



October 26, 2023

# **Annual Clergy Training Bricker Graydon LLP**

# 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- October 9, 2020 – 2016 Handbook is rescinded; new Appendix put in place; updated January 19, 2021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.

# 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*, which has been enjoined in 20 states (including Ohio)
- ED discontinued enforcement of regulatory provision that prohibited consideration of “statements” by individuals not subjected to cross-exam
- Proposed Title IX rules are pending (final rules due May 2023).

# 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.

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

# Sexual Assault: Penetration and Fondling

Nonconsensual Penetration – 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 Complainant.

Fondling: The touching of the private body parts of another person *for the purpose of sexual gratification*, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.



# Sexual Assault: Hypos

- Do the following count as sexual assault, 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. This varies by state. In Ohio, Revised Code Section 3101.01(A) prohibits marriage between individuals closer in kin than second cousins.

Statutory rape: Sexual intercourse with a person who is under the statutory age of consent. This varies by state. In Ohio, no person may have sex with a child under the age of thirteen, nor may a person over the age of eighteen have sex with a child under the age of sixteen.

# 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

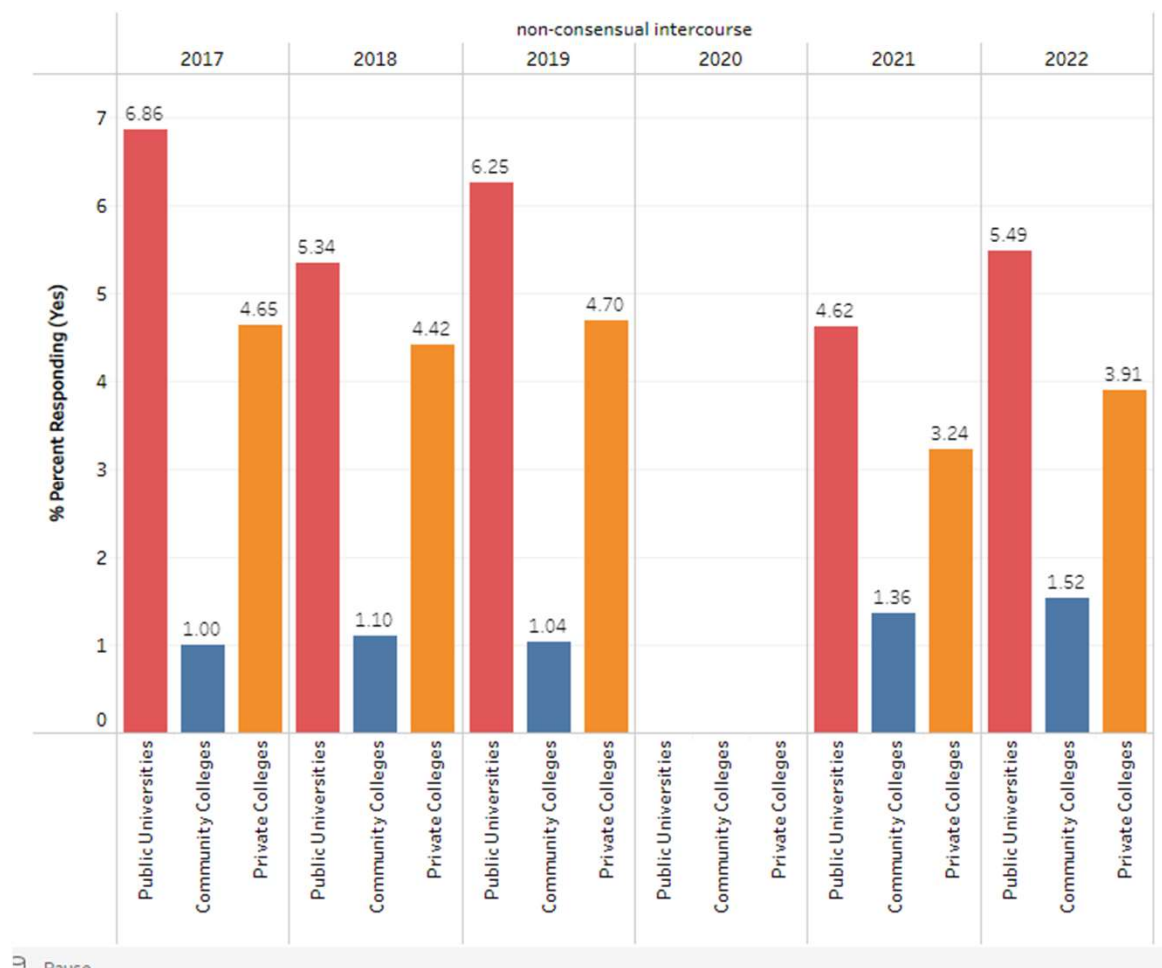
More than **1 in 2 women** and **1 in 3 men** have experienced sexual violence involving physical contact during their lifetimes.

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

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

# Sexual Assault Data

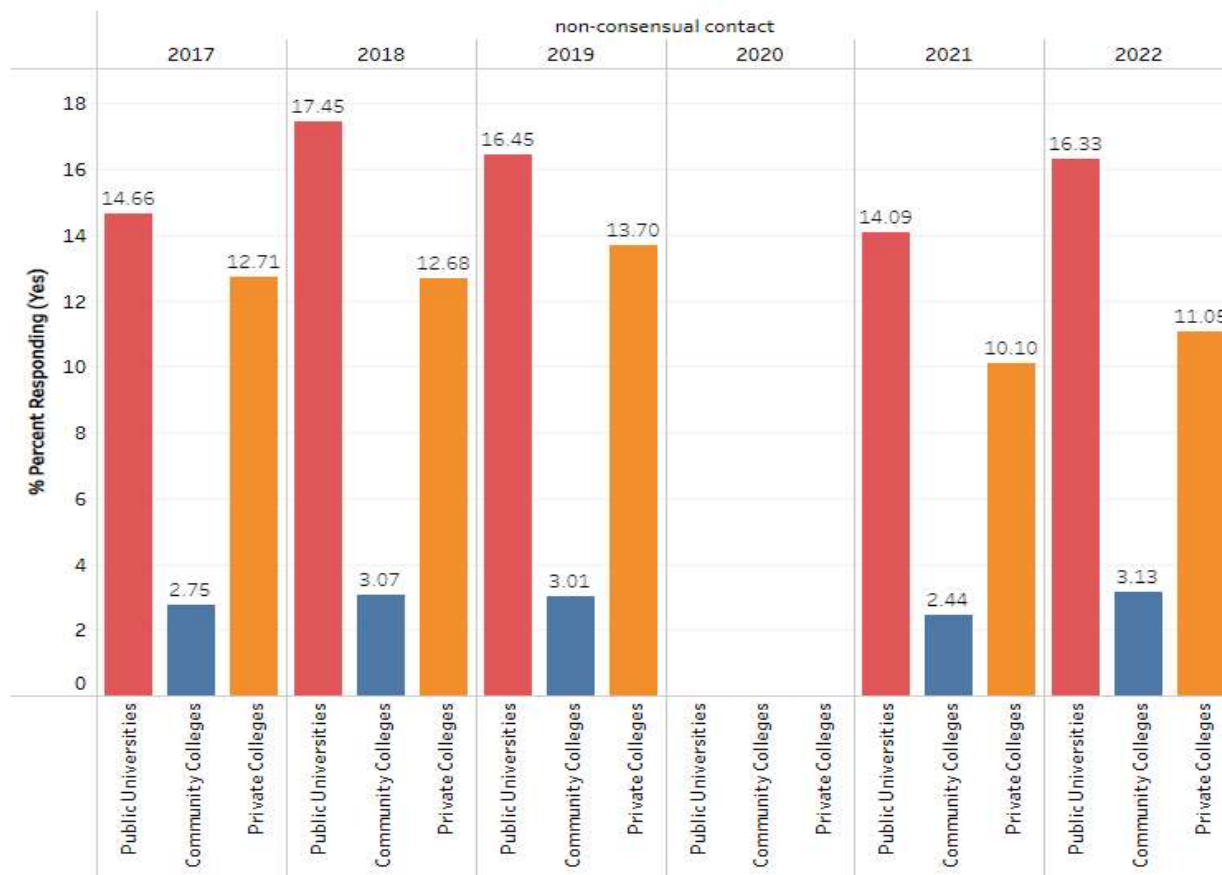
## ODHE Survey – Non-Consensual Intercourse



Statistics from ODHE Changing  
Campus Culture Benchmark Data  
(last accessed October 9, 2023)

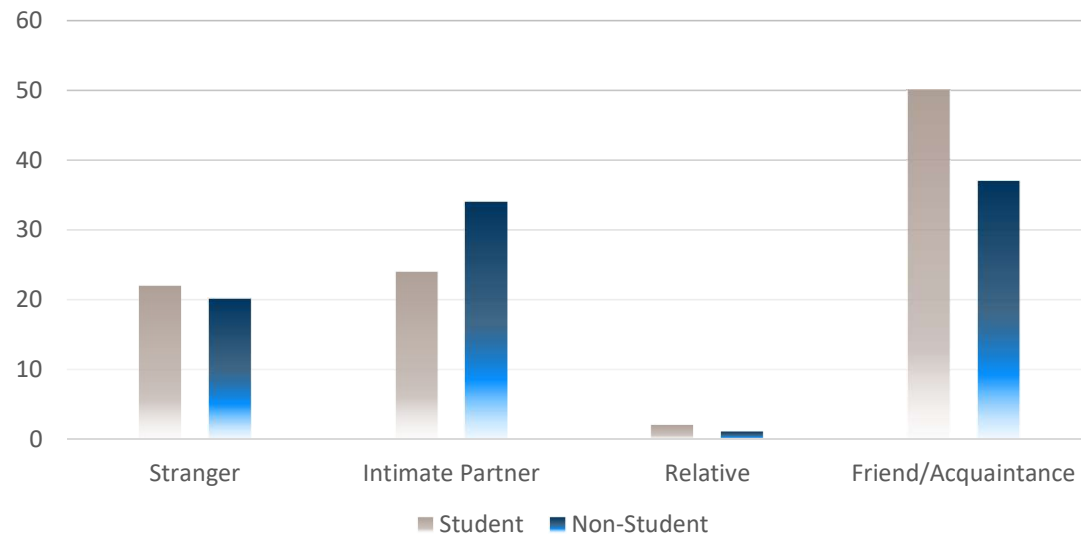
# Sexual Assault Data

## ODHE Survey – Non-Consensual Contact



Statistics from ODHE  
Changing Campus Culture  
Benchmark Data (last  
accessed October 9, 2023)

## 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.

# **Sexual Harassment: Dating Violence**

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

## **Sexual Harassment: Domestic Violence**

“Domestic violence” is an act of violence committed on the basis of sex by:

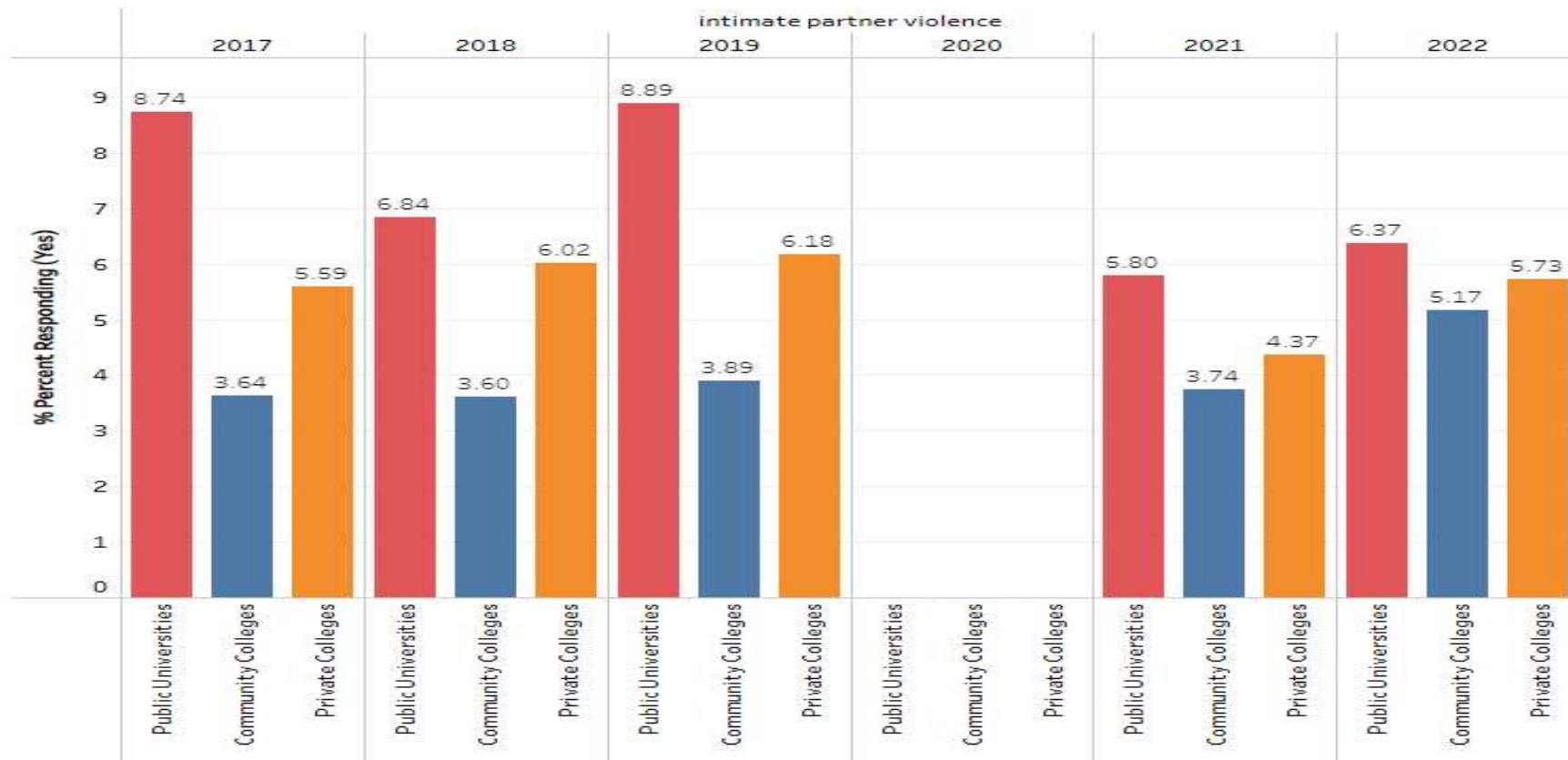
- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under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



# 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?

# 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?

## **Sexual Harassment: Stalking**

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

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

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

# Stalking: Course of Conduct

“Course of Conduct”

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

## **Stalking: Reasonable Person**

“Reasonable person”

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

# **Stalking: Substantial Emotional Distress**

“Substantial emotional distress”

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



# Stalking Data

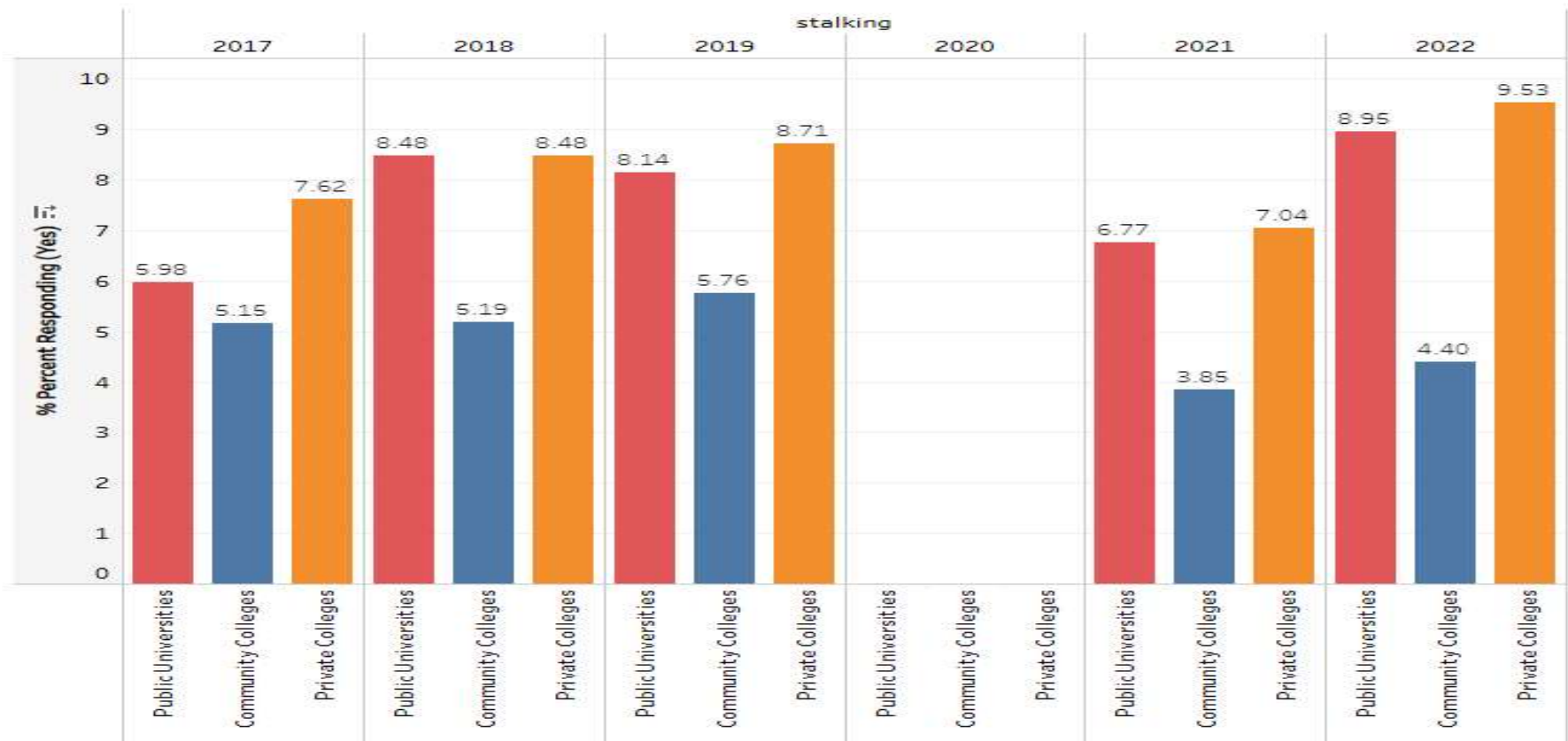
**3.4 million** individuals aged 16 or older (1.3%) were stalked during 2019. This represents a slight drop from 2016 (1.5%). Females were stalked more than twice as often as males.

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

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

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

# ODHE Stalking Data



# Impact of Stalking on Victims

## (1 of 2)

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

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

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

[Baum et al.]

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

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

# Impact of Stalking on Victims (2 of 2)

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

1 in 7 stalking victims move as a result of their victimization.

[Baum et al.]

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

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

# 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: July 27, 2022
- Location of incident: Two residence hall rooms, and the walk in between

## Scenario: Formal Complaint

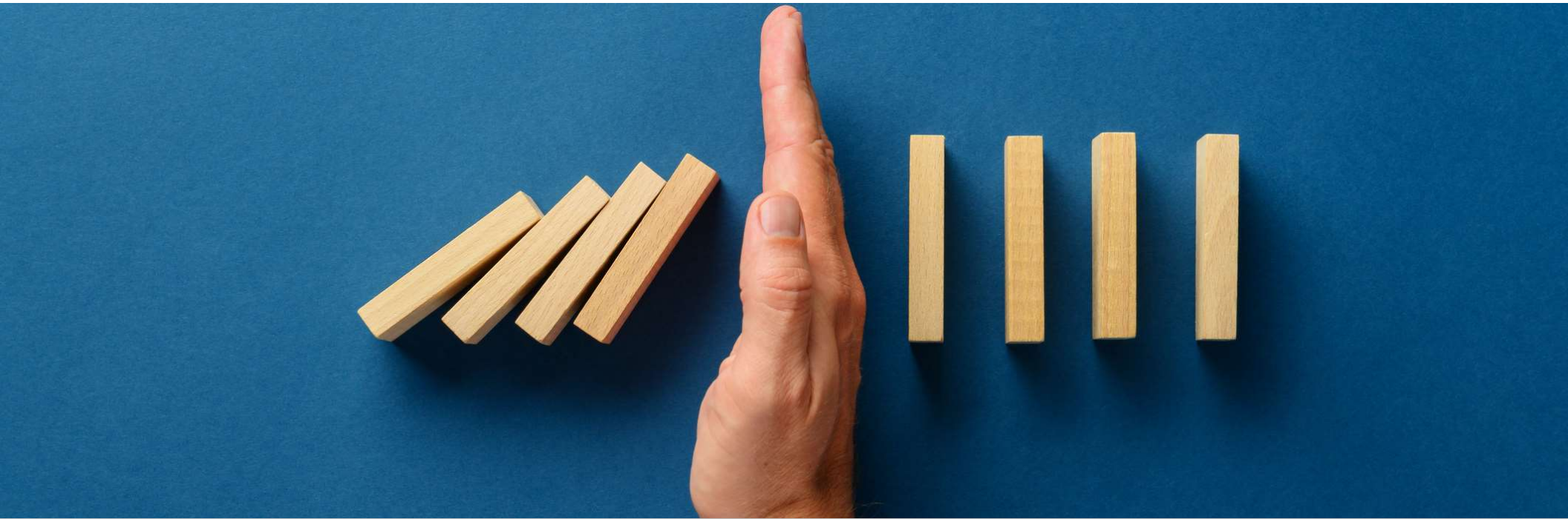
- “On July 27, 2022, I got into an argument with my boyfriend, Kim. He pushed me out of his room and into the hallway, then slammed the door in my face. When I left to go back to my hall, he followed me. We were still arguing. He barged into my room even though I didn’t want to let him in and threw a 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

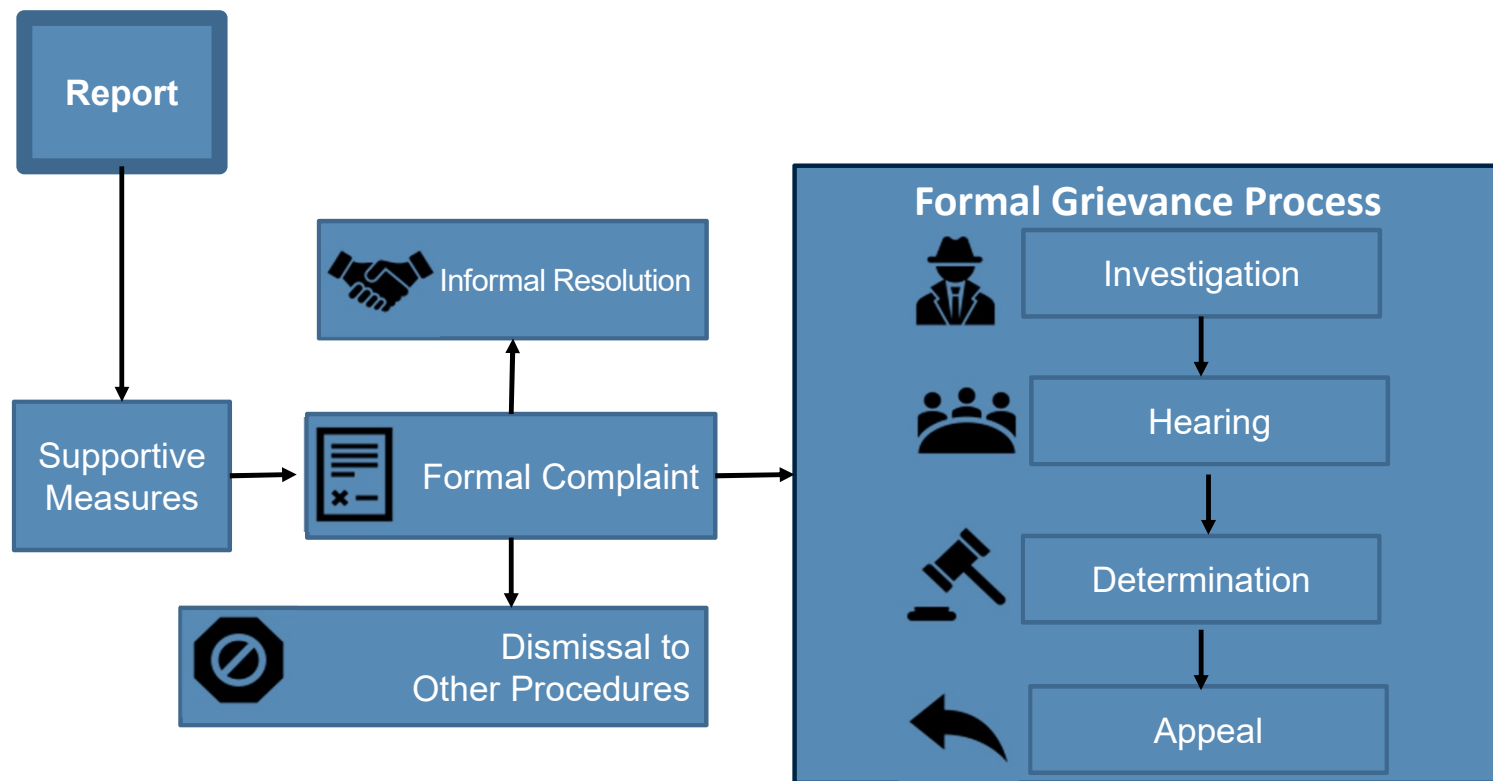
## **But what if...**

- 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.



**Conducting a Process That Protects and Holds Accountable**

# Overview of the Process



# 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.

# 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.

## **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.

# Party Participation

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



# 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

# Reluctant Party

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

# **Participation by Reluctant Party**

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

# 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

# Hearing

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

# Can't Consider

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

# Relevancy

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

# Decorum

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



# 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

# Sanctions

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

# 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?