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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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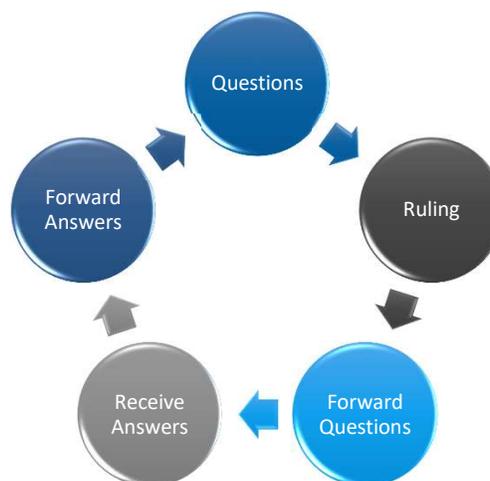
You Should Review

- 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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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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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, there is drinking at the party
- Drive to campus, “making out” in car
- Sexual activity happens—CP reports that it was sexual assault, RP says it was consensual
- Are these questions proper?

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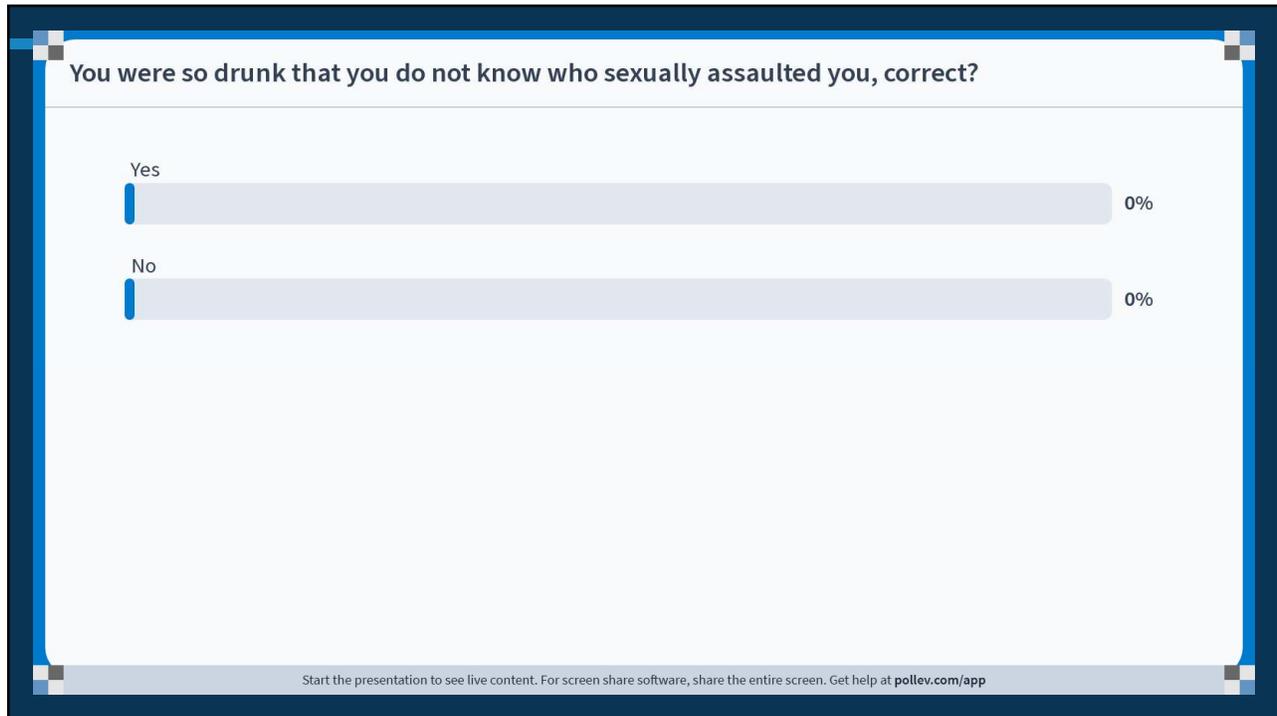
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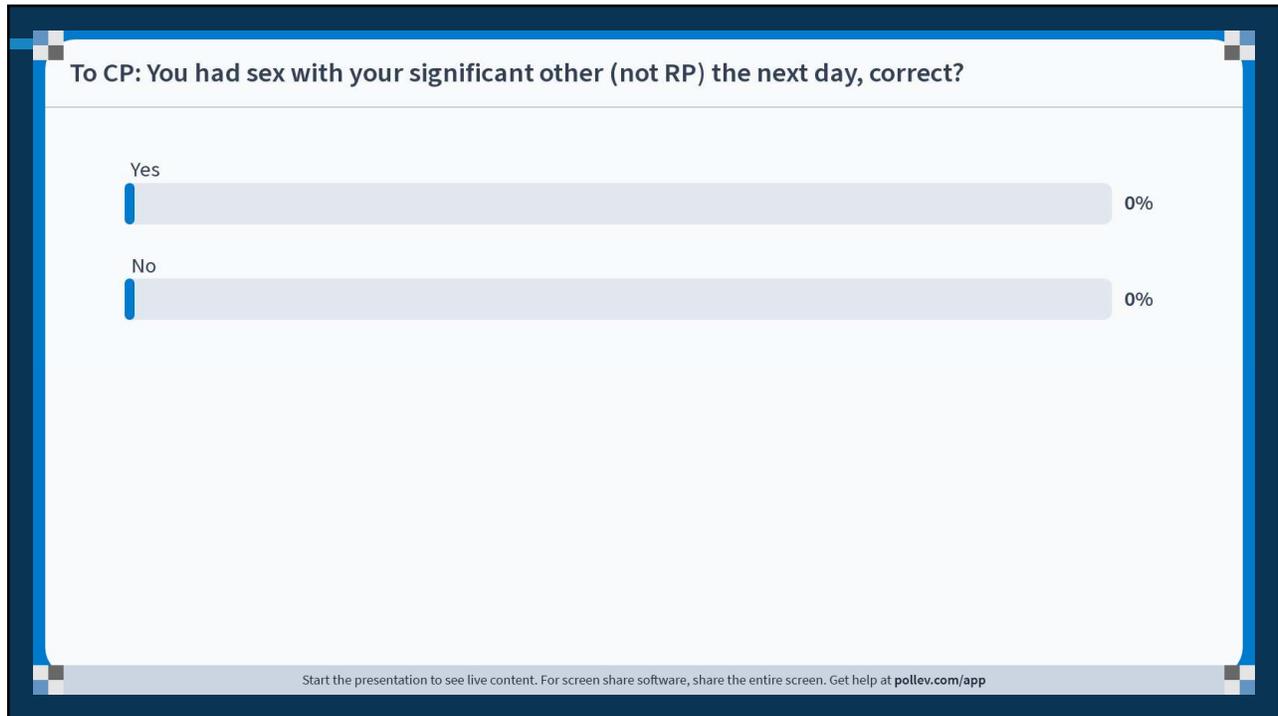
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Written Determination Regarding Responsibility

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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

- 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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Credibility

- Cameron recently lost a chess tournament against Parker
- Coaches did not have a good explanation for the text

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Decisionmaking Plan for Common Scenarios

- Complainant alleges sexual assault on campus occurred with no witnesses
- Complainant alleges teachers looks at breasts of young women on campus during classes
- Complainant alleges students are circulating a video of Complainant engaging in sex with other students

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Step 1: Identify Elements

- What type of harassment/discrimination is alleged?
- What do you need to prove to establish policy violation?

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Assault No Witness

- Was there sexual contact?
- Was there consent?
- Where did the contact occur?
- Who was engaged in the contact?

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Assault No Witnesses

- People?
- Documents?
- Videos?
- Communications?
- Creditability Evidence?



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Instructor Harassment

- On Campus?
- Unwelcome?
- Severe?
- Pervasive?
- Objectively Offensive?

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Instructor Harassment

- People?
- Documents?
- Videos?
- Communications?
- Creditability Evidence?



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Electronic Images

- On Campus?
- Unwelcome?
- Severe?
- Pervasive?
- Objectively Offensive?

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Electronic Images

- People?
- Documents?
- Videos?
- Communications?
- Creditability Evidence?



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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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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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