

DETERMINING RELEVANCE: DECISION MAKER TRAINING

MELISSA FLORES, ESQ.

GENERAL COUNSEL & TITLE IX COORDINATOR

JORDAN SCHOOL DISTRICT

801-567-8110

REGULATORY OVERVIEW



KEY CONCEPTS

DEFINITION OF SEXUAL HARASSMENT → Sexual harassment is broadly defined as any of the following:

- Quid pro quo harassment (employee to student),
- Unwelcome conduct so severe, pervasive, **and** objectively offensive that it effectively denies an individual equal access to the school's education program or activity, or
- Sexual assault, dating violence, domestic violence, or stalking (as defined in the Clery Act)

BASIC PROCEDURAL REQUIREMENTS → Jurisdiction must be met: An LEA has jurisdiction over claims of sexual harassment when such conduct occurs in the United States and in its education program or activity. This includes all locations, events and circumstances over which the LEA exercised substantial control and when the alleged conduct meets the definition of sexual harassment (as outlined above).

ACTUAL KNOWLEDGE of sexual harassment obligates an LEA to respond promptly and in a manner that is not deliberately indifferent. In K-12, "actual knowledge" means that a school must respond to sexual harassment allegations when any employee receives notice of the harassment, which includes instances where an employee observes or overhears a conversation about sexual harassment, or when a complaint is received.

INFORMAL V. FORMAL COMPLAINTS → Anyone can make an informal report of sexual harassment. Informal reports can be made to the Title IX Coordinator or other school officials, who must then work with the Title IX Coordinator to respond to the report. Informal reports can be made verbally or in writing, at any time and can be submitted anonymously.

Once the LEA has received an informal report of sexual harassment, the Title IX Coordinator must then contact the Complainant and: 1. Offer supportive measures to the Complainant and/or Respondent. 2. Determine whether the Complainant wants to file a formal complaint and explain how to do so.

FORMAL COMPLAINT → A formal complaint of sexual harassment initiates the formal grievance process. A formal complaint is a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the LEA investigate.

PRELIMINARY INQUIRY → The first step in the grievance process is to determine whether there is jurisdiction to address the alleged Title IX complaint. *Mandatory Dismissals*: The conduct alleged would not constitute sexual harassment under Title IX; the conduct alleged did not occur in the LEA's education program or activity; or the conduct alleged did not occur in the U.S. (may be referred to another office). *Discretionary Dismissal*: The Complainant withdraw the formal complaint; the Respondent is no longer enrolled in or employed by the District; or specific circumstances prevent the LEA from gathering evidence sufficient to reach a determination.

INFORMAL RESOLUTION (optional) → The parties may agree to attempt resolution through mediation/negotiation. Voluntary and must be in writing. Either party may withdraw and re-engage the grievance process.

INVESTIGATION → The "investigation" phase of the grievance procedure entails interviews, obtaining evidence, and identifying sources of information related to the complaint—must be thorough, impartial, and completed in a timely manner. The parties must have an equal opportunity to present witnesses and evidence.

INSPECTION OF EVIDENCE → Two inspection periods—the first is after the investigation is completed, but before the investigation report is written (10 days). The second inspection period is after the investigation report is drafted, but before the report is given to the decision maker (10 days). An investigative report does not (and cannot) include a determination of responsibility

QUESTION AND ANSWER PERIOD → The Decision-maker will allow the Parties to pose questions to each other or to any witness. The Decision-maker will determine relevance of the questions. Follow-up questions are allowed. Questions and answers become part of the official record.

DETERMINATION REGARDING RESPONSIBILITY → The Decision-maker will issue a written determination regarding responsibility, which must include:

- The allegations potentially constituting Title IX sexual harassment;
- A description of the procedural steps taken from receipt of the complaint through the determination regarding responsibility;
- Findings of fact supporting the determination.
- Conclusions regarding the application of the LEA's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions and remedies; and
- Procedures and permissible bases for the Complainant and Respondent to appeal the determination.

The determination becomes final: If an appeal is not filed, the date on which an appeal would no longer be considered timely or if an appeal is filed, on the date that the LEA provides the parties with the written determination of the result of the appeal

APPEALS → Grounds to appeal a determination regarding responsibility and/or dismissal include:

- A procedural irregularity that affected the outcome,
- New evidence that was not reasonably available at the time of the determination that could have changed the outcome of the investigation,
- The Title IX Coordinator, investigator(s) or Decision-maker(s) had a conflict of interest or bias that affected the outcome of the matter.

RETALIATION → Retaliation is specifically prohibited under Title IX's regulations. Retaliation includes intimidation, threats, coercion or discrimination for the purpose of interfering with any right or privilege secured by Title IX. Complaints of retaliation may be submitted through the Title IX grievance process.



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/
CIRCUMSTANTIAL
AND
INCULPATORY/EXCULPATORY
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.

Inculpatory: Implying or imputing guilt. This type of evidence tends to show that the Respondent DID engage in the behavior alleged in the complaint.

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

RELEVANT V. RELATED TO
AND
RELEVANT V. IRRELEVANT
EVIDENCE

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

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

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

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.

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?

SCENARIO #1
(FOR QUESTIONS 1-3)

SCENARIO #1

As part of the initial interview, a Respondent provides the investigators audio recordings of a conversation she had with the Complainant. This conversation occurred three (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.” 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 1-3

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.

2. Is this information relevant?

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

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 implicate the rape shield protection. It can be taken by the investigator, but the reasons why the evidence is not relied upon must be detailed in the investigative report.

SCENARIO #2

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 her blatant sexually inappropriate comments” about the Complainant.

The behavior is identified as “comments about her being “a sexual object for women.” In future texts in the chain, Complainant asked the witness, “what do you think I can do to make it stop?” He 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 LEA will see this as a serious case. Maybe I should say she fondled me. LOL.” **The Complainant is not alleging a sexual assault against Respondent.**

SCENARIO #2
(FOR QUESTIONS 4-6)

QUESTIONS 4-6

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.

5. Is this piece of evidence inculpatory or exculpatory evidence?

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

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 inappropriate touching. 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.

SCENARIO #3
(FOR QUESTIONS 7-10)

SCENARIO #3

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 inappropriate touching was to have occurred. The photos were taken by the Respondent. The photos are of two people grabbing the Complainant's crotch. The Complainant is smiling in the photos. 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.

QUESTIONS 7-8

7. 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 in this case, 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: The photos constitute an exception to the rape shield protection because in this case, 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.

8. 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.

HELPFUL HINTS ABOUT RELEVANCE

The most basic rule of evidence is that the information must be relevant to the case. Irrelevant evidence should be excluded because it oftentimes confuses the real issues.

Think of relevance as having a two-part test definition. To be relevant, the information must have the tendency to:

1. prove or disprove a fact, and that fact
2. must be of consequence in determining the action.

All relevancy arguments boil down to logic and common sense.

Ask yourself: Will the evidence help in some way (no matter how small) to reach a good decision, either by itself or in conjunction with other evidence?

SOME COMMON RELEVANCY ISSUES

A. Remoteness in Time or Place

Remoteness in time or place reduces the relevancy of information. Events taking place at times or locations distant from the event at issue are of little or no relevancy.

Example: A photo of the Complainant showing her smiling with a group of people, one of them (four people away from the Complainant) is the Respondent is more relevant to show they had a cordial relationship if the picture was taken one week before the conduct that is the center of the allegations than if it was taken two years ago.

B. Prior similar events

The similarity of a prior event affects relevancy. Prior events involving different people or objects are of little or no relevancy.

Example: Previous times when the Respondent threatened the Complainant are more relevant to show the need for supportive measures than incidents when the Complainant threatened other people. On the other hand, it may be very relevant to provide instances where the Respondent has threatened other people.



MORE

C. Backgrounds and Relationships Among Parties

It may be relevant to point out the background and relationship among the parties and the events leading up to the party's or witness's involvement in the case at hand. It is also generally permissible to describe the prior relationship between the parties.

D. Evidence That Someone Else Committed the Offense.

One area where it is permissible to discuss the Complainant's prior sexual behavior is when it is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent. Other than these instances, prior sexual behavior is irrelevant.

WHAT DOES A DECISION MAKER DO?

The Title IX **decision maker** is responsible for:

1. Reviewing the Evidence and Report

- After the Title IX Coordinator assigns an investigator to gather facts and create an investigative report, the decision maker receives this report.
- The decision maker must not be the same person as the Title IX Coordinator or the investigator (to maintain impartiality).

2. Providing the Parties an Opportunity to Respond

- Each party (Complainant and Respondent) is given the opportunity to review the investigative report and provide written responses. In K–12 settings, a **live hearing is not required**, unlike in higher education.

3. Making a Determination of Responsibility

- The decision maker evaluates all evidence and applies the school district's chosen standard of evidence (preponderance of the evidence).
- Based on this, the decision maker issues a written determination stating:
 - Whether the respondent is responsible or not responsible for the alleged Title IX violation.
 - The rationale for the decision.
 - Any disciplinary sanctions if the respondent is found responsible.
 - Any remedies for the complainant

WHAT DOES A DECISION MAKER DO?

4. Issuing the Written Determination

- This must include:
 - Allegations potentially constituting sexual harassment.
 - Procedural steps taken.
 - Findings of fact.
 - Conclusions about the application of the code of conduct.
 - A statement of and rationale for the result.
 - Information on how to appeal.

5. Remaining Neutral and Objective

- The decision maker must be trained on Title IX requirements, how to evaluate evidence fairly, and how to avoid bias or conflicts of interest.

**WHAT QUESTIONS DO YOU
HAVE?**