



Transferable
Skills

Transferrable Skills for Title IX and Title VI Investigators



**Bricker
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Title IX In Focus
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Disclaimers

We can't help ourselves. We're Lawyers.

- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- You will receive slides for today's presentation after we've concluded.

And another one...

Specific to the Title IX In Focus Webinar Series

- The 2020 Title IX regulations require training on several specific subjects
- While the Title IX In Focus webinar series will discuss some of the required subject matter, none of these one-hour webinars will cover all of the material required for Title IX training compliance
- Work with your TIXC to make sure that you are trained in accordance with Title IX, Clery, and any applicable state law

Can We Post These Materials?

YES – Post away!

Institutions are required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.



Agenda

- Rationale for this webinar
- Quick review of investigator roles
- Overlapping Concepts and Transferrable Skills
 - The importance of intake/support
 - Clear and Fact-Driven NOIs
 - Setting expectations for the process
 - Sensitivity during interviews
 - Attention to detail
 - A watchful eye on the policy elements
 - Consistent interview practices
 - Fact-finding and policy analysis (depending on your process)
 - Training on best practices for investigations

Why are we talking about this?

- Colleges and universities are combining separate civil rights offices for efficiency and shared oversight
- Pros and Cons
- Focus today: common ground and transferrable skills

Poll:

- Does a single office on your campus coordinate Title IX and Title IV responses and/or investigations?

Title IX Investigations

- 2020 Title IX regulations require investigations
- No single investigator process for Title IX cases
 - Still available for sexual misconduct cases that fall outside the jurisdiction of Title IX
- Role of the Investigator:
 - The GATHERER of all relevant evidence
 - The ORGANIZER of all relevant evidence
- Guidance from the 2020 regulations regarding relevance

Title VI Investigations

- Deliberate Indifference standard
 - The obligation to respond typically triggers the need for an investigation
 - OCR directs institutions to have grievance procedures
- May be required by institutional policy before discipline can be imposed
- Single investigator process is permitted (if allowed under institutional policy)

The Importance of Support

- Initially - may or may not be the responsibility of investigators
- However – needs to be an ongoing concern for the campus (aka, “recipient”) in general
- Strong emphasis on support in:
 - 2020 Title IX regulations (even without a Formal Complaint)
 - Recent OCR guidance (even when free speech is a concern)
- Cross-training investigators to be on the lookout for a party in need of support helps with compliance under both Title IX and Title VI
- What does this look like?
 - The need for no contact directives, collaboration with other stakeholders (i.e., housing, academic advisors, etc.), and reports to law enforcement
 - Making people feel comfortable coming to you for support (transferrable between Title IX and Title VI)

The Importance of Good Intake Practices

- May or may not be the responsibility of investigators
- Crucial to understand next steps:
 - If the reported conduct occurred, is it a Policy violation?
 - Where the did the reported conduct occur, and does that affect the institution's ability to respond?
 - Affiliation (or lack thereof) with the institution
- Do you need more information to know what comes next?
 - Recognizing the additional information needed is a transferrable skill between Title IX and Title VI
 - Ex: Impact for hostile environment cases
 - Necessary for both Title IX and Title VI Hostile Environment cases
 - If you don't know about the impact, you don't know whether there's enough to move forward

Clear and Fact-Specific Notices of Investigation

- Know what is required for NOIs under your Policy and relevant regulatory guidance
 - 2020 Title IX Regs = proscriptive (see next slide)
 - Less guidance on the specifics for Title VI – but consider:
 - Due process requirements
 - Transparency in the process
- Does it make sense for Title IX and Title VI Notices to look the same at your institution?
 - Watch for the hearing requirement

Title IX Notices of Investigation

- Title IX Notices of Investigation/Allegations
 - 34 CFR 106.45(b)(2) requires “sufficient details,” including:
 - Identities of the parties (if known)
 - Conduct (give a factual description)
 - Date, time, and /location of alleged incident
- Process information
- Presumption of Non-Responsibility
- Advisor of choice (who may or may not be an attorney)
- False statements prohibited (if applicable)
- Prohibition on retaliation (best practice)

Title VI Notices of Investigation

- No specifics like Title IX, but...
 - Benefits to being consistent
 - Think about whether the process looks different
 - Still a best practice to be fact-specific and advise of rights in the process
 - Presumption of non-responsibility
 - Advisor of choice (who may or may not be a lawyer)?
 - False statements prohibited (if applicable)
 - Prohibition on retaliation (still a best practice)

Setting Expectations for the Process

- Investigators should allow participants to make informed choices
- ALWAYS explain what will happen with the information that is shared
 - Shared with other parties or campus stakeholders?
 - Shared with law enforcement?
 - Is anonymity possible? Under what circumstances?
- Experienced investigators understand how to do this well – which is transferrable under Title IX and Title VI

Sensitivity during Interviews

- Meet people where they are – necessary for both Title IX and Title VI
 - Really listen and ask questions, particularly about impact
 - If you don't understand something, ASK (transferrable between Title IX and Title VI)
- Do your best to avoid repetitive interviews
 - Sometimes it is unavoidable, but when it's not...
 - Get the information you need and avoid asking multiple times
- Allow for written submissions and follow-up questions
- Trauma-informed interviewing is a transferrable skill for both Title XI and Title VI investigations

Sensitivity during Interviews (cont.)

- Remember your ABCs: Advisor, Breaks, Comfort
- Be curious, not judgmental.
- If you sense a question may be misread, explain why you are interested before you pose the question.
 - What were you wearing?
 - Why do you think this was based on [protected category]?
- Not asking the difficult questions now may make the process harder down the road.
- If information doesn't make sense, ask more questions.

Attention to Detail

- Gathering sufficient information is crucial
- Details like:
 - Frequency
 - Duration
 - The specific language used
 - Relationships between the parties
 - Physical interactions

Will impact outcomes in both Title IX and Title VI cases

- Similar elements for Hostile Environment under both laws – knowing how to gather that information is transferrable (see examples on next slide)

Attention to Detail (cont.)

- Follow up questions:
 - If verbal conduct, get examples and determine frequency
 - Ex: “Can you give me examples of the phrases [respondent] used?”
 - Ex: “How often did [respondent] make these comments? Once? Twice? Twice a day for 6 months?”
 - Establish a chronology (if possible – remember what you know about trauma)
 - Get more details and clarify, if needed
 - Explore evidence and witnesses related to specific incidents
 - If important to the case, get a good understanding of location, layout, proximity, etc.
 - Title IX example: Ask for a diagram of the residence hall room where a sexual assault occurred
 - Title VI example: Ask where on campus the harassment occurred and pinpoint the location where access to an academic building was blocked

A Watchful Eye on the Policy Elements

- Remember that offensive or “bad human” conduct may not be a policy violation
 - May require referral elsewhere
 - Recognizing when conduct doesn’t meet the elements is a transferrable skill for both Title IX and Title VI investigations
- If impact is an element – investigate it!

A Watchful Eye on the Policy Elements (cont.)

Title IX Hostile Environment Standard:

- On the basis of sex
- Objectively offensive

Unwelcome
Severe*
Pervasive*
Impact

Title VI Hostile Environment Standard:

- On the basis of race, color, national origin
- Persistent*

Intended as a visual aid only – please confirm the elements identified in YOUR policies

Consistent Interview Practices

- Initial commentary during interviews
- Recording interviews? Summarizing interviews?
 - Feedback from interviewees?
 - Opportunity to review the evidence
 - Required by Title IX
 - Part of your Title VI process, too?
- Recognizing that consistency builds trust – this is true for both Title IX and Title VI investigations
 - Be transparent when you can
 - “What we do for one, we do for the other”
 - Unless there’s a reason not to – in which case, document the reason

Fact-Finding and Policy Analysis**

- Remember – investigators cannot be decision-makers for Title IX cases
- Remember – no hearing requirement currently required for Title VI cases
- However – **the skills of fact-finding and policy analysis are transferrable**
 - Can you cross-train Title IX decision-makers to be Title VI investigators?
 - For Non-Title IX sexual misconduct cases – can your process look like your Title VI process?
- Think about ways to keep processes similar for purposes of clarity for your community – while still being compliant

Training on Best Practices

- Significant overlap in best practices for Title IX and Title VI investigations
- Cross-training may expand your pool of trained investigators
 - Remember training required by the 2020 Title IX regulations
 - Be aware of any state or institution-specific training requirements
- If you're paying for training – can you expand it to cover both topics?
 - Cost savings
 - Efficient

Upcoming Title IX In Focus Webinars

- All of these are free and held at 12:00 p.m. CT/1:00 p.m. ET
- Sign up at www.brickergraydon.com/events
 - April 23rd – Legal History of Title IX
 - May 28th – Title IX Litigation Update

Upcoming Higher Ed Webinars

All of these are free and held at 11:00 p.m. CT/12:00 p.m. ET

- April 8th – The Intersection of Higher Ed and Copyright

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