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## Agenda

- Who is the decision maker?
- Responsibilities
- Hearing
- Written Determination
- Record Keeping

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## Decision-Maker

- Cannot be the Title IX Coordinator or investigator
- No conflict of interest or bias
- Can be a panel but not required
- Can use employees or outsource

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## Decision-Maker Responsibilities

- Review evidence collected during the investigation
- Oversee hearing and live cross
- Make relevancy determinations
- Make independent judgment on responsibility and sanctions

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## What You'll Receive

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

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## Independent Judgment

- Make an independent judgement in objectively evaluating the relevant evidence to reach a determination regarding responsibility

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# Live Hearings

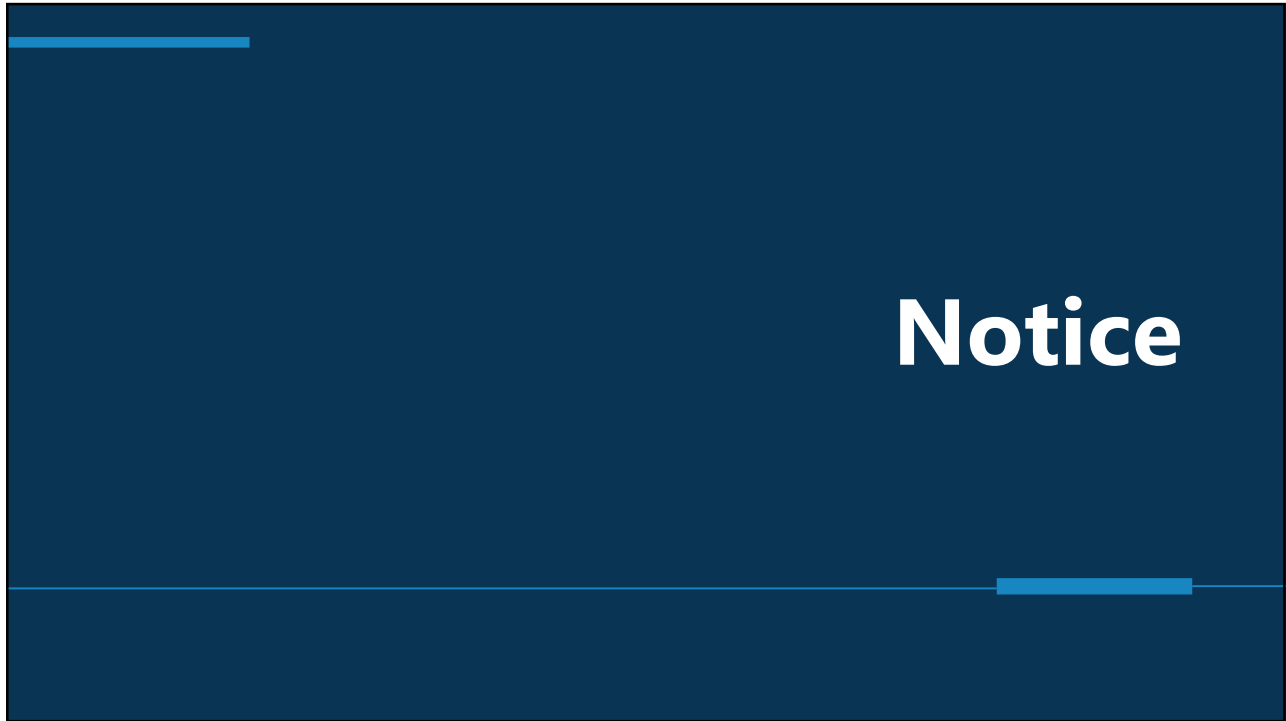
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## Elements of a Live Hearing

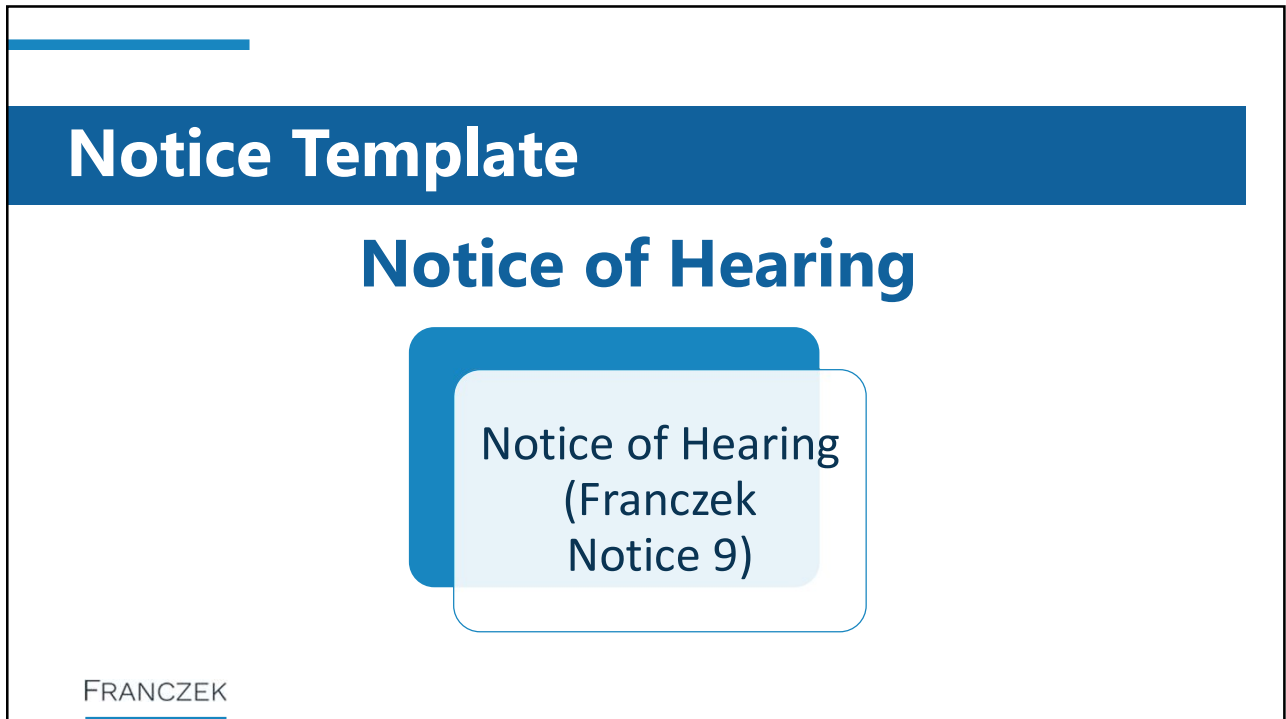
- Notice
- Process
- Cross Fundamentals
- Relevance Decisions
- Advisors Role
- Technology

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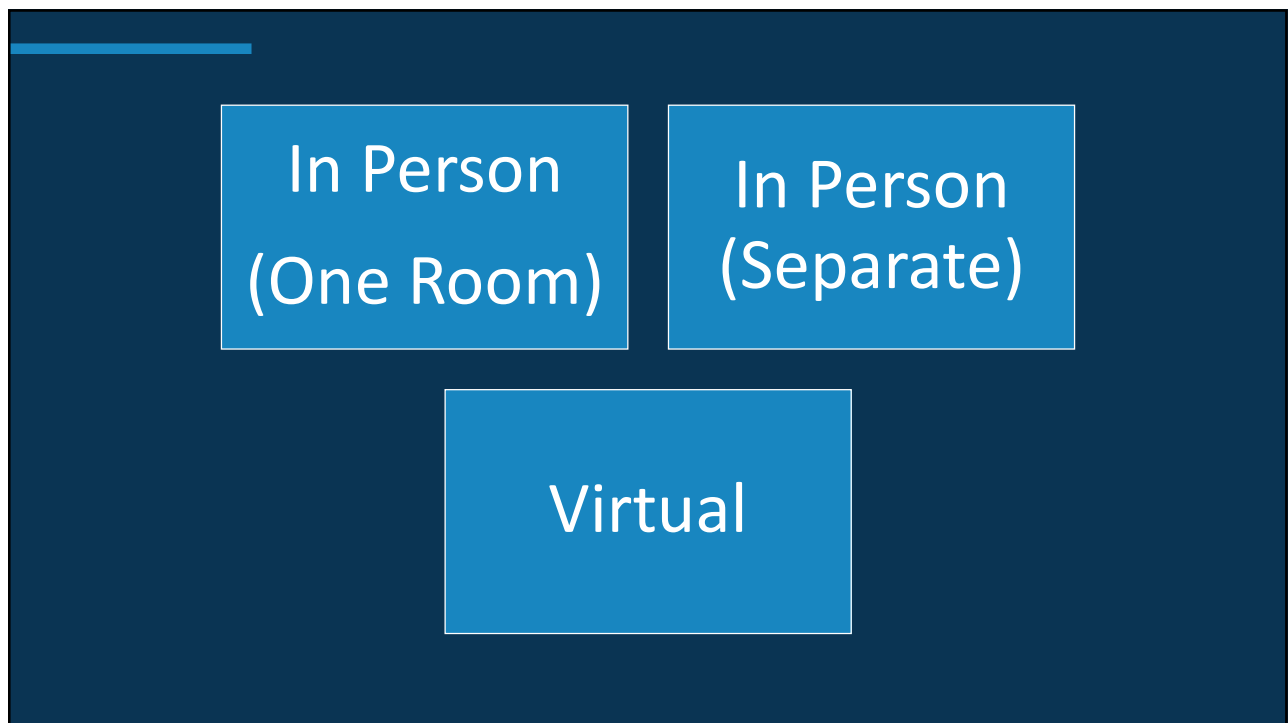
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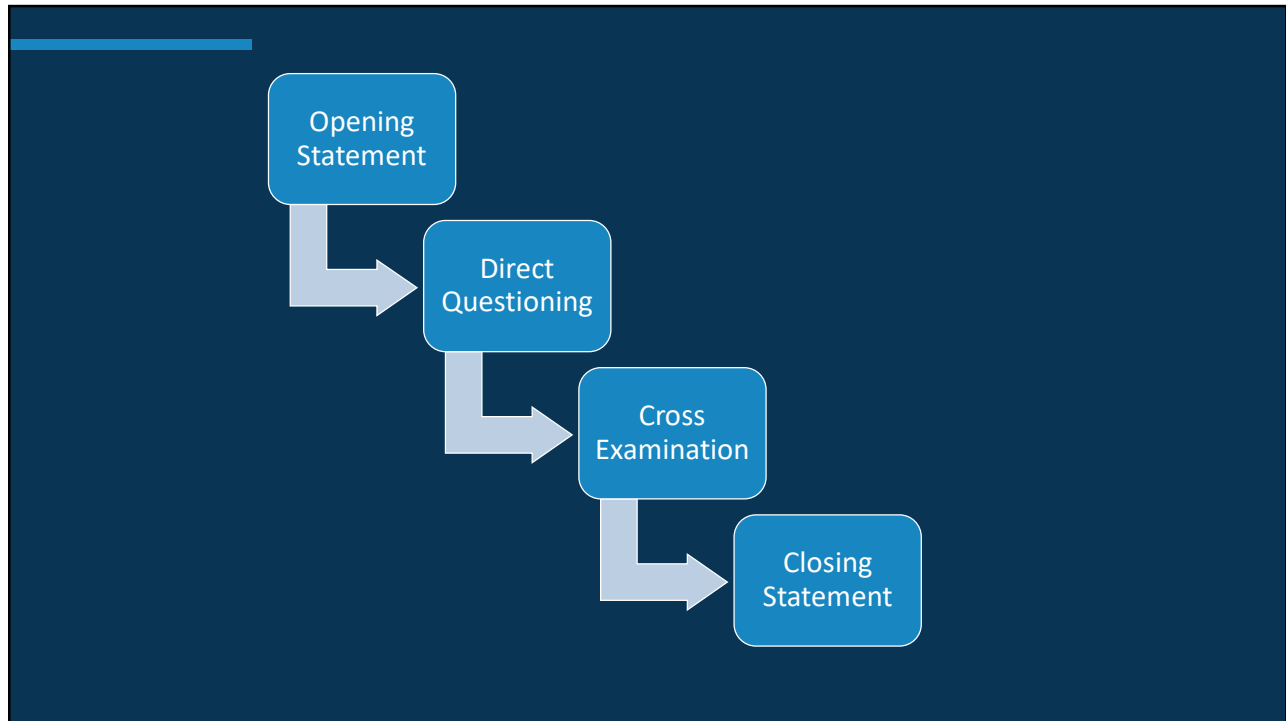
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## Hearing Procedures

- Requirement to rule on relevancy
- Set clear expectations
- Consider confidentiality concerns

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## Live Hearing Tips

- Meeting prior to the hearing
- Using a script
- Maintaining decorum
- Taking breaks
- Asking questions

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# Cross Fundamentals

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## Cross Examination

Important part of truth seeking partly because of live, in-the-moment nature and because conducted by someone whose purposes is to advance one side's perspective

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## Cross Examination

- Not for the protection only of respondents
- Both parties' advisors may direct decisionmaker's attention to implausibility, inconsistency, unreliability, ulterior motives, lack of credibility

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## Cross Examination

- An advisor may appear and conduct cross examination even when the party does not appear
- If neither the party nor the advisor appear, a recipient-provided advisor must cross examine appearing party
- Third-party cross examination insufficient

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## Improper Inference

If a party or witness does not submit to cross-examination, the decisionmaker cannot draw an inference about determination of responsibility based solely on their absence or refusal to answer questions.

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## Reliance on Prior Statements

- Cannot rely on a statement of that party (or witness) to reach a determination if party does not submit to other party's cross (not decisionmaker cross)
  - Consider: text message statement
  - Consider: statements in SANE, medical reports
  - Consider: statements made to those other than the Title IX Team

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## Cross: How & Where?

- Close-ended questions
- Advisor asks other party and any witnesses all relevant questions and follow-up questions
- Conducted directly, orally, and in real time by advisor
- May be in separate rooms (party request, institution choice)
- Must be relevant

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# Issues of Relevance and Evidence

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## Consider Relevant Evidence

- Must objectively evaluate all evidence 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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## Rulings on Relevance

- Live, in the moment determinations
- Provide reasoning for irrelevance
  - No complicated or lengthy explanation required
- Admit and consider all relevant evidence
- Exceptions

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## Relevance Considerations

- Must apply definitions used by the institution with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the requirements of the Title IX grievance process

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## Rape Shield Law

- Exclude evidence of Complainant's prior sexual behavior or predisposition
- Two narrow exceptions
  - Someone other than respondent committed the conduct
  - Specific incidents of complainant's sexual behavior with respondent 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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## Relevant Consideration: Prior Bad Acts

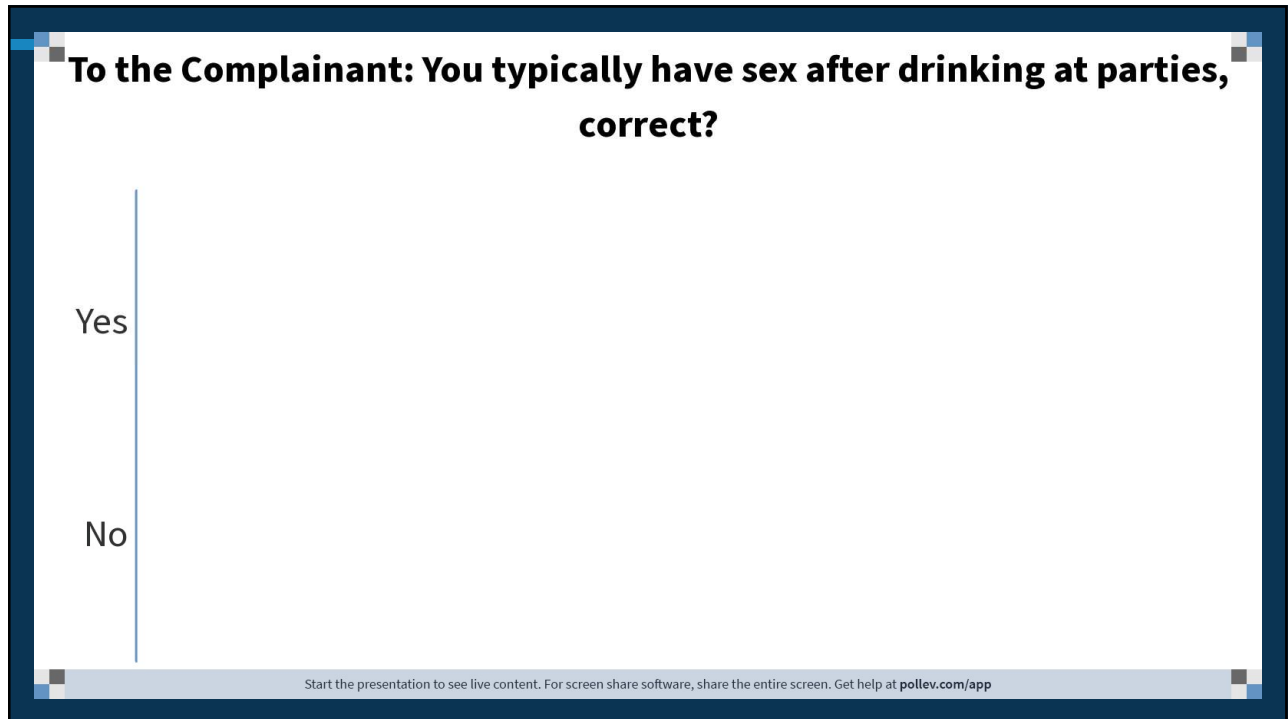
- Must consider
- May evaluate whether it warrants a high or low level of weight of credibility
- Must treat both parties equally in such weighing

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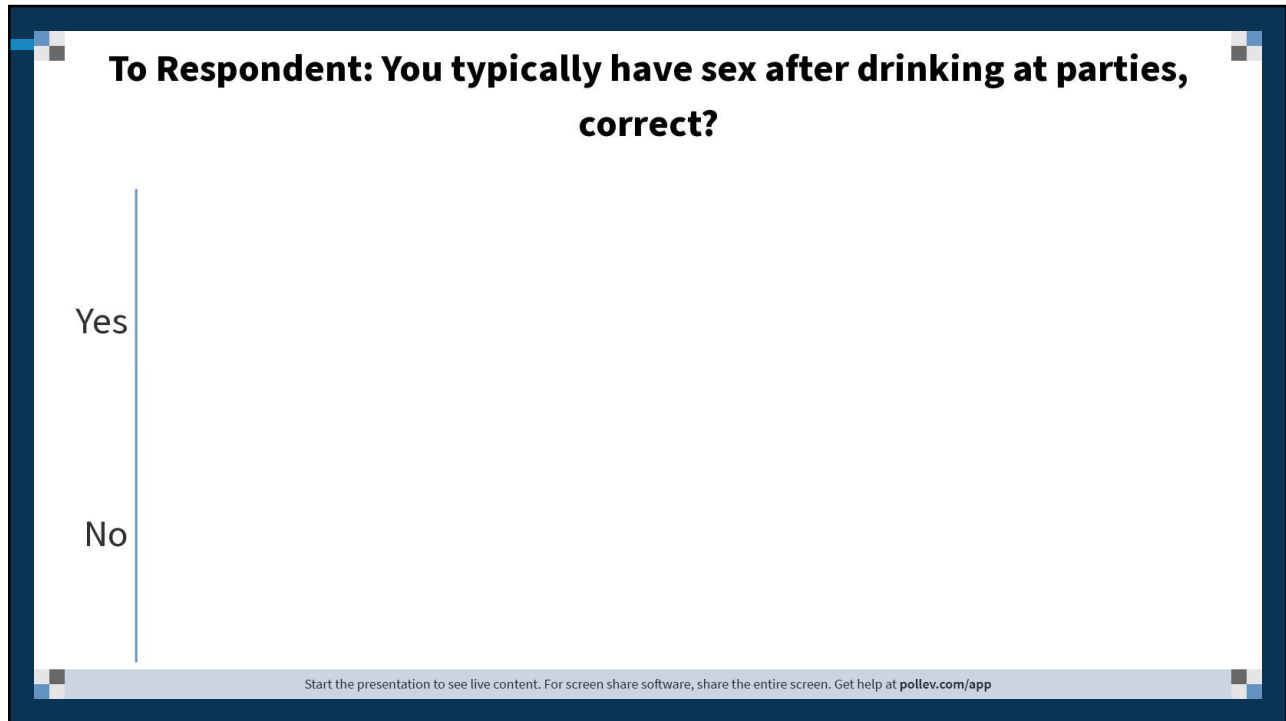


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**You messaged the Complainant the night before saying you wanted to hook up, right?**

Yes **A**

No **B**

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Text **FRANCZEK** to **22333** once to join

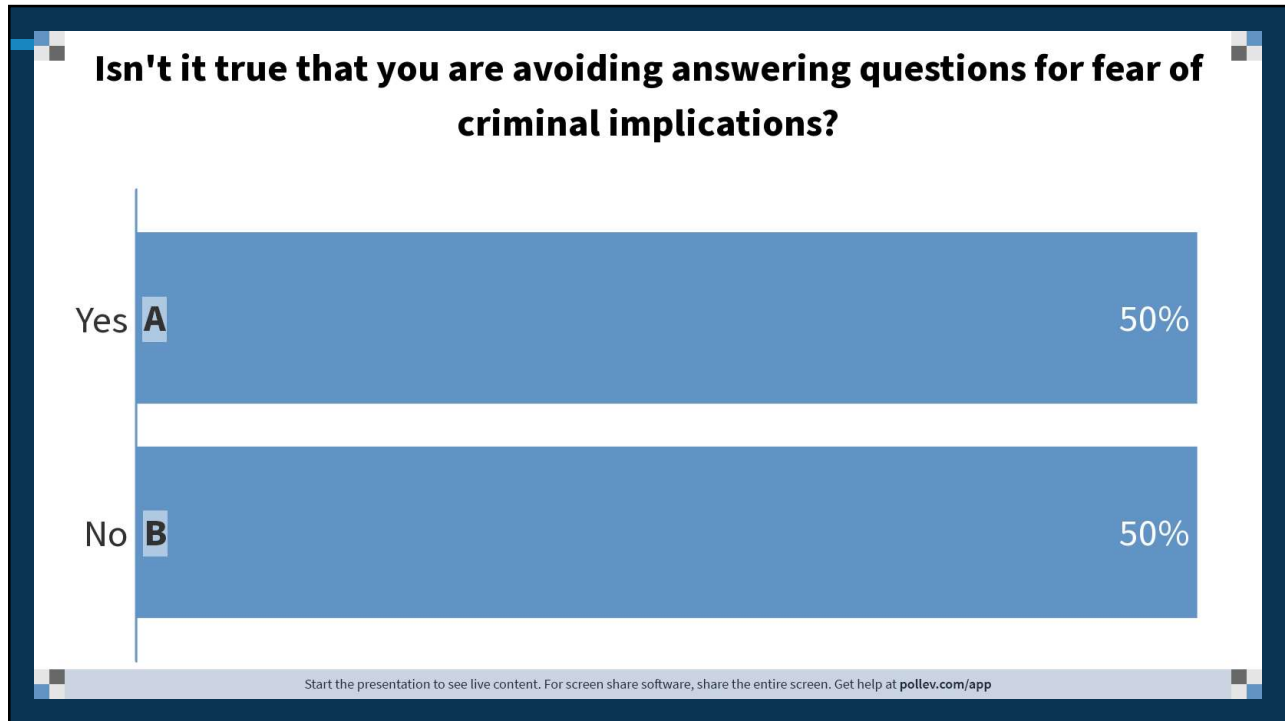
**Isn't it true that you called the Complainant the next day to see if she was okay?**

Yes

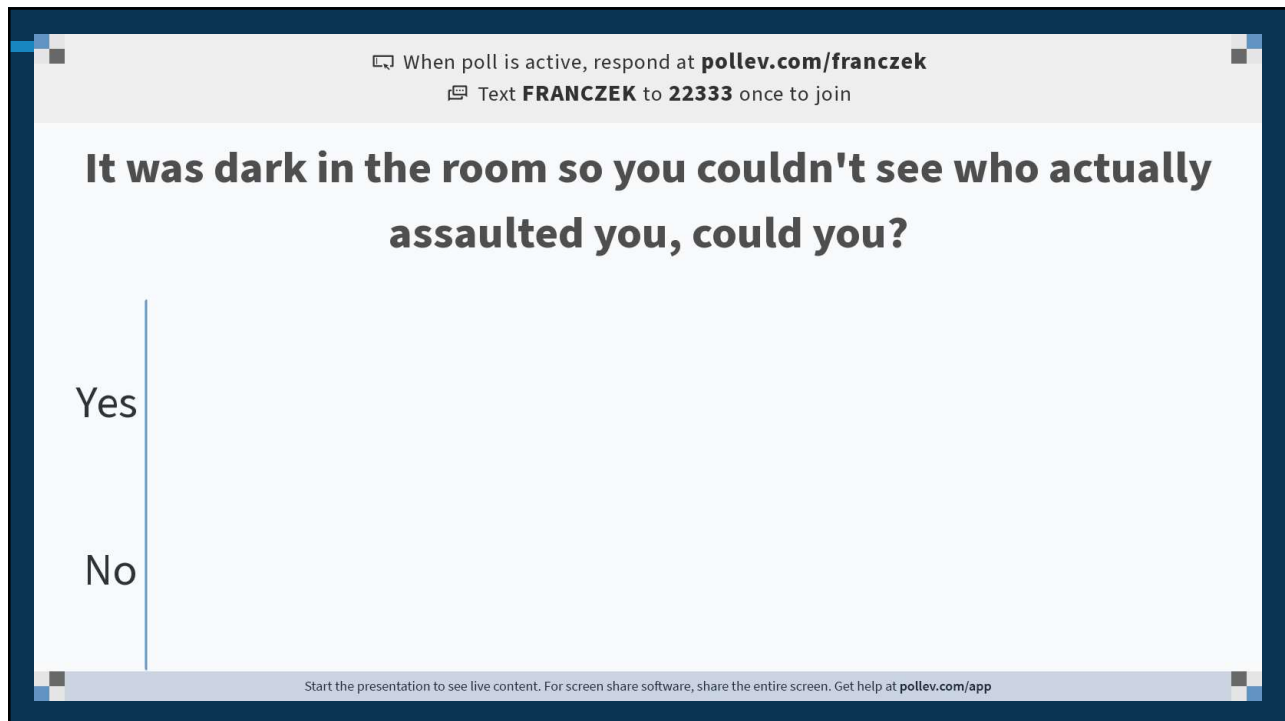
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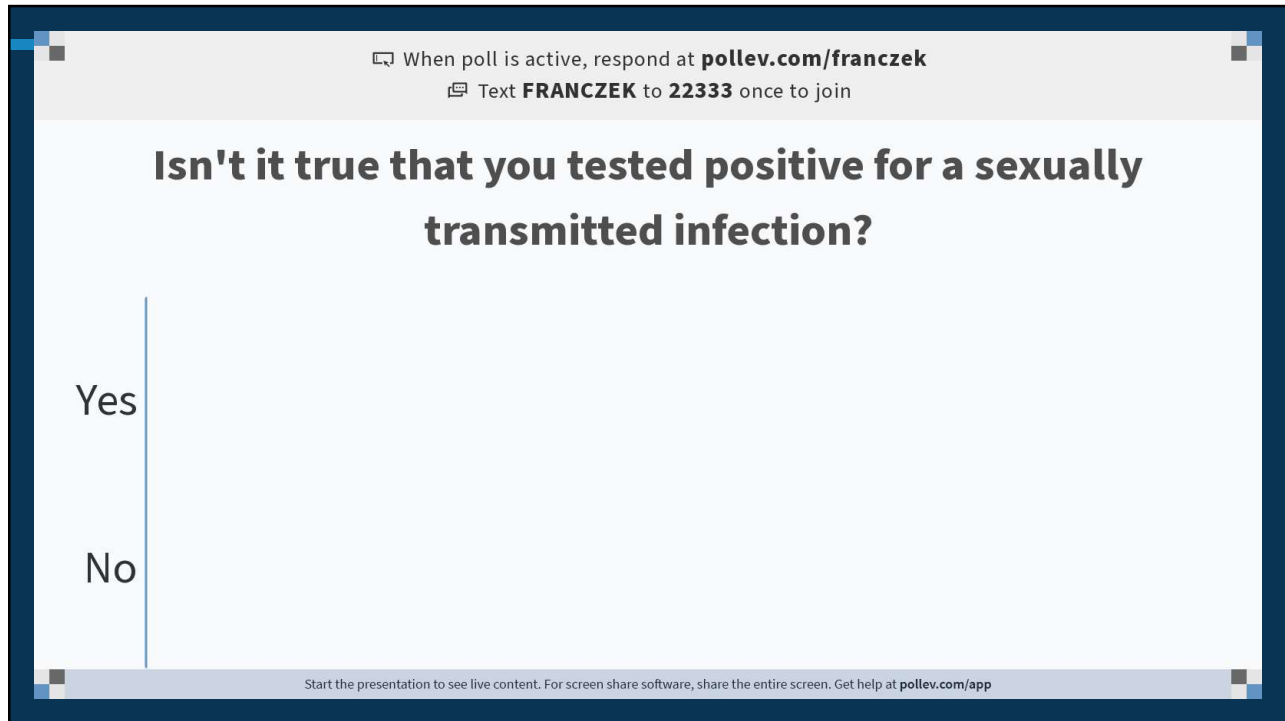
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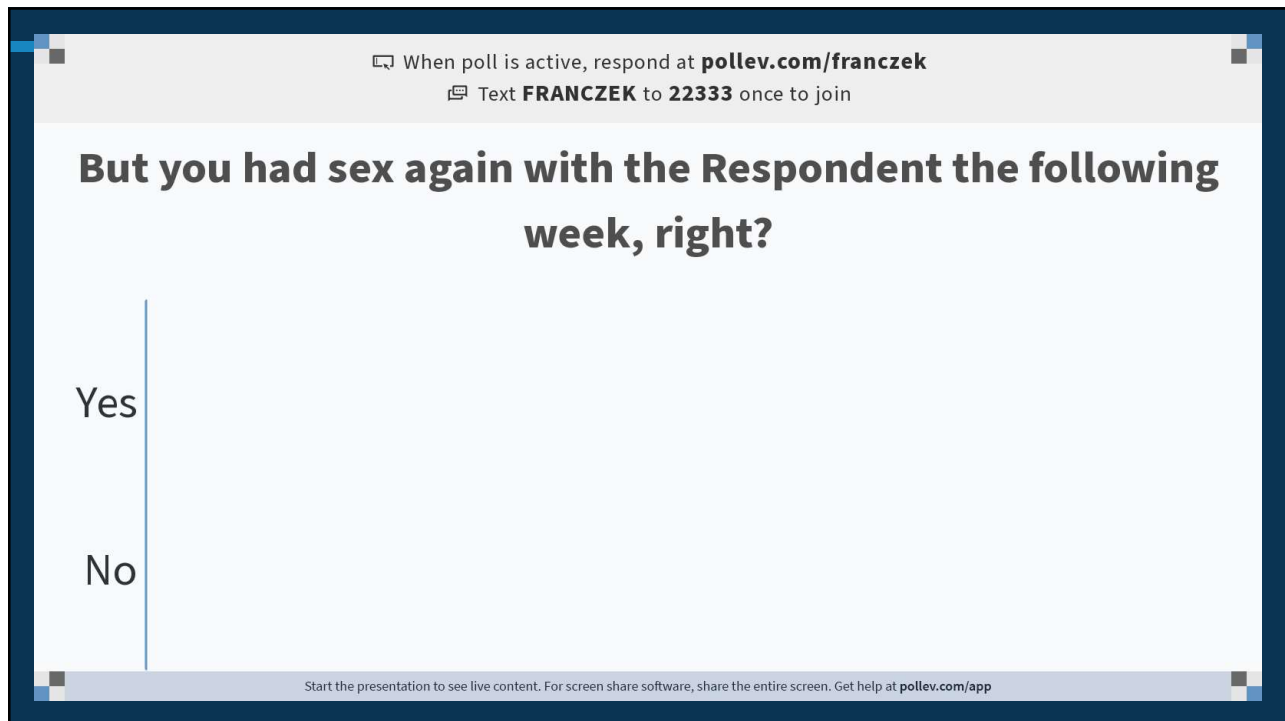
**Isn't it true that you tested positive for a sexually transmitted infection?**

Yes

No

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**But you had sex again with the Respondent the following week, right?**

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: Complainant's friend told you that Complainant said Respondent did not assault Complainant, isn't that correct?**

Yes

No

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# Advisors

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## Role of Advisors in Hearings

- Parties must have an advisor to conduct cross-examination, whether chosen by a party or the recipient
- Challenging relevancy determinations
- Consider confidentiality obligations

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## Advisor Role

- Can adopt rules
- Can limit to just cross
- Want to allow more? Be equal.

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## Advisor Decorum

- Can adopt rules
- Can address abusive, intimidating, or disrespectful questioning

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## Advisor Decorum

- Essential function is not to embarrass, blame, humiliate, or emotionally berate
- Essential function is to give the decisionmaker the fullest view possible of the relevant evidence

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## Questions from Decisionmaker

- Hearing approach is proactive and reactive
- So you can ask questions

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# Technology

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# Written Determination Regarding Responsibility

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## Forms/Notices

### Determination

Written  
Determination  
Template  
(Franczek Form C)

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## Making a Determination

- Remain unbiased and impartial
- Render a reasoned decision based on evidence
- Base decisions on relevant evidence alone
- Consider weight of evidence
- Evaluate witness credibility
- Standard of evidence

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## All Relevant Evidence

- Must consider all relevant evidence
- Must consider no irrelevant evidence

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## Written Determination

Allegations	Identify the allegations
Process	Describe procedural steps taken
Facts	Findings of fact
Conclusion	Apply the code of conduct to the facts
Result	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

Focus on material facts (i.e., those that affect outcome)

Can describe undisputed and disputed facts separately

For any facts in dispute, show your work and reasoning

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## Factual Findings

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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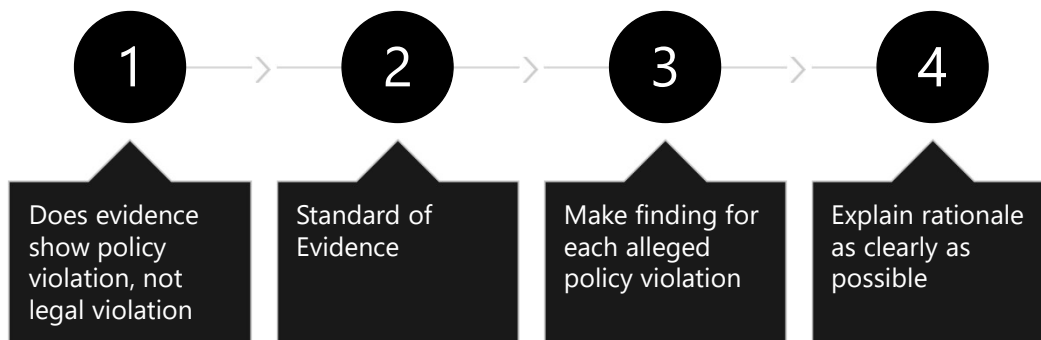
## Opportunity to Review

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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## Conclusion/Analysis



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# Bias, Conflicts of Interest, and Other Fairness Concerns

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## 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.

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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
- Actively 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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## Credibility

- Consider other evidence
- Show your work

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# Appeals

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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
- Illinois: Disproportionate Sanction

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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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## Bias / Conflict

- Conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent
- Affected the outcome of the matter
- Address any that are raised

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# Recordkeeping/File Maintenance

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## Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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