



RELEVANCE

WHO NEEDS THIS TRAINING

Investigators

- Individuals inquiring into allegations of sexual harassment
- Gather, assess, & summarize evidence into an investigative report

Decision-makers

- Individuals appointed to make decisions related to Title IX grievance processes
 - Hearing panelists
 - Single decision-makers

LEARNING OBJECTIVES



Learners will be able to:

- Learners will be able to make an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations aren't based on a party's status in a grievance process.
- Learners will be able to discern evidence that is relevant and evidence that is not relevant.
- Learners will be able to identify when questions or evidence should be considered irrelevant and therefore excluded from consideration.
- Learners will be able to explain why a question or piece of evidence is irrelevant and therefore excluded from consideration for the benefit of all parties in a grievance process.

DEFINITIONS & CONCEPTS

DEFINITIONS: Relevance



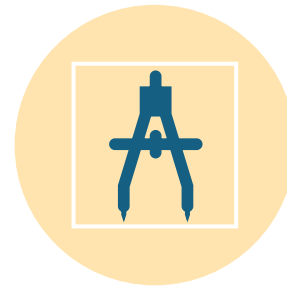
Relevant evidence includes “both inculpatory and exculpatory evidence”



“Relevant” means any evidence that tends to make the allegations “more or less likely to be true”



Decision-makers must determine, before an answer is given, whether a question is relevant or not.



Relevance determinations must be explained in real-time.

DEFINITIONS: Inculpatory & Exculpatory Evidence

EXCULPATORY & INCULPATORY

Exculpatory evidence increases the likelihood of finding of **non-responsibility or non-liability**

Inculpatory evidence increases the probability of a finding of **responsibility or liability.**

BOTH TYPES OF EVIDENCE MUST BE CONSIDERED, SO LONG AS THEY ARE RELEVANT.

DETERMINING RELEVANCE

PROBATIVE QUESTIONS



What is the purpose of the question?



Decision-makers focus on evidence that proves facts material to the allegation under investigation are “more or less likely to be true.”

EXCEPTIONS 1

QUESTIONS ABOUT COMPLAINANT'S PRIOR SEXUAL BEHAVIOR, OR SEXUAL PREDISPOSITION

Questions and evidence about a complainant's "sexual predisposition" or "prior sexual behavior" are considered irrelevant and should be excluded.

For example: A question asking about a complainant's interest in a particular sexual act or previous sexual encounters with unrelated parties should not be permitted.

This exception does not apply to respondents.

EXCEPTIONS 2

QUESTIONS ABOUT COMPLAINANT'S PRIOR SEXUAL BEHAVIOR, OR SEXUAL PREDISPOSITION

There are some specific exceptions about these kinds of questions. These questions and evidence may be permitted so long as they are either:

1. Used to prove that someone OTHER than the respondent committed the conduct alleged by the complainant, or
2. Concerning specific incidents of prior sexual behavior with respect to the respondent and are offered to prove that consent was given and received.

EXCEPTIONS 3

QUESTION REGARDING PRIVILEGED INFORMATION

Information protected by a legally protected privilege are determined irrelevant.

Examples of legally protected information:

- Medical records (psychological, dental, chiropractic, physician, rape crisis counselors, etc.)
- Attorney-client privileged information
- Information shared with clergy

If a party gives voluntary, written consent to discuss these records, questions pertaining to these records would be permitted.

EXCEPTIONS 4

GENERAL PROBATIVE QUESTIONS

Questions that are duplicative or repetitive may be deemed not relevant and thus excluded

OTHER CONSIDERATIONS

Determinations cannot be based on the following:

- Sex or gender of any party
- The party's status as a complainant or respondent
- The party's past status as a complaint or respondent
- A party's membership in a particular organization
- The protected class of the party

Relevant questions asked in an abusive or argumentative manner should be rephrased.

HOW DO YOU MAKE RELEVANCE DETERMINATIONS?

If decisionmaker is a single individual, they make the decision prior to the question being asked.

If decisionmaker is a panel, the panel chair will make that determination prior to the question being asked.

WHAT DOES THE RELEVANCE DETERMINATION CONSIST OF?

The Final Rule “does not require a decisionmaker to give a lengthy or complicated explanation.” It is sufficient to explain why a question is irrelevant.



SENSITIVE OR EMBARRASSING QUESTIONS

- Much of the content within these hearings may be considered sensitive or embarrassing by parties or advisors. This is perfectly understandable. However, relevant questions need to be considered even if a party finds them uncomfortable to answer.
- Only **irrelevant** questions, including those about the complainant's prior sexual history, will be excluded. This should be discussed with students prior to beginning the grievance process.
- While this is the case, trauma-informed approaches are still possible. One way to avoid re-traumatization is to maintain clear rules of decorum in the manner that questions are asked.

CORRECTIONS



- You may discover that a question was allowed to be asked which resulted in the disclosure of “irrelevant” information, such as a complainant's prior sexual conduct with someone other than the respondent. In that case, you can direct the decisionmaker to disregard that irrelevant information and strike it from consideration in their decision.
- If a party insists that an irrelevant question should have been allowed, they have the right to appeal that decision. Under the current rule, colleges and universities must allow parties to appeal these decisions based on “procedural irregularity.” Incorrect relevance determinations would likely be a ground appropriate for appeal, based on procedural error.
- Still, even if a party disagrees with a relevance ruling, an appeal may only be granted if it “affected the outcome.” Generally, it will be difficult for a party to show that their inability to ask a question would have changed the outcome if other evidence supported the hearing decisionmaker’s findings.