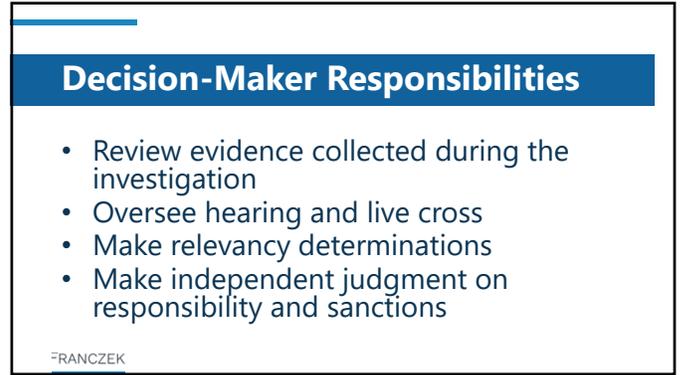
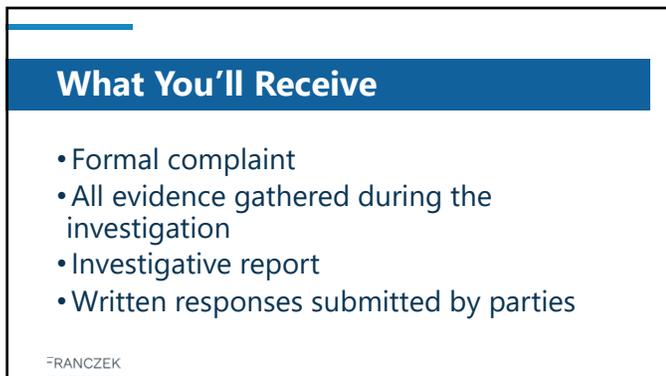




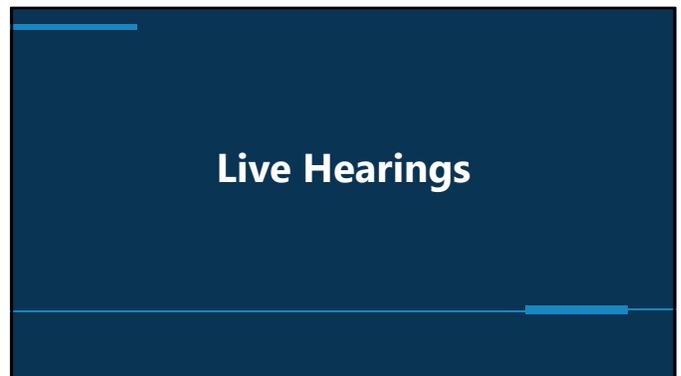
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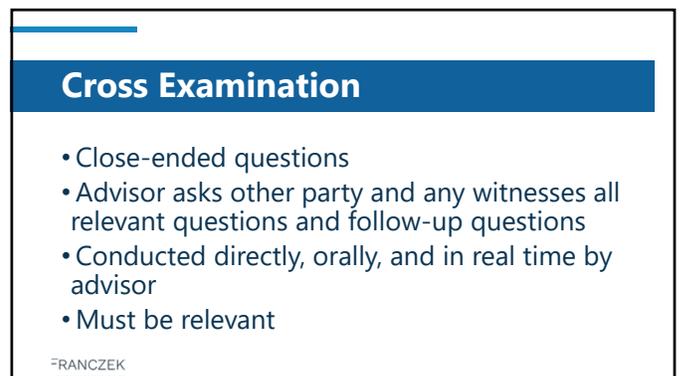
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6

Issues of Relevance and Evidence

7

Issues of Relevance

- 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

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Exceptions
 - Sexual behavior (except in limited situations)
 - Legal privilege
 - Treatment records

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Rape Shield Law

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

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Treatment Records

- (1) Can't access, consider, disclose, or use records
- (2) Made by a physician, psychologist, or other recognized professional
- (3) Which are made and maintained in connection with the provision of treatment,
- (4) 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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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 retaliate against a party who chooses not to participate
- Cannot make inferences from non-participation or compel participation
- BUT, can't rely on a statement of that party (or witness) to reach a determination either

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Reliance on Prior Statements

- 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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Reliance on Prior Statements

- Cannot use statements in police, SANE, or medical reports or other documents
- Can only consider statements that have been cross-examined

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"But you typically have sex after drinking at parties, don't you?"

Yes

No

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18

"Isn't it true that you have had sex with the Respondent after partying together?"

Yes

No

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"But you were so drunk that you can't be positive whether you had sex with the Respondent, can you?"

Yes

No

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

Yes

No

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21

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

Yes

No

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22

"You texted the Complainant the night before, saying you wanted to hook up with her, correct?"

Yes

No

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23

"You texted the Complainant the night before, saying you wanted to hook up with her, correct?"

Yes

No

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24

"You texted the Complainant the night before, saying you wanted to hook up with her, correct?"

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25

"You texted the Complainant the night before, saying you wanted to hook up with her, correct?"

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26

"You texted the Complainant the night before, saying you wanted to hook up with her, correct?"

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No

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27

"You texted the Complainant the night before, saying you wanted to hook up with her, correct?"

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No

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28

"You texted the Complainant the night before, saying you wanted to hook up with her, correct?"

Yes

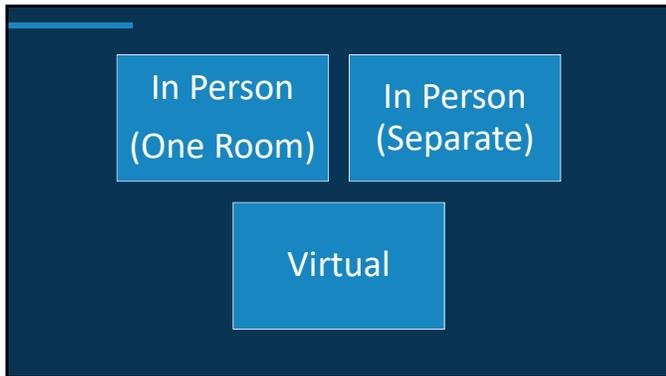
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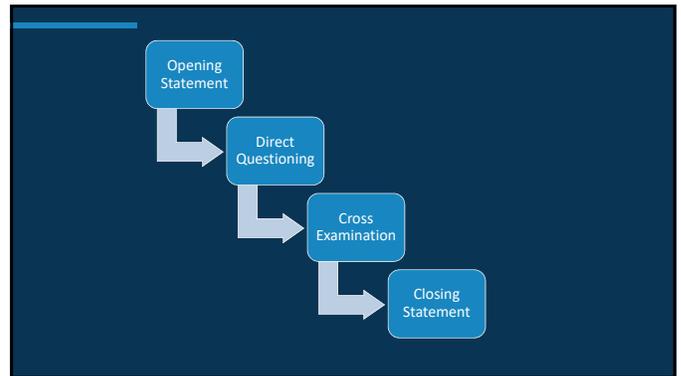
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Live Hearing Process

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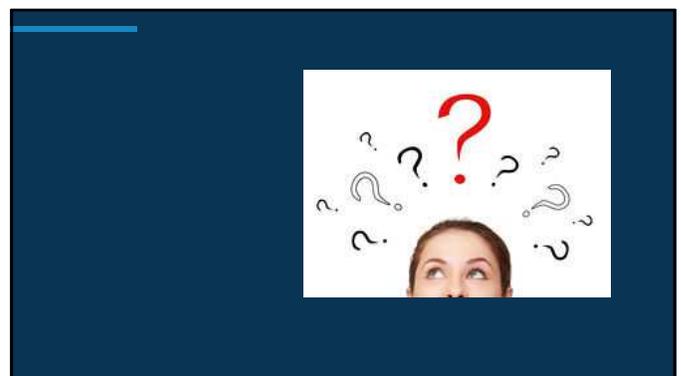
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Role of Advisors in Hearings

- 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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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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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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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
- 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

- 1 Does evidence show policy violation, not legal violation
- 2 Standard of Evidence
- 3 Make finding for each alleged policy violation
- 4 Explain rationale as clearly as possible

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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 prejudice 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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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

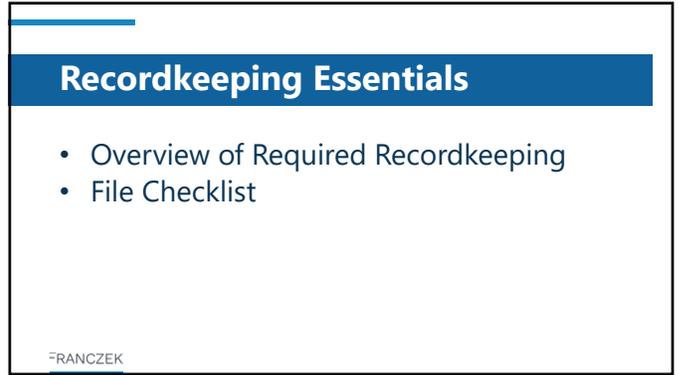
- New Information
- Not known at the time
- Would change the opinion of the decisionmaker if known at the time
- Not a review of information known at the time

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