



**Annual Clergy Training and Title IX Hot Topics
February 22, 2023**



Disclaimer



- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- Watch for your “Thanks for Attending” email, which will include a link to the **slides** of this webinar.
- Yes, you may share the slides with your colleagues and post them!

Your Presenters



Melissa Carleton
mcarleton@bricker.com



Rob Kent
rkent@bricker.com



Josh Nolan
jnolan@bricker.com

3

Agenda



- How to Conduct an Investigation and Hearing Process that Protects the Safety of [All Parties]* and Promotes Accountability
- Dating violence, domestic violence, sexual assault, and stalking
- Informal Resolution
- Staffing Your Team
- Retaliation

4



Conducting a Process That Protects and Holds Accountable

Keys to a Good Process



- Ensure your policy complies with Title IX where conduct is based on sex.
- Ensure your policy complies with the Clery Act where it involves sexual assault, dating violence, domestic violence, or stalking.
- Follow your policy and your process.
- When your policy and process do not provide all the answers, lean into your ethic of care.

Clery ≠ Title IX



- Not all Clery cases are Title IX cases. Examples:
 - Stalking not on the basis of sex.
 - Domestic violence not on the basis of sex.

If these cases aren't handled by your Title IX policy, where do they fall, and do those procedures follow the Clery requirements?

7

Clery Cases: Procedural Requirements



- Note: The regulations often refer to things you must do for a "victim." We have changed that to "complainant" in this section.
- We suggest you do these things for both parties, where appropriate.
 - Example: Provide both parties with information about available counseling, but only the complainant needs information about how to report to law enforcement (unless the respondent is also a complainant, of course)

8

Clery Cases: Procedural Requirements (2)



- These slides hit the main highlights, but you will want to review 34 C.F.R. 668.46 in detail if you are reviewing your policies and handbook language to determine compliance.
- These only apply to cases involving sexual assault, dating violence, domestic violence, or stalking

9

Clery Cases: Procedural Protections



- Must define the standard of evidence you will use to make determinations (e.g. preponderance of the evidence)
- Must maintain as confidential any supportive/protective measures provided to the complainant (except as necessary to provide those measures)
- Each party can bring an advisor of choice to any related meeting or proceeding, but school may limit participation
- Protective measures must be provided if victim requests and they are reasonably available
- Must provide complainant with written explanation of rights and options

10

Clery Cases: Notice to Complainant



- Must provide complainant with written information about:
 - Importance of preserving evidence
 - How and to whom offense should be reported
 - Options about involving law enforcement and school authorities
 - Victim's rights and institution's responsibilities for protection orders, "no contact" orders, etc.

11

Clery Cases: Notice to Complainant (2)



- Must provide complainant with written information about:
 - Existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims, both within the institution and the community
 - Options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures

12

Clery Cases: Transparency



- Must complete within reasonably prompt timeframes
- Must follow a policy that is transparent for both parties
- Must provide timely notice of meetings a party is expected to attend
- Must provide timely and equal access to information that will be used in proceedings
- Proceedings must be conducted by officials without conflict of interest or bias for or against either party

13

Clery Cases: Simultaneous Notice

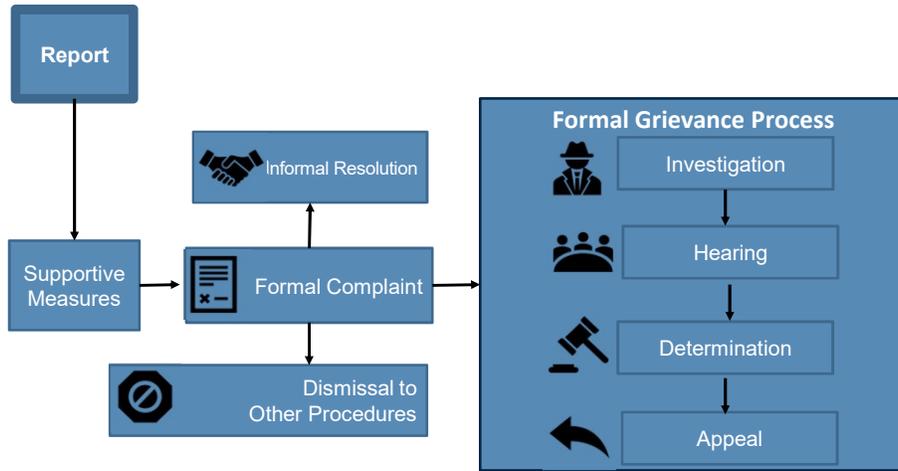


- Must provide simultaneous written notice to both parties of:
 - Results of any institutional disciplinary proceeding
 - Procedures to appeal (if available)
 - Any change to the result
 - When such results become final

Providing this notice does not violate FERPA.

14

Overview of the Title IX Process



15



Intake and Initial Steps

Intake Goals



- Protect
 - Supportive Measures
- Assess – Need enough information to determine what options may apply:
 - Procedural Pathways (Formal, Informal, Other)
 - Party options – what choices can we give them?
- Set the Tone for the relationship with the Title IX Office

17

Protect Safety and Provide Support



- What individual protections are needed for a party to continue to access your education program/activities?
- Are there other supportive measures needed for the community?
- Consider the party's requests as well as what is reasonably available.
- Document all supports provided and not provided. Show you did the right thing.
- (Also, actually do the right thing.)

18

What Happened?



- You don't need the full story at intake, but you need enough information to be able to assess the situation and determine appropriate options.
- If the Complainant isn't ready to tell their story, provide options and information on when each might apply.
- What happens if you have a Complainant that has trouble organizing their thoughts?

19

Set the Tone



- Transparent – It's all right here in the Policy.
- Willingness to Engage – Answer all their questions.
- Offer Choices – Whenever they can have a choice, give them a choice.
- Keep the Lines of Communication Open with the parties, even when it can be difficult to do so.

20

When Things Go Off the Rails



- A party complains the process is taking too long
- A complainant is upset that the respondent hasn't been subject to emergency removal
- A party feels like the other party is intentionally playing games, and the Title IX office is "letting them"
- One party goes to the media
- The community takes sides

21

Preventing Friction



- Follow every conversation with a party up with a written summary to ensure a common understanding
- Cite to the policy frequently
- Provide frequent updates – what has happened, what's happening next, upcoming choices to think about
- Acknowledge the emotions they feel

22

Self Care



- It can be frustrating not to be able to defend yourself when cases are debated in the public eye.
- Secondary trauma is real.
- Taking on the emotional burden of these cases can be exhausting.
- Be kind to yourself and your colleagues.

23

Incomplete Formal Complaints



- Formal complaints for purposes of Title IX must allege conduct that, if true, would constitute Sexual Harassment.
 - If it's an "unwelcome conduct" prong, or stalking is alleged, the impact is an element of the formal complaint.
 - Initial assessment may require that the formal complaint be amended to include necessary information prior to sending Notice.
- Outside the Title IX context, "formal complaints" aren't necessarily required. Check your policy for specifics.

24

What if I'm not sure about...



- Be careful of falling into the trap of pre-adjudicating cases before issuing notice.
 - Initial assessment, yes. “This could potentially constitute...”
 - Pre-adjudication, no. “There is no way they will have the evidence to support...”
 - This is an art form, not a science.

25

Notice of Allegations



- Be specific! Consider attaching the formal complaint.
- Include parties, dates, locations, and conduct.
- “Title IX Sexual Harassment” is too broad. Is it quid pro quo? Stalking?
- What specific sections of the policy might have been violated?
- Make sure to use the policy prohibitions that were in place at the time of the prohibited conduct.
 - You can't get a ticket for running a stop sign that won't get put up until tomorrow.

26



Investigations

Investigator Role



- The goal of the investigator is to gather the relevant evidence.
- Investigators can ask parties and witnesses, but they should also ask third parties for evidence where it is reasonable to do so.
- Be grateful for any engagement in the process by parties and witnesses.

Investigation Duties



- Investigators:
 - Conduct interviews of all available, relevant witnesses who are willing to participate
 - Gather relevant evidence
 - Provide regular status updates to the parties
 - Prepare a comprehensive investigation report fairly summarizing the investigation, all witness interviews, and addressing all relevant evidence (attached)
 - Provide draft report and evidence file to parties and advisors for review and response within 10 business days

29

Party Participation



- Parties may each separately decide whether to participate in the process and if so, to what extent.
 - Interview?
 - Written statement?
 - Written questions/answers?
 - Submission of evidence/witness lists?

Your policy may be specific as to what types of participation are allowed at different points in the investigation.

30

Reluctant Party



- How do you encourage a reluctant party to participate?
- Address concerns about:
 - Retaliation
 - Intimidation
 - Subtle attempts to influence party
 - Emotional impact of the process
- There is a line between providing support to allow for participation and coercing participation. Remember: retaliation definition is broad. Don't coerce.

31

Participation by Reluctant Party



- If a party opts out of participation during the investigation, what does this mean for the investigative report review?
- Can the party still provide information in response to the case file and/or draft report? YES. Don't coerce the party to participate either.

32

Relevancy: Investigation Stage



- Investigators pursue relevant evidence. If it isn't relevant, you don't need to pursue it.
- If you're handed irrelevant evidence, put it in the file.
- The only evidence that you are prohibited from including are the specific categories listed in the regulations and your policy (rape shield, privilege, medical records).

33

Pattern Evidence?



- Rape shield protects Complainants, not Respondents. When are other allegations of misconduct relevant?
- Check your policy. Typical considerations:
 - Is the reported behavior substantially similar in nature?
 - Is the reported behavior such that if you didn't know who the Respondent was, you'd think that the two incident descriptions pointed to the same person?

34

Pattern Evidence and Roles



- Inclusion of pattern evidence is done on a case by case basis, and that evaluation differs based on role.
 - Coordinator – Do I give this to the investigators?
 - Investigators – Do I pursue it? Do I include it in the file?
 - Decision-Maker – Do I rule that it is relevant?

35

Pattern Evidence in the Interview



- How do you handle when a Complainant or witness says, “Respondent did bad things to my friend. You should talk to them.”?
- How do you handle when a Respondent or witness says, “Complainant brought a false claim against my friend. You should talk to them.”?

36

What Do You Do If...?



- The Complainant wants to bring up their *own* sexual predisposition or prior sexual history to support their argument that they never would have consented (e.g. “I’m gay,” “I’m religious”, “I’m a virgin”)
- Respondent wants to argue that Complainant has brought nearly identical sexual harassment claims against other individuals at previous institutions

37

Finalizing Report



- 10 day review and response to evidence
- Investigators:
 - Conduct any follow-up deemed necessary
 - Incorporate responses and additional evidence into report
 - Finalize report
- Parties/advisors have 10 days to provide a written response to the report

38

Breaking the Cycle?



39



Hearings

Hearing



- Pre-hearing conferences are recommended for purposes of efficiency and to help the parties and advisors know what to expect.
- They are typically (but not always) held separately with each party/advisor to review procedures, determine witnesses, and address any evidentiary issues
- Hearing officer versus Panel?
- In making the decision, the decision-maker can generally use:
 - Hearing testimony
 - Investigative report/attachments
 - Other new, relevant evidence if permitted at the hearing

41

Can't Consider



- Evidence that is not relevant
- Evidence relating to prior sexual history/predisposition of the complainant
- Evidence relating to privileged information where privilege has not been waived
- Medical records, the inclusion of which consent has not been provided from patient
- Inferences from party/witness refusing to submit to cross-examination or declining to participate

42

Relevancy



- Decision-maker will make relevancy determinations at the hearing: “Relevant”
- Cross-examination will be live and direct
- Decision-maker will be permitted to call witnesses and ask questions

43

Decorum



- Parties and advisors are expected to abide by decorum standards
- Questions must be relevant, respectful, and non-abusive
- No questions may be asked in an abusive or intimidating manner

44

Final Decision



- Decision-maker issues written final decision, including:
 - Determination
 - Rationale
 - Evidence used or not relied upon
 - Credibility assessments
 - Any sanctions
- Parties receive simultaneous written notice of outcome

45

Connecting the Dots



- Go back to the Notice of Investigation. Are you addressing all the allegations raised?
- What procedural issues need explained to make the record clear on appeal?
- What evidence was disregarded and why?
- What evidence was weighted more heavily and why?

46

More Thoughts



- Check for tone, thoroughness, and clarity
- Would a party's parent be able to understand why the case came out the way it did?
- If both parties were equally credible, it's appropriate to say that. The same is true for the opposite.
- Use the theory of judicial economy – only decide what you must decide, without going down unnecessary rabbit holes. (Exception: Belt and Suspenders issues)

47

Sanctions



- Holding parties accountable also includes sanctioning appropriately where the policy has been violated
- Be consistent in sanctioning similar conduct under similar circumstances

48

Sample Sanctioning Factors



- Prior discipline for similar conduct by others (remember to look outside Title IX conduct)
- Respondent's disciplinary history
- Harm to or impact on the complainant/community
- Severity of the behavior (e.g. injury, weapon)
- Acceptance of responsibility
- Mitigating/aggravating circumstances
- Ability of the Respondent to conform behavior to expectations going forward
- Deterring future behavior
- Remedy to the Complainant?

49

Remedies



- What does the Complainant reasonably need to put them back in the position they should have been in if the prohibited conduct hadn't occurred?
- What does the Complainant need (aside from the Respondent's sanctions) to continue accessing the education program/activity?
- What does the community need going forward?
- Remedies are kept private unless they must be disclosed to implement them.

50



Sexual Assault, Dating Violence, Domestic Violence, and Stalking

Data Disclaimer



- We will be discussing statistics regarding sexual assault, dating violence, domestic violence, and stalking
- Statistics help us understand the way these crimes may affect the individuals involved, as well as our community.
- Statistics should **never** influence your decisions with regard to handling a specific case.

Sexual Assault



Sexual assault is defined as “an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart”

Appendix A includes definitions from the FBI’s Summary Reporting System (SRS), which was phased out effective December 31, 2020. The FBI now uses NIBRS, not SRS.

The policy must include in its definition the conduct not permitted by NIBRS, but can be worded differently.

53

Definitions (1 of 3)



Rape – The carnal knowledge* of a person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sodomy – Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

54

Definitions (2 of 3)



Sexual Assault With An Object – To 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 unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Fondling – 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 unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

55

Definitions (3 of 3)



Statutory Rape – Nonforcible sexual intercourse with a person who is under the statutory age of consent.

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

56

Sexual Assault: Hypos



- Using your policy, do the following count as sexual assault, if there is no consent?
 - Kissing
 - French kissing
 - Grinding on a dance floor
 - Slap a football player on the butt on the way out to the football field
 - Slapping a fellow partygoer on the butt on the way onto the dance floor
 - Mouth-to-vagina oral sex

57

Sexual Assault: Attempt



Note that attempted sexual assault is considered to be sexual assault under the UCR.

What constitutes “attempt”? Generally, it means engaging in conduct that, if successful, would constitute or result in the offense.

58

Sexual Assault: Attempt Hypos



Which of the following do we believe constitute attempted rape?

- Respondent stranger pulls Complainant into the bushes, begins to undress Complainant, and then is disrupted by passersby and runs away.
- Respondent attempts to penetrate Complainant with genitalia but does not aim correctly and misses, then is disrupted.
- Respondent attempts to fondle Complainant for sexual gratification but actually fondles Complainant's roommate, for whom Respondent has no sexual attraction.

59

Sexual Assault Data Women and Men



More than **1 in 2 women** and **1 in 3 men** have experienced sexual violence involving physical contact during their lifetimes.

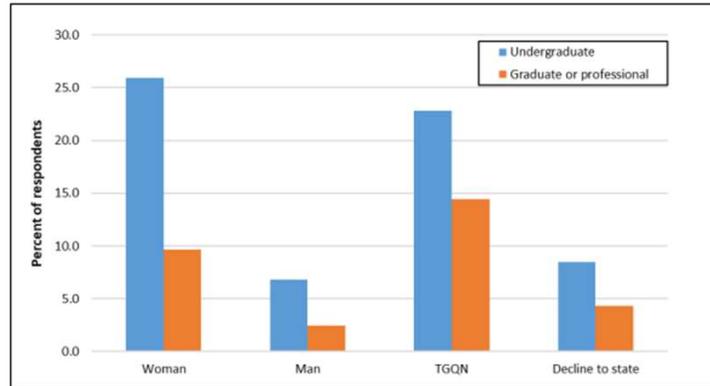
1 in 4 women and about **1 in 26 men** will experience completed or attempted rape during their lifetimes.

Nearly **1 in 9 men** was made to penetrate someone (completed or attempted) during his lifetime.

Statistics from [CDC.gov/violenceprevention/sexualviolence/fastfact.html](https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html) (last accessed October 29, 2022)

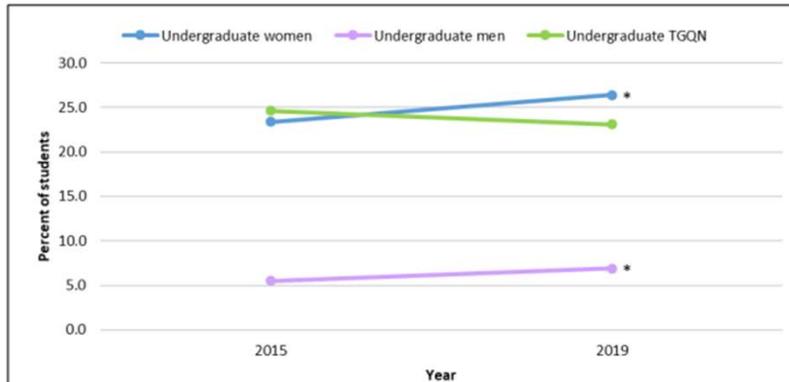
AAU 2019 Climate Survey Data

Figure E-1. Percent reporting nonconsensual sexual contact involving physical force or inability to consent or stop what was happening since enrolling in the school by gender and affiliation



AAU 2019 Climate Survey Data (2)

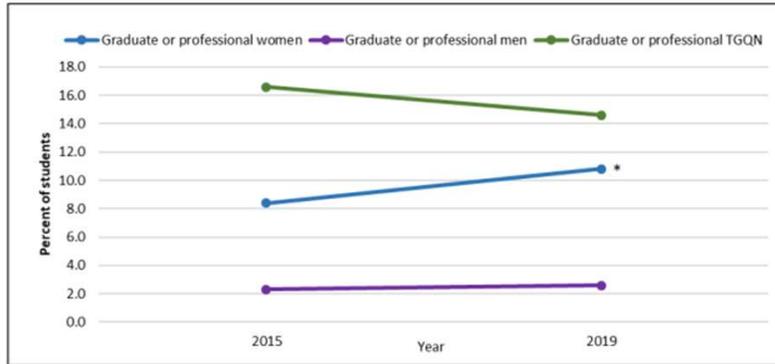
Figure E-3. Percent of undergraduates reporting nonconsensual sexual contact by physical force or inability to consent since enrolling in school by gender and year for 21 schools that participated in both AAU surveys



*Significant at $p < .05$, two-tailed test.

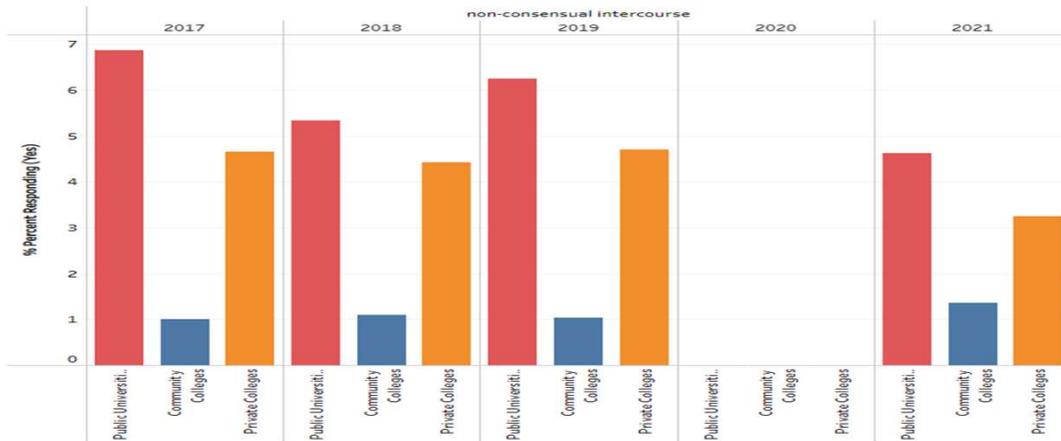
AAU 2019 Climate Survey Data (3)

Figure E-4. Percent of graduate/professional students reporting nonconsensual sexual contact by physical force or inability to consent since enrolling in school by gender and year for 21 schools that participated in both AAU surveys

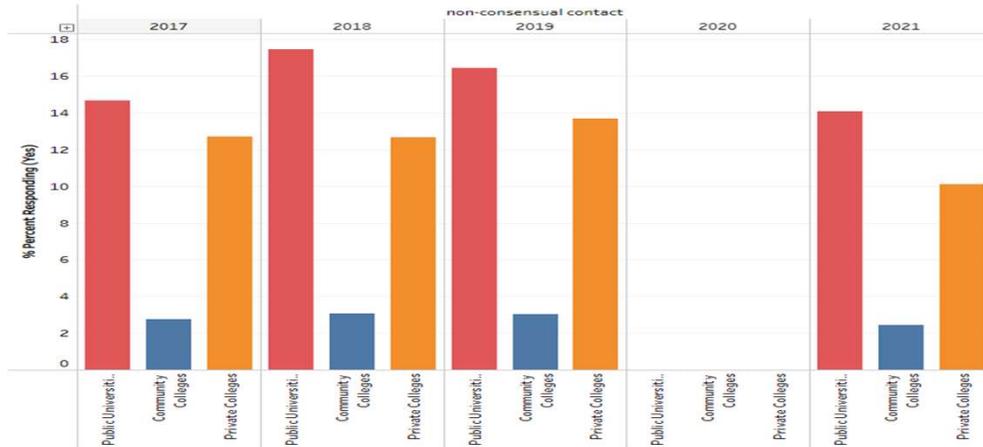


*Significant at p<.05, two-tailed test.

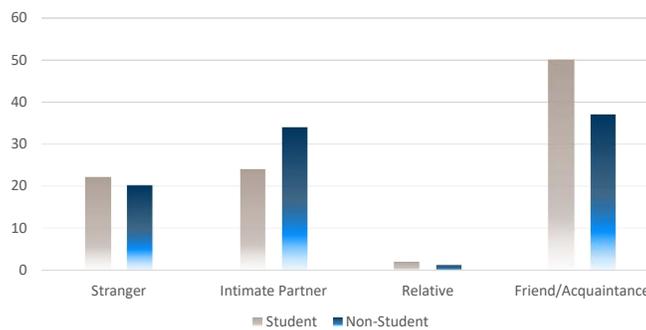
Sexual Assault Data ODHE Survey – Non-Consensual Intercourse



Sexual Assault Data ODHE Survey – Non-Consensual Contact



Sexual Assault Data: Identity of Perpetrator (BJS 2014)



Preamble, p. 300767(Official) notes that *Commenters cited: U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report: Rape and Sexual Assault Victimization of College Age Females, 1995-2013 (2014).



Sexual Assault Data: Timing

Prevalence Data for Postsecondary Institutions

- 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.

Preamble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>."

67



Sexual Assault Data: Alcohol/Drug Use

"About half of sexual assaults involve survivors drinking alcohol before the assault."

"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.

68



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.

Preamble, p. 30082 (Official) notes that "Commenters cited: 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).

69



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.

Preamble, p. 30080 (Official) notes that "Commenters cited: U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime* (2014).

70



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).

Preamble, p. 30080 (Official) notes that "Commenters cited: 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).

71

Sexual Assault: Considerations for Intake



- What was touched?
- What was penetrated (and with what)?
- Is either party under the age of consent?
- Is incapacitation alleged?
- Are the parties in an intimate relationship? (E.g., could the sexual assault also constitute IPV?)

72

Sexual Assault: Investigation Concerns



- Be cautious of questions that appear to blame the party for what happened or they will shut down and stop engaging.
- Better options:
 - Explain why you need information on alcohol/drug use, what the party was wearing, etc. before you ask the questions.
 - Explain the concept of consent to the parties so that they can understand why you need detailed information on the sexual encounter.
 - Check your tone constantly so as to encourage continued sharing of information.

73

Sexual Harassment: Dating Violence



“Dating Violence” means violence committed by a person:

- who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- where the existence of such a romantic or intimate relationship is determined based on a consideration of the following factors:
 - The length of the relationship,
 - the type of relationship, and
 - the frequency of interactions between the individuals involved in the relationship.

74

Sexual Harassment: Domestic Violence



“Domestic violence” includes felony or misdemeanor crimes committed by a person who is:

- A current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction;
- A current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim;
- Cohabiting, or has cohabited, with the victim as a spouse or intimate partner;
- Shares a child in common with the victim; or
- Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

75

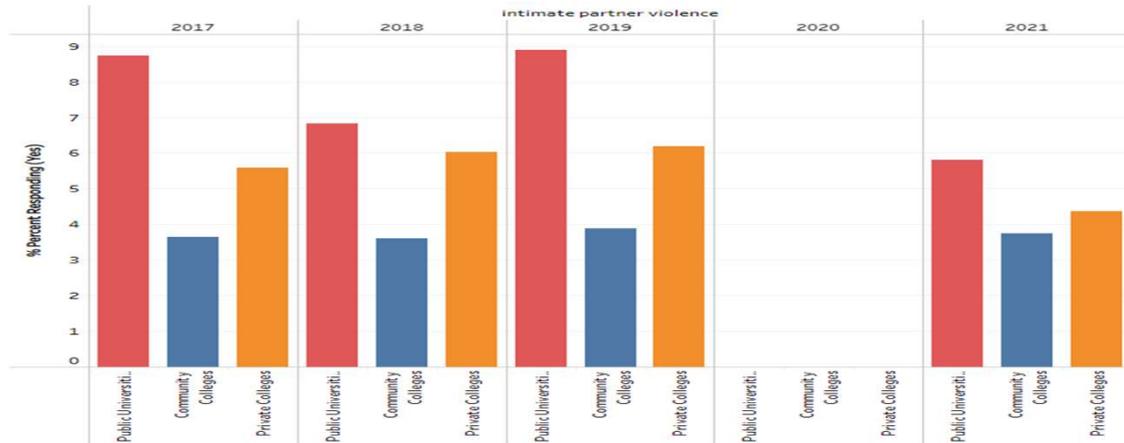
IPV vs. Healthy Relationships



- Counseling individuals on healthy and unhealthy relationships will teach them about warning signs and how to handle problematic behavior.
- The line between healthy and unhealthy is not typically where your policy draws the line for disciplinary purposes.
 - How do you partner with your counseling center and local domestic violence shelter to ensure consistent messaging with regard to the policy?
 - What options do you have to address behavior that is uncomfortable but does not rise to the level of a potential policy violation?

76

ODHE Data



77

Common Concerns in IPV Situations



- Supportive measures are important to ensure the parties can be separate and feel safe
- Retaliation is often a critical concern – parties may still have a relationship
- Consider whether parties need contingency plans as part of their supportive measures if safety concerns arise
- Balancing third-party reports of violence and safety concerns with complainant's refusal to participate in the process
- No contact order violations as continued evidence of underlying policy violation allegation
- It is not uncommon for both parties to be complainants and respondents. Watch for this scenario and ensure you provide appropriate intake for both.

78

IPV: Concerns at Intake



- What is the relationship between the parties? Do they agree?
- What is the act of violence described?
- Under what circumstances did the act of violence occur?
- If the situation involved mutual combat:
 - Was one person the initiator and the other acting in self defense?
 - Should an investigation be opened against the complainant as well?

79

Supportive Measures in IPV



- Think of a no-contact order as a protective bubble. The bubble gets bigger by:
 - Mutual residence-hall restrictions
 - Dividing resources on campus
 - Building presence restrictions
 - Emergency removal
- How big of a bubble is necessary based on your facts?
- Let the parties guide you. Remember: Defining the bubble may increase the risk.

80

Sexual Harassment: Stalking



“Stalking” is engaging in a course of conduct directed at a specific person on the basis of sex 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.

81

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.

82

Stalking: Reasonable Person



“Reasonable person”

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

83

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.

84

Stalking Data



3.4 million individuals aged 16 or older (1.3%) were stalked during 2019. This represents a slight drop from 2016 (1.5%). Females were stalked more than twice as often as males.

1 in 6 women and **1 in 17** men have been stalked at some point in their lives.

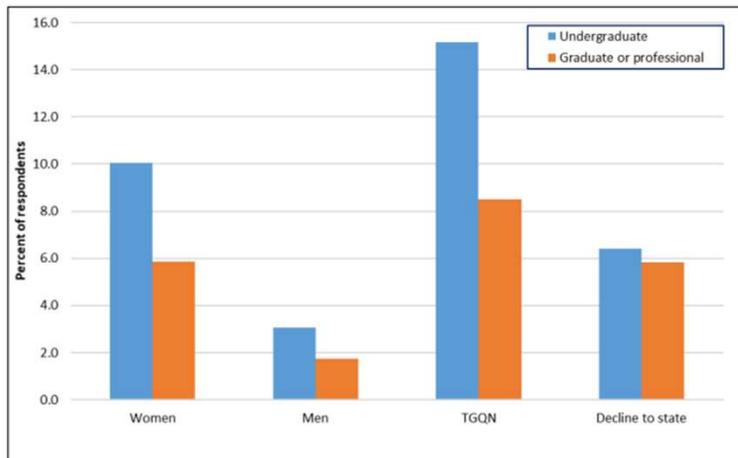
Nearly **54%** of female victims and **41%** of male victims experienced stalking before the age of 25.

- First statistic: U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.
- Second and third statistics: CDC "Preventing Stalking" fact sheet, accessed October 29, 2022.

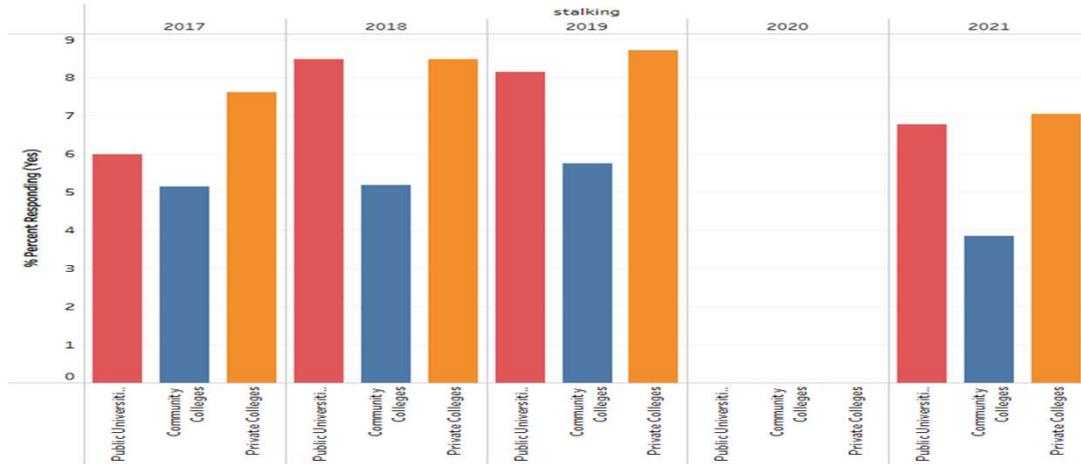
85

AAU 2019 - Stalking

Figure E-5. Percent reporting stalking since enrolling in the school by gender and affiliation



ODHE Stalking Data



Impact of Stalking on Victims (1 of 2)



46% of stalking victims fear not knowing what will happen next.

[Baum et al., (2009). "Stalking Victimization in the United States." BJS.]

29% of stalking victims fear the stalking will never stop.

[Baum et al.]

67% of stalking victims in 2019 were fearful of being killed or physically harmed.

U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.

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.

[Baum et al.]

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.]

89

Stalking: Intake Considerations



- What acts constituted the course of conduct?
- Did the person have sufficient impact from the conduct such that the allegations potentially rise to the level of stalking?
- Supportive/protective measures will be very important to address underlying fear.
 - While fear is an element of a stalking violation, its presence in the complainant does not preclude a full assessment of risk to the community for purposes of an emergency removal analysis.

90

Stalking: Common Concerns



- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern through supportive measures.
- Stalking after a no contact order may constitute additional instances of the underlying alleged policy violation, which may mean you need to run it through your Title IX process.

91

Stalking: Investigation Considerations



- Outline a timeline of the “course of conduct”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered

92



Informal Resolution

Why You Do It



- Some campuses have a very high preference for informal resolution, while others prefer formal resolution
- Can be more efficient and effective, and helps put both parties in a position to move forward.
- Reduces stress on the parties, takes less time and energy, and can leave staff feeling more positive about their participation
- May be more educational than a formal/disciplinary approach

Approaches – Pros and Cons



- Shuttle diplomacy
- “Mediation” – may be subject to state law requirements
- Restorative Justice
- Other procedures on your campus?

95

Questions to Consider (1 of 2)



- Who should facilitate the informal resolution?
- Where does the process live? (Title IX must keep records.)
- Are you tying the process back to the formal complaint so it is clear what will be resolved?
- Will the Title IX Coordinator “sign off” on the agreement?
- How will you handle a violation of the agreement?
- What if the violation is a continuation of the problematic behavior that was reported? (E.g. more stalking)

96

Questions to Consider (2 of 2)



- If no agreement is reached, can the parties use information exchanged during the informal process as evidence in the formal process?
- Will you make the process confidential so that parties may not share information outside the process?
- What information about the process will be communicated back to the Title IX Coordinator?
- Will your formal process pause during the informal process?

97

Brainstorming List



Sometimes parties know their concerns but not how to address them. Here are some categories to consider:

- No contact order
- Residence hall restrictions
- Dining hall restrictions
- Class scheduling
- Access to athletic facilities
- Sharing student organizations
- Access to counseling services
- Alcohol restrictions
- Disciplinary sanctions
- Face-to-face discussion (be very cautious)

98

Confidentiality Provisions



Does your institution want to enforce a confidentiality provision that prohibits the parties from talking about:

- The underlying situation;
- Each other;
- The agreement itself?

Parties sometimes request these, but they can be hard to enforce. Think carefully about these requests.

99



Retaliation

Retaliation Hypothetical #1

```
graph LR; A[They accused me of rape] --> B[Yik Yak calls me a rapist]; B --> C[Now no one likes me];
```

They accused me of rape

Yik Yak calls me a rapist

Now no one likes me

Retaliation Hypothetical #2

```
graph LR; A[I accused them of rape] --> B[They called me a liar]; B --> C[Now no one likes me];
```

I accused them of rape

They called me a liar

Now no one likes me

Retaliation Hypothetical #3



Peer Retaliation



- Peer retaliation has been included in the proposed regulations, but it can be difficult to define in the context of students.
- What is retaliation versus uncomfortable behavior in a social setting?
- Is there a way to prevent uncomfortable behavior from occurring?
- What can we say in training that might help prepare your community to weather the process?



Staffing the Title IX Office

The Facts



- Unemployment rate for the USA is currently 3.4%, but only 2.0% for individuals with at least a bachelor's degree
- Private education and health services employed 105k more people in January 2023 than in December 2022. Where are they coming from?

The Anecdotes



- Virtually every Title IX team we work with is looking to hire someone.
- There are many well-paying positions that are failing searches – multiple times.

10
7

What are the barriers?



- Prior Title IX experience required
- Level of educational attainment required (e.g. JD)
- Location
- Flexibility
- Burnout and stress
- Losing “entry level” higher education employees to other industries, so there are not enough people to move up the ladder
- Money and resources

10
8

Potential Approaches?



- How are we drawing students (undergrad and grad) into higher education careers?
- Are we giving alumni a bridge back to campus? Can we help get them trained if they are interested?
- Are we setting the barriers for the positions too high for the salaries?
- Can a pool approach reduce the stress on team members, so each team member has a variety of tasks?
- Can sharing services between entities reduce the stress on team members?
- Other thoughts?

10
9

You Can't All Out-Recruit



- Poaching from your neighbors only gets you so far.
- How can we work collectively to build a better career path for Title IX team members, while still serving our campus communities and meeting our legal obligations?

11
0

Upcoming Free Webinars (12 ET)



- February 23: New OCR Guidance on Title IX and Athletics
- March 15: Athletic Compliance Update (Higher Ed)
- May 17: Title IX Litigation Update
- June 6: Whistleblowers and Retaliation Claims (Higher Ed)

Register for all at www.bricker.com/events.

11
1

Other Trainings



- Level 1, 2, and 3 trainings: registration is online at www.bricker.com/titleix
- March 10: In-person Title IX Decision-Maker & Hearing Training in Dayton, Ohio through SOCHE
- March 22: Clery Act Boot camp

11
2

Keep in Touch!



- Find us on LinkedIn – Melissa Carleton, Rob Kent, and Josh Nolan
- Subscribe to our newsletter on the Bricker [homepage](#) by clicking “subscribe” in the upper right corner