

2020 Title IX Regulations: Decision-Maker Training

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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

What You'll Receive

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



Live Hearings




Forms/Notices

Hearing


Notice of Hearing
(Franczek Notice
9)

Cross Examination

- 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
- Must be relevant



Issues of Relevance and Evidence



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

Rulings on Relevance

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

Rape Shield Law

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

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

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

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.

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

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

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

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

Yes

No

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

Yes

No

"You were diagnosed with depression, right?"

Yes

No

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

Yes

No

"Were you prepped not to answer that question by your attorney?"

Yes

No

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

Yes

No

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

Yes

No

"Isn't it true that you hired a criminal defense attorney for these proceedings instead of using the University's advisor?"

Yes

No

"It was dark in the room so you couldn't see who actually assaulted you, could you?"

Yes

No

"Isn't it true that you are avoiding answering questions for fear of criminal implications?"

Yes

No



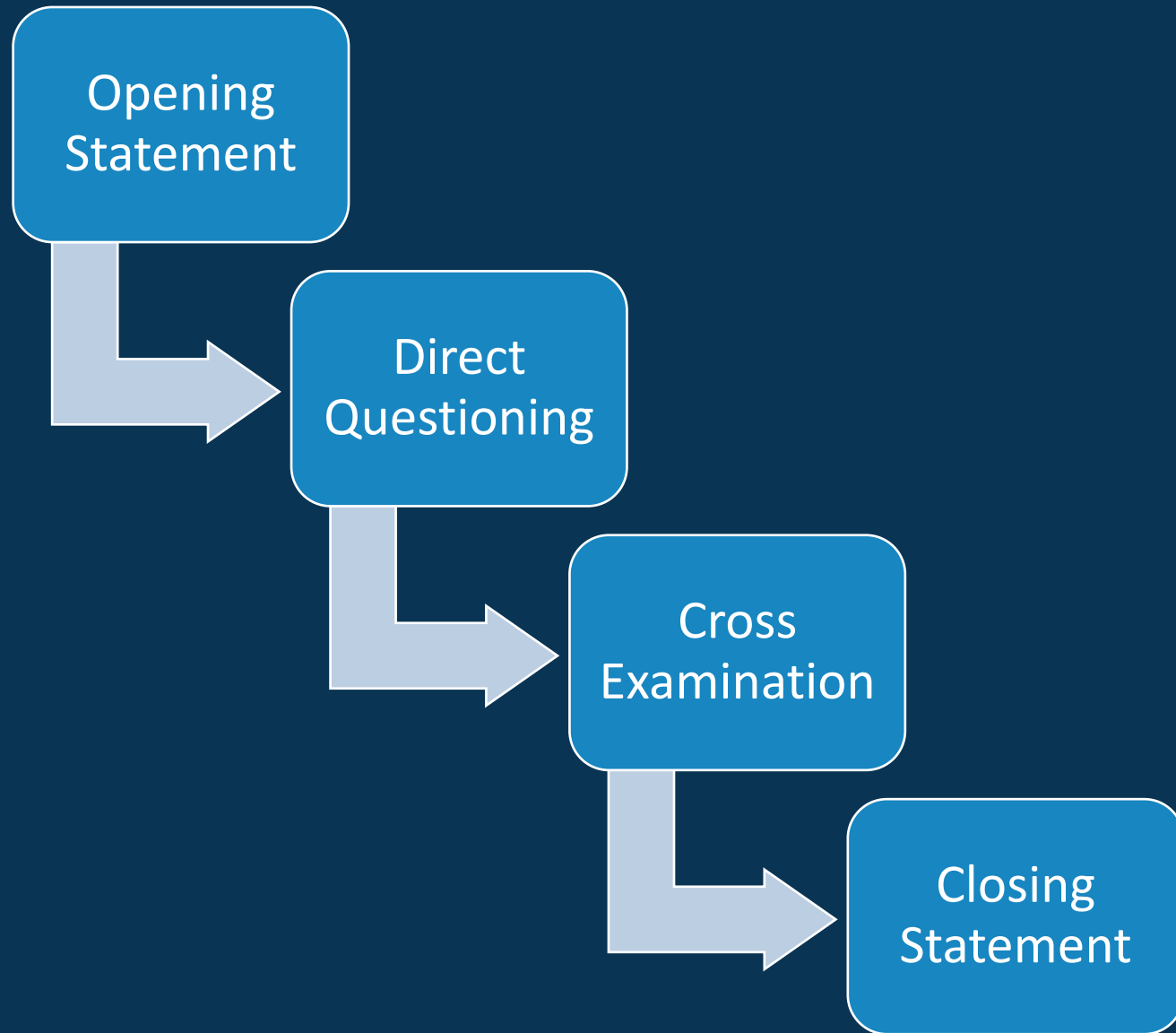
Live Hearing Process



In Person
(One Room)

In Person
(Separate)

Virtual



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



Hearing Procedures

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

Live Hearing Tips

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



Written Determination Regarding Responsibility



Forms/Notices

Determination

Written
Determination
Template
(Franczek Form C)

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

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

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

Factual Findings

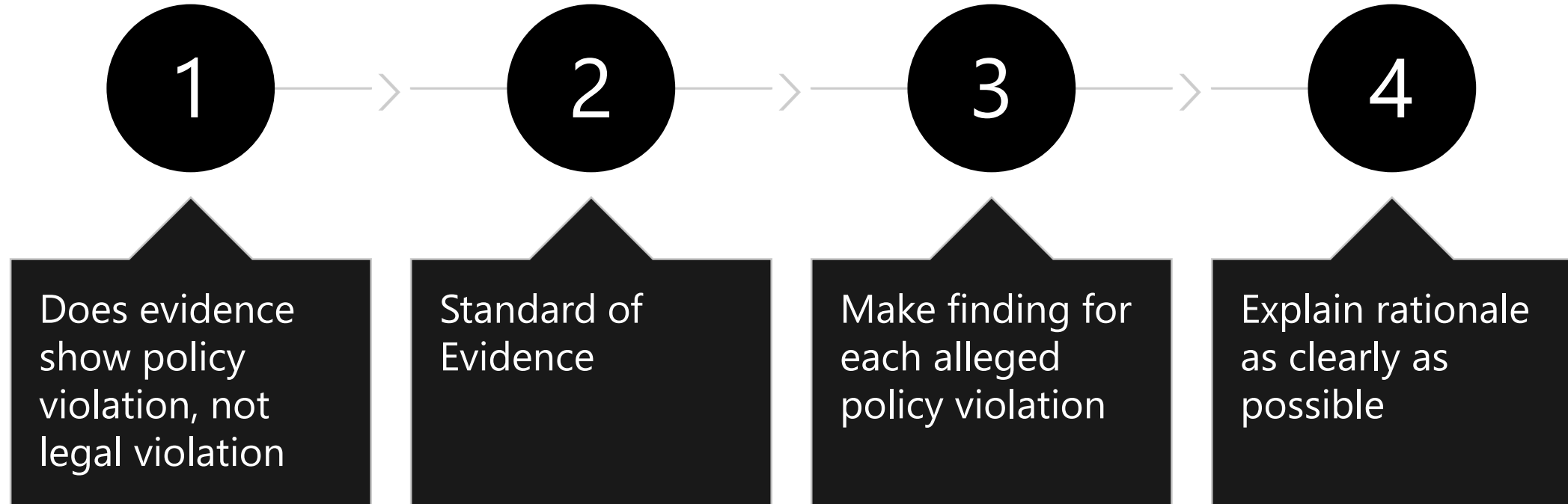
Consider	Consider both supporting/corroborating and conflicting/inconsistent information for each disputed fact
Make	Make credibility determinations by considering corroborating evidence, inconsistencies, logic of explanation/narrative, impact of trauma
Use	Use words of parties/witnesses
Be	Be detailed and precise

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.

Conclusion/Analysis





Bias, Conflicts of Interest, and Other Fairness Concerns



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.

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

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

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



Appeals



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

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
- Note any other state-required basis?

Procedural Issue

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

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



Recordkeeping/File Maintenance



Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

Questions?



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