Sexual Misconduct (Title IX)
Investigation Class

Presented by:

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(Limited permission is granted to each attendee of this class to make training materials available per the requirements outlined in the Title IX Regulations published on May 19, 2020)
Sexual Misconduct Investigations Agenda
ACC/WCU

Online Course Agenda
July 13-17, 2020
Four Hours per Day

9am-1pm PDT each day (15 min BREAK 10:30am and 11:30am)
11am-3pm CDT each day (15 min BREAK 12:30pm and 1:30pm)
12noon-4pm EDT each day (15 min BREAK 1:30pm and 2:30pm)

*Breakout rooms, polling and group exercises not identified on schedule TBD by instructor

Day 1-July 13, 2020
• Introduction and Definition of Terms
• New Regs--Title IX Overview-Then and Now
• The Clery Act for Title IX Practitioners

Day 2-July 14, 2020
• Review & Reflection
• Title IX Structure and Roles of Institutional Stakeholders
• Group Exercise-Understanding Sexual Harassment, Sexual Assault, Domestic Violence, Dating Violence and Stalking

Day 3-July 15, 2020
• Review & Reflection
• Special Considerations
• Intake and Supportive Measures
• Informal Resolution Considerations
• Role of the Advisor of Choice

Day 4-July 16, 2020
• Investigative Strategy and Evidence Collection
• Interviewing
• Considerations in Creating the Preliminary Report

Day 5-July 17, 2020
• Credibility and Relevancy
• Final Reports, Outcomes and Resolutions
• Final Activity
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Adrienne Meador Murray, Executive Director of Training and Compliance Activities

Adrienne Meador Murray began her career in municipal law enforcement as a civilian employee with the City of Richmond Police Department (Virginia). She graduated from the Virginia Commonwealth University Police Training Academy and began her career as a sworn police officer for the University of Richmond (UR) Police Department (Virginia). At UR, Murray progressed through the ranks from a night shift patrol officer to Operations Lieutenant (overseeing criminal investigations, crime prevention and patrol) over the span of a decade before becoming the Chief of Police at Davidson College in North Carolina. Most recently, Murray served as Chief of Police at Trinity Washington University (in Washington, D.C.). In January 2014, Murray joined the National Association of Clery Compliance Officers & Professionals (NACCOP) and D. Stafford & Associates where she currently serves as Executive Director of Training and Compliance Activities after having been affiliated with D. Stafford & Associates as a part-time Associate since 2012.

As the Executive Director, Equity Compliance and Civil Rights Services, Murray builds on her 17-year career in law enforcement in which she became a nationally recognized expert in the field of best practice postsecondary institutional response to the sexual victimization of college women in the United States and in Canada. She is also a trained civil rights investigator and is well respected throughout the country for her ability to aid institutions in understating how to do best practice criminal and civil rights investigations concurrently. She is well known for her work in having provided support, advocacy and criminal investigative services for victims of sexual assault, stalking and intimate partner violence and is a sought-out speaker and investigator. She has expertise in the construction of best practice law enforcement standard operating procedures and training police officers to respond in best practice and trauma-informed ways to victims of sexual assault and intimate partner violence. In her current role, Murray coordinates curriculum development and instruction for national classes, including basic and advanced sexual misconduct investigation classes; an investigation of dating violence, domestic violence and stalking class; and a Title IX Coordinator/Investigator class offered through D. Stafford & Associates. To date, Murray has trained more than 3,500 criminal and civil rights investigators throughout the U.S.

Drawing on her experiences as a trained criminal and civil rights investigator, Murray also oversees independent investigations of complex sexual misconduct cases; conducts audits of Title IX/VAWA Compliance; drafts institutional sexual misconduct policies and procedures; and conducts campus-based...
trainings pertaining to the resolution of sexual misconduct offenses on college and university campuses. Murray frequently presents at regional and national conferences on topics such as the *Sexual Victimization of College Women, Understanding Consent and Incapacitation*, and *Responding to Sexual Assault on Campus: Clery Act and Title IX Implications*. Murray also conducts provincially specific sexual misconduct trainings throughout Canada.

Murray is a graduate of the University of Richmond, where she received her Bachelor's Degree in Applied Studies in Human Resource Management and of New England College, where she received her Master's Degree in Campus Public Safety Administration. Murray is also a graduate of the 235th session of the prestigious FBI National Academy where she was awarded a graduate certificate in Criminal Justice from the University of Virginia. She has authored numerous journal articles.
INVESTIGATION CLASS ACRONYMS

ASR: Annual Security Report (often used as a reference to the Annual Security Report and/or the Annual Security and Fire Safety Report) that must be published by each institution of higher education.

CSA: Campus Security Authority—Individuals on each campus who have been identified by the Department of Education as persons who are required to report crimes that they become aware of to the Reporting Structure at each institution.

DCL: Dear Colleague Letter—this is a formal name of the method of communication from the Department of Education to college campuses. It is like naming their official “memo” to campuses.

FERPA: Family Educational Rights and Privacy Act—governs the confidentiality of student records.

FNE: Forensic Nurse Examiners

GO: General Order—some departments describe their operating procedures as general orders

HEOA: Higher Education Opportunity Act—the broader law that contains the Clery Act language and the fire safety and missing person language that is in the law but not contained within the “Clery Act” portion of the law.


MOU: Memorandum of Understanding—an official agreement developed between agencies.

NIBRS: National Incident-Based Reporting System. 1 of 2 crime reporting systems developed by the FBI, but not the system that you are required to use for Clery Reporting—the only portion of this system that is used for Clery Act purposes are the 4 forcible and 2 non-forcible sex offense definitions.

OCR: Office for Civil Rights—the unit of the Department of Education that oversees Title IX Compliance.

RE: Responsible Employee as defined by Title IX (OCR)

PD: Police Department

PS: Public Safety

PNG: Persona-non-Grata—process used by some campuses not keep students from entering certain areas of the campus or the entire campus (administrative process) versus legal bar notice or trespass warning.
SANE: Sexual Assault Nurse Examiner

SART: Sexual Assault Response Team

SOP: Standard Operating Procedures—some departments describe their operating procedures as Standard Operating Procedures. Some call them General Orders, etc...

TWN: Timely Warning Notice

UCR: Uniformed Crime Report. This is 1 of 2 crime statistics reporting systems developed by the FBI. Institutions are required to use UCR Standards for counting and classifying crimes for reporting the Clery statistics.
New Regs—Title IX Overview

How We Got Here

- Title IX Prohibits Discrimination On The Basis Of Sex
- ED And The Courts Have Interpreted Title IX To Prohibit Sexual Harassment (Including Sexual Assault)
- Among Other Things, Colleges And Universities Must Investigate Allegations Of Sexual Harassment And Take Appropriate Disciplinary Action

How We Got Here (Cont.)

- Obama-Era ED Guidance Focused On Protecting Victims
  - Including The 2011 “Dear Colleague” Letter; And
  - The Mandatory “Preponderance Of The Evidence” Standard
- Trump/DeVos-Era ED Has Focused On The Due Process Rights Of The Accused:
  - Rescinded Obama-Era Guidance
  - Issued Informal Guidance (Including 2017 Q&A)
  - Engaged In Formal Rulemaking Process
Major Changes Under New Regs

- Jurisdiction
- Definitions
- Responsible Employees
- Duty to Respond
- Report vs Signed Formal Complaints
- Role of Advisor of Choice
- Supportive Measures
- Separation of Duties
- Live Hearings
- Notice Requirements

1. Definition Of Sexual Harassment

Must Be Severe, Pervasive, and Objectively Offensive
- Conduct Must Occur Within The Context Of An “Education Program Or Activity” and the institution must have control over the Respondent
- Conduct Must Occur In The U.S.

Sexual Harassment Will Also Expressly Include The Following (As Of August 14, 2020) (AND these definitions use the Clery Act & VAWA definitions):
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking
2. Mandatory Dismissal

- Recipient Must Dismiss Complaint If Allegations Do Not Meet Title IX Definition Of Sexual Harassment
- Dismissal Does Not Preclude Action Under The College's Or University's Code Of Conduct

3. Emergency Removal

- Colleges And Universities May Remove A Student From An Education Program Or Activity If The Institution:
  - Conducts An Individualized Safety And Risk Analysis;
  - Determines There Is An Immediate Physical Threat; And
  - Provides Respondent With Notice And An Opportunity To Challenge Decision Immediately Following Removal.

4. Notice Requirement

- Respondent Must Receive Written Notice (With Sufficient Time To Prepare Before Initial Interview), Including:
  - Identities Of The Parties Involved
  - Conduct Allegedly Constituting Sexual Harassment
  - Date Of Alleged Incident
  - Continuing Obligation To Update Written Notice
  - Written Notice Must Also State That Respondent:
    - Is Presumed Not Responsible
    - May Have An Advisor (Attorney?)
    - May Inspect And Review Evidence
5. Evidence Gathering

- Institution May Not Restrict Either Party From Either Discussing The Allegations Under Investigation Or Gathering And Presenting Relevant Evidence
- ED: Restricting Respondent From Discussing Allegations May Limit Ability To Effectively Present Evidence

6. Informal Resolution

- Informal Resolution Process Allowed (Except For Allegations That An Employee Harassed A Student)
- Both Parties Must Agree To Informal Resolution
- Either Party May Withdraw From Informal Process And Resume Grievance Process

7. Evidentiary Standard

- Consistent With Interim Guidance, Colleges And Universities May Use Either The “Preponderance” Standard Or The “Clear and Convincing” Standard
- Must Apply The Same Standard of Evidence To:
  - All Title IX Complaints Against Employees And Against Students
Preponderance Of The Evidence

Clear And Convincing Evidence

- This standard requires a finding in favor of the complainant if the evidence shows that a particular violation was substantially more likely than not to have occurred.
- Some courts have described this standard as requiring a high probability that a particular fact is true. This standard sets a higher threshold than the preponderance of the evidence standard but does not rise to the widely recognized standard in criminal cases of “beyond a reasonable doubt.”

Considerations When Choosing Standard

- How will the community react to changes:
  - Students?
  - Faculty?
  - Employees?
  - Alumni?
- Possible impact of union-represented employees?
- Who should be involved in choice?
8. Inspection Of Evidence

- Both Parties Must Be Given An Equal Opportunity To Inspect Evidence Directly Related To The Allegations
  - At Least 10 Days Before Completion Of Investigation Report
  - At Any Hearing

- Must Include Any Incriminatory And Exculpatory Evidence, Whichever Obtained From A Party Or Another Source

9. Live Hearing

- Required Element For All Post-Secondary Grievance Procedures
- "Single Investigator" Now Prohibited
- Hearing May Be Held In One Location
- May Be Held Virtually, In Real Time
- At The Request Of A Party; Or
- At The Institution's Discretion

- Must Be Recorded Or Transcribed; With Recording Or Transcript Available To Parties For Inspection And Review

Cross-Examination

- Must Be Conducted By Advisor (Or Attorney)
  - Never By Party
  - If Any Party Has No Advisor, Institution Must Provide One Free Of Charge

- Questions Challenging Credibility Are Allowed
  - Decision-Maker May Preclude Irrelevant Questions
  - Questions About Complainant’s Prior Sexual History Or Sexual Predisposition Generally Not Allowed

- If An Individual Refuses To Submit To Cross-Examination, Decision-Maker May Not Rely On Any Statement Of That Individual To Determine Responsibility
10. Decision-Maker's Written Determination

- Decision-Maker(s) must issue written determination that:
  - Identifies allegations
  - Describes procedural steps
  - Includes findings of fact
  - Includes conclusions applying facts to Code of Conduct
  - Includes rationale for conclusion regarding each allegation
  - Describes appeal procedures

11. Appeal

- Equal access to appeal for complainant and respondent
- May be allowed for any material...
- Procedural irregularity
- New evidence
- Conflict of interest
- Institution has discretion to offer additional grounds for appeal

12. Publication of Training Materials

- Institutions must publish on their website all materials used to train:
  - Title IX coordinators
  - Title IX investigators
  - Title IX decision-makers
  - Any person who facilitates informal resolutions
And then don’t forget to add the Clery Act Requirements!

- As you redevelop your institutional policies and procedures related to Title IX, remember, half the Clery Act contains requirements related to institutional disclosures, training, and procedures you must have in place when responding to a report of sexual assault, dating violence, domestic violence and stalking.

Questions?
The Clery Act
FOR TITLE IX PRACTITIONERS

Agenda
- The Clery Act (with Title IX Intersections)
  - CSAs
  - Crimes
  - Geography
  - Campus Alerts
- VAWA
  - Amendments/Definitions
  - Procedural Requirements
  - Education Requirements

Key Requirements of the Clery Act
- Collect, Classify, and Count Crime Reports/Statistics
- Public Disclosures
- Publish Annual Security Report
- Submit Crime Statistics to the Department
Key Requirements (part 2)

Provide Educational Programs and Campaigns on Dating/Domestic Violence, Sexual Assault, & Stalking

Have Procedures for Institutional Disciplinary Action for DV/DV/SA/S

If you have a campus police or security department: Publish Daily Crime Log

If you have residential facilities: Fire Log, Fire Safety Report, Missing Persons Procedures

Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution’s reportable Clery geography?
Campus Security Authorities (CSA)

- Campus police/security
- Security responsibility
- Individual or organization where crimes should be reported
- An official with responsibility for student and campus activities

Who is never a CSA?

Professional Counselors
Licensed professional counselors. Includes individuals who are unlicensed and uncertified but acting under the supervision of an exempt counselor, e.g., a graduate student doing an internship.

Pastoral Counselors
NOTE: These positions are exempt only when acting within the scope of their duties as a counselor or trainee.

CSA FUNCTION
A CSA’s function is to report allegations of CLERY ACT OFFENSES IN GOOD FAITH.
Reporting Considerations

Title IX—“Officials with authority to institute corrective action on behalf of the institution”

- Title IX Coordinator
- Official(s) who can institute corrective measures on behalf of the school
- Any other person who is designated by the institution as a person who shall report

Clergy Act—CSAs

- Campus police department responsible for security
- Individuals to whom crimes should be reported
- “Officials with significant responsibility for student and campus activities”
- Local law enforcement

COUNTING CRIME STATISTICS: CLERY CRIMES

Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution’s reportable Clery geography?
Clery Crime Categories

- Primary Crimes
- Hate Crimes
- Arrests and Referrals for Drug, Liquor and Weapon Violations
- Dating Violence, Domestic Violence and Stalking Incidents (VAWA Crimes)

Clery Reportable Crime Categories

- Murder/Non-negligent Manslaughter*
- Negligent Manslaughter*
- Sex Offenses* (Rape/Fondling)
- Sex Offenses* (Incest/SR)
- Robbery*
- Aggravated Assault*
- Burglary*
- Motor Vehicle Theft*
- Arson*

Arrests and Disciplinary Referrals for:
- Liquor
- Drugs
- Weapons
- Domestic Violence
- Dating Violence
- Stalking
- Hate Crimes for *, plus
  - Larceny-Theft
  - Simple Assault
  - Intimidation
  - Vandalism

Counting Clery Crimes

If a crime is reported (and otherwise meets the three-part test) it is counted:
- Includes attempts
- Includes cases a DA would reject
- Includes cases of "not responsible"
- Does NOT include every conduct code violation

It is not the word used but the facts of the case that determine how it gets counted.
Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution’s reportable Clery geography?

Clery Geography

- On Campus (Inc. On-Campus Residential)
- Public Property
- Non-campus building or property
Impact of Location & Party

- **2020 Title IX Regulations**
  - Conduct that occurs within its "education program or activity"
  - Against a person within the United States
  - School must have exercised substantial control over both the respondent and the context in which the sexual harassment occurs
  - Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

- **Clery Act**
  - On campus: on public property within or immediately adjacent to and accessible from the campus, or on non-campus buildings or property that your institution (or a recognized student organization) owns/controls
  - May include some study abroad programs
  - For VAWA crimes, must use processes even if occurs off-campus

Geography versus Jurisdiction

- **Geography** is the defined physical area in which the Clery Act attaches. A crime MUST occur within the institution's physical Clery geography to be captured.
- **Jurisdiction** generally describes authority to apply law to a certain area and/or to certain persons. For example, under Title IX, an act may not physically occur on campus, but if it occurs within certain programs between certain people, Title IX attaches.
Public Disclosures

- Daily Crime Log
- Annual Security Report (ASR)
- Emergency Notifications/Timely Warning Notices

Timely Warning/Emergency Notification

<table>
<thead>
<tr>
<th></th>
<th>Timely Warning (TWN)</th>
<th>Emergency Notification (EN)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Standard</td>
<td>Serious or continuing threat</td>
<td>Immediate threat to health and safety</td>
</tr>
<tr>
<td>Circumstance</td>
<td>Clery-reportable crimes that have been reported (occurred in past)</td>
<td>Clery-reportable crimes as well as other types of emergencies (happening right now or about to happen)</td>
</tr>
<tr>
<td>Audience</td>
<td>Community-wide</td>
<td>Can send to a segment of the community, if appropriate</td>
</tr>
<tr>
<td>When Issued</td>
<td>As soon as pertinent information is available</td>
<td>Upon confirmation of emergency (when possible)</td>
</tr>
<tr>
<td>Follow-Up</td>
<td>Not Required</td>
<td>Required</td>
</tr>
</tbody>
</table>
Timely Warning Decisions

EVERY Clery-reported crime must be assessed on a case by case basis for timely warning purposes.

The nature and type of the crime

The continuing danger to the campus community

Duties Under VAWA

Added "Dating Violence, Domestic Violence, & Stalking" to the Clery crimes

Added Gender Identity to Hate Crimes categories

Added training requirements on DVDVS Crimes (including Sexual Assaults)

Added process and procedures to DVDVS Crimes (including Sexual Assaults)
Rape
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. This definition includes any gender of victim or respondent.

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

The Clery Act does not require any particular definition of consent
ASR must include definition of consent as defined by jurisdiction (state law)
Institution should have a definition in their institutional sexual misconduct policy

“Non-Forcible” Sex Offenses

STATUTORY RAPE
Non-forcible sexual intercourse with a person who is under the statutory age of consent

INCEST
Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law

Domestic Violence

A felony or misdemeanor crime of violence committed by:

- a) a current or former spouse or intimate partner of the victim
- b) by a person with whom the victim shares a child in common
- c) by a person who is cohabitating with, or has cohabited with the victim as a spouse or intimate partner
- d) 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 OR
- e) 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
What is a “Crime of Violence?”

According to Section 16 of title 18 of the United States Code, the term “crime of violence” means

- an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

1. The existence of such a relationship shall be 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.

2. For the purposes of this definition—
   A. Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
   B. Dating Violence does not include acts covered under the definition of domestic violence.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

a) Fear for the person’s safety or the safety of others; or

b) Suffer substantial emotional distress.
Stalking (related definitions)

a) **Course of conduct** means two or more acts, including, but not limited to, acts 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.

b) **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.

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

Discussion: What’s Missing?

- Are there sex-based offenses that are not included here but should be included in our conduct codes?
- Are there other behaviors that are sex-based that are not included here but should be included in our conduct codes?

Overlapping Conduct Violations
Response Requirements for VAWA Crimes

Procedures victims of VAWA crimes should follow

Procedures an institution will follow when crime reported

and make sure it is all in WRITING.

Written Explanation of Student or Employee’s Rights

(b)(11)(vii) “When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student’s or employee’s rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section. . . ”
Written Explanation of Rights and Options

1. The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
   - Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later

2. How and to whom the alleged offense should be reported
   - List any person or organization that can assist the victim
   - Recommended: Also include community organizations

3. Notification of the victim’s option to
   - Notify proper law enforcement authorities, including on-campus and local police;
   - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
   - Decline to notify such authorities

4. The rights of victims and the institution’s responsibilities for
   - orders of protection,
   - “no contact” orders,
   - restraining orders, or
   - similar lawful orders issued by a criminal, civil, tribal, or institutional

5. To students AND employees about existing:
   - Counseling
   - Health
   - Mental Health
   - Victim Advocacy
   - Legal Assistance
   - Visa and Immigration Assistance
   - Student Financial Aid
   - Other services available for victims

6. Options for, available assistance in, and how to request changes to (if requested and reasonably available)
   - Academic, Living, Transportation, Working
7. Confidentiality
   - Publicly available recordkeeping has no personally identifying information about the victim. (not required for respondent but best practice in most cases)
   - Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)

8. Disciplinary Procedures
   - An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required by paragraph (k)
### Advisors under Clery

**Advisor Requirement**
- Advisor - individual who provides support, guidance, or advice
- Do not limit the choice of advisor
- May restrict participation if apply equally
- Provide timely notice of meetings
- May form a pool of people
- Can remove a disruptive advisor
- Could allow them to serve as a proxy
- Don’t have to delay for them (but encouraged to be reasonable)

### Standard of Evidence
- 2020 Title IX Regulations
  - Either the preponderance of the evidence standard or the clear and convincing standard but must be the same for all sexual misconduct
- Clery Act
  - Any standard of evidence ... must include in policy
  - Would not prohibit using different standards for different groups
Informal Resolutions

- Can offer, but may not require
- Not allowed for "employee on student" sexual harassment
- Party may withdraw up to a point

Clery Act

- Written information about procedures the institution will follow for VAWA offense (does not differentiate between formal vs informal)

Formal Complaint Rights

2020 Title IX Regulations

- Treat equitably with goal to restore/preserve access to education; due process for respondent;
- Include presumption of not responsible;
- Include any discipline for false statements
- Reasonably prompt time-frames;
- Describe the range of sanctions;
- Describe range of supportive measures

Clery Act

- Prompt, fair, and impartial investigation and resolution
- Anticipated timeframes
- List all possible sanctions for each offense (employees and students)
- Consistent with policy and transparent
- Not required to list all protective measures

Formal (Live Hearing)

2020 Title IX Regulations

- Requires live hearing with cross examination by advisor

Clery Act

- Clery is silent regarding live hearing
Written Determination

Title IX
- Identification of the allegations
- Procedural steps taken from receipt through determination
- Notifications to the parties
- Interviews with parties and witnesses
- Site visits
- Methods used to gather other evidence
- Hearings held
- Findings of fact supporting the determination
- Conclusion regarding the application of code of conduct to the facts
- Result (responsibility, rationale, sanctions, remedies for each allegation)
- Appeals procedures
- When results become final (post appeal)

Clery Act
- Result (include any sanctions and rationale for results and sanction)
- Appeals procedures
- Any change to the result
- When such results become final

Clergy Requirements for Officials

- Training must be described in ASR
- Annual
- Should include (at a minimum):
  - Relevant evidence and how it should be used
  - Proper interview techniques
  - Basic procedural rules for conducting a proceeding
  - Avoiding actual/perceived conflicts
- Can be in person or electronic (webinar or video)

Bias Free and Training for “Officials”

Title IX (“Title IX Personnel”)
- Training for all on...
  - Definition of sexual harassment in § 106.30
  - The scope of the recipient’s education program or activity
  - How to conduct an investigation and grievance process
  - How to serve impartially, including by avoiding prejudgment of the facts
  - Decision Makers
  - Training on any technology and on issues of relevance
  - Investigators
  - Relevance to create an investigative report that fairly summarizes
  - Training materials must not rely on sex stereotypes

Clery (“Officials”)
- Annual training on...
  - The issues related to dating violence, domestic violence, sexual assault and stalking
  - How to conduct an investigation and hearing process that promotes the safety of the victims and promotes accountability
Appeals

2020 Title IX Regulations
- Must offer both parties an appeal
- Based on specific grounds

Clery Act
- Not required (but must provide notice if allowed along with appeal procedures)
- Simultaneous written decision describing result, sanction, any changes to the result, when it becomes final

Recordkeeping

2020 Title IX Regulations
- 7 years

Clery Act
- Retain all records used in compiling ASR for three years from the latest publication of the report to which they apply (in effect 7 years)
Primary Prevention Best Practices

“Programming, initiatives, and strategies intended to stop dating violence…stalking…before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in a health and safe direction.”

- Not required that all students take or attend (but mandate encouraged)
- Must show “good faith effort” to reach them with “active notification”
- Format and timeframe encouraging maximum attendance
- Equally important to prevent perpetration as it is to prevent victimization

Primary Prevention & Awareness

“The institution’s primary prevention and awareness programs for all incoming students and new employees, which must include...

- Statement prohibiting dating DV/DVSAS
- Definitions of DV/DVSAS
- Definition of consent
- Safe and positive options for bystander intervention
- Information on risk reduction
Ongoing Prevention & Awareness

“Ongoing prevention and awareness campaigns for students and employees...must provide the same information as the primary awareness and prevention programs”

- Deeper dives
- Sustained over time
- Promote services
- Range of strategies/audiences
  - Social media, email, posters, ads
  - Take Back the Night
  - Sports teams, Greek, dorms
  - Student fairs or campus events
  - DV program for supervisors

CSA Training (Recommendations, Not Requirements)

- Role of a CSA
- Provide Reporting materials
- Map of Clery geography
- Definitions of Clery crimes
- Forms for documenting and reporting
- Importance of documentation
- Need for timely reporting
- “Super CSAs?”
- Personally Identifiable Information

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Title IX Structure 2020

**Title IX Coordinator**
- Accepts Reports-Offers Supportive Measures to Complainant and Explains Process for filing Formal Complaint
- Accepts Formal Complaints and determines jurisdiction (if Title IX)
- Coordinates each investigation and the extension of Supportive Measures to the Respondent
- Drafts all Title IX related notice documents
- Assigns Investigators for each investigation, if applicable
- Assigns the Advisor of Choice for the Live Hearing if a Party does not have one
- Oversees the Live Hearing procedures, but does not make any decisions regarding the outcome of the allegations

**Decision Maker**
- Review evidence and deposition of both parties by the Advisors of Choice
- Rule on whether the questions asked are relevant
- Makes the finding regarding each allegation contained in the complaint

**Investigators**
- Interviews both parties and witnesses
- Gathers evidence
- Write the preliminary and final investigative reports

**Advisors of Choice**
- Chosen by the Party; not required until Live Hearing
- Assigned by ACC for purposes of cross examination only if the Party does not have one for Live Hearing
- Participates in the examination of the opposing party and witnesses
- Reviews evidence and investigate report
- Prepares the questions for the examination of the other party during the Live Hearing

**Appellate Officer**
- Different than the original Decision Maker
- Only one Appeal
Group Exercise:
Understanding Sexual Harassment, Sexual Assault, Domestic Violence, Dating Violence and Stalking

Agenda

 Group Discussion – Understanding the Offenses
 Report Out
 Questions & Answers

PRONG I: Quid Pro Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
• 1: An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct.
Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity;

PRONG 3: Clery Act & VAWA Crimes

- Sexual Assault
  - Rape
  - Fondling
  - Statutory Rape
  - Incest

- Intimate Partner Violence
  - Dating Violence
  - Domestic Violence

- Stalking

Sexual Assault - Rape

Rape is 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. This offense includes the rape of both males and females.
Sexual Assault-Fondling

Fondling is 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.

Dating Violence

Dating Violence is defined as 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

Domestic Violence is defined as a felony or misdemeanor crime of violence committed—
a) By a current or former spouse or intimate partner of the victim;
b) By a person with whom the victim shares a child in common;
c) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
d) 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;
e) 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.
Stalking

Stalking is defined as 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.

For the purposes of this definition:

- **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** means a reasonable person under similar circumstances and with similar identities to the victim.

- **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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Group Discussion

**Breakout groups**

Each group will be assigned a breakout room. Identify a reporter who will present back to the larger group after 30 minutes of group discussion.

---

**Topics**

1. QPO-Sexual Harassment
2. Dating Violence
3. Domestic Violence
4. Hostile Environment + Sexual Harassment
5. Stalking
6. Sexual Assault - Rape
7. Sexual Assault - Fondling

---

**Assignment**

1. Identify the elements of the offense?
2. Where might we find evidence associated with this offense?
3. What are the challenges with investigation into your assigned offense?

---

**Questions**

You can send questions to the chat while you work, and we will discuss them in the reporting out phase.
Special Considerations

Agenda

- In person and remote considerations
- Recognizing bias
- Unique considerations

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**In-person**

- Room layout
- Available materials
- Advisors
- Interpreters

---

**Equity Issues – Remote Locations**

- Socioeconomic
- Computer
- Internet
- Home

---

**HOME BROADBAND USE**

**Home broadband use by income**

- % of U.S. adults using home broadband, by income

**Home broadband use by education**

- % of U.S. adults using home broadband, by education level

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Intake – Intimate Partner Violence

- Increased risk
- Check-ins

Intake – New Reports

- Jurisdiction
- Nature of the report
- Clery implications
- Reporting options
- Outreach

Intake - Accommodations

- Academic
- Living
- Working
MEN

- 15% of college-aged men
- 26% of gay men and 37% of bisexual men experience rape, physical violence, or stalking by partner
- More likely to be assaulted than falsely accused of assault

LGBTQ+

- LGB rates of sexual violence double rate of heterosexual youth
- 73% of LGBTQ+ college students sexually harassed (61% non-LGBTQ+)
- 44% of lesbians and 61% of bisexual women experience rape, physical violence, or stalking by an intimate partner

PERSONS OF COLOR

- 23% of Asian Pacific Islander women experience sexual violence
- 21% of black women are survivors of sexual assault
- 13.5% of Hispanic women are survivors of sexual assault
- Seven out of every 1,000 American Indian (including Alaska Native) women experience rape or sexual assault, compared to two out of every 1,000 women of all races
Data

IMMIGRANTS

- Twice as likely as non-immigrant peers to experience sexual assault

Employee/Student Relationships

- Vary
- "Dual relationship"
- Reluctance to report

The Title IX Regulations
Unofficial Version Published on the U.S. Department of Education Website on May 6, 2020

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Issues for Stalking Cases

- Recognize behaviors
- Duration
- Frequency
- Safety plan

Retaliation

- Identify behaviors
- Which policy?
- Remedies
- What qualifies?

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Intake and Supportive Measures

Agenda

- Review Title IX and Clery Regulations
- Contacting the Complainant
- Contacting the Respondent

Title IX Case Flowchart

1. Title IX Coordinator
2. Informed (Actual Knowledge)
3. Outreach and Supportive Measures
4. Complainant Decision
5. No Formal Complaint
6. Formal Complaint Signed
7. Investigation-Hearing-Appeal
8. Case closed (except for supportive measures)
9. Title IX Coordinator may sign complaint
Actual Knowledge

- Title IX
  * "Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school."

- Clery
  * Campus police, security, or official with significant responsibility for student and campus activities
  * "Official" is any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution

Actual Knowledge - Next Steps

- Contact Complainant
- Meeting
- Written Communication
- Offer Support & Provide Rights
2020 Title IX Regulations - Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- To the complainant and/or the respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment
- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures
Meeting Review

What is the Difference?

Confidentiality
Privacy

Follow-Up Steps
Evidence Collection and the Investigatory Process

Agenda
- Investigators
- Developing an Investigative Strategy
- Breaking Down the Definitions
- Evidence Collection
Investigative Strategy

Scope

- Notice of Allegation
- Notice of Investigation
- Policy Definitions
- Rights of the Parties

Methodology (and who does what?)

- Liaisons
- Logistics
- Internal Communications
Challenges: Evidence Considerations

- Testimonial Evidence
- Non-Testimonial Evidence

Challenges: Other

What issues could come up given the facts of the case?

Pre-Work

- Draft Questions
- Initial Evidence Collection
Sexual Harassment under Title IX

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct.

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.

PRONG 1: Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

PRONG 2: Hostile Environment +

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

PRONG 3: Sexual Assault

Rape is 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 is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.
PRONG 3: Intimate Partner Violence

**Dating Violence**: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

**Domestic Violence**: A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim.

---

PRONG 3: Stalking

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

Stalking is defined as 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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Retaliation
Evidence

Types of Evidence

- Real evidence
- Demonstrative
- Documentary
- Testimonial

Ability to Utilize Evidence

- All evidence obtained
- Directly related to allegations
- Relevant
Research

Websites  Organizations  Calendars  Schedules  Party "directory information"

Initial Evidence Collection

Other “statements”
Evidence from campus sources
Other Sources of Evidence

- Photographs
- Text messages
- Social media/dating apps
- Documents (diagrams, memos, letters, notes)
- Voicemail
- Phone logs
- Guest lists

Floorplans

Diagrams
Interviewing

Agenda

- Interviewing Basics
- The DSA Interview Outline
- Stress, Trauma and the Interview
- Sample Questions

What are Interviews

PART OF EVIDENCE (TESTIMONIAL)
CONVERSATION
STRUCTURED
Interview Golden Rules

Preparation  Environment  Flexibility

Interview Preparation

Research
- The incident
- The policy
- Topics of inquiry

Pre-draft questions
- Background questions
- Narrative question
- Case Specific Questions

Preliminary Info
- Procedural
- Recordkeeping
- Notice

INTERVIEW – WHAT TO BRING
Flexibility

I pledge to...
Be open-minded
Consider different theories of a case
Roll with the surprises
Adapt to the room

THE INTERVIEW

The DSA Interview Outline
- Preliminaries
- Background
- Narrative
- Clarification
- Case Questions
- Closing
EVALUATION

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Interviewing
Bad Habits

- Interrupting
- Two questions at once
- Not listening for the answer
- Avoiding the hard questions
- Lost focus on elements

STRESS, TRAUMA AND THE INTERVIEW

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Re-traumatization

- Safety and Wellbeing
- Maintain privacy and confidentiality
- Kept up to date
- Empathy and respect

Question Format

- Tone
- Phrasing
- Open-ended
- Safe
- Judgment-free

Witness Interviews

- Follow same interview structure
- Assess credibility
- Confidentiality/Privacy
- How “know”?
RESPONDENT - POTENTIAL DEFENSES

- Victim consented and is now lying (Regret? Guilt?).
- Victim consented but does not remember due to intoxication.
- The sexual misconduct did not occur (victim was mistaken).
- The sexual misconduct occurred but a different assailant.

SAMPLE QUESTIONS

RECREATE THE SCENE
Credibility and Relevancy

Agenda

- Detecting deception
- Credibility checklist
- Relevancy

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Deception

What is the percentage of people who cannot go 10 minutes without lying??

Answer:

60%
Credibility Checklist

Truthfulness

- Past behaviors
- Post-assaultive behaviors
- Corroborating evidence
- Ability to perceive

Ability to remember

Plausibility

Demeanor

Motivation

Bias

Truthfulness

- Omission
- Embellishment

Truthfulness

- Repeat v. Reconstruct
- Get them to talk
- Consistency
- Details
Past and Post Behaviors

Past behaviors

Post assaultive

Corroborating Evidence

Physical
Contemporaneous documentation
Personal documents

Admissions
Eyewitness
Outcry
Other?

Ability to Perceive

Distance
Knowledge
Credentials
Competence
Ability to Remember

- Passage of time
- Alcohol
- Blackout
- Peripheral details
- History of memory

Plausibility

- Believability
- Perspective

Demeanor

- Baseline
- Discomfort
- Emotions
- Shame
- Anger
- Defensive
- Fear
Motivation

To lie  Pressure  Past relationships

Bias

Personal preference  Impartiality  Internal Biases

Confirmation Bias
- Confirmed preconceived opinion
Availability Bias
- Most important to the memory immediately recalled
Hindsight Bias
- See things as more predictable than they were
Foresight Bias
- Ability to predict future events
Gender Bias
- More likely to believe one gender over another
Race
- More likely to believe one race over another
Other Factors that Impact Credibility

Memory and trauma  Cross-cultural issues
What Does Relevancy Mean?

- Directly related to the issue and helps prove or disprove the issue AND fact must be material to an issue in the case
- Makes something more/less true or more/less false
- The tendency to make a fact more or less probable than the fact would be without the evidence
- Questions are irrelevant when they are not related to the issue at hand

Other Ways to Put It...

- Testimony that witness was “pretty certain” defendant had been a patron at a bar was relevant and properly admitted
- It is sufficient if the evidence constitutes a link in the chain of proof
- It is enough if in connection with other evidence, it helps a little
“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
Resolutions and Outcomes

Agenda

- Informal resolution
- Formal resolution
- Sanctions and remedies
- Appeals

We are Here...

Intake  Investigation  Resolution
§106.45(b)(9) – Informal Resolution

“However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication...”
Informal Resolution

- Mediation
- Restorative Justice
- Educational efforts
- Other

Restorative Justice

- Harms and Needs
- Obligations
- Engagement

RESTORATIVE PRACTICE
Single Adjudicator Model

“Combining the investigative and adjudicative functions in a single individual may decrease the accuracy of the determination regarding responsibility, because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome.”
Formal Resolution – Considerations

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Scheduling

Decision maker(s)

Advisors

In person or virtual

Live Hearings

- Must provide for a live hearing
- At the request of either party, the recipient must provide for a live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions
- Must create an audio recording or transcript and make available.

Advisors

"If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party."
Cross Examination

“At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally...”

Relevancy

“Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”
Participation

“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”

Formal Resolution – Making a Finding

- Policy language - Alleged violations
- Weighing the evidence
- Determined behaviors
- Standard of evidence

SANCTIONS AND REMEDIES
A recipient may impose disciplinary sanctions upon a respondent after a grievance process that complies with § 106.45. “The Department does not prescribe whether disciplinary sanctions must be imposed, nor restrict recipient’s discretion in that regard. As the Supreme Court noted, federal courts should not second-guess schools’ disciplinary decisions, and the Department likewise believes that disciplinary decisions are best left to the sound discretion of recipients.”

• Expulsion, separation, probation
• Protective measures, restrictions, separation
• Action plans
### Written Outcome

<table>
<thead>
<tr>
<th>Allegations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural steps</td>
</tr>
<tr>
<td>Findings of fact</td>
</tr>
<tr>
<td>Conclusion/application</td>
</tr>
<tr>
<td>Rationale (each allegation, determination regarding responsibility, disciplinary sanctions, remedies)</td>
</tr>
<tr>
<td>Appeal procedures</td>
</tr>
</tbody>
</table>

### Live Hearing Recording or Transcript

- **Recording**
- **Transcript**
Appeals

- Must offer
- Three bases: Procedure, New evidence, Conflict or bias
- Additional grounds permitted
- No other role for appeal officer

Notification

- Comply with appeal standards
- Equal opportunity to respond
- Issue written decision simultaneously

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When is the Decision Final?