


HIGHER EDUCATION: ANNUAL CLERY TRAINING AND INTRODUCTION TO TITLE IX BASICS

Title IX Training

LEVEL ONE



Disclaimer

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.
- This training satisfies both annual Clery training and some of Title IX–required training (explanation in later slide).
- Use the chat function to ask general questions and hypotheticals, or raise your hand—this is a meeting setting so we can discuss issues.
- This training is not being recorded, but you may post the PDF of the slides on your websites for Title IX compliance.

Presentation Rules



- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Aspirational Agenda Day 1



Level 1: Higher Education: Annual Clergy Training And Introduction to Title IX Basics

Day 1: (all times are EST)

- 2:00-2:10 Introduction: Overview of training requirements
- 2:10-2:20 Ethic of Care and Themes of Title IX
- 2:20-3:15 Sexual Violence Data and Statistics
- 3:15-3:30 Break
- 3:30-5:00 Law & Regulation: Overview of law, existing guidance, and the new Title IX Regulations with focus on “educational program or activities”

Aspirational Agenda Day 2



Level 1: Higher Education: Annual Clergy Training And Introduction to Title IX Basics

Day 2: (all times are EST)

- 2:00-3:15 Sexual Harassment under Title IX, employees, mandatory and discretionary definitions
- 3:15-3:30 Break
- 3:30-5:00 Continue Sexual Harassment: Mandatory and Discretionary/Avoiding Sex and Cultural Stereotypes

Posting these Training Materials



- Yes!
- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on it’s website
- You should have already received a copy of the slides. If not, please let us know in the chat.

Training Requirements – Title IX Regulations



“A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training of **sexual harassment in §106.30**, the scope of the recipient’s **education program or activity**, how to **conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable**, and how to serve **impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**” §106.45(b)(1)(iii)

Training Requirements - Clery Act



Under the Clery Act, those involved in the disciplinary process must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

Training Requirements - Today's Training



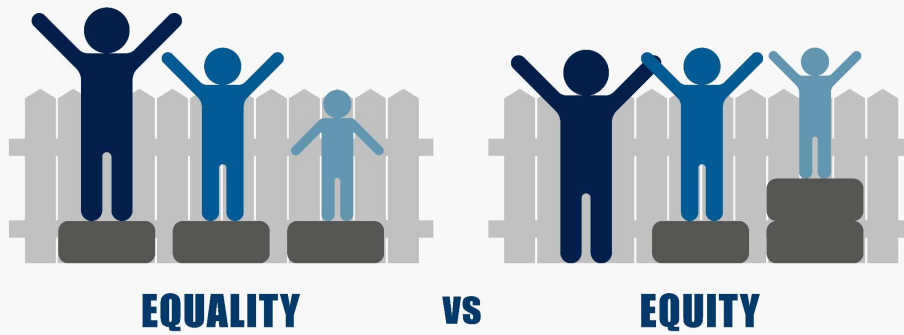
Additional specific training requirements apply to different members of the Title IX team. All require training on the definition of “sexual harassment” under the Regulations.

Today's training covers:

- “educational program or activity,”
- the definitions under §106.30 for “sexual harassment,”
- annual Clery training, and
- avoiding cultural and sex stereotypes.

TITLE IX TODAY: Themes

Title IX is an Equity Statute



Ethic of Care



- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?

Overview of Themes



Themes - Access



- It is meant to ensure ACCESS to your programs and activities, regardless of sex.
- “What we do for one, we do for the other” (or at least consider whether it is appropriate under the circumstances)
- Why are you treating someone differently?

Themes – Duty to Protect



- We have an obligation to **PROTECT** our campus.
 - **“They are all our students.”**
 - Supportive measures
 - Any action by a recipient that results in changes or removal of access to education for respondents will require a process to respond (if interim emergency measure) or engage in live cross-examination (if formal process that could lead to disciplinary action).

Themes - Transparency



- **TRANSPARENCY** is key to trusting the process.
 - Know your grievance process
 - Help them understand next steps.

**Themes –
Evidence Based Decisions**



- We base decisions on **EVIDENCE**.
 - **“Don’t weigh your gut.”**
 - We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.

**Themes –
Always Room for Improvement**



Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

Themes – Avoid Conflicts of Interest, Bias



- Always be working to avoid actual or perceived:
 - Conflict of interest:
 - Bias

Institutional Duties and Interests vs. Personal interests

Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to reset them to neutral.

SEXUAL VIOLENCE:

Data and statistics

Data and Statistics - Disclaimer



- More Disclaimers
 - These should not influence your decision in any particular Title IX case
 - We didn't do the research ourselves and can't vouch for it
 - Some of the studies use the terms Offender, Victim, and Rape. Please use policy definitions (complainant, respondent) when you handle Title IX cases.
 - Okay but really, statistics SHOULD NOT influence your decision in any particular Title IX case

Sexual Assault Data 1 of 3



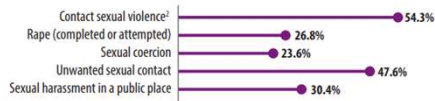
- Nearly 1 in 2 women and about 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.
- 1 in 4 women and about 1 in 26 men will experience completed or attempted rape during their lifetimes.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatriwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data 2 of 3

Figure 1

Lifetime Reports of Sexual Violence — U.S. Women, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.

² Contact sexual violence includes rape, sexual coercion, and/or unwanted sexual contact.

Types of Sexual Contact Reported by U.S. Women:

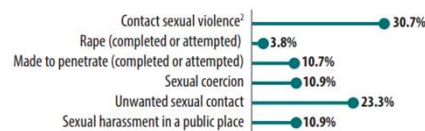
- 54.3% reported sexual violence;
- 26.8% experienced completed or attempted rape;
- 23.6% experienced sexual coercion;
- 47.6% reported experiencing some form of unwanted sexual contact other than those specifically identified elsewhere.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khattiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
Located at: [Link to survey: CDC website](https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf)

Sexual Assault Data 3 of 3

Figure 2

Lifetime Reports of Sexual Violence — U.S. Men, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.

² Contact sexual violence includes rape, being made to penetrate, sexual coercion, and/or unwanted sexual contact.

Types of Sexual contact reported by U.S. Men:

- 30.7% reported some form of sexual violence
- 3.8% experiencing completed or attempted rape,
- 10.7% made to penetrate, 10.9% experiencing sexual coercion,
- 23.3% experiencing some other form of unwanted sexual contact.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khattiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data: Prevalence Data in Higher Ed



- More than **50 percent** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in **September or October, particularly for first year students.**

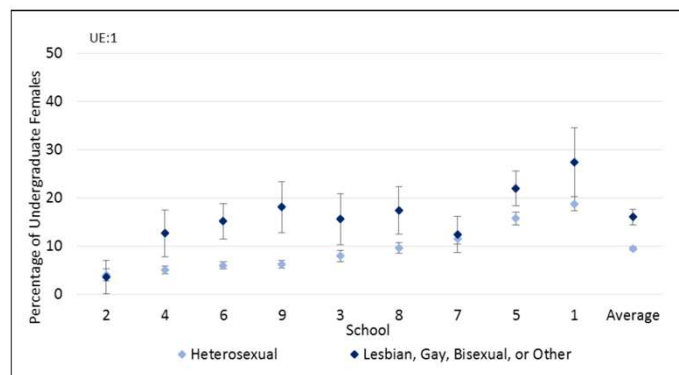
Statistic one: "Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics.*" RAINN Sourced from: "Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsiu, et. Al, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, Journal of American College Health (2008)."

Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

Sexual Assault Data

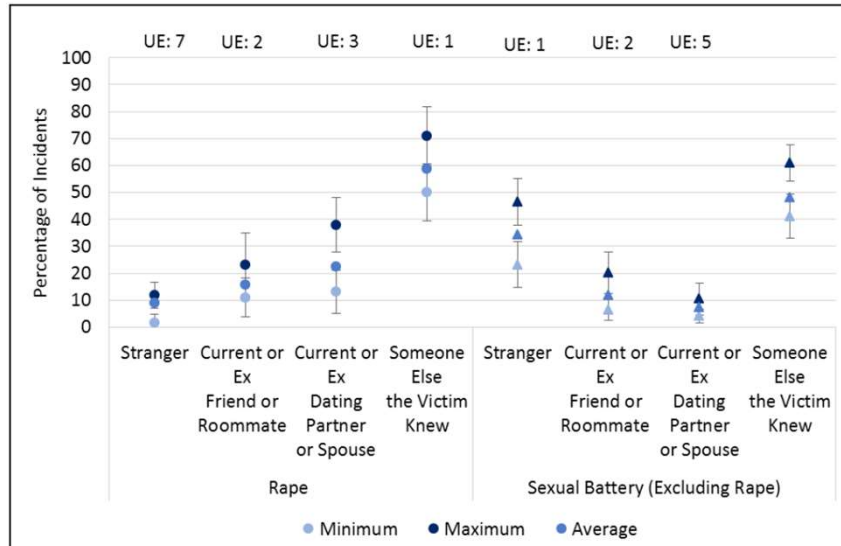


Prevalence of Sexual Assault reported by Non-heterosexual female students



Source: Campus Climate Survey Validation Final Technical Report (2016)

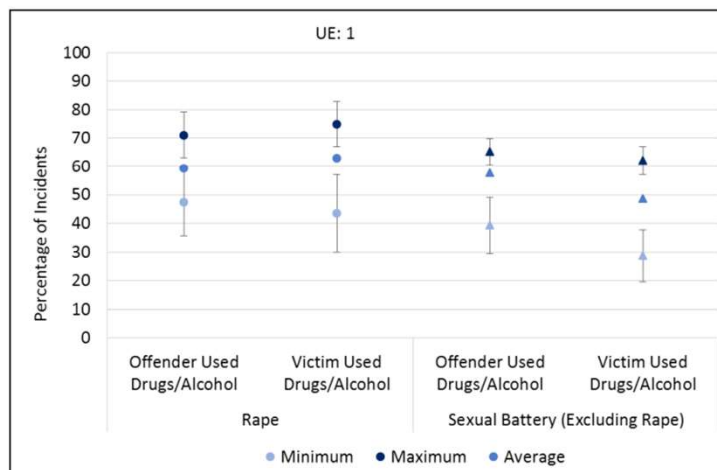
Sexual Assault Data: Identity of Perpetrator



Source: Campus Climate Survey Validation Final Technical Report (2016)

Sexual Assault Data: Alcohol/Drug Use

Figure 28. Minimum, maximum, and overall average estimates of the percentage of rape and sexual battery incidents experienced by undergraduate females that were believed to involve offender and victim alcohol/drug use, 2014–2015 academic year



Source: Campus Climate Survey Validation Final Technical Report (2016)

Sexual Assault Data: Alcohol/Drug Use



“Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims.”

Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25,10 (2016): 1058-1078. doi:10.1080/10926771.2016.1219801.

Data and Statistics: Reporting Data



- About 65 percent of surveyed rape victims reported the incident to a friend, a family member, or roommate but only ten percent reported to police or campus officials.

U.S. Dep’t of Justice, Office of Justice Programs, Office for Victims of Crime, *2017 National Crime Victims’ Rights Week Resource Guide: Crime and Victimization Fact Sheets* (2017).

Data and Statistics: Impact Data 1 of 2



- Approximately **70 percent** of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.

U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime (2014)*.

Data and Statistics: Impact Data 2 of 2



- **81% percent** of women and **35% percent** of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD).

Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS); 2010 Summary Report (Nov. 2011).

Sexual Harassment Data



Percentage of females versus males on experiencing different forms of sexual harassment:

Sexual harassment: Female Gender 62%; Male gender 61%

Sexual comments: Female gender 57%; male gender 48%

Grabbed: Female 28%; Male 22%

Called homophobic name: Female 13%; male 37%

Cornered sexually: Female 13%; male 10%

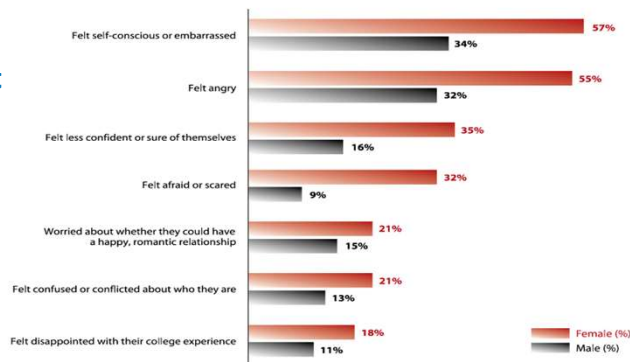
Forced to kiss: Female 7%; male 8%

Sexual postings: Female 6%; male 12%

American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005)."

Sexual harassment has a statistically significant heavier toll on female students

Figure 7. Reactions to Sexual Harassment Experiences (By Gender)



Returning to the subject of impact – this report from the American Association of University Women showed that sexual harassment has a statistically significant heavier toll on female students when it comes to feeling embarrassed, angry, less confident in themselves, afraid, worried about future relationships, confused, and disappointed with their college experience.

American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005)."

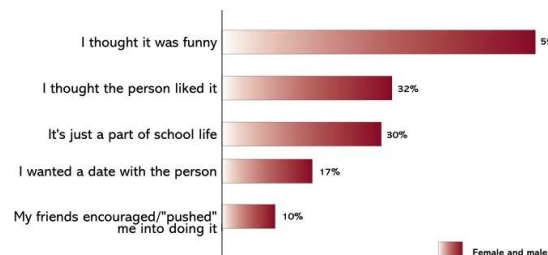
Sexual Harassment Data



- LGBT students are more likely to be sexually harassed and have negative emotional and behavioral responses to harassment.
- 73% of the LGBT students report harassment (versus 62% of heterosexual students).

American Association of University Women Educational Foundation,
Drawing the Line: Sexual Harassment on Campus (2005).

The most common rationale for harassment (59%) is “I thought it was funny.”

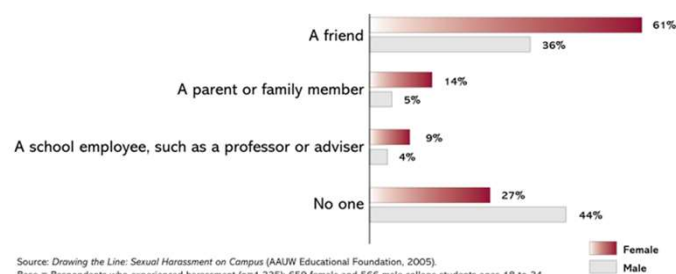


Source: Drawing the Line: Sexual Harassment on Campus (AAUW Educational Foundation, 2005).
Base = Those who say they ever harassed someone (n=776); 451 male and 325 female college students ages 18 to 24.

32% said “I thought the person liked it.” 30% said “It’s just a part of school life.” 17% said “I wanted a date with the person.” and 10% said “My friends encouraged/pushed me into doing it.”

Less than one-fifth (17%) admitted to harassing others *because they wanted a date with the person*

Many students do not report to anyone that they have been harassed



61% of females and 36% of males report the harassment to a friend. 14% of females and 5% of males report to a parent or family member. 9% of females and 4% of males report it to a school employee such as a professor or adviser. And 27% of females and 44% of males report it to no one.
 Why are males less likely to report?

Data and Statistics: Reporting Data.



Research shows that students are deterred from reporting sexual harassment and assault for the following reasons:

- Policies that compromise or restrict the victim's ability to make informed choices about how to proceed;
- A desire to avoid public disclosure
- Concerns about confidentiality
- Uncertainty as to whether they can prove the sexual violence or whether the perpetrator will be punished
- Campus policies on drug and alcohol use
- Policies requiring victims to participate in adjudication
- Trauma response
- The desire to avoid the perceived or real stigma of having been victimized

U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities are Doing About It (2005).*"

Stalking Data 1 of 2



- **31.2%** of women and **16.1%** of men in the U.S. reported stalking victimization at some point in their lifetime.
- **43.4%** of female victims and **32.4%** of male victims of stalking are stalked by a **current or former intimate partner**.
- Over **85%** of stalking victims are stalked **by someone they know**.

First and second statistics: Smith, S.G., Basile, K.C., & Kresnow, M. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking — Updated Release*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

Third statistic: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

Stalking Data 2 of 2



- **11%** of stalking victims have been **stalked for 5 years or more.**
- **46%** of stalking victims experience **at least one unwanted contact per week.**

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011")]

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7])

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJJS, 2009).]

Impact of Stalking on Victims 1 of 2



- **46%** of stalking victims fear not knowing what will happen next.
- **29%** of stalking victims fear the stalking will never stop.

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJJS, 2009).]

Impact of Stalking on Victims 2 of 2



- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJJS, 2009).]

- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.

[Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

LAW AND REGULATION

Terminology 1 of 3



- “Complainant” – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)
- “Respondent” – “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)

Terminology 2 of 3



- “Recipient” – “means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, **any public or private** agency, **institution**, or organization, or other entity, or any person, **to whom Federal financial assistance is extended** directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.” §106.2

Terminology 3 of 3



- “Post-secondary institution”- “an institution of graduate higher education as defined in §106.2(l), and institution of undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o).” §106.30(b)

What applies? 1 of 3



- Law – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106
 - Athletics, employment, admissions, housing, etc.
- Clery – 20 U.S.C. 1092(f); 34 C.F.R. 668.46; Clery Appendix
 - The Clery Handbook has been withdrawn but can still be helpful

What applies? 2 of 3



Guidance Documents from USED:

- T9 Q&A - July 2021 (Updated June 28, 2022)
- Notice of Interpretation – Gender Identity in Light of Bostock (Enjoined in certain states due to litigation)
- Limiting Use of Statements by Parties and Witnesses Not Subject to Cross-Examination at Live Hearing – 8/24/2021
- OPEN Title IX Q&A Parts 1 and 2 - January 15, 2021

All guidance in effect may be found on USED's Policy Guidance Portal located at:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

Rescinded Guidance



- 2017 DCL + T9 Q&A on Campus Sexual Misconduct
-> Rescinded on 8/26/2020
- 2011 DCL on Sexual Violence
-> Rescinded on 9/22/2017
- 2016 DCL on Transgender Students
-> Rescinded on 2/22/2017

Database of all Rescinded Title IX Guidance available at:
[Dept of Education OCR; Rescinded Guidance website](#)

What applies? 3 of 3



- Case Law
 - Supreme Court, federal courts
 - State courts
 - Look to other court decisions for persuasive authority

And of course...



The Current Title IX Regulations
effective Aug. 14, 2020.

Current Regulations



“Non-negotiable principles” include the right of every complainant to be taken seriously and the right of every respondent to know that they are not assumed to be responsible for a policy violation.
(30059 and throughout)

- Training requirements
- Different definitions
- Different processes

Overview of the Process 1 of 2



- Not every employee has to be a mandatory reporter in the postsecondary institution
- This is so complainants can talk to employees without having to initiate the Title IX process

Check your policy and confer with your GC or Compliance officer on applicable state laws

Overview of the Process 2 of 2



1. Report
2. Supportive Measures
3. Formal Complaint
4. One of three options here –
 - a. Informal resolution;
 - b. Dismissal; or
 - c. Formal grievance process
5. Formal grievance process includes investigation, hearing, determination, and appeal

Overview of the Process: 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** (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process

Overview of the Process: **Formal Complaint**



A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer the complainant supportive measures (even if the complainant does not want to file a formal complaint)

Overview of the Process: **Formal Grievance Process 1 of 4**



Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed (assuming they in fact violated the policy)

Overview of the Process: **Formal Grievance Process 2 of 4**



- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require an individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias

Overview of the Process: **Formal Grievance Process 3 of 4**



- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)

Overview of the Process: **Formal Grievance Process 4 of 4**



- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege

Overview of the Process: **Written Notice 1 of 2**



- Recipient's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice

Overview of the Process: **Written Notice 2 of 2**



- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation

Overview of the Process: **Dismissal**



- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
 - If conduct alleged would not constitute sexual harassment, even if proven, OR
 - Conduct did not occur within recipient's education program or activity or in the United States OR
 - Complainant was participating or attempting to participate in the recipient's program or activity??

Overview of the Process: **Investigation 1 of 4**



- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient, not either party
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

Overview of the Process: **Investigation 2 of 4**



- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

Overview of the Process: **Investigation 3 of 4**



- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party’s advisor with at least 10 days to submit a written response before completion of investigation report

Overview of the Process: **Investigation 4 of 4**



- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party’s advisor

Overview of the Process: **Hearings**



- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed
- Decision-maker makes live relevancy determinations after each question asked by advisors

Overview of the Process: **Determinations 1 of 3**



- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
 - Allegations
 - Procedural steps taken from receipt of formal complaint

Overview of the Process: **Determinations 2 of 3**



- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

Overview of the Process: **Determinations 3 of 3**



- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

Overview of the Process: **Appeals 1 of 2**



- Recipient must offer to both parties the following bases of appeal (can offer more by policy):
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

Overview of the Process: **Appeals 2 of 2**



- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

Overview of the Process: **Informal Resolution 1 of 2**



- Informal Resolution is an optional process
- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed

Overview of the Process: **Informal Resolution 2 of 2**



- Recipient can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process
 - Does not offer for allegations of employee sexual harassment of a student

Overview of the Process: Retaliation



- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because a person made a report or complaint, or participated or refused to participate in the process

Overview of the Process: Confidentiality



Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process**.

Jurisdiction



- 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.

Jurisdiction - Scope



“Education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

§106.30(a)

Education Program or Activity



Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

Online Study



- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in your educational program or activity
- And in the United States...

Education Program or Activity



Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house

Not an Education Program or Activity



Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Jurisdiction



- No obligation to address off-campus conduct that does not involve a program or activity of school BUT
- “Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.”

Off Campus? 1 of 2



Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient’s “operations” (meaning as a “recipient” as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

Off Campus? 2 of 2



(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

Study Abroad Programs



- Title IX draws a bright line: plain text of Title IX states “no person in the United States” is protected, which means you must dismiss anything that occurred against a person outside the USA. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States are covered.

Jurisdiction and Mandatory Dismissal 1 of 3



Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, ...

Jurisdiction and Mandatory Dismissal 2 of 3



or **did not occur against a person in the United States**,

Jurisdiction and Mandatory Dismissal 3 of 3



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.**

Jurisdictional Hypotheticals



“In an educational program or activity”?

Jurisdictional Hypotheticals **Disclaimer**



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Jurisdictional Hypotheticals **Questions**



For each of the following hypotheticals, you will need to determine whether there is jurisdiction under the Title IX Regulations based on the facts as provided.

Jurisdictional Hypotheticals **Answer Options**



After review of each hypothetical, you will be prompted via zoom poll to answer by voting whether:

- Yes, there is jurisdiction
- No, there is not jurisdiction
- I'm not sure (we only give you this option because we are nice)

Jurisdictional Hypotheticals **Analysis**



To answer these questions, think through the elements for jurisdiction:

- In an educational program or activity?
 - In the United States?
 - On campus?
 - If off campus,
 - Exercise substantial control over Respondent and context?
 - Off campus building owned or operated by student group recognized by institution?

Hypothetical 1

Charlie, a student, informs the Title IX Coordinator or designee that she was sexually assaulted at a party over the weekend, by another student she knows, Rook. Charlie states that the party and assault occurred at In-between Apartments. Charlie believes this is part of campus. In-between Apartments is a complex directly behind the university and sits in between two university-owned senior apartment complexes, but In-Between is owned by a private landlord.

Hypothetical 2

Taylor, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted him at a fraternity party over the weekend. The fraternity house is affiliated with the university, but the university does not own the house and the house is located off-campus.

Hypothetical 3

The university has partnered with the city for an improvement district along the main street that runs through campus. The improvement district removes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime. Kayla, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted her on the main street in front of campus over the weekend.

Hypothetical 4

Rebecca, a student, calls the Title IX Coordinator or designee frantically from Argentina, where she is enrolled in the university's "Argentina Program," in which professors and students from the university hold courses at a sister university in Buenos Aires. Rebecca states that one of the university's professor's told her that she could only get an A in the course if she slept with the professor.



Sexual Harassment

Sexual Harassment - 3 Classifications



- **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;
 - **[Unwelcome conduct]** 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

Sexual Harassment: **Quid Pro Quo**



- Only applies to employee respondents (can be any complainant)
- USED interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

Sexual Harassment: **Davis/Gebser**



- The second prong: severe, persistent, and objectively offensive and deny equal access (vs. Title VII: severe, persistent, or pervasive)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe



- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics/protected classes
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive



- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that Quid Pro Quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive



Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Sexual Harassment Considerations



The preamble notes that the Regulations do not prohibit postsecondary institutions from:

- Publishing a list of situations that would violate Title IX as “sexual harassment”
- Advising when similar conduct has been found to violate Title IX
- Publishing a list of situations that would violate the code of conduct (30158)

Applies to Employees 1 of 5



- Whether Employees could bring suit under Title IX was unsettled in most Circuits. Now, several Circuits have addressed this issue and are split on it. While the Title IX policy applies to employees, some courts have ruled that they cannot bring a private lawsuit under Title IX, only Title VII.
- Enter **Title VII**
 - Commentary notes that “severe or pervasive” definition (Title VII) shouldn’t apply because elementary, secondary, and postsecondary schools are unlike the adult workplace. (Pages 43-44)
 - *Davis* case – 5th grade students
 - Instead - “**severe, pervasive, and objectively offensive**”

Applies to Employees 2 of 5



Near the beginning of the preamble, the Department noted:

“The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application **would equate workplaces with educational environments**, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments.” (30037 of preamble).

Applies to Employees 3 of 5



But towards the end of the preamble, the Department clarified:

- “The Department appreciates support for its final regulations, which apply to employees.” (30439)
- No “inherent conflict” between Title VII and Title IX (30439)
- Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students (30440)

Applies to Employees 4 of 5



The preamble clarified:

- Recipients that are subject to both Title VII and Title IX must comply with both (30440)
- “Deliberate Indifference” standard “most appropriate” for both Title VII and Title IX (30440)
- Because Title IX recipients are “in the business of education”
- “Marketplace of ideas” makes postsecondary institutions special

Applies to Employees 5 of 5



- Conflicts between Title VII and Title IX noted by Commenters:
 - Formal complaint requirement
 - Notice requirement
 - Deliberate Indifference Standard (noted above)
 - Definition of Sexual Harassment
 - Live hearing if public (as opposed to notice and opportunity to respond)



HIGHER EDUCATION: ANNUAL CLERY TRAINING AND INTRODUCTION TO TITLE IX BASICS

**TITLE IX TRAINING:
LEVEL ONE**



What we covered on Day 1



Level 1: Higher Education: Annual Clery Training And Introduction to Title IX Basics

Day 1: (all times are EST)

- 2:00-2:10 Introduction: Overview of training requirements
- 2:10-2:20 Ethic of Care and Themes of Title IX
- 2:20-3:15 Sexual Violence Data and Statistics
- 3:15-3:30 Break
- 3:30-5:00 Law & Regulation: Overview of law, existing guidance, and the new Title IX Regulations with focus on “educational program or activities”

Aspirational Agenda Day 2



Level 1: Higher Education: Annual Clery Training And Introduction to Title IX Basics

Day 2: (all times are EST)

- 2:00-3:15 Sexual Harassment under Title IX, employees, mandatory and discretionary definitions
- 3:15-3:30 Break
- 3:30-5:00 Continue Sexual Harassment: Mandatory and Discretionary/Avoiding Sex and Cultural Stereotypes

Definitions Disclaimer



This next section of the presentation uses the terms such as “rape,” “victim,” and “perpetrator”, and “sodomy.”

These are the CRIMINAL terms, not POLICY terms, but they are the definitions that apply according to the Title IX regulations.

Mandatory: Sexual Assault, Dating Violence, Domestic Violence, & Stalking



Third prong refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI’s Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
- Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

Sexual Assault Definition - FBI UCR & NIBRS



- The FBI UCR provided definitions for Sexual Assault under two different databases, the SRS and the NIBRS.
- The FBI retired the SRS in January of 2021, so the NIBRS database is the best source of Sexual Assault definition available.

Campus Considerations:

- The specific offenses covered in the NIBRS definitions of Sexual Assault must be prohibited by your policy.
- You do not have to track word for word, as long as the behavior is covered.
- Ex – Sodomy may be viewed as a derogatory term in the LGBTQ Community.

Sexual Harassment: Sexual Assault as Defined in NIBRS



“Sexual Assault” includes:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

Sexual Assault: Rape - NIBRS Manual 2021



“Rape” means the **carnal knowledge** of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

Sexual Assault: Rape USED Guidance 2020



- “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of complainant, without the consent of the complainant.”

Sexual Assault: Sodomy



“Sodomy” means **oral or anal sexual intercourse** with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault: With an Object



“Sexual Assault with an Object” means use an object or instrument to unlawfully **penetrate**, however slightly, the **genital or anal opening** of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An object or instrument is anything used by the offender **other than the offender’s genitalia**, e.g., a finger, bottle, handgun, stick.

Sexual Assault: Fondling



“Fondling” means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault: Incest



“Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

- State Law Considerations

Sexual Assault: Statutory Rape



“Statutory Rape” means sexual intercourse with a person who is under the statutory age of consent.

Ex. In Ohio:

- Under 13 → can’t consent
- Under 16 → can’t consent to those older than 18

*Consult with your GC or Compliance office on your state’s Age of Consent rule.

Sexual Harassment: Dating Violence



“Dating Violence” means an act of violence committed by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

Sexual Harassment: Domestic Violence



“Domestic violence” is an act of violence committed by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction

Sexual Harassment: Stalking



“Stalking” is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

Stalking: On the basis of sex



The preamble distinguishes between stalking and stalking on the basis of sex (only the latter of which falls under Title IX):

- Recognition that stalking does not always relate to sex and therefore do not always fall under Title IX (ex. celebrity stalking)
- See footnote 772 on 30172– “Stalking that does not constitute sexual harassment because it is not ‘on the basis of sex’ may be prohibited and addressed under a recipient’s non-Title IX codes of conduct”

Stalking: Course of Conduct



“Course of Conduct”

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Stalking: Reasonable Person



“Reasonable person”

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

Stalking: Substantial Emotional Distress



“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Sexual Harassment Hypotheticals



Is this “sexual harassment”
under Title IX?

Sexual Harassment Hypotheticals Disclaimer



*Disclaimer: The following hypotheticals
are not based on any actual cases we have
handled or of which we are aware. Any
similarities to actual cases are coincidental.*

Sexual Harassment Hypotheticals **Bricker** **Questions** **Graydon**

For each of the following hypotheticals, you will need to determine whether the allegations, if proven true, would constitute sexual harassment under the Title IX Regulations based on the facts as provided. Assume jurisdiction exists.

Sexual Harassment Hypotheticals **Bricker** **Answers** **Graydon**

After review of each hypothetical, you will be prompted to answer by voting whether:

- Yes, this is sexual harassment
- No, this is not sexual harassment
- I'm not sure (you only get this option because we are nice)

Sexual Harassment Hypotheticals Reference

- 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;
 - [Unwelcome conduct] 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

Hypothetical One



Complainant tells the Title IX Coordinator that Respondent, a fellow student in her ceramics class, jokingly commented that her sculpture could, "lose some weight." Complainant stated that this piece was meant to be a self-portrait, and that the comment was devastating to her because she considers herself overweight and interpreted this as an attack on her about her weight.

Hypothetical Two



Complainant tells the Title IX Coordinator that his boyfriend hit him in the face after they returned from drinking downtown, and wants to file a complaint against him. Complainant states that this occurred two years ago in the beginning of their relationship, but they just broke up and he felt he should report it. Complainant stated that this only ever occurred once.

Hypothetical Three



An anonymous letter to the Title IX Coordinator states that a video is circulating among students of Respondent, a student, having sex with Complainant, another student, who appears to be unresponsive.

Hypothetical Four



Complainant, a student, alleges that her partner, another student, created a sculpture of her naked using the school's 3D printer in the library. Several students and employees saw the nude sculpture and recognized it as Complainant. Complainant stated that she just found out about the sculpture when a friend texted her a photo of the sculpture.

Hypothetical Five



Complainant, an employee, tells the Title IX Coordinator that Respondent, an unknown person on campus who may be a student, has been following Complainant around campus. Whoever it is has key card access to buildings. Complainant states that she often catches Respondent staring at her at different location around campus (cafeteria, library, outside her classroom). Complainant states she is scared because she is often alone at night on campus.

Combining Mandatory Regulation Language

With discretionary policy language

Discretionary: Consent, Coercion, Incapacitation, Exploitation Bricker Graydon

- Discretion is left to the institution on consent, coercion, and incapacitation, which, as we will discuss, allows institutional discretion on the extent of these violations, especially under “sexual assault”
- Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination (30166)

Consent: Left to the Institutions to Define



USED left “consent” and terms that often negate consent to the discretion of the recipients to “reflect the unique values of a recipient’s educational community.” (30159, see also 30174)

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

Who Can *NEVER* Give Consent?



- Those who are unable to consent by law (ex. minors, incarcerated persons)
- Severely cognitively disabled persons
- Those who are incapacitated

Consent 1 of 2



- Some policies require:
 - Clear – (Non verbal v. verbal) communication
 - Knowing - Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
 - Voluntary - Freely and actively given
 - Consent for activity with one person does not transfer to another person

Consent 2 of 2



- Some policies include:
 - May be withdrawn with clear communication
 - Consent for one activity is not consent for everything
 - Silence or failure to resist does not constitute consent
 - Previous consent does not constitute consent for future activities

When Does Consent *NOT* Exist?

- Use of physical force or threats of physical force,
 - Many policies also include physically intimidating behavior or coercion

Evidence of Consent? 1 of 2

- What words or actions did complainant use to convey consent/non-consent?
 - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting?
(Asleep? Passed out? Not understanding what was happening?)

Evidence of Consent? 2 of 2



- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- Who was in position of physical advantage?
- “They gave consent” = What did you say to them, and what did they say to you?

Coercion: Left to Institution to Define



- Is this in your policy?
 - Does your TIX team, your preventive education team, and your local rape crisis center agree on a definition when working with your community?
- Often defined as unreasonable pressure for sexual activity
- Compare: “I will break up with you” versus “I will kill myself”

Incapacitation: Left to Institution to Define



- State of being unconscious, asleep, or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Intoxicated people **can** consent. Incapacitated people **cannot** consent.

Incapacitation: Amnesty?



Nothing in the Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation

Incapacitation 1 of 2



- Determined by how the alcohol (or drugs) consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments
- Beyond mere intoxication
- No requirement for incapacitation to be voluntary or involuntary on the part of the complainant

Incapacitation 2 of 2



- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**
- Incapacitation of the respondent is not a defense

Productive Questioning on Gauging Intoxication



Difficult to gauge:

- How trashed were you?
- On a scale of 1-10, how drunk were you?
- Why did you get that drunk?

Preferable approach:

- Explain why you need the information
- Don't place blame

Any Drugs?



- Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?
- Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?
- What, how much, and when?
- Remember: can have amnesty in your policy for personal drug and alcohol use (also a good way to avoid institutional retaliation!) at 30536

Physical Effects



Some policies list physical effects that are not solely indicative of, but may indicate incapacitation:

- Conscious or unconscious
- Vomiting
- Slurred speech
- Difficulty walking
- Difficulty holding a coherent conversation

Blackout ≠ Incapacitation



- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- Listen carefully to the way they describe what they remember. Does it fit with what you know about intoxication and recall?



Myths and Stereotypes

Bricker
Graydon




**These statements
are common, but
not helpful.**

- “Why wasn’t she hysterical?”
- “It can’t have been rape. She went back to him the next day!”
- “Of course he did it.”
- “If she hadn’t been drunk...”

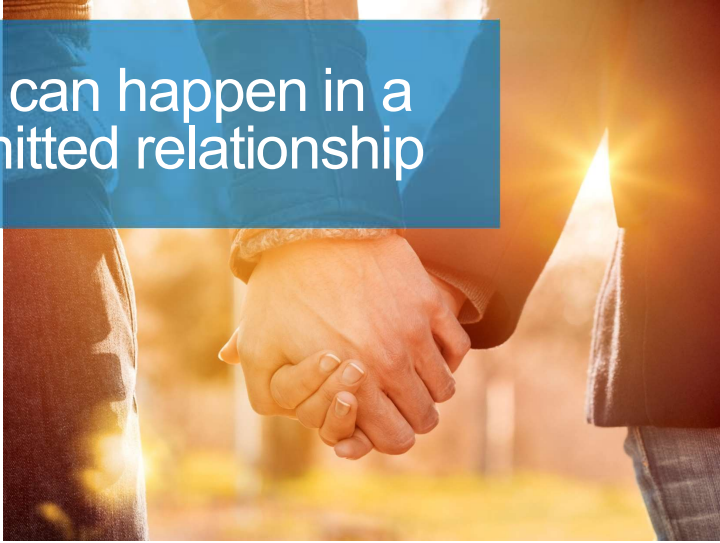


Know Better

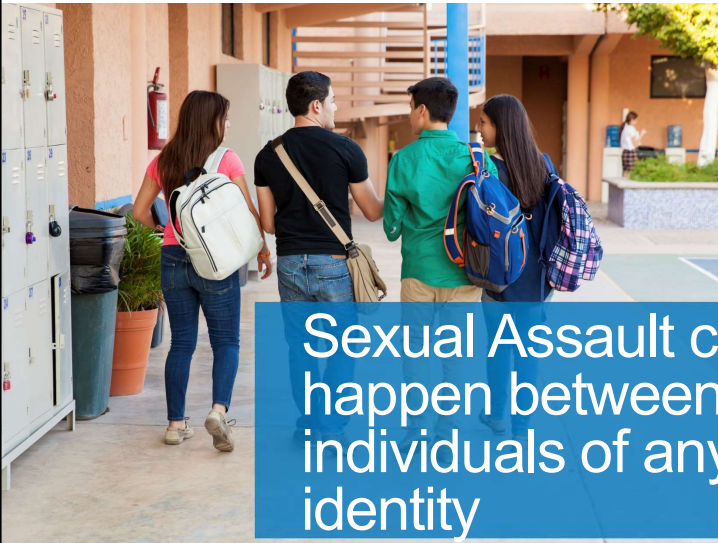
Let's talk about why these statements don't help get the information we need to make a good decision in our process.



Most rapes are committed by perpetrators that know their victims



Rape can happen in a committed relationship



Sexual Assault can happen between individuals of any gender identity

Victims of intimate partner violence may return to their perpetrator for reasons that may not seem rational to others




Drug-facilitated sexual assault is common, and the most common drug used is alcohol

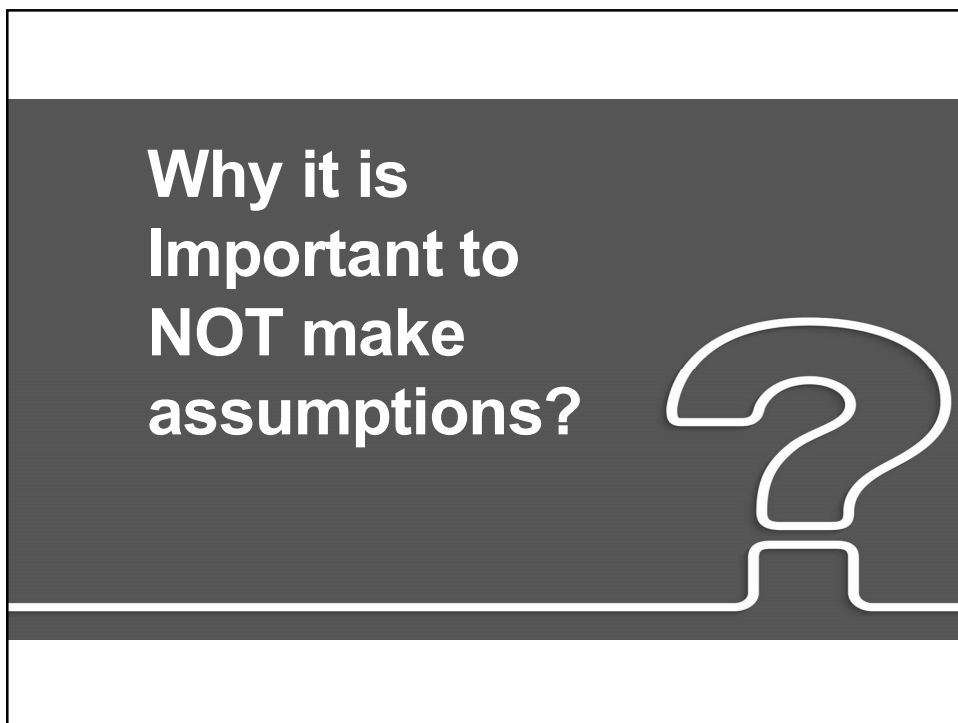
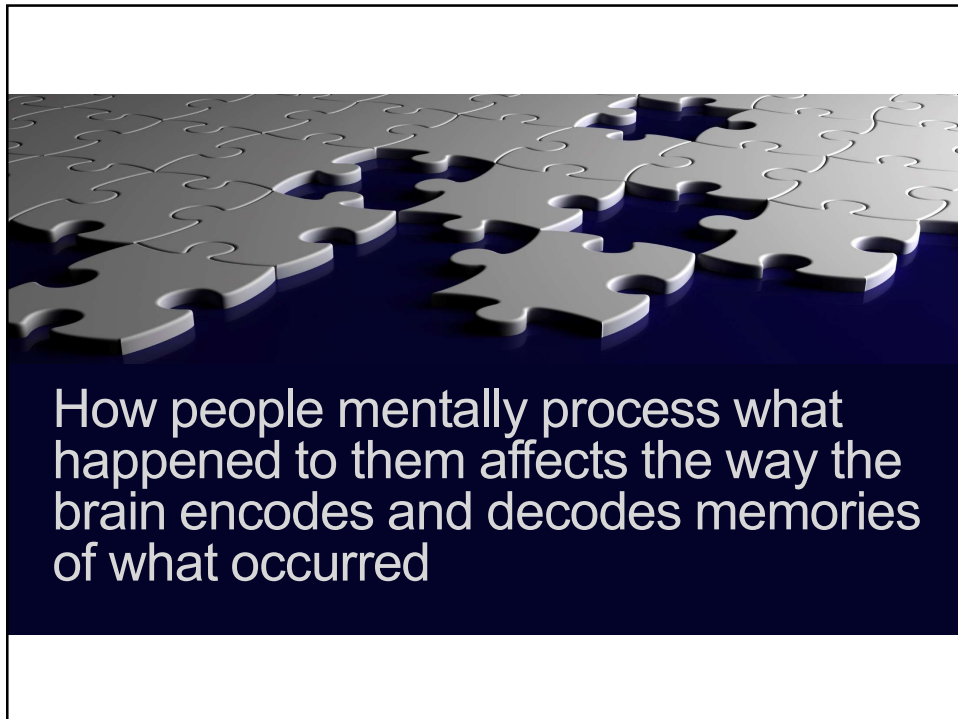




Being drunk doesn't excuse
a perpetrator's own behavior



A wide variety of responses are
normal for victims: people are
different and react differently—
don't make assumptions about
how they "should act"



Why Don't People Tell Right Away

- The Preamble to the Title IX Regulations suggests:
 - Shame
 - Fear of retaliation
 - Fear of not being believed (30081)



Why Don't People Always Remember

- A party should not be “unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory” (Preamble, p. 30323)

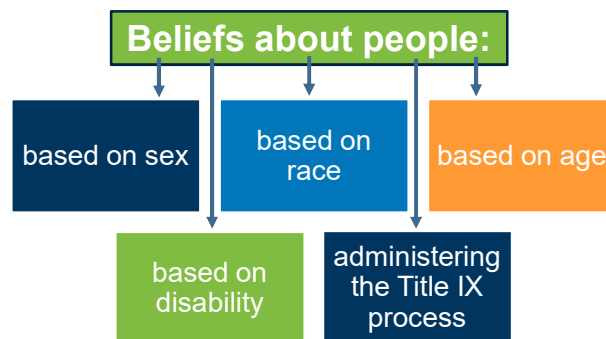


A Note About Trauma



- Assume all parties and witnesses may be dealing with trauma – from this or other incidents
- Meet them where they are
- Help them tell their story as part of the process
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation

Stereotypes Affect Response



Avoiding Sex Stereotypes



- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (Preamble, p. 30253):
 - Women have regret sex and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault

Analyzing Sex Stereotypes



- Age of consent
- Dating vs. arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

Culture Affects Response



- I won't report it if it doesn't feel wrong.
- I'll admit it because I don't understand it's prohibited.
- I won't report it if I would be a snitch.
- It's impolite to look you in the eye, so I'll look down the whole time.
- I deserved it. It's normal.
- Reporting this would result in serious consequences at home.

Process YOUR Response (1 of 2)



- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or Respondent)? (It shouldn't be.)

Process YOUR Response (2 of 2)



- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person "acting guiltily" by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, SO WHAT?

Counterintuitive Response



- If they didn't act the way you might have, that doesn't mean it isn't true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another's perspective to be counterintuitive to something. Be careful to use a valid measurement.

Be Human and Be a Blank Slate

Questions?

Bricker Graydon LLP © 2023