

Impartiality, Bias, Prejudgment & Conflict of Interest



NACUA

National Association of College and University Attorneys

17

Impartiality, Bias, Prejudgment & Conflict of Interest

Impartiality

basing a conclusion or decision on the facts rather than on a preference for one party over another; unbiased.

Bias

a pre-disposition or pre-conceived opinion that prevents one from impartially evaluating facts

Conflict of Interest

demonstrating bias or inability to be impartial because it will be to one's own personal benefit or other competing interest

Prejudgment

reaching a conclusion before considering all relevant evidence

NACUA

National Association of College and University Attorneys

18

Understanding Relevance

19

How is Relevance Defined?



- September 4, 2020 Guidance
- Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

20

Relevant Evidence



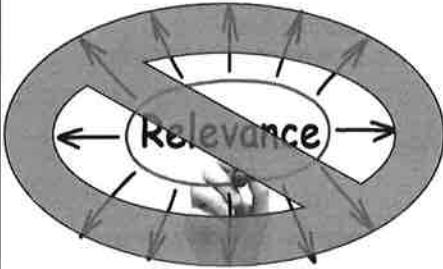
- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
 - The fact is of consequence in proving or disproving the allegations.
- Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/rules/fre/rule_401

Admission vs. Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
 - The rules do not conflict with § 106.45; and
 - The rules apply equally to both parties.
- For example:
 - An IHE may, e.g., adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.
- **REMEMBER:** An IHE's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the IHE should be addressed in the IHE's publicly available training materials.

What Is NOT Relevant?



- **September 4, 2020 Guidance**
- The Regs direct schools to exclude the following evidence and information:
 - a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)];
 - information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
 - questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and,
 - a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].

 **NACUA**

National Association of College and University Attorneys

23

Defining Relevance in Policy



- **September 4, 2020 Guidance**
- “An IHE may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).”
- Hmmm ... let's break it down.

 **NACUA**

National Association of College and University Attorneys

24

All Relevant Information Is Not Created Equal

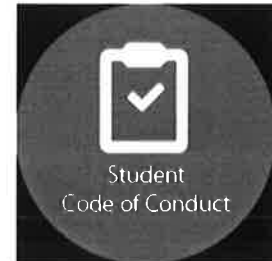


- May weigh evidence
- Considerations:
 - Is it corroborated?
 - Is there a reason the source might not be reliable?
 - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- "Not probative of any material fact."

Violations of Other Policies

Violations of Other Policies

- Knowingly making false statements or submitting false information
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards



Update notice with later-discovered allegations.

Questions?

Note

The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice.

The transmission of information in this presentation does not establish an attorney-client relationship with the recipient. The recipient should not act on the information contained in this presentation without first consulting retained legal counsel.

If you desire legal advice for a particular situation, you should consult an attorney.

