



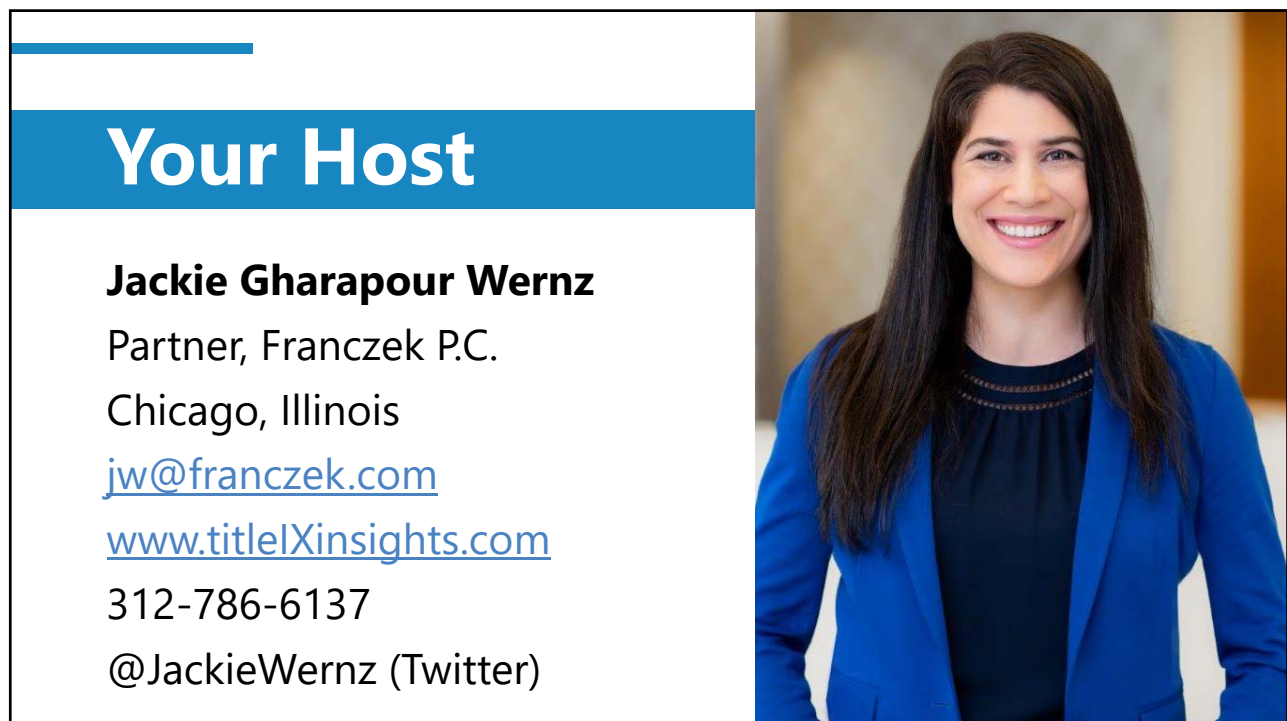
# OSPA Virtual Fall Summit 2020

## Title IX Compliance Certification Training: Decisionmaker Training

October 26-27, 2020  
Presented by Jackie Gharapour Wernz ,Partner


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## Your Host

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

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# Decision-Making Process

## The Complaint

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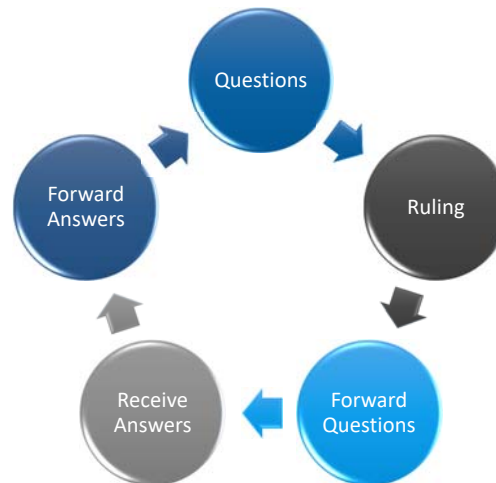
### You Should Review

- 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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## Issues of Relevance and Evidence

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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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## Relevance

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

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## 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

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## Rape Shield (CP Only)

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

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## 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.

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## 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?

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## 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

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## Beyond Relevance

- 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 after drinking at parties, correct?**

Yes

No

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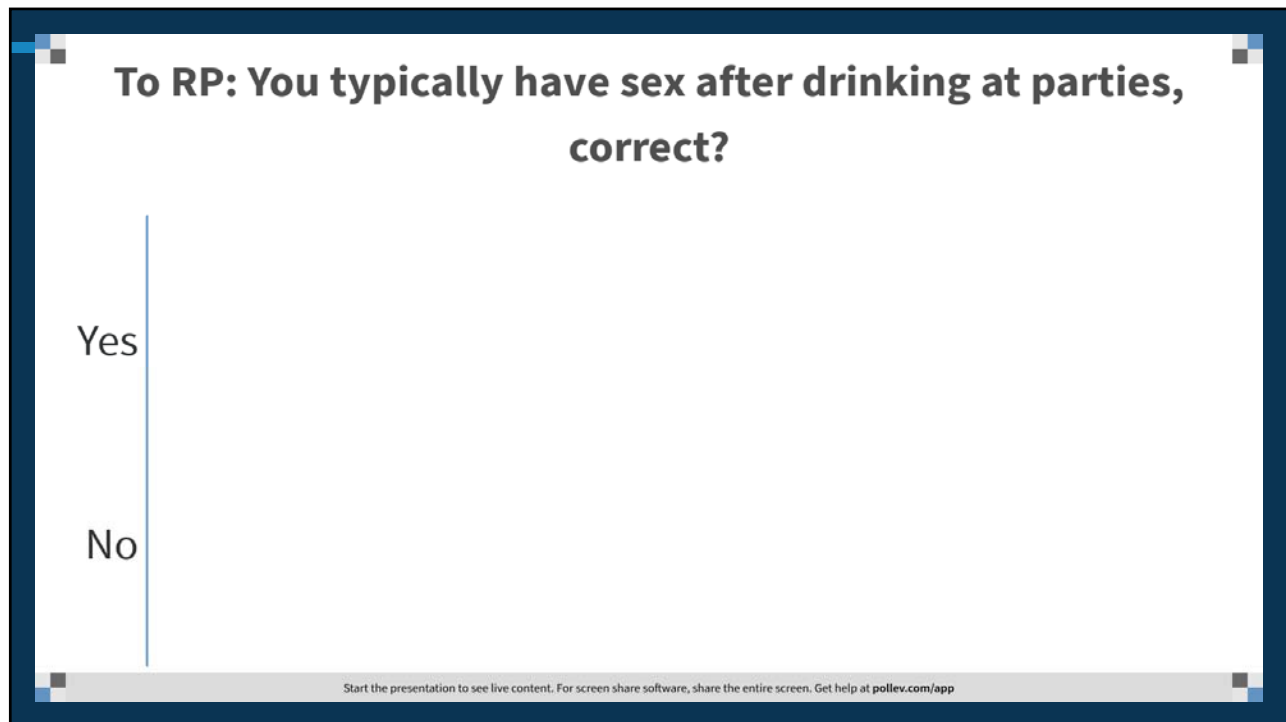
**To CP: You typically have sex with RP after drinking at parties, correct?**

Yes

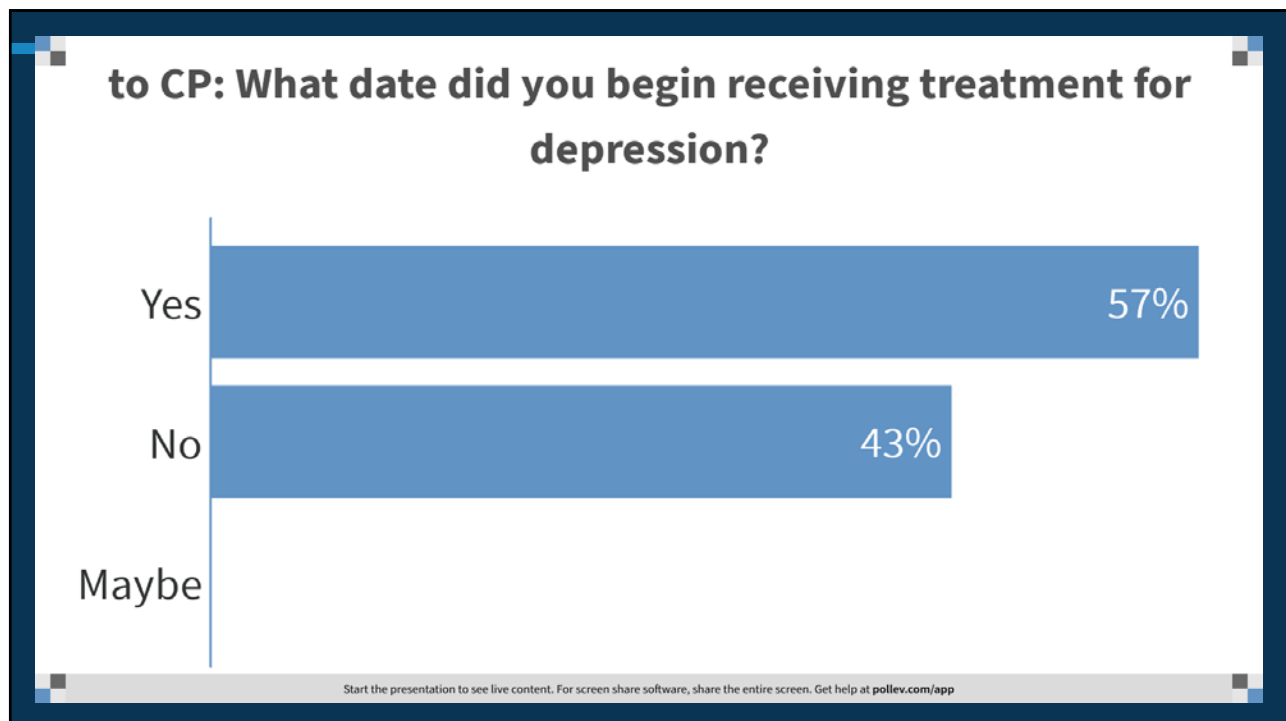
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**To CP: You told a friend that RP did not actually assault you, but that you reported RP because your mom made you, didn't you?**

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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## 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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## 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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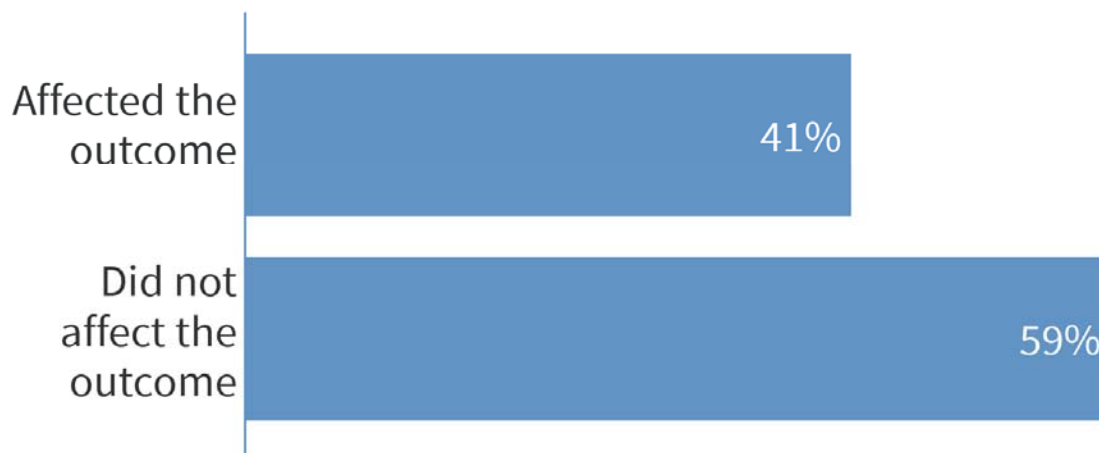
## Procedural Issue

- 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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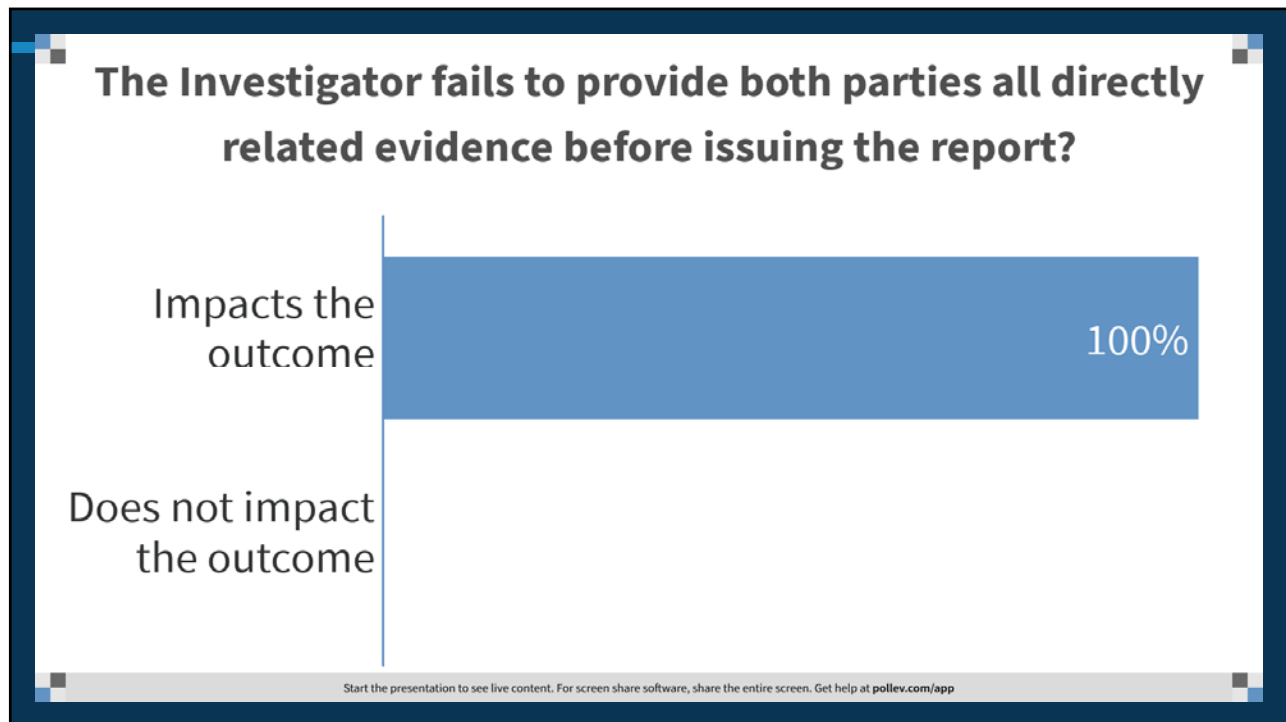
### The Title IX Coordinator failed to meet with the CP to offer supportive measures



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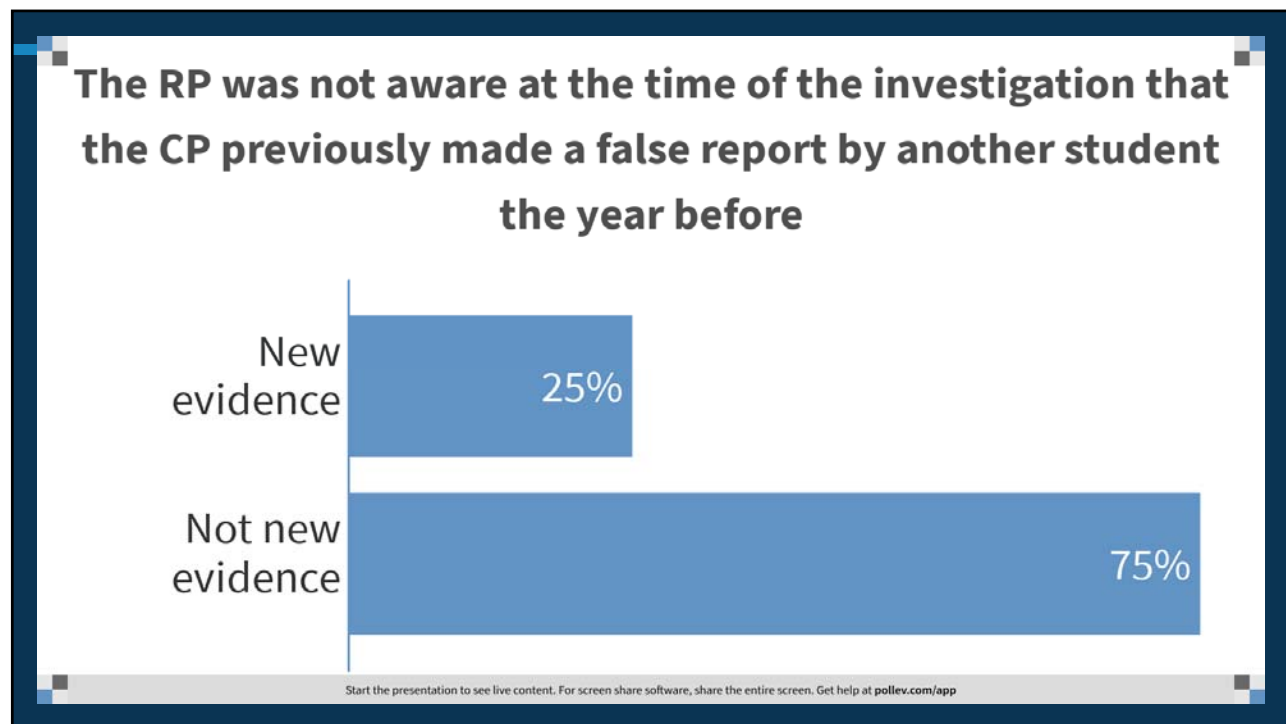
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## New Information

- 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 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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