

Title IX Investigations and Relevance

Purpose of an Investigation

- To collect **relevant evidence** sufficient to permit an impartial decision-maker to determine whether or not the reported sexual harassment occurred
- Inculpatory evidence: Information tending to support the proposition a respondent committed sexual harassment as alleged
- Exculpatory evidence: Information tending to support that the respondent did not commit sexual harassment as alleged

General Principles of an Investigation

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- ***Investigation is evidence-gathering;***
 - ***not fact-finding***

Burden of Gathering Evidence

- The burden of gathering evidence must remain on the university and not the parties
106.45(b)(5)(i)
- Both parties have the right to provide evidence and witnesses (both fact and expert),
106.45(b)(5)(ii) (but it is not their responsibility to do so)

Role of the University

Goal of the Investigative Mission

- To conduct the investigation and gather all evidence possible and interview witnesses
- Remain neutral during this process, and not focusing on gathering evidence to prove respondent “guilty” or not responsible.
- The goal is a truth-seeking mission; gather everything relevant so that a neutral decision maker can reach an accurate determination based on the information presented during a hearing.

Investigation Requirements Right to Inspect Evidence

106.45(b)(5)(vi)

The University must send the parties and their advisors:

- ALL evidence directly related to the allegations
 - will include relevant and irrelevant evidence including that which would otherwise be excluded under the rape shield protections
 - includes evidence the school will not use/rely in making a decision
 - includes inculpatory or exculpatory evidence whether obtained from a party or other source
 - electronic format or a hard copy, otherwise, method and format of delivery up to school
- parties must have at least 10 days to submit a written response
- the investigator will consider parties input prior to completion of the investigative report
- **Relevant** evidence must be made available if there is a hearing

Final Investigative Report

106.45(b)(5)(vii)

An investigative report that fairly summarizes relevant evidence must be created at least 10 days prior to a hearing (if a hearing is required) or other dispensation of the complaint.

The investigative report may be in an electronic format or a hard copy, for their review and written response of the parties.

**Right to
Discuss
Allegations
and
Gather
Evidence**

106.45(b)(5)(iii)

The University must not restrict the ability of the parties to discuss the allegations or gather evidence (no gag orders)

Parties have the right to discuss the allegations with anyone they choose with limited exceptions. For example when a no-contact directive has been issued.

All communication must be in a non-retaliatory manner.

Standard of Proof or Evidence

The standard of proof/evidence used for Title IX investigations is based on the strength and importance of the evidence (preponderance of evidence).

This standard requires proof based on physical evidence, reports from the parties involved, and witness testimony that leads to the belief that there is more than a 50% likelihood that the incident occurred and that the facts are more likely than not to have occurred.

Relevance Defined

Evidence **is relevant** if it is
“Important to the matter at hand.”

In legal terms,
relevance is defined as having value or
tendency to prove a matter of fact which is
significant to the case or situation.

Who determines the facts in a Title IX case?

The hearing board or officer or decision maker are the **fact-finders**, but they are left to "find" **facts** only from relevant evidence presented in a hearing.

There are two individuals who determine relevancy: the investigator and the Chair of the Hearing Board or Officer or Decision Maker.

Relevancy Determination Process

How to determine relevancy:

1. Review the evidence being offered
2. Consider the allegations of the Title IX sex harassment complaint
3. Ask yourself whether the evidence being offered has the potential to prove/explain or disprove an incident under investigation

Title IX Rape Shield Protections

Every relevance analysis in a Title IX Sex Harassment investigation must also include a consideration of Title IX's rape shield protections.

Title IX's rape shield protections provide that 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.

Title IX Rape Shield Exceptions

Rape Shield Exceptions: Evidence/questions regarding a Complainant's sexual predisposition or prior sexual behavior may be deemed relevant only if:

1. The questions and evidence are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; or
2. The questions and evidence relate to specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent

Why Does Relevance Matter?

The purpose of having restrictions placed on evidence that can be introduced is to prevent the fact finders from making decisions based on factors other than what is relevant.

The goal is a truth-seeking mission; gather everything relevant so that a neutral decision maker can reach an accurate determination based on the information presented during a hearing.

Summary

- The purpose of an investigation is to collect relevant inculpatory and exculpatory evidence sufficient to permit an impartial decision-maker to determine whether or not the reported sexual harassment occurred.
- The burden of gathering evidence must remain on schools not the parties 106.45(b)(5)(i)
- It is the University's job to conduct the investigation, track down and gather all of the evidence possible and interview witnesses.
- The goal is a truth-seeking mission; gather everything relevant so that a neutral decision maker can reach an accurate determination based on the information presented during a hearing.
- Evidence is relevant if it has any tendency to make an allegation more or less probable than it would be without the evidence; and it is of consequence in determining the action.

Summary- Continued

- The hearing board or officer or decision maker are the **fact-finders**, but they are left to "find" **facts** only from relevant evidence presented in a hearing.
- Determine relevancy by reviewing the evidence being offered; considering the allegations of the Title IX sex harassment complaint; and asking yourself whether the evidence being offered has the potential to prove/explain or disprove an incident under investigation.
- Title IX's rape shield protections provide that 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.
- Reason your way to a relevancy decision by applying your education, experience, training, and expertise to your decision-making process..