



## In-Depth Higher Education “Decision-Makers” Title IX Training

November 5, 2020

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### Topic 1: Admissibility of Evidence

- Department of Education regulations’ standard is “**relevance**”
- Regulations do not define “relevance” – use ordinary meaning
  - Different than determining how much *weight* to give the evidence
    - Irrelevant evidence: Excluded
    - Relevant, but not much weight: Included for consideration
- Department of Education guidance:
  - Do not learn or apply Federal Rules of Evidence
  - Do not draft or apply “admissibility rules” which can exclude certain types of “relevant” evidence, even if considered unreliable or unfairly prejudicial
    - Lie Detector Tests
    - “Character” Evidence
- Consider all relevant evidence and minimize only as to weight, persuasiveness, and credibility
- Irrelevant: Rape Shield, Privileged Information, Unduly Repetitive Questions (DOE guidance)
- Preparing for relevancy determinations:
  - Review final investigation report (no deference)
  - Review parties’ comments to report
  - Review investigative materials
  - Review policy definitions of alleged misconduct
  - Consider or list elements or issues, and what facts inform those elements or issues

### Topic 2: Hearing Management

- Pre-Hearing Preparation
  - Determine a hearing date consistent with Policy timeframes
  - Review the Notice of Hearing provided to the parties by the Title IX Coordinator
  - Timely respond to any requests for remote participation

- Secure available and FERPA-compliant technology; cannot require students to provide tech;
    - *Ask IT to train you how to use it if needed*
    - *Must have video and audio in real time*
    - Confirm the technology has recording capabilities and you know you to record and retain file
  - Prepare Witness Lists
    - Witnesses may include:
      - “Character” witnesses
      - “Expert” witnesses
  - Conduct Pre-Hearing Meetings as appropriate and permitted by policy
- Hearing Procedures
  - Review your policy’s procedures and prepare an order of proceedings
  - Start the hearing by introducing yourself, those present, and explaining the order of proceedings consistent with your policy and the matter:
    - Opening Statements?
    - Examination and/or Cross-Examination
    - Relevancy objections to Materials or Documents in the Record?
    - Closing Statements?
  - Consider reserving/taking under advisement evidentiary rulings, with the exception of cross-examination
  - Advisor selection and participation
- Cross- Examination
  - Purpose, Format, Examples
  - Title IX regulations’ exclusionary rule
    - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility
      - Department of Education guidance on exclusionary rule application
    - The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.