

Civil Rights and Title IX Training: Level 1

with Kate Davis



Bricker & Eckler
ATTORNEYS AT LAW

Our Presenter: Kate V. Davis

kdavis@bricker.com | 937.535.3902

Kate Davis is an attorney with over 16 years of experience representing educational and other public institutions. Kate frequently partners with K-12 and higher education institutions on a variety of issues, including civil rights and Title IX issues. She has conducted independent investigations for public entities and assists clients with policy revision and training.



Kate's Recent Trainings Include:

- **K-12 Level I TIX General Training** (May-Sep 2020)
- **K-12 Level II TIX Trainings** (June 2020-Jan 2021)
- **New Title IX Regulations: Hot Takes for K-12** (May 2020)
- **K-12 Title IX/Civil Rights Investigator and Coordinator Training** (Jan 2020)
- **Changing Standards: Is Preponderance Right for Your Campus?** (Feb 2019)
- **K-12 Title IX and Sexual Harassment Investigations** (Oct 2018, Feb 2019)
- **Title IX for K-12 Staff and Administrators** (Aug 2018)

Disclaimers

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

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Yes, we will send a copy of the slides after this presentation to all who registered their email address when signing in
- Feel free to submit questions - I will answer them at the end as time permits

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your district electronically to post

Agenda

- Civil Rights Laws
 - Notice of a Complaint
 - Discrimination on the basis of sex
 - Sexual Harassment
 - Hypothetical examples of potential harassment/discrimination
- Mandatory reporting obligations
 - Retaliation
 - District obligations
 - Employee obligations

Additional information
available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
@BrickerEdLaw





Civil Rights Laws: Key Laws, Regulations, and Guidance

Discrimination = Treating people differently

Discrimination is the act of treating people **differently** based on a protected characteristic (or stereotypes based on that characteristic)

- Focus on access to education opportunities, resources, programs
- Disparate treatment in the workplace/school
- Disparate impact claims (neutral policies that have discriminatory impacts)

Common Types of Protected Traits

- Race
 - Color
 - Religion
 - Sex (gender)
 - Military status
 - National origin
- Disability
 - Age
 - Ancestry
 - Marital status
 - Pregnancy
 - Genetic information

Disability Harassment

- Denying participation in or benefits of school's programs and services on the basis of a disability
- Intimidation or abusive behavior based on disability can create a hostile environment
- Look to Policy/Handbook

Title VI and Title VII

- Title VI – “Any program, activity receiving Federal financial assistance”
- Race, color, or national origin
- Contracts, grants, educational activities



Title VI and Title VII

- Title VII – “An unlawful employment practice for any employer...”
- Fail or refuse to hire, or discriminate, on the basis of race, color, religion, sex**, or national origin
- Limit, segregate, or classify employees that would deprive or limit employment opportunities based on...

What does “race” mean?

- Ancestry
 - Physical characteristics
 - Race-linked illness
 - Culture
 - Association
- Perception that someone belongs to a certain race
 - “Race-Plus”
 - Reverse race discrimination

Sex Discrimination and Harassment

Title VII and 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...”

Sex Discrimination under Title IX

34 C.F.R. § 106.31(b)

- Treat one person **differently** from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service
- Provide **different** aid, benefits, or services, or provide aid, benefits, or services in a different manner
- Deny any person such aid, benefit, or service
- Subject any person to separate or **different** rules of behavior, sanctions, or other treatment

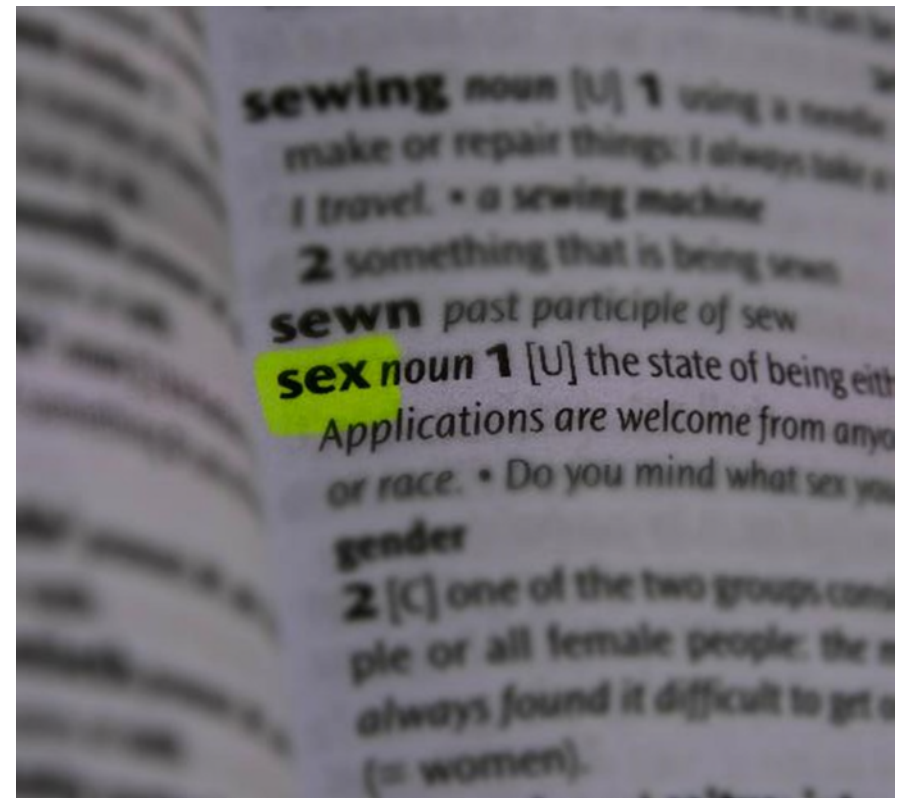
Sex Discrimination under Title IX

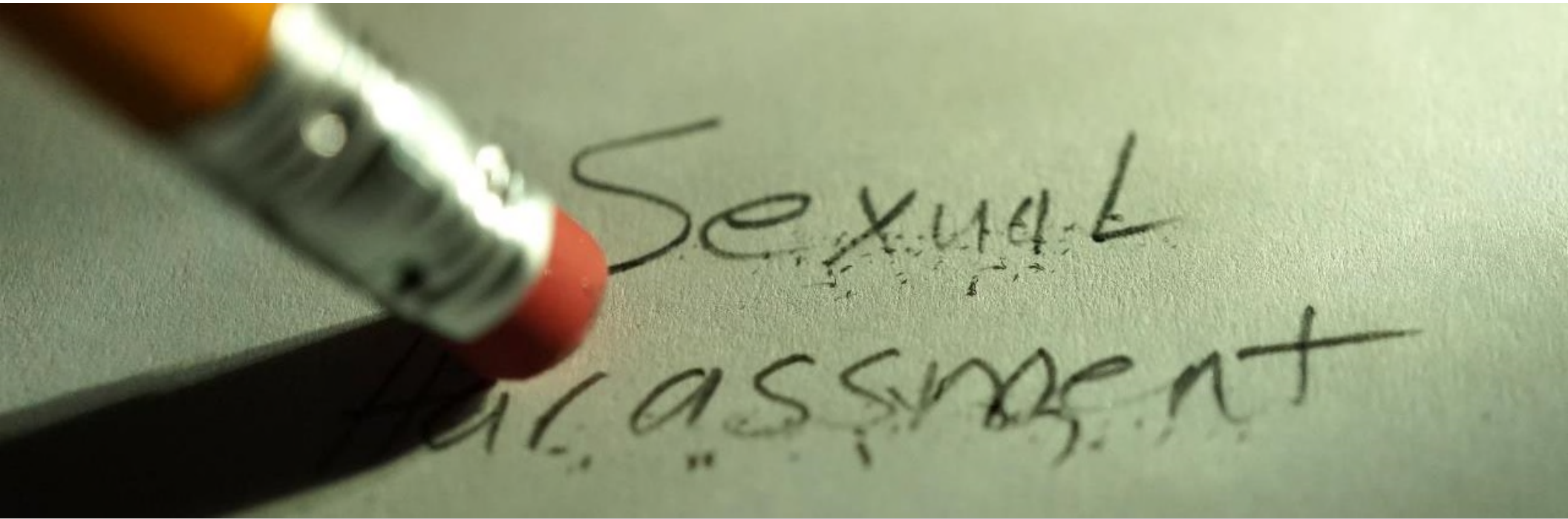
34 C.F.R. § 106.31(b)

- Apply any rule concerning the domicile or residence of a student or applicant
- Aid or perpetuate discrimination against any person by **providing significant assistance to any agency, organization, or person which discriminates on the basis of sex** in providing any benefit or service to students or employees
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity

What does “sex” mean?

- Biological sex
- Gender
- Sex stereotyping
- Sexual orientation**
- “Sex” as a verb





Sexual Harassment Definitions under the New Title IX Regulations

When does a school have notice of a complaint?

Actual knowledge = notice of sexual harassment or allegations of sexual harassment to a recipient's:

- Title IX Coordinator, or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
- **To any employee of an elementary or secondary school**

34 C.F.R. § 106.30(a)

The School's Obligation

A recipient with **actual knowledge** of sexual harassment in an **educational program or activity** of the recipient against a person in the United States, must **respond promptly in a manner that is not deliberately indifferent**. A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

New Definitions of Sexual Harassment under Title IX

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- **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
- **Hostile environment** – 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 education program or activity; or
- **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

Final Regulations Apply to Employees

- Recipients that are subject to both Title VII and Title IX must comply with both
- “Deliberate indifference” standard applies
 - Because Title IX recipients are “in the business of education”
 - “Marketplace of ideas”

Quid Pro Quo

- They do/won't do this, so...
- They will/won't put up with this, so...
- If you do/don't... I will/won't...



Quid Pro Quo

- May involve a power differential
- “Everyone knows that so-and-so...”
- Voluntary conduct between some may put observers in the position of believing that something sexual is necessary to get something favorable

Hostile Environment – What does this look like?

Be aware of things that are **not** elements:

- “Happened more than once”**
- “Parties weren’t dating at the time”
- “Must involve two people of compatible sexual orientations”
- “Must occur on school property” ** (but remember state law restrictions)
- “Must have bad intent”

Jurisdictionally Important

From 34 C.F.R. § 106.44:

“If the conduct alleged in the formal complaint would not constitute sexual harassment... even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient **must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part**; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

Hypothetical #1

- Chuck and Mary Sue are bus drivers
- Chuck asks Mary Sue out on a date
- Mary Sue says no

Hypothetical #1

- Chuck brings flowers and asks again
- Mary Sue says no again

Hypothetical #1

- Chuck asks Mary Sue out over the radio, and Mary Sue says no again
- The transportation supervisor warns them both informally not to discuss personal matters on the radio

Hypothetical #1

- Chuck corners Mary Sue in the break room before the morning route to ask her why she won't date him and won't let her leave until she says yes
- The transportation supervisor writes both of them up for starting their routes late

Hypothetical #2

- Mr. Joe is a well-loved teacher
- He is always commenting on how pretty his female students look
- Josie, a student, is his helper and comes to his room during fourth period class to grade papers
- Josie's mother brings you text messages that Mr. Joe has been sending to Josie (not sexual in nature)

Hypothetical #3

- One of your newer teachers is a person of color
- She has struggled with communicating with parents, disciplining students appropriately, classroom management, and curriculum
- She is claiming that her non-renewal is due to race discrimination

Hypothetical #4

- A student approaches a trusted teacher after class and mentions that she was at a party last Friday night
- The student tells the teacher she was kissing another student at the party and then he reached down her pants and touched her in a way that made her uncomfortable after she told him to stop
- The student asks the teacher not to tell anyone, saying she “doesn’t want to make a big deal out of it”

Hypothetical #5

- You're a custodian in the school district
- While working in the boys' locker room one evening, you overhear a student complaining to his friend about the annual "hazing ritual" that happens in the locker room
- The student tells his friends that he's "dreading the towel on his privates..."

Mandatory Reporting

- Child Abuse
- Felonies
- If a school employee engages in sexual conduct with a student, it must be reported
 - Even if the student is 18
- ODE Conduct Reporting



Retaliation

Section added to new Title IX regs

Retaliation defined in part: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...”

34 C.F.R. § 106.71

Retaliation

- Report this **immediately** to the Title IX Coordinator
- Is there already a no-contact order and, if not, do you want one?
- Adverse action against an individual
- Abuse, violence, threats, and intimidation
- More than just someone expressing their opinion

District Obligations

- Update district policies
 - Address complainant and provide supportive measures
 - Mandatory reporting
 - Informal resolution
- Investigation
 - Formal grievance process:
 - Notice
 - Report
 - Decision
 - Appeal

Employee Obligations

- Know who the District Title IX Coordinator is (their information will be posted on the school's website)
- Recognize a potential Title IX violation
- Report any potential Title IX violation to the Title IX Coordinator **the same day** you receive notice of it
- Review your district's anti-discrimination and anti-harassment policies as soon as they are updated

How do you make a report on your own behalf?

- Promptly report incidents of unlawful discrimination and/or retaliation to your District's Title IX Coordinator so that the Board may address the conduct
- Remember – retaliation is prohibited



How do you make a report on your own behalf?

- The Title IX Coordinator can describe for you the difference between formal and informal complaints, discuss the criminal reporting process, determine appropriate supportive measures, and identify other available resources
- You can then choose how you wish to proceed (i.e., a formal or informal resolution process)

How do you make a report on your own behalf?

- If you make a report, the Title IX Coordinator should discuss **supportive measures** with you
- May include counseling, extensions of deadlines, modifications of work or class schedules, escort services, mutual no-contact orders, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures

Key Takeaways for Staff

- Understand the definition of sexual harassment
- Know to whom you should report any complaints of sexual harassment (whether witnessed yourself, or reported to you by someone else)
- Recognize or know responsibility to report any acts of retaliation
- Understand supportive measures you may need to help implement

Key Takeaways for Administrators

- Everything listed in the previous slide for staff
- Update the Title IX policy by **August 14, 2020**
- Follow notice and posting requirements for anti-discrimination, Title IX policies, and training materials

Training Requirements for Your Title IX Team

- The definition of sexual harassment as defined in 34 C.F.R. § 106.30
- The scope of the district's education program or activities
- How to conduct an investigation
- How to consistently apply definitions used by the district with respect to consent (or the absence/negation of consent)
- The grievance process, including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially and avoid prejudgment of facts at issue, conflicts of interest, and bias

Bricker's Title IX Toolkit

More info at k12tixtoolkit.bricker.com

Model Sexual Harassment Intake Form

Employee Completing Intake: _____
First Name Last Name Po

Complainant(s): [complete and attach an intake form for each Complainant]

• Name: _____
First Name Last Name

• Student: Age _____ Grade in school _____

Employee: Position _____ Building _____

• Contact Information (and parent/guardian contact information if minor student)

Person(s) Reporting [if different from Complainant(s)]:

First Name Last Name

Title IX Flowchart



Upcoming K-12 Trainings

Register at: www.bricker.com/events

Level 1

- General Title IX Training: Jan 28

Level 2

- TIX Report Writing Training: Jan 20
- TIX Informal Resolution Training: Jan 25
- New dates in Feb. and March TBD

Thank you for attending!

Remember – additional information available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
@BrickerEdLaw

