senior, Parker, sexually assaulted Cameron
- Title IX Coordinator or designee meets with Cameron (the Title IX Complainant)
- Cameron files a formal complaint against Parker (the Title IX Respondent)

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## Investigation

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

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## What Issues to Investigate?

- What issues are in dispute?
- Remember your definition of “sexual harassment” (employee quid pro quo, T9HE, T9 “Big 5”)
- For sexual assault includes “consent”

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**During the investigation, Cameron is responsible for providing evidence to support the complaint; failing to do so can lead to a finding of insufficient evidence.**

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True False

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**Parker complains that Cameron has bipolar disorder and is lying. Can you ask Cameron if that diagnosis is true?**

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Yes No

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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 the investigation, you can tell Cameron and Parker not to talk to other students or members of the school community about the investigation.**

True

False

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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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**Parker brings an attorney to the interview, and the attorney jumps in every time a question is asked before Parker can answer. Can you kick the attorney advisor out and continue the meeting?**

No, because a party has the absolute right to their advisor of choice at all meetings.

No, you should remind the advisor of the rules of decorum and warn that you will remove the advisor if the rules are not followed again

Yes, because you are allowed to have rules of decorum and if an advisor does not follow them there is no requirement to give a warning. You should allow Parker to get another advisor before moving on.

Yes, because you are allowed to have rules of decorum and if an advisor does not follow them there is no requirement to give a warning or to delay the investigation to allow Parker to obtain a replacement.

None of the above

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# Forms/Notices

## Notice to Advisors

Advisor  
Conduct  
Expectations

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**Upon learning of the allegations, you can go down and pull Parker out of class for questioning because of the school's "in loco parentis" authority.**

True

False

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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.**

True

False

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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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### 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 seem to be flirting

Draft interview notes from interviews with parties and witnesses (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

None of the above (they all are directly related) zoom login

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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

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

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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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## Investigation Report

- Must fairly summarize all **relevant evidence** **(will discuss more in a moment)**
- Relevant evidence is different from evidence "directly related to the allegations"
- Provided to parties 10 days prior to decision with opportunity provide written response
- Report and parties' responses to reports will be sent to the initial/complaint decisionmaker

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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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## 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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## 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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## 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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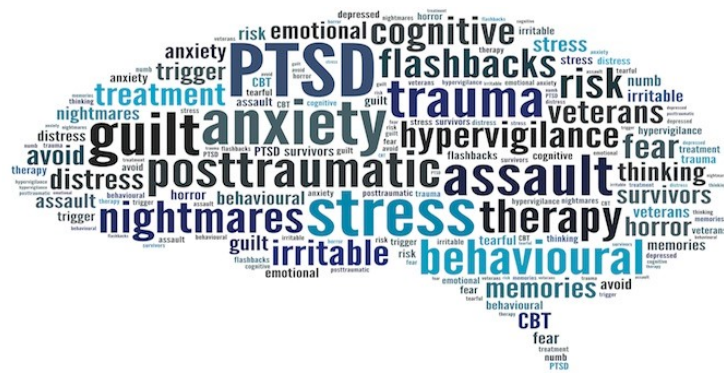
## Closing

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

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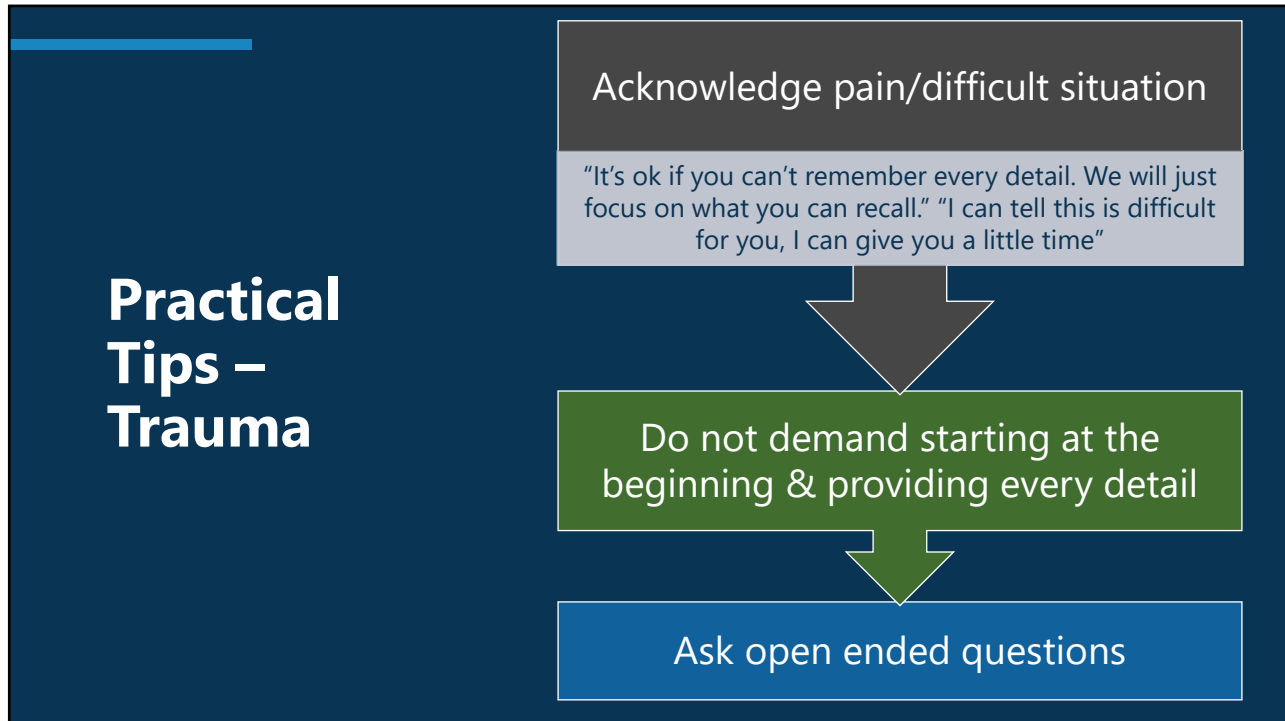
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## Potential Trauma for CP and RP



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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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## 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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## 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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## Issues of Relevance and Evidence

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## Relevance

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

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## 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

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## Investigator's Role with Relevance

- Only relevant evidence goes into the report
- ALL relevant evidence **MUST** go into the report

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## Exceptions to Relevance

- Three exceptions
  - Sexual behavior of CP (except in limited situations)
  - Legal privilege
  - Treatment records
- Investigator can't consider/Decisionmaker can't allow questions or consider

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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

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# Decision-Making Process

## The Complaint

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### You Should Review

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

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## Written Cross Examination Process

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## Decisionmaker Rulings on Relevance

- Admit and consider all relevant questions
- Provide reasoning for irrelevance

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## Beyond Relevance – Written Cross

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

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## 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?

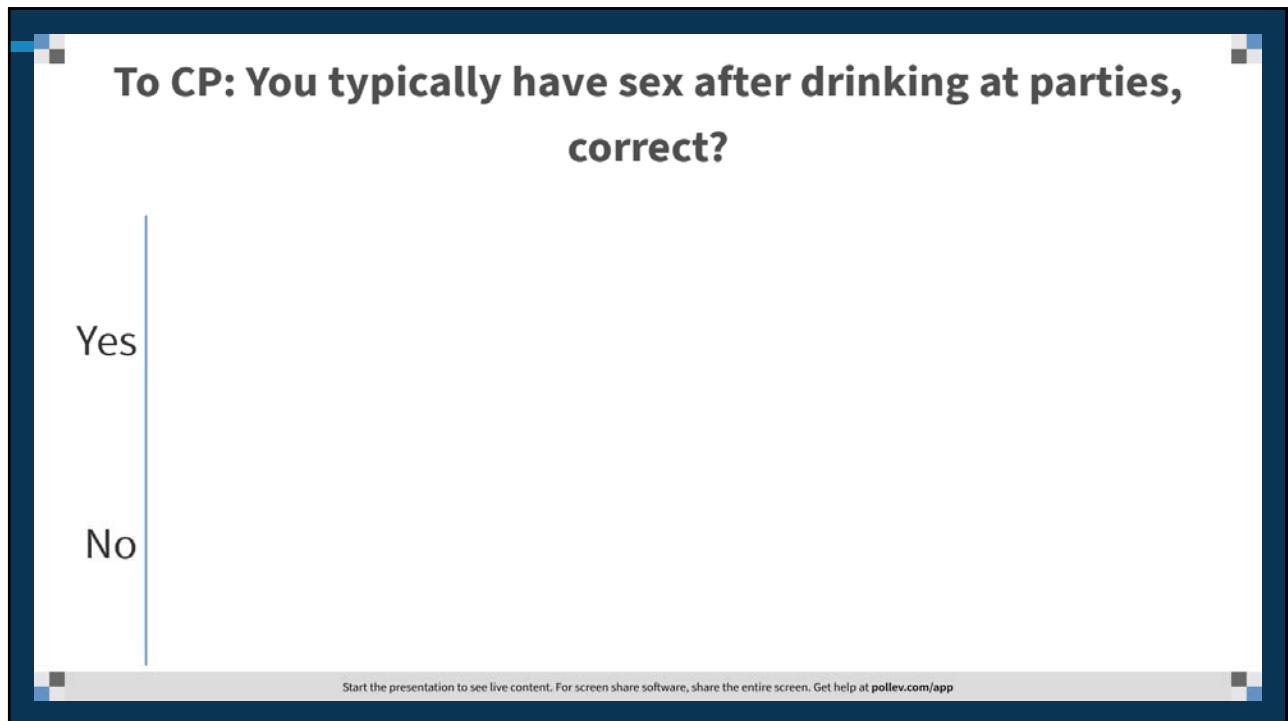
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**To CP: You typically have sex with RP after drinking at parties, correct?**

Yes

No

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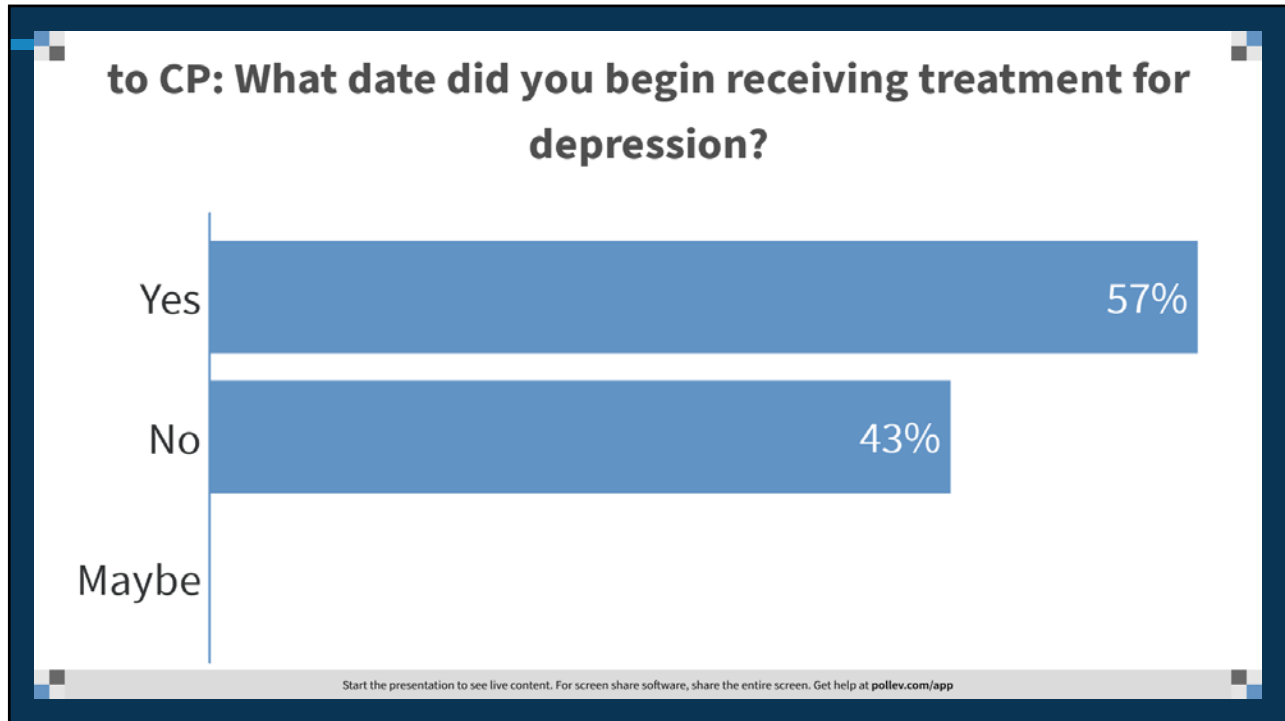
**To RP: You typically have sex after drinking at parties, correct?**

Yes

No

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**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**

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

Yes

No

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

Yes

No

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

Yes

No

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

Yes

No

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# Written Determination Regarding Responsibility

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## 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)

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## Forms/Notices

### Determination

Written  
Determination  
Template  
(Franczek Form C)

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## 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

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## Factual Findings

Separate findings for each alleged policy violation

For any facts in dispute, show your work and reasoning

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<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

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<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.

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## Cameron's Report

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

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## 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

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## 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

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## 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

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## 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

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## 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.

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# Discussion

What is your finding?

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## 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

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# Decision-Making Process

## The Appeal

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### 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

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## 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

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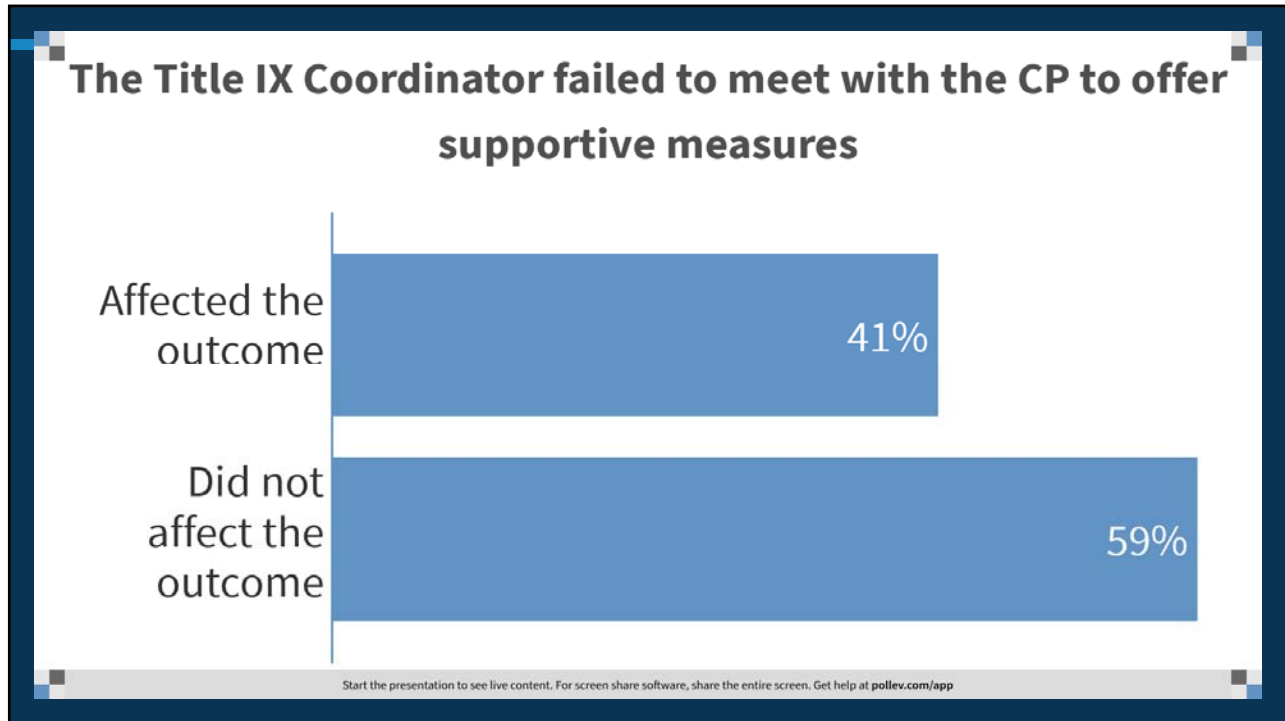
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## Procedural Issue

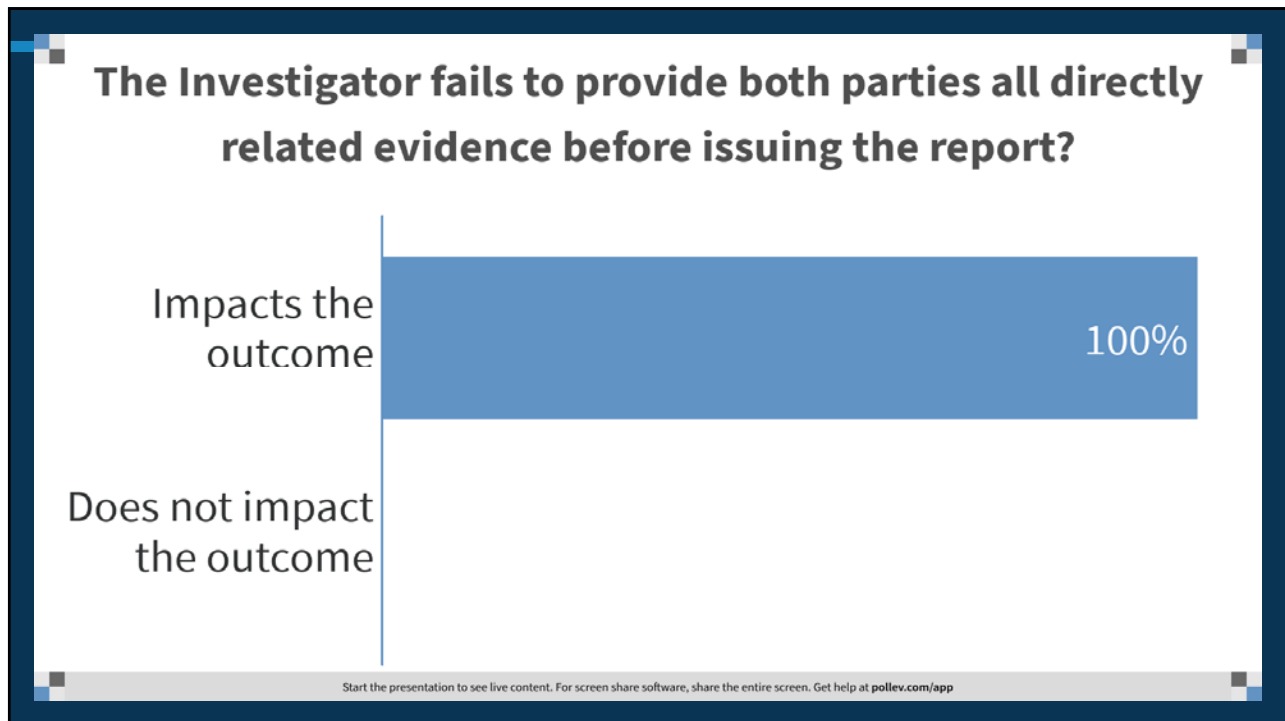
- Failure to follow the rules in policy/procedure
- Can be intentional or inadvertent
- Resulted in inappropriate decision; not always the case

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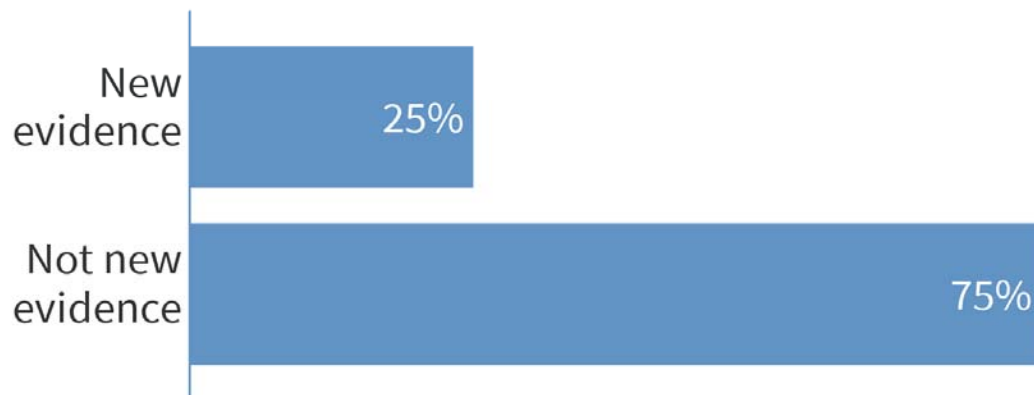
## New Information

- 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

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



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## 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”)

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## Recordkeeping/File Maintenance

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## Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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Questions?



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