



July 13, 2021

**University of Dayton  
Title IX Training (Day 1)**



**Bricker & Eckler**  
ATTORNEYS AT LAW

## **Disclaimer #1**



- Change is constant in this field.
- Expect new guidance and case law to be issued regularly after this training.
- Check with legal counsel regarding specific situations in light of the dynamic nature of requirements.

## Disclaimer #2

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- Clery Act language is centered on language used in criminal situations – e.g. “victim”
- We have included such language here for accuracy, but we recommend that you use terminology from your policies instead, and treat both parties equitably.
- We will talk about the Violence Against Women Act and its amendments to Clery, but know that Clery requirements apply regardless of the gender of either party.

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## Posting These Materials

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- Yes, you have permission to post these materials on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

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## Today's Agenda



- 8:30-9:00 Introduction to Clery
- 9:00-9:45 Issues related to Dating Violence, Domestic Violence, Sexual Assault, and Stalking
- 9:45-10:00 Review of Scenario
- 10:00-10:30 Overview of Procedural Protections
- 10:30-10:45 Break
- 10:45-11:30 Investigative Strategies Review and Discussion
- 11:30-12:15 Mock Interview of Complainant
- 12:15-12:30 Debrief and Prep for Next Week

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## Clery Act in Context



- April 5, 1986 – Jeanne Clery is raped and murdered at Lehigh University
- 1990 - Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act – tied to Higher Education Act funding
- 2013 – Violence Against Women Act amends the Clery Act with regard to sexual assault, dating violence, domestic violence, and stalking procedures
- July 1, 2015 – Current regulations go into effect
- 2016 Handbook – Issued to give detailed guidance on compliance
- October 9, 2020 – 2016 Handbook is rescinded; new Appendix put in place; updated January 19, 2021

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## Where does Clery fit?



- Title IX policies handle sexual assault, dating violence, domestic violence, and stalking when:
  - The complainant is currently participating or attempting to participate in your education program or activity and
  - The conduct occurred in your education program or activity and
  - The conduct occurred against a person in the United States

If any one of these things is not true, the case is subject to “mandatory dismissal” from the Title IX process (and likely into your Equity Compliance Resolution Process) – but if the case is addressed through another policy, the Clery Act still applies.

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## Training Requirements



From the Clery regulations:

Proceedings involving sexual assault, dating violence, domestic violence, and stalking must –

- “Be conducted by officials who, at minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking, and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability”

We will discuss safety for all parties – not just victims – and our community.

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## Training Check



Ensure that all individuals handling

- Investigations
- Adjudications
- Appeals

For cases involving sexual assault, dating violence, domestic violence, and stalking have all undergone **annual** training.

(This includes Title IX team members.)

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## Title IX Overlay



- New regulations issued on May 6, 2020, effective on August 13, 2020.
- OCR Blog posts and guidance issued throughout fall of 2020.
- New administration has issued guidance, mostly focused on application of *Bostock* (prohibiting discrimination on the basis of sexual orientation and gender identity/expression).
- We are awaiting:
  - Guidance on how the new administration interprets the regulations.
  - Notice of Proposed Rulemaking to change the current regulations (scheduled for May 2022).

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## Overarching Themes



- Follow your policies. Follow your process.
- Treat everyone equitably throughout the process.
- Consider the need for supportive and protective measures for both parties.
- Be transparent and communicate with the parties regularly.
- Rely on evidence, not your gut.

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## 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

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## 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.

Your Policy contains a restated definition that is compatible with SRS and NIBRS. The Clery definitions follow on the next slides.

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## Sexual Assault: Rape and Fondling



Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

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 incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

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## Sexual Assault: Incest and Statutory Rape



Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law. [In Ohio, this means closer in kin than second cousins.]

Statutory rape: Sexual intercourse with a person who is under the statutory age of consent. [In Ohio, this means the individual is under the age of 13, or is between 13-16 and the other person is 18 or older. The age of consent in Ohio is 16.]

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## Sexual Assault: Attempt



Note that attempted sexual assault is considered to be sexual assault under both the UCR program and your Policy.

What constitutes “attempt”?

Ohio Revised Code Section 2923.02(A) gives some guidance: “engag[ing] in conduct that, if successful, would constitute or result in the offense.”

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# Sexual Assault Data

## Women and Men



More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

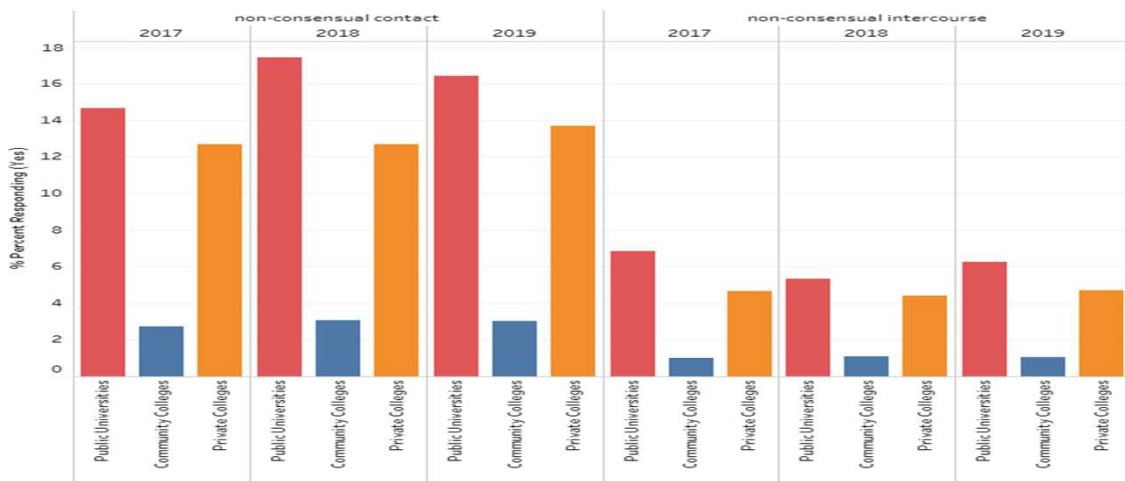
Nearly 1 in 5 women and 1 in 38 men will experience completed or attempted rape during their lifetimes.

Nearly 1 in 14 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 July 13, 2021)

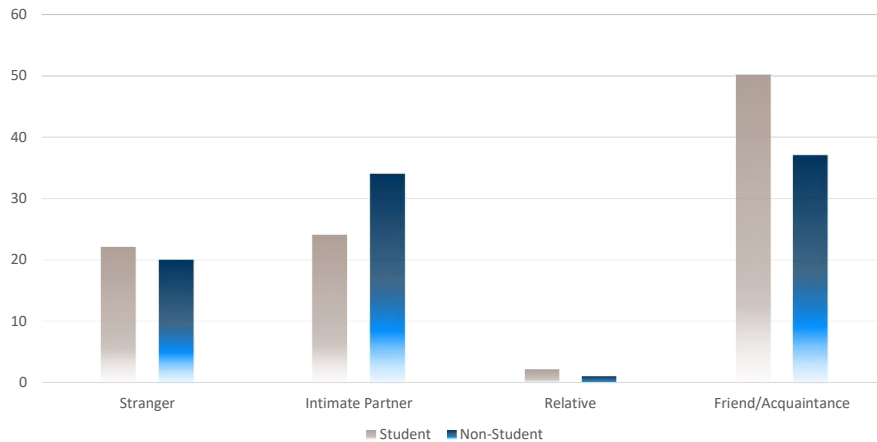
# Sexual Assault Data

## ODHE Survey



Statistics from ODHE Changing Campus Culture Benchmark Data (last accessed July 13, 2021)

## 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).

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## 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>."

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## 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.

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## 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).

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## 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)*."

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## 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)."

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## Sexual Assault: Common 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.

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## Dating Violence



- Definition: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
  - The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
  - For the purposes of this definition:
    - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
    - Dating violence does not include acts covered under the definition of domestic violence.

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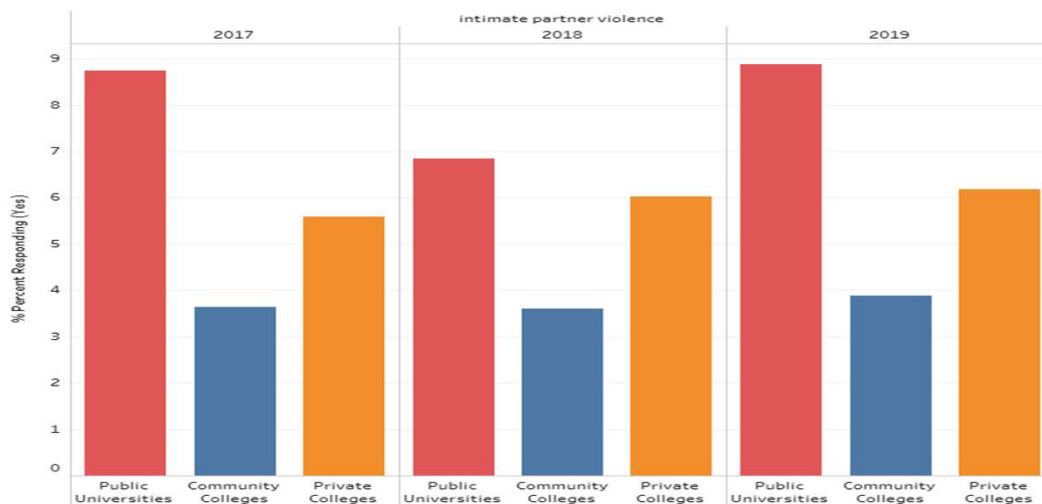
## Domestic Violence



- Definition: A felony or misdemeanor crime of violence committed –
  - By a current or former spouse or intimate partner of the victim
  - By a person with whom the victim shares a child in common
  - By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner
  - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred
  - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred

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## ODHE Data



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## 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

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## IPV: Questions



- 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?

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## Stalking



- Stalking is engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.

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## Stalking: Sub-Definitions



- Course of conduct 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.
- Reasonable person is a reasonable person under similar circumstances and with similar identities to the victim.

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## Stalking: Sub-Definitions (2)



- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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## Stalking Data



**4.5 million** women and **2.1 million** men are stalked in one year in the United States.

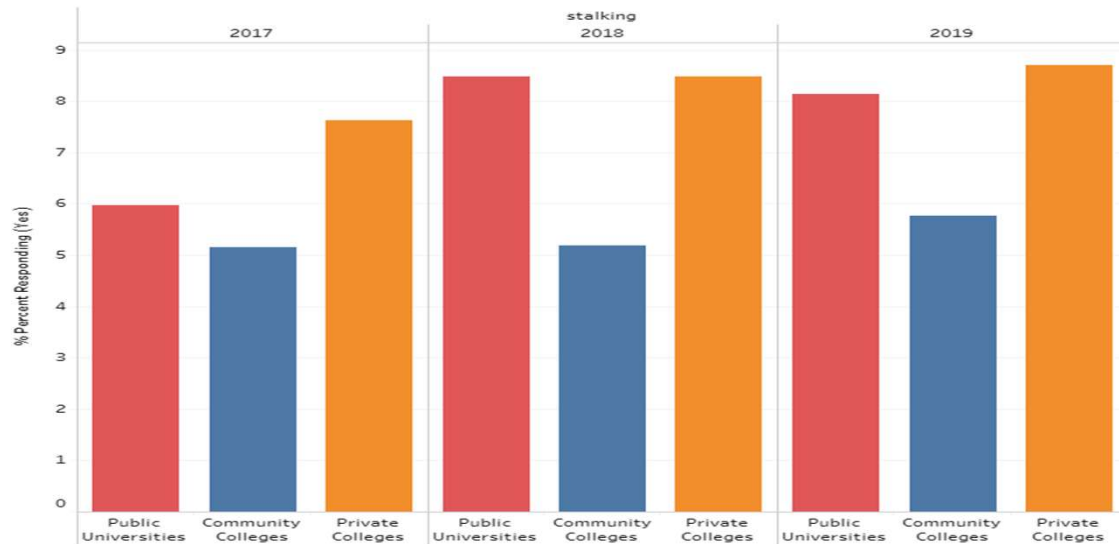
**1 in 6** women and **1 in 17** men have been stalked at some point in their lives.

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

- First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
- Second and third statistics: CDC "Preventing Stalking" fact sheet, accessed July 13, 2021.

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## 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.]

## 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.]

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## 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.

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## Stalking: 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

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**Our Scenario**

## Scenario Disclaimer



- This scenario is entirely fictitious.
- It has been crafted to allow the Title IX team to explore issues surrounding sexual assault, incapacitation, and consent.
- No identification with actual persons is intended or should be inferred.

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## Scenario Basics



- Complainant: Tessa Tasker (rising junior)
- Respondent: Michael Murphy (rising junior)
- Date of Reported Incident: Saturday, April 3, 2021
- Date of Formal Complaint: Monday, July 12, 2021
- Location: On-campus apartment

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## Scenario: Formal Complaint



- “On April 3, 2021, my then-boyfriend, Michael, sexually assaulted me in my apartment. We were in my bedroom and I was trying to sleep after a long night of going out with Michael and some friends. Michael knows I’m against premarital sex, but that night I was very intoxicated and he had sex with me, even though I was too incapacitated to consent and can’t remember everything.”

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## Scenario: The Charges



- Sexual Assault (sexual intercourse where individual cannot consent)
- Title IX Jurisdiction? Yes
  - ✓ Would constitute sexual harassment (sexual assault) if proved
  - ✓ Occurred on campus and in United States
  - ✓ Complainant is still a student

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## Procedural Requirements – Clery, then UD

### 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)

## 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

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## 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

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## 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.

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## 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

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## 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

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## 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.

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## Back to our Scenario



- What does your process look like for Title IX Sexual Assault cases?
- Tessa and Michael will both get written notice of the formal complaint.
- Coordinator will check in with both parties (and advisors) at the outset about policies, procedures, rights, and supportive measures

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## Scenario: Party Options



- Parties may have an advisor of choice from the very first meeting/conversation.
- Parties are both offered supportive measures.
- Both parties are offered informal resolution. (At least one declined.)
- Parties are both provided with instructions about retaliation.

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## Scenario: Party Participation



- Tessa and Michael 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?

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## Scenario: Investigation Report



- 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

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## Scenario: Finalizing Report



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

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## Scenario: Hearing



- Single decision-maker or three-person panel
- Pre-hearing conferences held for each party/advisor to make relevancy determinations and address questions
- In making their decision, can generally use:
  - Hearing testimony
  - Investigative report/attachments
  - Other new, relevant evidence if permitted at the hearing

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## Scenario: Can't Consider



- Statements of individuals who refuse to participate in cross-examination
- 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

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## Scenario: Relevancy



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

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## Scenario: Decorum



- Parties and advisors are expected to abide by decorum standards
- Questions not permitted to be irrelevant, unduly repetitious, or abusive

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## Scenario: 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

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## Introduction to Investigative Techniques

### Set the Stage

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- Make introductions
- Be hospitable – snacks, tissues, water, Zoom?
- Give overview of why they are being interviewed
- What information will be shared, and with whom?
- Explain retaliation policy
- Explain amnesty policy, if relevant
- Invite questions



## **Begin Broadly**

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- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?

## **Freeze Frames – Important for Consent**

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- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language

## Ask Follow-Up Questions

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- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?

## Credibility

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- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by both parties and all witnesses (related to the case, or not)

## When Consent is at Issue

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- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

## Evidence of Consent?

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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?)

## More Evidence of Consent?



Who took off what clothes?

Who provided the condom?

Who initiated physical contact?

Who touched who where?

“They gave consent” = What did you say to them,  
and what did they say to you?

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## Incapacitation: UD Definition



“A person cannot consent if they are unable to understand what is happening or they are disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this Policy if they engage in sexual activity with someone who is incapable of giving consent.”

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## **Incapacitation: UD Definition (1/3)**



“It is a defense to a sexual assault policy violation that the respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. ‘Should have known’ is an objective, reasonable person standard which assumes that a reasonable person is both sober and exercising sound judgment.”

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## **Incapacitation: UD Definition (2/3)**



“Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing and informed consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).

“Incapacitation is determined through consideration of all relevant indicators of an individual’s state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.”

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## **Incapacitation: UD Definition (3/3)**



“This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.”

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## **Incapacitation: Key Issues**



- Timeline:
  - What did complainant ingest and when?
  - What did respondent know about what complainant ingested?
  - Who saw complainant and when, and what symptoms of incapacitation did complainant show at the time?
  - What did respondent have the opportunity to witness regarding symptoms of incapacitation shown by complainant?

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## 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
- "They were drunk." → "What did drunk look like?"
- "Were you having any difficulties \_\_\_\_\_?"

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## 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: amnesty

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## 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?

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## 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?

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## Data for your Timeline

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- Text messages unrelated to the incident itself, but that give time stamps and other valuable information
- Videos/pictures of parties with time stamps
- Card swipes for the parties and anyone with the parties on the evening of the incident
- Security footage

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## Closing the Interview

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- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

## **After the Witness Leaves 1 of 2**

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- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

## **After the Witness Leaves 2 of 2**

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- Consider whether there are additional allegations that now need to be addressed
  - Do you have jurisdiction, or should these be referred to another administrator?
  - Do you have mandatory reports to make – law enforcement, Title IX Coordinator, Children Services, etc.?
  - Does the NOIA need to be amended?
  - Does the Respondent have any claims?

## Create Investigative Summary

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- Summarize what you have done to investigate:
  - Who you talked to
  - Who declined to participate or didn't respond
  - What evidence you gathered
  - What evidence you tried to gather but couldn't
  - Whether there is any evidence that you were provided but do not believe is relevant
- Summarize interviews and evidence gathered
- Identify disputed and undisputed facts

## Mock Interview Prep

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- Plan your questions for Tessa!

## Debrief

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- On Friday, you'll receive the investigative report for this case.
- Next week, we'll hold the hearing. We need:
  - Decision-maker panel (each will practice being the chair)
  - Advisors
  - Parties
  - Witness: Sarah Shade