

Title IX: Decision Makers



THE TRUST

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Presented by

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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
- Conducting a Hearing
- 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 College's education program or activity;
2. Type, frequency, and duration of the conduct;
3. Parties' ages, roles within the College'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 College'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 College

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

- You will receive the investigation report which summarizes the relevant evidence in the investigation, and the evidence itself
- Parties have a minimum of 10 days to provide a written response to the investigation report upon receipt
 - No hearing can occur prior to the 10 days for review and written response

Scheduling a Live Hearing

- You are required to schedule a live hearing prior to a determination of responsibility
- “Live” just means in real time
 - No requirement to be in person
 - Permissible to be virtual
- It is the College’s discretion if this will be in person, or virtual.
- Must provide an advisor (for free!) to any Party without one

If Hearing Is In Person

- Location
 - Private/Confidential
 - Free of Interruption
 - Sufficient Space to Accommodate Participants (Parties, Advisors, Witnesses)
- Potential Need for Two Rooms
 - If a party requests to to be located in a separate room, College must accommodate this
 - If Separate rooms, parties must be able to see/hear person answering questions

If Hearing Is Virtual

- Still ensure privacy/confidentiality for the space you are in
- Must include technology capabilities for participants to see/hear each other simultaneously

Scheduling a Live Hearing

- At a hearing parties are given the opportunity, via their advisor, to ask questions of the other party or witnesses
- You do not need to drag all witnesses in for the hearing
- Best practice: Send notice/request to the parties in advance to let you know which witnesses they are requesting be present to answer questions (Coordinator may do this)

Hearing

- Must be recorded – specific recording type is up to the College
 - Audio
 - Audiovisual
 - Transcript
- It is a good idea to put this into your policy/procedure for your College's protocol for hearing recordings and type (in person vs. virtual)
- Parties are permitted to review the recording

Procedures

- Opening Statements
 - By Party or Advisor
- Questions of Witnesses and/or Parties
 - By Advisor
 - NEVER by Parties
- Closing Statements
 - By Party or Advisor

Questions

- Each party's advisors may ask *relevant* questions to Party/Witness
- It is Decisionmaker's role to determine relevance or exclude the question
- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant

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

Relevance of Questions

- A party or witness may be requested to submit to cross-examination at the hearing if either party has questions for them, but is not required to appear/attend.
- Decisionmaker cannot make an inference for their failure to submit to cross or refusal to answer certain questions

Decision

- Standard = preponderance of the evidence or clear and convincing (standard adopted by the College)
- 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. Procedural Steps Taken
 - Date of Formal Complaint Receipt
 - All Notifications to Parties
 - Interview Dates
 - Evidence Gathered
 - Hearing Date

Issuing a Determination cont.

3. Findings of Fact
4. Application of College's Code of Conduct to the Facts
5. Statement and Rationale for each allegation result (i.e. determination for each allegation)
6. Disciplinary Consequences
7. Supportive Measures
8. Appellate Process

Issuing a Determination cont.

- Detail and explanation in your rationale
- Refer to the Evidence and Hearing as Basis to Justify your decision
- Analyze each allegation separately
- Analyze each element in the definition(s) of sexual harassment relevant to each allegation

Determining Sanctions

- Use Code of Conduct and Be Consistent With it
 - Sanctions should not exceed or be less than code of conduct expectations for discipline
- Considerations:
 - Responsibility = Definite Consequence(s)
 - Context
 - Age
 - Disability

Determining Sanctions

- Considerations:
 - Prior history
 - Severity
 - Length of Sanction
 - Ability to Implement

Sanction Examples

- Counseling
- Threat assessment
- Community service
- Course reassignment (different course, online, etc.)
- Suspension Without Pay
- Expulsion/Termination
- Dismissal from Team/Club/Program
- This is a Non-Exhaustive List!

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

Appeals

- Three bases to Appeal:
 1. Procedural Irregularity *that affected the outcome of the matter*
 2. New Evidence Not Reasonably Available at the Time of the Decision *that affected the outcome of the matter*
 3. Title IX Coordinator, Investigator, Decisionmaker had a conflict or bias *that affected the outcome of the matter*

Appeals

- Upon receipt of appeal, notify the other party in writing
- Parties must be afforded equal opportunity to respond to appeal
- Decision as to appeal must be in writing
- Decisionmaker on appeal cannot be the Title IX coordinator, investigator, or decisionmaker in the matter
- Provide decision of appeal in writing to parties

QUESTIONS????

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