

Determining Relevance: Investigative Evidence/Hearing Evidence

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TITLE IX REGULATORY OVERVIEW

Types of Evidence

Physical Evidence

Objects or things used to prove an incident occurred.

Documentary Evidence

Evidence written down on paper or electronically.

Demonstrative Evidence

Evidence representing or preserving a piece of physical evidence

Verbal Evidence

Oral report of memories of a witness' experiences or observations

Direct or Circumstantial Evidence

- Direct Evidence: What someone reports **personally seeing and hearing**. It **doesn't require drawing a conclusion/inference** to show that something happened.

- Circumstantial Evidence: What someone **doesn't see/hear**. It **requires drawing a conclusion/inference** based the circumstances to show something happened.

ANOTHER TYPE OF EVIDENCE

INCULPATORY

Implying or imputing guilt. Tending to incriminate or **inculcate** an **inculpatory** statement.

This type of evidence tends to show that the Respondent DID engage in the behavior alleged in the complaint.

EXCULPATORY

Evidence favorable to the Respondent that **exonerates or tends to exonerate** the defendant of guilt.

This type of evidence tends to show that the Respondent DID NOT engage in the behavior alleged in the complaint.

“Relevant” v. “Related to”

Related-to

Evidence related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records, or rape shield)

Relevant

Relevant evidence is all evidence that is related to the incident in question and goes to prove or disprove the allegations being made

What evidence is important?

During the Investigation period, both relevant and irrelevant evidence is turned over to the parties.

Once the investigative report is drafted, only relevant evidence is submitted to the Decision-maker and parties.

Relevant Evidence:

Facts that potentially describe or explain an event or incident under investigation.

Irrelevant Evidence:

Facts that do not have the potential to describe or explain an incident under investigation.

Title IX Rape Shield Protections

Questions and/or evidence about the Complainant's sexual predisposition or prior sexual behavior are **presumptively not relevant**, unless they are offered under two limited exceptions.

1. To prove that someone other than the Respondent committed the conduct alleged by the Complainant;
or
2. To demonstrate the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent.

THE OBJECTIVE TEST FOR DETERMINING RELEVANCE

Step 1: Review the evidence being offered

Step 2: Consider the allegations being made.

Step 3: Does the evidence being offered have the potential to prove/explain or disprove one or all of the allegations being made.

Determining Relevance of Evidence



Scenario #1 (for questions 1-3)

As part of the initial interview, a Respondent provides the investigators audio recordings of a conversation she had with the Complainant. This conversation occurred 3 months prior to the incident of alleged non-consensual sex between the two. In the recording, Complainant is clearly flirting with the Respondent, saying such things as: “I am really looking forward to having sex with you.” “It will be hard to sit with you in a movie theater when I want to touch you so badly.” Though this “talk” never led to a sexual encounter between the Respondent and Complainant, Respondent proffers this as evidence of consent to the sexual encounter at issue.

Questions #1

What type of evidence is this? Direct or circumstantial?

ANSWER: This is circumstantial evidence. It requires drawing a conclusion/inference based the circumstances to show something happened. This audio is NOT regarding the incident in question.

Questions #2

Is this information relevant? Yes or No?

ANSWER: This evidence is irrelevant. This fact does not have the potential to describe or explain an incident under investigation.

Questions #3

Does this evidence qualify as an admissible exception to the Rape Shield protection?

ANSWER: No. There was no prior sexual relationship between the Respondent and Complainant, so this audio does not survive the rape shield protection. It can be taken by the investigator, but the reasons why the evidence is not relied upon in the investigative report. It will, however, be shared in the evidence dump after the investigation is finished.

Scenario #2 (for questions 4-7)

During the course of an investigation into allegations of sexual harassment, the investigators collect text messages between a witness and the Complainant. This information is disclosed after the witness is asked whether she had any information that would help "clarify what happened between the Complainant and the Respondent." In these messages, the two speak about how uncomfortable the Complainant felt around the Respondent, specifically "because of his blatant sexually inappropriate comments" about the Complainant.

More

The behavior is identified as “comments about his desire to touch her private parts and that she is “just a woman—a sexual object for men.” In future texts in the chain, Complainant asked the witness, “what do you think I can do to make it stop?” She continued, “if I make a complaint, will you make sure to back up all of the things I say?” At one point, the Complainant says, “I am not sure if the college will see this as a serious case. Maybe I should say he raped me. LOL.” **The Complainant is not alleging a sexual assault against Respondent.**

Question #4

Is this text chain relevant evidence?

ANSWER: This is relevant evidence that tends to prove or disprove an allegation in the complaint. This text chain is contemporaneous evidence of the actions of the Respondent. It is also a “real time” look at the Complainant’s mindset—good or bad. For this reason, this evidence is relevant to the allegations.

Question #5

Is this piece of evidence inculpatory or exculpatory evidence?

ANSWER: This evidence is inculpatory regarding the allegations being made against the Respondent.

Question #6

During the first inspection of evidence, the Complainant's Advisor asks for the text chain to be declared irrelevant because of the prejudicial nature of the "joke" about falsely alleging rape. The Respondent's Advisor argues it is relevant as exculpatory. Should the text chain be declared irrelevant?

ANSWER: While it is possible for an Advisor to challenge the relevance of evidence, in this case, the rules of evidence are not applicable (except for rape shield protections) in the Title IX grievance process, so the evidence cannot be declared irrelevant based on their possible prejudicial nature.

Question #7

Is the text chain demonstrative or documentary evidence?

ANSWER: This is documentary evidence. Documentary evidence is evidence that is written down on paper or electronically.

Scenario #3 (for questions 8-11)

Complainant has made an allegation of inappropriate touching against Respondent. The allegations survive the mandatory and discretionary dismissal review and an investigation is opened. After the investigation, both parties review the evidence and you are in the process of writing your final investigative report. As part of this report, you have removed a piece of evidence citing it as irrelevant. The evidence is photos of the Complainant and two other people. The photos are date and location stamped and were taken a few hours before the time at which the alleged sexual assault was to have occurred. The photos were taken by the Respondent.

More

The photos are of two people grabbing the Complainant's crotch. The Complainant is smiling in the photos and they are all holding alcoholic beverages—and are clearly drunk. As reason for your removal of the evidence, you cite to the fact that this evidence is irrelevant as it is barred by the rape shield protection. After reviewing the Final Investigative Report, the Respondent's Advisor questions the removal of the evidence.

Question #8

What would the Respondent Advisor's best argument be for including the piece of evidence?

a. Though the photos are circumstantial evidence, they are relevant because the decision-maker can still determine that Respondent welcomed the conduct.

b. The photos constitute an exception to the rape shield protection because Respondent is using the photos to show that someone other than the Respondent committed the action.

c. Since the Complainant was drunk, he cannot actually say who inappropriately touched him, making this exculpatory and relevant evidence.

Answer to #8

B. The photos constitute an exception to the rape shield protection because Respondent is using the photos to show that someone other than the Respondent committed the action. This would be an appropriate exception to the rape shield protection.

Question #9

Is this direct or circumstantial evidence?

ANSWER: This is circumstantial evidence. The photos don't show the Respondent, nor do they answer the question regarding consent.

Question #10

Now the allegation is that the Respondent kissed Complainant's lips and grabbed his buttocks without his consent. Can the photos be deemed irrelevant based on the rape shield protections?

ANSWER: Yes. The photos would likely be seen as irrelevant because it is related to the Complainant's sexual predisposition or prior sexual behavior.

Question #11

Now the allegation is that Respondent grabbed Complainant's crotch without his consent. Are the photos direct exculpatory evidence that Respondent did not engage in the conduct?

ANSWER: No. The photos are not of Respondent and do not answer the question of consent.



**A Reminder about the two
inspection periods**

Opportunity to Review Evidence & Investigative Report

Both parties and their advisors get a copy of all evidence collected during the investigation. The evidence shared is everything that is directly related to the allegations—all inculpatory & exculpatory evidence, relevant and irrelevant. Anything NOT shared must be identified and an explanation as to why it is not being shared must be noted.

Collecting and presenting Evidence

It is the responsibility of the Title IX Investigator to consider any questions regarding the relevance of evidence asked by the Advisor(s) or the parties

- *If evidence is determined irrelevant, the Title IX Investigator must provide a valid reason for their evaluation and annotate it in the investigative report.*

- *If evidence is determined relevant, the Title IX Investigator will include the evidence in the investigative report.*

**ALL REVIEWS
OF EVIDENCE
REQUIRE AN
OBJECTIVE
EVALUATION**



**WHAT
QUESTIONS
DO YOU
HAVE FOR
ME?**



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