

Title IX: Decision Makers



THE TRUST

Gilbert, Arizona

April 11, 2025

Presented by

Kathleen Brantingham

Jessica Sanchez

Udall Shumway PLC

Welcome!

- Introductions
- Meet your table mates
- Questions are encouraged!

Disclaimer

The information provided in this document is for informative purposes only and should not be used in place of legal advice.

Learning Objectives

- Review Title IX in general
- Decision Maker's Role and Responsibilities
- Writing a Decision

Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

U.S. Congress, 1972

Title IX Sexual Harassment or Sexual Violence

- 3 Types
- All three require:

**Unwelcome sexual conduct
(no consent)**

+

**Conduct effectively denies (or limits) a
person's equal access to educational
activity**

Type 1: Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

Type 2: Severe, Pervasive and Objectively Offensive

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's (school's) education program or activity

Severe and Pervasive

- No specific definitions in the regulations, but the more severe the conduct, the less need to show pervasiveness.
- Pervasive means widespread, persistent, and/or exists throughout an entire system or institution.
- They work in tandem so that if something is more severe, it may be less pervasive and still meet Title IX and vis versa.

Severe/Pervasive Analysis

1. Degree to which the conduct affected the complainant's ability to access the District's education program or activity;
2. Type, frequency, and duration of the conduct;
3. Parties' ages, roles within the District's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

Severe/Pervasive Analysis

4. Location of the conduct and context in which the conduct occurred; and
5. Other sex-based harassment in the District's education program or activity.

Objectively Offensive

- Whether a reasonable person in similar circumstances would find it offensive, hostile, or intimidating.
- Subjective feelings or interpretations may not be the sole basis for evaluating whether a Title IX violation has occurred.

Type 3: Sexual Assault or Violence

- Sexual assault as defined in 20 U.S.C. 1092(f)(6)(A)(v)
- Dating Violence as defined in 34 U.S.C. 12291(a)(10)
- Domestic violence as defined in 34 U.S.C. 12291(a)(8)
- Stalking as defined in 34 U.S.C. 12291(a)(30)

Education Program or Activity

Schools are only required to address sexual harassment in the education program or activity, which is

- Any location, event, or circumstance over which the school exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

Against a Person in the United States

- This is a jurisdictional requirement for application of Title IX
- Students in a study abroad program are not protected by Title IX outside the U.S.
- Final rule notes that though not required, a school may initiate a student conduct proceeding against a perpetrator or offer supportive measures to a victim

Examples of Denial or Limitation to Educational Activity

- Skipping classes or refusal to go to school
- GPA goes down
- Difficulty concentrating in class
- Bedwetting, crying at night
- Quitting sports or extracurricular activities to avoid contact with alleged perpetrator

Review Type 3: Sexual Assault or Violence

- Sexual assault
[20 U.S.C. 1092(f)(6)(A)(v)]
- Domestic violence
[34 U.S.C. 12291(a)(8)]
- Stalking
[34 U.S.C. 12291(a)(30)]

Title IX Can Be Difficult for Schools/Staff/Students

- Violations of processes/procedure can become the subject of an OCR complaint/investigation
- Title IX process may take 60 days or more
- No discipline can be taken against the Respondent until the full process has completed

DECISION MAKERS:

Your Job Starts with Receipt
of the Investigation Report
with the Evidence

Basic Premises: Decision Makers

- Objectively evaluate all available evidence, both inculpatory and exculpatory
- Weigh the evidence using preponderance of the evidence or clear and convincing burden of proof standard
 - Depends which standard is adopted by your District

Basic Premises: Decision Makers

- **Preponderance of the Evidence:** *more likely than not* that the respondent is responsible for the alleged conduct
- ***Clear and Convincing:*** *highly probable* that the respondent is responsible for the alleged conduct

Decision Makers Cannot be Biased

- Keep an open mind
- Remember that each case is unique and different
- Actual Bias
- Perception of Impropriety/Bias
- (Implicit Bias)

Investigation Report by Title IX Investigator

- The written investigation report summarizes the relevant evidence
- Should include observations
- The report is provided to the parties AND their advisors, if any, at the same time for review and opportunity to provide another written response prior to the decision maker rendering a determination

Upon Receipt of Investigation Report

- Send notice to parties for written questions—template provided

Written Questions

The District does not hold in-person hearings but after the investigation report is completed, and before a determination is made, the parties must have the opportunity to review the investigation report and submit written, relevant questions to the decision maker that the party wants asked of the other party or witnesses (= due process)

Written Questions

- Each party may submit relevant questions to decision maker
- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant
- Each party will be provided answers to its questions and then will have a limited opportunity to ask limited follow up questions

Relevance of Questions

Complainant's sexual history or predisposition is NOT RELEVANT unless:

- Offered to establish that someone else committed the acts complained of
- Offered to establish consent with the specific Respondent

Decision

- Standard = preponderance of the evidence or clear and convincing (standard adopted by the District)
- Determines if there is a violation of TIX
- Determines consequences
- Written decision provided to parties
- If not TIX, there may be another policy violation and consequences outside TIX—but that is not part of TIX Decision

Issuing a Determination

Using a preponderance of the evidence standard to review the evidence, issue a written determination that includes the following components:

1. Allegations of the Complaint
2. Applicable Legal Standard
3. Compliance with Grievance Procedures/Procedural Steps

Issuing a Determination cont.

4. Standard of Evidence
5. Findings of Fact
6. Determination
7. Disciplinary Consequences
8. Appeal Rights

Use the Template to Draft Report

Template Provided

Determining Sanctions

- Use District Code of Conduct/Handbook Policies
- Considerations:
 - Founded = Consequence(s)
 - Context
 - Age
 - Disability (Special Education/504)
 - MDR may be necessary if discipline will exceed 10 days

Determining Sanctions

- Considerations:
 - Prior history
 - Severity
 - Resources district has
 - Resources district doesn't have
 - How long? How can District enforce?

Sanction Examples

- Counseling
- Threat assessment
- Community service
- Short-term suspension
- School reassignment (another, alternative, online)
- Referred for long-term suspension
- Referred for expulsion

Remedies

- If the determination is that the Respondent is responsible for the conduct, then determine remedies that will restore or preserve equal access to the education program or activity
 - Same types of things as supportive measures except that they now can be punitive toward respondent (i.e. discipline)
 - Discipline matrix may be relevant/helpful

Decision Maker Activity

- Discussion

QUESTIONS????

UDALL | SHUMWAY

COUNSELORS AT LAW SINCE 1965

Kathleen Brantingham

Jessica Sanchez

Education Law Attorneys

khb@udallshumway.com

jss@udallshumway.com

UDALL SHUMWAY PLC

1138 North Alma School Road, Suite 101

Mesa, Arizona 85201

480-461-5300

www.udallshumway.com