



August 4, 2021

Ohio Five Conference Clery & Title IX



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



- 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.

Posting These Materials



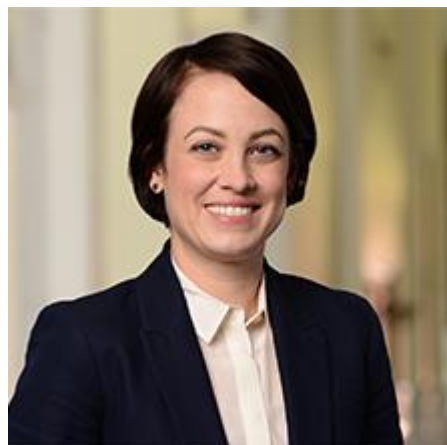
- Yes, you have permission to post these materials on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

Today's Agenda



9:30-12:00	Annual Clery Training
12:00-1:30	Lunch Break
1:30-2:00	The Successes and Challenges of Informal Resolution
2:00-2:30	Potential Impacts of the Department of Education's Notice of Interpretation and Dear Colleague Letter
2:30-2:45	Break
2:45-3:15	"I Feel Like I'm Outsourcing Everything!" Best Practices in the Use of External Investigators, Decision-Makers and Other "Outsides" Involved In Your Policy
3:15-3:45	Process Potpourri

Who We Are



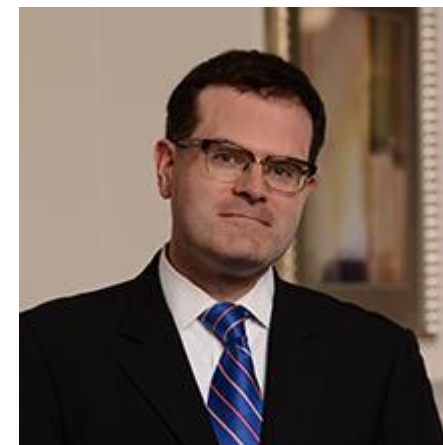
Erin Butcher



Joe Hall



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Josh Nolan



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Melissa Carleton

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 Clery regulations go into effect
- 2016 Handbook – Issued to give detailed guidance on compliance
- August 13, 2020 – New Title IX Regulations go into effect
- October 9, 2020 – 2016 Handbook is rescinded; new Appendix put in place; updated January 19, 2021

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 – but if the case is addressed through another policy, the Clery Act still applies.

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.

Training Check



Ensure training for 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.)

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 on *Bostock*, as well as more broad-ranging guidance on the new Title IX regulations (67 pages!)
- We are awaiting:
 - Notice of Proposed Rulemaking to change the current regulations (scheduled for May 2022).
 - How ED will address *Victim Rights Law Center et al. v. Cardona* (D. Mass, July 28, 2021) – Required remand for reconsideration of “statements” provision of 34 CFR 106.45(b)(6)(i)

Overarching Themes



- Follow your policies. Follow your process.
- Treat everyone equitably throughout the process. “What we do for one, we do for the other.”
- Consider the need for supportive and protective measures for both parties.
- Be transparent and communicate with the parties regularly. “If you aren’t keeping them updated, they will assume you are doing nothing or actively working against them.”
- Rely on evidence, not your gut. “Don’t weigh your gut.”

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.

Your Policy must include in its definition the conduct not permitted by NIBRS, but can be worded differently. We will use the Clery definitions for today’s discussion.

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.

Sexual Assault: Hypos



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

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.]

Sexual Assault: Attempt



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

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.”

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

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.

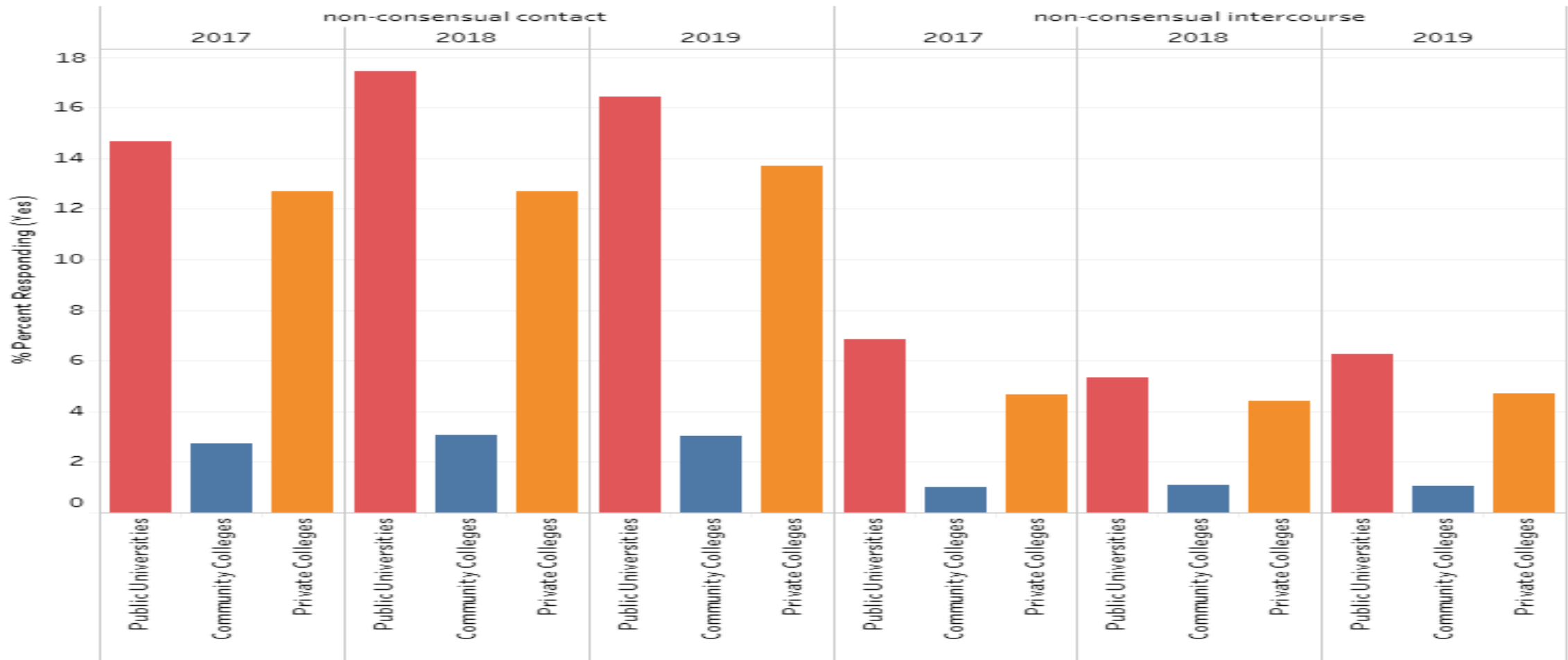
Nearly 1 in 5 women and 1 in 38 men will experience completed or attempted rape during their lifetimes.

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)

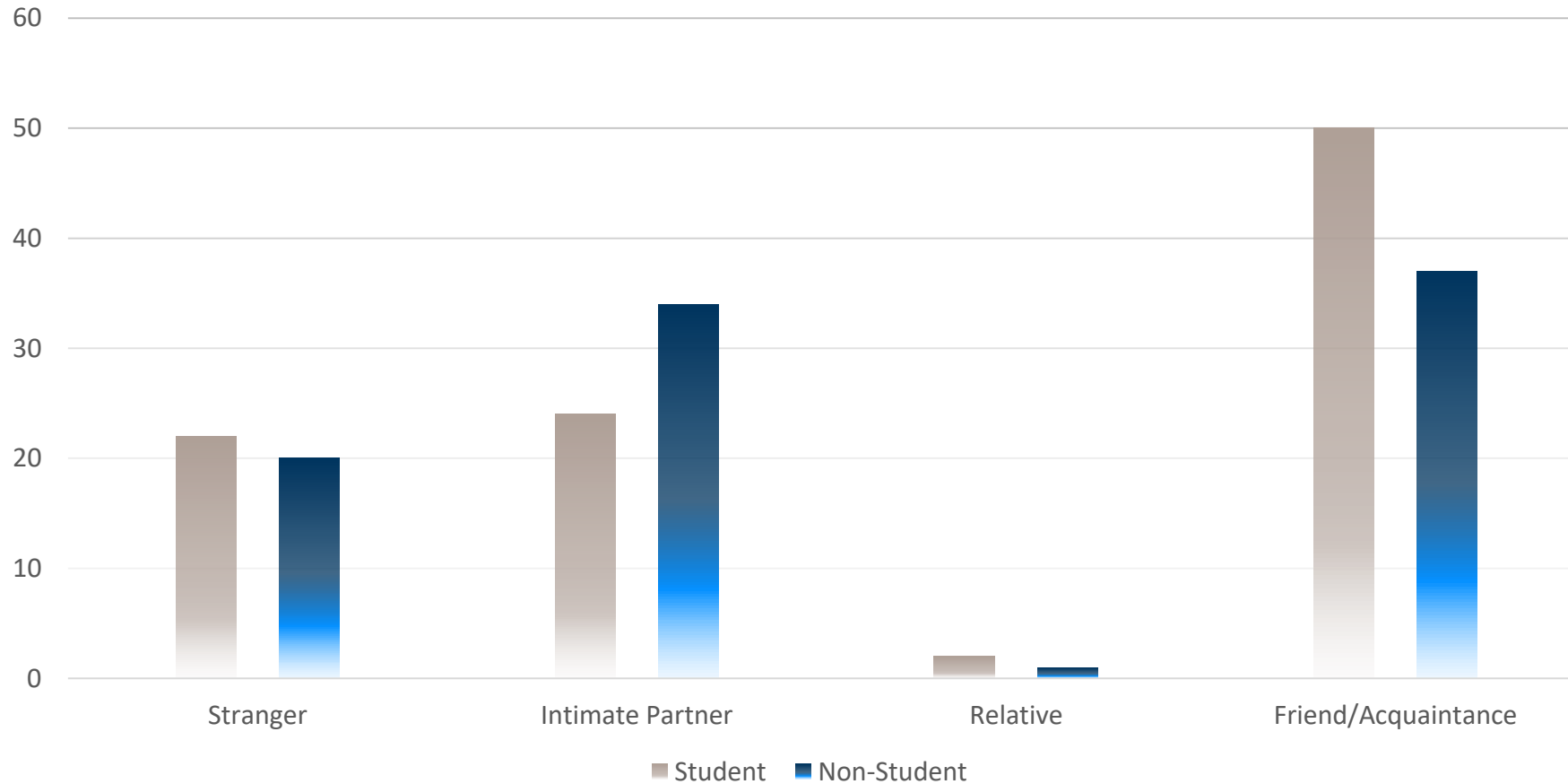
Sexual Assault Data

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).

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>.”

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.

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).

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)*.”

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).

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.

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.

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

IPV vs. Healthy Relationships



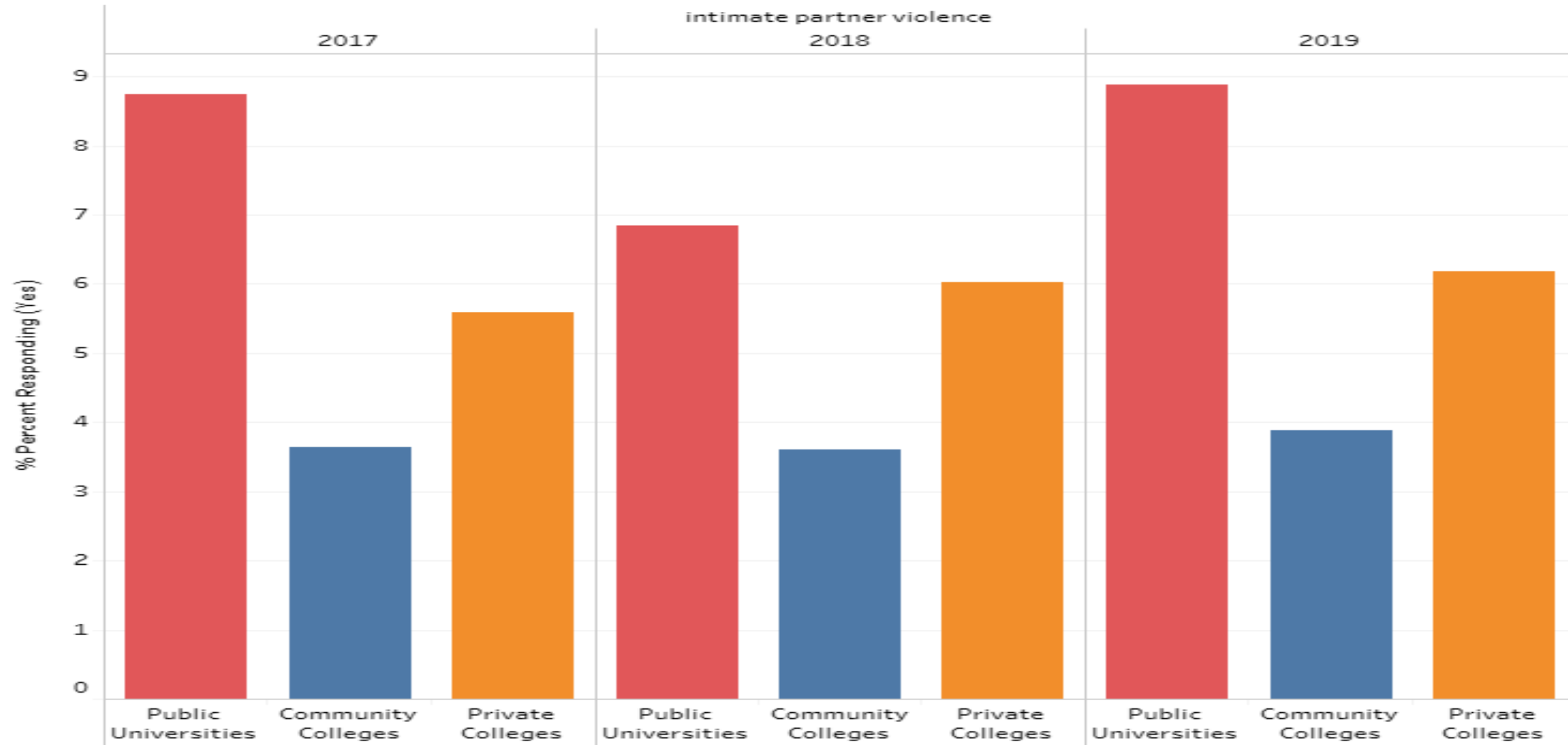
- Counseling individuals on healthy and unhealthy relationships will teach them about warning signs and how to handle problematic behavior.
- The line between healthy and unhealthy is not typically where your policy draws the line for disciplinary purposes.
- How do you partner with your counseling center and domestic violence shelter to ensure consistent messaging with regard to the policy?

IPV Hypos



- Which activities fall under IPV according to your policy?
 - Driving recklessly with C in the car
 - Restraint of C
 - Spitting at C
 - Shaking C
 - Silent treatment towards C
 - Playing mind games with C
 - Threats to C, followed by “just joking”
 - Coercing sex from C by using guilt: “If you loved me, you’d...”
 - Isolating C from friends and support systems

ODHE Data



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.

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?

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.

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.

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.

Stalking: Hypos



- When does this become stalking?
 - Your ex likes your latest post on Instagram
 - Your ex suddenly likes all your posts on Instagram
 - Your ex started liking all your posts on Instagram after you haven't seen them in years
 - Your ex suddenly “friends/follows” you on Instagram, Facebook, LinkedIn, Twitter, and Snapchat, then calls you out of the blue (you let it go to voicemail, but no message)
 - Your ex is standing outside in the hallway with roses

Stalking Data



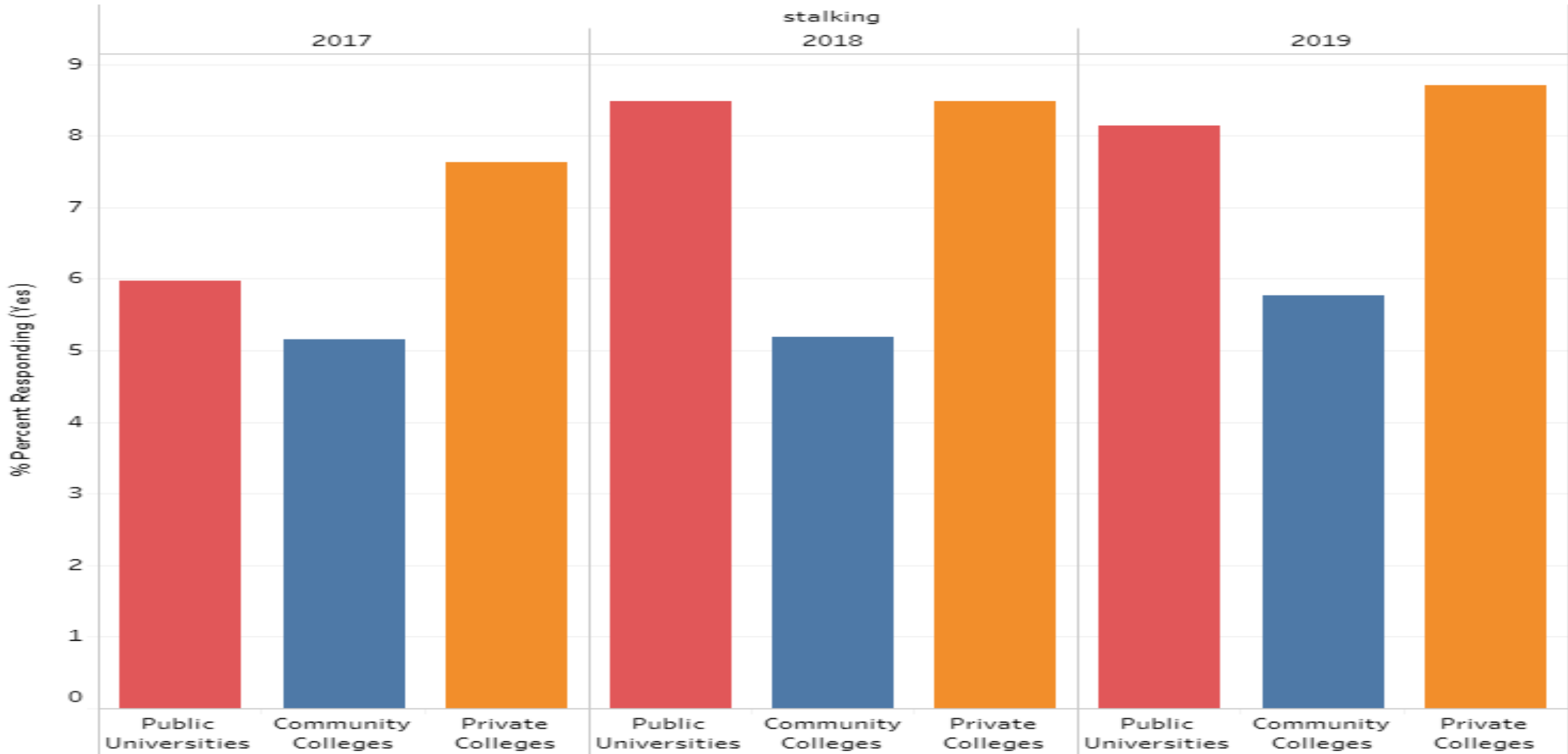
4.5 million women and 2.1 million men are stalked in one year in the United States.

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.

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.]

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.

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



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.

Scenario Basics



- Complainant: Bailey Angel (rising sophomore)
- Respondent: Kermit “Kim” Carnegie IV (rising junior)
- Date of incident: Tuesday, July 27, 2021
- Location of incident: Bailey’s residence hall room

Scenario: Formal Complaint



- “On July 27, 2021, I got into an argument with my boyfriend, Kim. He pushed me out of his room and into the hallway, then slammed the door in my face. When I left to go back to my hall, he followed me. We were still arguing. He barged into my room even though I didn’t want to let him in and threw a porcelain statue of a cat at my head. He missed. Then he threatened to break my phone if I didn’t apologize for everything in our relationship.”

Scenario: The Charges

- Dating Violence
- Title IX Jurisdiction? Yes
 - ✓ Would constitute sexual harassment (dating violence) if proved – right?
 - ✓ Occurred on campus and in United States
 - ✓ Complainant is still a student

But what if...

- What if instead of happening on campus, this happened in an off-campus apartment, or at home over break?
- What policy would apply?
- Clery procedural protections would still apply if you were to move forward with a disciplinary process.



Procedural Requirements – Clery, then TIX

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

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

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.

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

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

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.

Back to our Scenario



- What does your process look like for Title IX Dating Violence cases?
- Bailey and Kim 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

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.

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.
- Parties are both provided with instructions about retaliation.

Scenario: Informal Resolution



- Is this an appropriate case for informal resolution?
- What would be appropriate terms of an agreement?
 - How are we preventing harm to the parties?
 - How are we preventing harm to the community?
- What happens if one or both parties want to lift any restrictions later?

Scenario: Party Participation



- Bailey and Kim 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?

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

Scenario: Bailey is Reluctant

- How do you encourage a reluctant complainant 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.

Scenario: Kim Opts Out

- Let's say there are pending criminal charges against Kim, so Kim opts out of the interview process.
- What does this mean for the investigative report review?
- Can Kim still provide information in response to the case file and/or draft report? **YES.** Don't coerce Kim to participate either.

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

Scenario: Hearing

- We recommend pre-hearing conferences with each party/advisor to review procedures, determine witnesses, and address any evidentiary issues
- Decision-maker holds the hearing
- In making the decision, the decision-maker can generally use:
 - Hearing testimony
 - Investigative report/attachments
 - Other new, relevant evidence if permitted at the hearing

Scenario: Can't Consider



- Statements of individuals who refuse to participate in cross-examination (but more expected on this due to recent court case)
- 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

Scenario: Relevancy



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

Scenario: Decorum



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

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

Scenario: Hearing Hypos

- What if Bailey decides not to show up?
- What if Kim decides not to show up?
- What if a key eyewitness doesn't show up?
- What if an advisor doesn't show up?
- What if one of your parties becomes suicidal in the middle of the hearing?
- What if there are suspicions of witness tampering leading to the no-show of a party or witness?

Scenario: Sanctions



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

Scenario: 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?

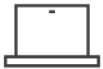
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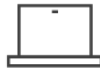
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LUNCH
BREAK!



**The Challenges and Successes of
Informal Resolutions
with Laura Anthony**



Bricker & Eckler
ATTORNEYS AT LAW

What is informal resolution?



- A process by which two parties enter into an agreement to resolve a formal complaint of Title IX Sexual Harassment.

Types of Informal Resolution

- Shuttle diplomacy
- Mediation
- Restorative justice
- Other conflict resolution procedures available on your campus

Why Offer It?



- Parties may be more satisfied with an outcome they can control themselves
- Parties can tailor solutions to their needs
- May reach a resolution more quickly
- Less adversarial than the investigation/adjudication process in the regulations (per Preamble at 30098 FN 463)



Current Regulations (and Preamble)

Key Regulation: 106.45(b)(9)

- Can/will you offer informal resolution?
- What boundaries apply to who can participate?
- What notice must be provided to the parties?
- What is required in terms of consent?

Will You Offer Informal Resolution?

- Can **not** offer it in cases involving allegations of an employee sexually harassing a student
- Otherwise, you “may” offer it at any time prior to reaching a determination
- How do you decide when to offer it and when not to offer?
 - Consider memorializing some factors to consider in your policy or procedures.

Can't Require Informal Resolution

- Can **not** require parties to participate in informal resolution
- Can **not** require students or employees to **waive their right** to investigation and adjudication of a formal complaint as a condition of becoming or continuing as a student or employee.
- Can **not offer** informal resolution until there is a formal complaint

Written Notice to the Parties

- Must include:
 - Allegations
 - Requirements of the informal resolution process (precludes formal complaint from same allegations)
 - Party may withdraw from process at any time prior to resolution
 - Consequences of participation, including what records will be maintained/shared

Consent

- Must obtain the parties' **voluntary written consent** to initiate informal complaint process
- Regulations do not require use of a particular form for this consent
- Consent can be provided electronically if your institution chooses to accept electronic consent

Considerations

- Is the scope limited to the formal complaint?
- Will the Title IX Coordinator “sign off” on the agreement?
- How will you handle a violation of the agreement?
- If no agreement is reached, can the parties use the information exchanged during IR as evidence?
- Confidentiality
- What information is shared with the Title IX Coordinator?

Training Requirements

- Must train facilitators of informal resolution in:
 - Definition of sexual harassment in the regulations
 - Scope of your education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

See 34 C.F.R. 106.45(b)(1)(iii).

What Should Our Process Look Like? Requires a Prompt Timeframe

The recipient (the school) should decide what “prompt” timeframe to set to resolve the informal resolution

Prompt Timeframe Considerations

- Stop the clock for exams or breaks so that students are not required to participate during exams or breaks or have that time count against resolving
- Have the ability to extend timeframe if close to resolving but need a few extra days
- Remember: you can continue past the timeframe if the parties agree to do so, but you may want to get your formal process going in the meantime



Structuring Your Program

Remember Your Ethic of Care

- What we do for one, we do for the other.
- The process must be truly voluntary.
- We cannot make a finding of responsibility without going through the formal process.

Finding Your Facilitators

- Skill set:
 - Good listener
 - Open-minded
 - Solves problems creatively
 - Has ability to fit it into their schedule
 - Knows options on your campus

Consider your options

- Title IX team members not otherwise assigned to the case
- Ombudsperson
- Human Resources staff with conflict resolution training
- Residence Life professionals
- Student Affairs professionals
- Legal clinic/law professors
- Local alumni lawyers (pro bono project?)

Mediation

- Specifically listed in the Preamble, but not defined.
- “Mediation” may have a specific legal meaning in your jurisdiction that invokes certain requirements
 - May require specific training for mediators in your jurisdiction (e.g. lawyer, certification)
- Typically involves a third-party facilitating the resolution of a dispute between the parties
- Communications are protected

Restorative Justice

- The Preamble refers to restorative justice as an option for informal resolution, but does not define it.
- Usually aims to repair harm done to crime victims through facilitation, but will vary from program to program
- Example: school-based, non-punitive interventions to bring students and staff together to discuss differences and conflicts, often in a group setting
- Some RJ programs require as one of their key elements that respondents admit responsibility and make amends.

Where Does The Process Live?

- No requirement as to “who” does it
- Title IX Coordinator must maintain records for 7 years
- Need to have good connectivity with Title IX Office



Conducgting Informal Resolutions

Contact the Parties

The informal resolution officer should contact each party individually to initiate and explain the process.

A written notice shall be provided disclosing:

- The allegations
- The informal resolution process requirements
- Any consequences

Determine Setup

- In person in same room?
- In person but in separate rooms with informal resolution officer going between (sometimes called shuttle mediation)?
- Virtual meeting
- No meeting – just separate calls with facilitator

Setup Considerations

- Each matter is different, so providing multiple methods for conducting a resolution may be helpful
- Should the parties communicate directly with each other?
- Are there attorneys or parents involved?

Initial Meeting

- Will the parties be separated?
- Facilitator should give an overview of the process and outline expectations
- Establish ground rules
- Provide each party with the opportunity to tell their story

Script of Overview of Process

A script is helpful to ensure:

- You (and every other facilitator) approach each facilitation consistently
- Overview of your process
- Don't forget anything you needed to say

Determine What Each Party Wants

- Often referred to as the “WIFM” (what’s in it for me?)
- Ask each party what they want/need out of the process and from the other party
- Make a list of each WIFM and prioritize
- Can they be flexible on any demand?
- Be clear with each party what you can share from the list with the other party

Questions Facilitator May Ask of a Party

- What would make you feel safe?
- What do you want your day at school to look like after this?
- What could the school do to make you feel safer?
- What could the other party do to make you feel safer?
- What do you need and what do you want, and are those different?
- What could you live with?

Reality Checking – Be Careful

It may be helpful to remind one or both parties

- That informal resolution requires agreement to complete
- that the alternative may be a return to the formal process
- That they can control the outcome in the informal process, but not the formal process

But do so in a neutral way.

Reality Checking – Bias?

Example of a biased/pushy reality check:

“I’ve seen cases like yours and it’s not looking good for you. You should take the informal resolution option offered by the other party.”

Reality Checking – Neutral

Example of a neutral reality check:

“If this goes back to the formal process, you will not have control over the outcome, and there is a possibility that a decision-maker could find you in violation of policy”

What can be easily offered?

- No-contact orders
- Separate residences
- Arrangements regarding classes, dining halls, workout rooms, athletic facilities, and student organizations
- Counseling
- Discipline
- Consider having a list of supportive measures

Is a resolution possible?

- Sometimes the parties want the same things
- Other times there is no overlap
- Facilitator should identify with each party what they can share with the other party
- Not every dispute can be resolved. Preview this for the parties.

If Agreement Reached...

- Document the terms so there is a shared understanding of the agreement
- Have the parties sign that the documentation accurately reflects their understanding
- Try to finish it before the parties leave so it doesn't fall apart

If No Agreement Reached...

- Parties may want time to think about the resolution – this will be up to the school on how to proceed
- May provide a certain deadline by which to have signed
- May provide certain provision that it will go back to formal process by deadline
- May choose to offer further facilitated resolution on the dispute of it the parties think it would be helpful

Have a Form/Template for Documenting the Resolution

- Have a template easily accessible that you can customize during the IR session
- More likely to lead to resolution that day – no need for drafting delay (and second thoughts)
- Include confidentiality provision for IR process
- Consult legal counsel to develop template

Recordkeeping

- Maintain a copy of documentation in the Title IX office for seven years
- If the resolution is not successful, maintain any records of the process and its result for seven years

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Title IX Regulations & LGBTQIA+ Updates

Ohio Five Training at Kenyon College
August 4, 2021

Presented by
Erin Butcher



Bricker & Eckler
ATTORNEYS AT LAW

TIX Regs' Definitions of Sexual Assault



“Sexual Assault” includes:

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

Sexual Assault: Rape



“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: 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: 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.

January 20, 2021 Executive Order

(1 of 2)



EO on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (January 20, 2021)

- States, “It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation...”
- “Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.”

January 20, 2021

Executive Order (2 of 2)



EO on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (January 20, 2021) - Continued

- Order to the head of each agency to review all existing orders, regulations, etc. that promulgates or administrates any statute or regulation that prohibits discrimination on the basis of sex to review it within 100 days to ensure *Bostock v. Clayton County*, 590 U.S. ____ (2020) is applied
- *Bostock* held discrimination “because of ...sex” covers discrimination on the basis of sex for gender identity and sexual orientation under Title VII.

March 8, 2021

Executive Order



EO on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (March 8, 2021)

- Order Secretary to consider taking additional enforcement steps to, in part:
 - “account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence”
- (Sec. 2(b))

June 16, 2021 Notice of Interpretation (1 of 2)



Expressly notes DOE will apply *Bostock* to interpret “Title IX’s prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation...”

- Noted that the US. Supreme Court in *Bostock* declined to adopt (punted) on whether the definition of “sex” meant “reproductive biology,” as posited by one party, or a definition “capturing more than anatomy,” offered by another party.

Who protected? Anyone who identifies as

“male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways.”

June 16, 2021 Notice of Interpretation (2 of 2)



So what does this mean in practice?

- OCR will open an investigation of allegations that an “individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities.”
- Must still meet jurisdictional requirements set forth in Title IX regulations
- Notes institutions that are controlled by a religious organization are exempt to the extent compliance would not be consistent with the organization’s religious tenants
- Supersedes and replaces any prior inconsistent statements by DOE

June 23, 2021 Dear Colleague Letter

(1 of 2)



- Reminds institutions, on the 48th anniversary of the passage of Title IX and one-year anniversary of *Bostock*, of the January 2021 EO and June 16, 2021 Notice of Interpretation
- Encourages review of OCR’s “Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students” and notes
“I recognize the particular vulnerability of LGBTQI+ students and the often overwhelming challenges these students face in education compared to their peers, including feeling less safe, experiencing poor mental health, facing a higher risk of suicide, being more likely to miss school, and facing a disproportionate risk of being homeless.”

June 23, 2021 Dear Colleague Letter

(2 of 2)



- Contains references for resources to LGBTQI+ students
- Provides Overview of the Law and Frequently Asked Questions
- Overview of the Law



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

Confronting Anti-LGBTQI+ Harassment in Schools

A Resource for Students and Families

Many students face bullying, harassment, and discrimination based on sex stereotypes and assumptions about what it means to be a boy or a girl. Students who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender non-conforming may face harassment based on how they dress or act, or for simply being who they are. It is important to know that discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by federal law. It is also important that LGBTQI+ students feel safe and know what to do if they experience discrimination.

Public elementary and secondary schools, as well as public and private colleges and universities, have a responsibility to investigate and address sex discrimination, including sexual harassment, against students because of their perceived or actual sexual orientation or gender identity. When schools fail to respond appropriately, the Educational Opportunities Section of the Civil Rights Division (CRT) at the U.S. Department of Justice and the Office for Civil Rights (OCR) at the U.S. Department of Education can help by enforcing federal laws that protect students from discrimination. CRT and OCR can also provide information to assist schools in meeting their legal obligations.

Examples of the kinds of incidents CRT and OCR can investigate:

A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is “not appropriate for school.” Teachers suggest that the student attend alone or bring a boy as a date.

When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates “out” him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school’s administrators, they dismiss it, saying: “you can’t expect everyone to agree with your choices.”

A community college student discloses he’s gay during a seminar discussion. Leaving class, a group of students calls him a homophobic slur, and one bumps him into the wall. A professor witnesses this, but does nothing. Over the next month, the harassment worsens. The student goes to his dean after missing several lectures out of fear. The college interviews one, but not all, of the harassers, does nothing more, and never follows up with the student.

An elementary school student with intersex traits dresses in a gender neutral way, identifies as nonbinary, and uses they/them pronouns. The student’s teacher laughs when other students ask if they are “a boy or a girl” and comments that there is “only one way to find out.” The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks “you have to be able to laugh at yourself sometimes.”

On her way to the girls’ restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys’ restroom or nurse’s office because her school records identify her as “male.” Later, the student joins her friends to try out for the girls’ cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her “those are the district’s policies.”

If you have been treated unfairly or believe a student has been treated unfairly—for example, treated differently, denied an educational opportunity, harassed, bullied, or retaliated against—because of sexual orientation or gender identity, there are a number of actions you can take:

1

Notify a teacher or school leader (for example, a principal or student affairs staff) immediately. If you don't get the help you need, file a formal complaint with the school, school district, college, or university. Keep records of your complaint(s) and responses you receive.

2

Write down the details about what happened, where and when the incident happened, who was involved, and the names of any witnesses. Do this for every incident of discrimination, and keep copies of any related documents or other information.

3

If you are not proficient in English, you have the right to **ask the school to translate or interpret information** into a language you understand. If you have communication needs because of a disability, you have the right to receive accommodations or aids and services that provide you with effective communication.

4

Counseling and other mental health support can sometimes be helpful for a student who has been harassed or bullied. **Consider seeking mental health resources** if needed.

5

Consider filing a complaint with the Civil Rights Division of the U.S. Department of Justice at [civilrights.justice.gov](https://www.civilrights.justice.gov) (available in several different languages), or with the Office for Civil Rights at the U.S. Department of Education at www.ed.gov/ocr/complaintintro.html (to file a complaint in English) or www.ed.gov/ocr/docs/howto.html (to file a complaint in multiple languages).

**Frequently
Asked
Questions
About Sex
Discrimination-
Discrimination
Based on
Sexual
Orientation
and Gender
Identity**

Does Title IX Prohibit Discrimination Based on Sexual Orientation and Gender Identity?

Yes. Title IX prohibits discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance. This includes situations where individuals are harassed; disciplined in a discriminatory manner; excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities; denied the benefits of a school's programs or activities; or otherwise treated differently because of their sexual orientation or gender identity.

For more resources for LGBTQ+ students, please click here (<https://www2.ed.gov/about/offices/list/ocr/lgbt.html>).

Top

Ohio Federal Case (1 of 2)

Board of Education of the Highland Local School District v. United States Department of Education

Southern District of Ohio 2016, Judge Algenon Marbley

- Issue: Ohio school district challenged the DOE's investigative finding that the school district's policy of not permitting the student, a transgender girl, to use the girls' restroom impermissibly discriminated against the student on the basis of her sex in violation of Title IX (under the Administrative Procedures Act)
- School sought a preliminary injunctive order to prevent DOE from enforcing (meaning they wanted to keep preventing girl from using girls' rest room)

Ohio Federal Case (2 of 2)

Board of Education of the Highland Local School District v. United States Department of Education, cont'd

- Holdings: Student substantially likely to succeed on the merits of her Title IX sex discrimination and equal protection claims – preliminary injunction granted in student's favor

Ohio HB 61 and SB 132

AKA “Save Women’s Sports Act” (both referred to committee)

- On 2014, OHSHAA voted to permit transgender girls to compete following a year of hormone therapy or test results that show no physical advantage over genetic females of the same age group
- Would ban transgender girls and women from playing women’s sports
- Also tacked on to NIL bill last minute, so Govern DeWine, who criticized the “Save Women’s Sports” addition, issued an EO to address NIL
 - Passed House 57-36 along party lines with one Republican member voting with Democrats against the bill
- The Ohio Capital Journal noted that, of the 400,000 high school athletes in Ohio, five were transgender girls who competed in women’s sports

West Virginia Federal Case (1 of 3)

B.P.J., et al. v. West Virginia State Board of Education, et al.

Southern District of West Virginia, July 21, 2021, Judge Joseph Goodwin

- Issue: West Virginia had passed a “Save Women’s Sports Act” like Ohio’s HB 61 and SB 132 and it was signed into law on April 28, 2021 and B.P.J., transgender sixth-grade girl who played sports, sought preliminary injunction to enjoin law and sought declaratory judgment that law unconstitutional under equal protection and violated Title IX

West Virginia Federal Case (2 of 3)

B.P.J., et al. v. West Virginia State Board of Education, et al.

- Holdings:
 - West Virginia now not substantially related to protecting girls' opportunities in athletics or physical safety while playing athletics and likely to succeed on merits under equal protection
 - Transgender people make up a small percentage of the population: .6% of adult population and .7% of thirteen- to seventeen-year olds
 - B.P.J. only transgender female student athlete at school

West Virginia Federal Case (3 of 3)

B.P.J., et al. v. West Virginia State Board of Education, et al.

- Holdings:
 - Citing 4th Circuit decision from 2020 and *Bostock*, likely violates Title IX because all other cisgender girls, cisgender boys, transgender boys, and students falling outside these definitions are allowed to play West Virginia sports that best fit their gender identity

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Session 3: I feel like I'm outsourcing everything!

Best Practices in Outsourcing

Jeff Knight

Of Counsel

Bricker & Eckler



Bricker & Eckler
ATTORNEYS AT LAW

You may be outsourcing the work, but you are not outsourcing the obligations.



Initial Considerations

When does it make sense to outsource?

What should we consider?

Who can make the decision?

Initial Considerations



- Don't start with monetary considerations (*important, but don't start with it!*)
- Ask yourself, and your team:
 - Are we capable of doing this?
 - Do we have the capacity to do this?
- Identify the benefits and challenges if you outsource.
- Understand who needs to be involved in the decision to outsource.



Moving Forward

What role(s) need filled?

Identifying a partner.

Evaluating potential partners.

Moving Forward



- The role that needs filled should dictate the skillset that you are seeking.
 - *Looking at the case that needs staffed, what skills will be necessary to satisfy your obligations?*
- Evaluate the tangible and intangible traits of your prospective partners against your institution's ethic of care.
 - *Tangible: their training, depth of bench, staffing models, diversity*
 - *Intangible: do they inspire? do they fit? will this be value added?*
- Insurance considerations at this point.



Engaging a Partner

Creating the relationship.

Managing the relationship.

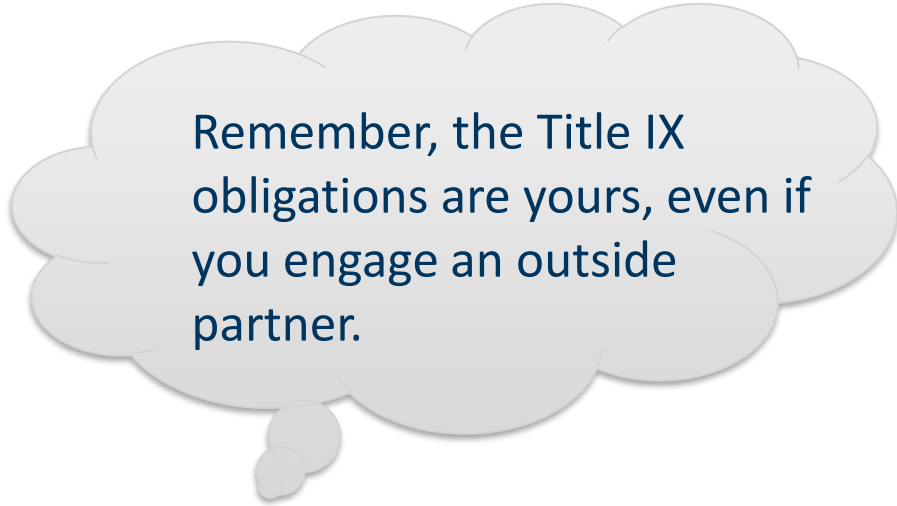
Assessing the relationship.

Engaging a Partner



- Creating the relationship.
 - Documenting the key terms in an engagement letter is critical.
 - Be prepared to meet in the middle (*and start this process early*)
 - Address:
 - Scope of services and any attendant requirements (*e.g.*, training)
 - Billing practices (not just rates, but how expenses are handled, etc.)
 - Communication expectations
 - Confidentiality and FERPA
 - Records retention
 - Availability of insurance coverage
 - Termination

Services to Be Provided. I will provide adjudication services for matters reported to the University through its policy relating to sexual misconduct as described above. I agree to undergo training on Title IX and maintain my expertise on serving as a hearing officer. I agree to serve as an impartial hearing officer and be free from bias or conflict of interest for all cases in which I perform this role. I agree to inform the University's Title IX Coordinator if I have any relationships to either party or other issue in a particular case that may raise an actual or perceived conflict of interest or claim of bias by a party. I agree to follow the procedures set forth under the Policy. I will issue a written notice of hearing outcome in an appropriate form for each case. I will make every effort to issue the written decision within the time frames provided under the Policy.



Insurance Coverage. The University may have commercial general liability or other insurance coverage which may provide some reimbursement for the services associated with our engagement. We urge you to contact your insurer or broker to determine the nature of the applicable coverage, if any. It is the University's responsibility to pay INCompliance for services rendered, and to obtain reimbursement from the insurer, unless other arrangements are made in writing with INCompliance.

Billing Practices and Manner of Payment. With respect to our fees, our billing statements include a description of work performed, the amount of time expended, and disbursements incurred on the University's behalf.

The University agrees to cooperate in providing access to documents and employees necessary to the adjudication process, as well as facilities or technology that may be needed. The University also agrees to consult as necessary regarding the Policy and procedures that the University has established. The services to be provided are not legal services, and you recognize that I am not a licensed attorney in your state, nor is there an attorney-client relationship. My law licensure is in Ohio only.

The University has determined that I, and assisting members of my firm, have a proper need to know for information protected by the Family Educational Rights and Privacy Act.

I agree to keep secret and maintain the confidentiality of all information shared with me by the University and the parties during hearings. I agree that my only communication regarding the rationale of my decision as hearing officer will be through written decisions; and I further agree that I will provide such decisions only to the case manager as identified by the University. I also agree that neither I nor any member of my firm will respond to any requests for comments about the University's Policy or any specific case under the Policy without prior written approval. Instead, I agree to direct to any requests for public comments to the University.

Engaging a Partner



- Managing the relationship.
 - Remember, YOU are the client.
 - Communicate your expectations.
 - Help kick it off on the right foot.
- Assessing the relationship.
 - Review work product against internal work product.
 - Evaluate against your critical requirements (communications, fit, cost, value, etc.)
- (Ending the relationship)



You agree that in expressing your dissatisfaction, you will not attempt to pressure a decision-maker to reach a particular conclusion in a particular case.

Termination of the Relationship. You may terminate this engagement for any reason upon written notice to me or the firm. Immediately after receiving such notice, we will cease to render additional services and will cooperate with the University in facilitating the orderly transfer of files and records to the University, subject to, if appropriate, resolution of any outstanding financial issues.

Our Firm may withdraw from this agreement for good cause or with the University's consent. If the University fails to meet its obligations with respect to this engagement and continues to fail to do so after receiving written notice of that failure from the Firm, then the Firm will have the right to end the relationship and this letter agreement.

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Session 4: Title IX Process Potpourri

Clery and Title IX
Drive-In Conference
August 4, 2021



Agenda



- Mandatory and Discretionary Dismissal
 - The basics
 - Considerations
- Minimizing Liability through Transparency
 - Showing Your Work
 - Working with GC
- Lingerin g Questions Regarding Investigative Reports and Decisions

****This is not a complete training on the Title IX regulations and does not, by itself, comply with the training requirements in the new Title IX regulations.****

Before we get to dismissal...



Guidance re: Formal Complaints

- July 20, 2021 Q & A – Question 24
- Possible Title IX violation if coordinators don't file a Formal Complaint – even if the Complainant is not associated with the school in any way – when...
 - Actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority (Preamble, p. 30089)

“Put simply...”



Per the most recent guidance:

“Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process.”



Mandatory and Discretionary Dismissal

Jurisdiction & Mandatory Dismissal

(1 of 2)



Dismissal of a formal complaint per §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,**
 - or **did not occur against a person in the United States, ...**

Jurisdiction & Mandatory Dismissal

(2 of 2)



(Cont.)... 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.”
- **When and Where are your exit ramps?**

Discretionary Dismissal



Dismissal of a formal complaint per §106.45(b)(3)(ii)

- “The recipient **may** dismiss the formal complaint or any allegations therein, if at the time during the investigation or hearing:
 - A complainant notifies the TIXC in writing that **the complainant would like to withdraw the formal complaint** or any allegations therein;
 - The **respondent is no longer enrolled or employed** by the recipient; or
 - **Specific circumstances** prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissal Notice & Timing

34 CFR § 106.45(b)(3)(iii)

- Must promptly send written **notice** of dismissal/**reasons** simultaneously to the parties
- Jurisdictional issues can arise **at any time**, even during the investigation



-
- Procedural posture
 - Has a formal complaint been filed?
 - If not, how will you document the dismissal and/or referral?
 - Reaction of the parties
 - Has the issue of dismissal been previewed?
 - Do you need to meet to explain the decision?

Dismissal Considerations

(2 of 3)



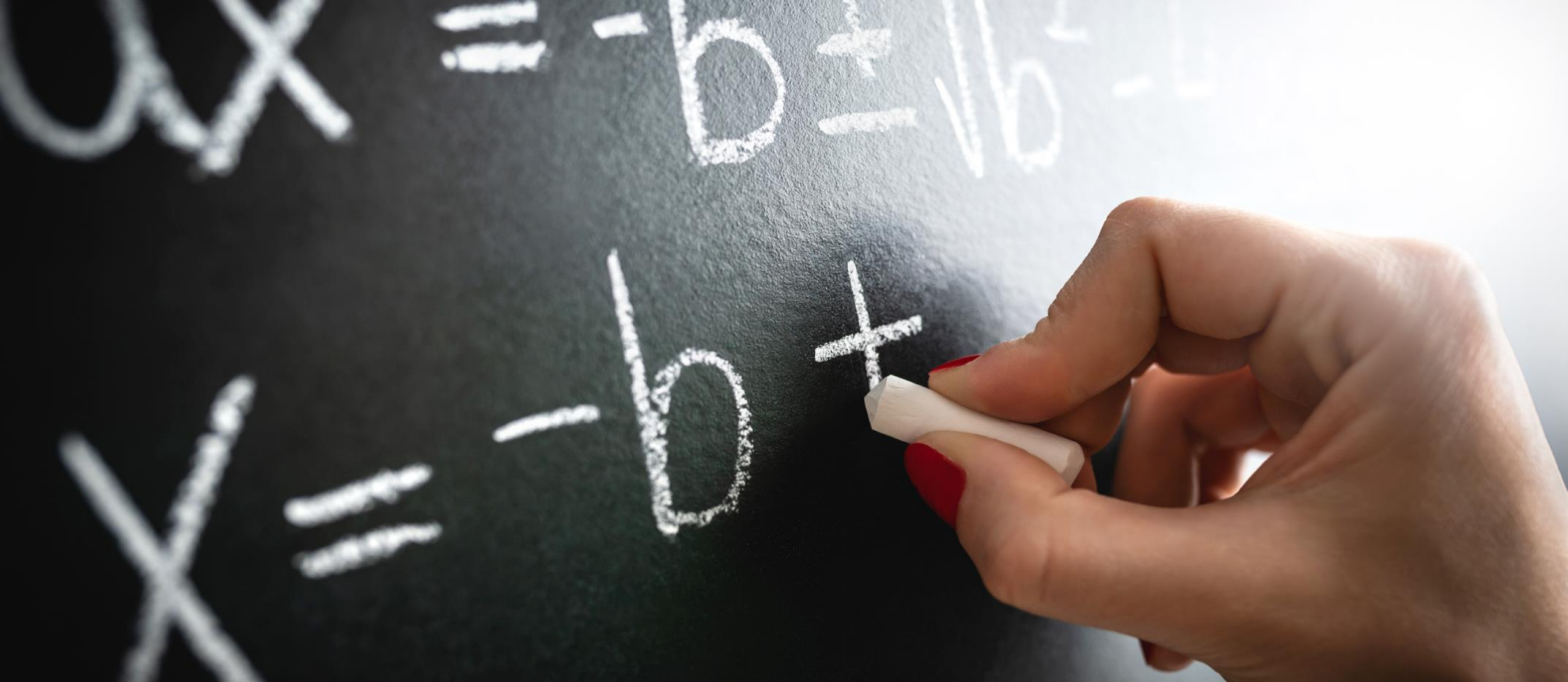
- Documentation of the dismissal
 - Show your work
 - Internal or shared with the parties?
 - Depends on FC and your process
- Consistency with prior dismissals
 - Substantively and Procedurally
 - Watch for this with discretionary dismissals

Dismissal Considerations

(3 of 3)



- Appeals
 - How do they work?
 - Who is the decision-maker and will you need to look for additional decision-makers if the dismissal is reversed and goes to a hearing



Minimizing Liability Through Transparency

“Show Your Work” is Required



Places in the new regs that require a written rationale:

- Supportive measures
- Dismissal of a Formal Complaint
- Determination regarding responsibility
- Appeal decision

Additional provisions that require documentation of decision-making:

- Demonstrating a lack of deliberate indifference generally
- The “result” of an institutional disciplinary proceeding under Clery

Disclaimer: this is not a discussion of record-keeping, which is much broader; this discussion is focused on documenting a thought process for a particular decision

“Show Your Work” – Supportive Measures



Must show the basis for *not* providing certain supportive measures

- 34 CFR § 106.45(b)(10)(D)(ii)
- “must document the reasons why such a response was not clearly unreasonable in light of known circumstances”

“Show Your Work” – Dismissal



Dismissal of a Formal Complaint

- 34 CFR § 106.45(b)(3)(iii)
- “must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties”

“Show Your Work” – Decision



Determination Regarding Responsibility

- 34 CFR § 106.45(b)(7)(ii)(A)-(E)
- 5 topics required in order to explain the decision, including:
 - Findings of facts
 - “A statement of, and rationale for, the result as to each allegation...”

“Show Your Work” – Appeal



Determination Regarding Responsibility

- 34 CFR § 106.45(b)(8)(iii)(E)
- “Issue a written decision describing the result of the appeal and the rationale for the result...”

“Show Your Work” – Informal Resolution



No “result” or “finding” to be explained, but...

- Best practice to document the resolution reached
- And the steps that got you there
 - Adequate notice
 - Voluntary written consent
 - Does not involve allegations that an employee sexually harassed a student

Other requirements to “Show Your Work”



Additional provisions that require documentation of decision-making:

- Demonstrating a lack of deliberate indifference generally
 - 34 CFR § 106.44(a) *General response to sexual harassment*
- The “result” of an institutional disciplinary proceeding under Clery
 - 34 CFR § 668.46(k)(2)(v) and (k)(3)(iii)
 - “Result means any initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution... the result must include the rationale for the result and the sanctions.”

Working with GC



- Point out that the regs require a written rationale
- Meet with them to discuss any concerns they have about documenting decisions
- Work with them to be consistent



Investigative Reports & Decisions

Lingering Questions



- Best practices for transitioning from the investigation to the hearing process
 - Anyone care to share with the group?

- Do you have a system in place to share evidence and the report?
 - If so – is it working and do you like it?
- Scheduling
 - Is this your job? Your Coordinator's job?
 - How do cases flow through your process, timing-wise?
 - Pre-hearing conferences
 - Other steps specific to your process?
 - Create a flowchart or calendar for yourself

- New information and requests for further investigation
 - How are you handling these?
 - Requires a fact-specific analysis
 - Work with legal counsel & coordinators
- Tie up as many loose ends as possible before the hearing
 - Don't leave any "gathering" responsibilities for the decision-maker

Potpourri Evidentiary Issues



- Both investigators and decision-makers must consider relevance and document their decisions
- When providing evidence to inspect and review, a recipient must:
 - Include “the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so
 - That each party can meaningfully respond to the evidence prior to the conclusion of the investigation.” 34 CFR § 106.45(b)(5)(vi)

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Upcoming Webinars

www.bricker.com/events

Level 1: 9AM – 12PM

- Higher Ed annual Clery training & Title IX basics: Nov 8-9

Level 2: 9AM – 12PM

- Higher Ed Title IX coordinator training: Aug 5-6
- Higher Ed Title IX investigator training: Aug 23-24
- Higher Ed Title IX decision-maker training: Aug 26-27
- Higher Ed Title IX appeals officer training: Aug 30-31

Other Webinars: 12PM – 1PM

- What You Missed This Summer in Higher Education: Aug 20
- Hazing in Ohio – A Higher Education Update: Sept 17

Questions?



Additional information available at:

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

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