

Rape Shield Reference
Office for Civil Rights
U.S. Department of Education
June 10th, 2015

Question: In a recent 302 agreement and OCR Guidance, OCR wrote a provision requiring "Disallowance of evidence of the Complainant's past relationships with anyone other than the accused." I understand the purpose behind such a shield, but wonder if OCR has thought about how that applies to a case like the one I have right now:

Answer: Complainant alleges a rough sexual assault. The respondent student claims they were just engaged in 50 Shades-style kink, and that it was consensual. In response, the complainant has stated that she has never engaged in and would never engage in any form of rough sex play. I have three witnesses (credible, who have no idea about this complaint) who will testify that they had kinky, rough sex play with her prior to this incident. OCR's provision would prohibit admission of such testimony, despite its relevance and admission for purposes of assessing credibility (of both parties), and not for any purpose of slut-shaming. Does OCR see this as a negotiable or non-negotiable stance?

Answer: Each case is fact-specific and each determination is based on the particular set of facts presented so we cannot comment on the specific case you describe in your email. Although we do not give legal advisory opinions, we do provide information on how the civil rights laws that OCR enforces apply generally.

As you are aware, OCR enforces Title IX of the Education Amendments of 1972 and its implementing regulation at 34 C.F.R. Part 106 (Title IX), which require schools receiving federal funding to respond promptly and equitably to allegations of sexual violence. As discussed in question F-7 in OCR's [April 2014 Questions and Answers on Title IX and Sexual Violence](#) (April 2014 Q&A), "questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant."

Your email refers to a specific OCR resolution agreement. Although OCR hopes that our resolution agreements are helpful for schools seeking to address similar problems, we note that every agreement represents the resolution of a particular case, not OCR policy. Every school needs to take into account the circumstances on its own campus in adopting practices to comply with Title IX. For example, OCR's [October 2014 resolution agreement with Princeton University](#), which was tailored to the facts of that case and includes language reflecting applicable federal and state law, provides that the University will include the following provision in its grievance procedures to address complaints of sexual misconduct: "a statement that the complainant's past sexual history will typically not be used in determining whether sexual misconduct occurred; except where consent is at issue, prior consensual activity between the two parties, while not determinative, may be relevant to determining whether consent was sought and given, recognizing that consent to one sexual act does not constitute consent for another sexual act; in addition, the past sexual history may be relevant under limited circumstances, for example, to explain injury." The resolution agreement notes that this provision takes into account OCR's April 2014 Q&A and New Jersey law.



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