

***Week Two:  
Responding to  
Complaints of  
Sexual Harassment  
& Terminology  
June 11, 2020***



# Welcome & Introductions

## Our Hopes...

### What this workshop is:

1. Unpack legal requirements
2. Identify what needs to change in your policy
3. Networking/discussion with colleagues/expert faculty

### What this workshop is not:

1. Not legal advice
2. Not a "how to" operationalize roles - focus is on integrating mandates into policy
3. Not a "one-size-fits-all" given institutional context



## Agenda:

1. Review Responding to Complaints of Sexual Harassment & Terminology
1. Attendee Participation and Responses
2. Q & A



## CHAT

*How do you like to participate in virtual learning environments? Let us know!*

### CONNECTING YOUR MICROPHONE

To connect your microphone, identify the Microphone Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your mic muted at all times, unless you are speaking.



### RAISING YOUR HAND TO SHARE YOUR VOICE

If at any time during the event you'd like to say something using your mic, please raise your hand and the speaker/host will call on you. To raise your hand, identify the icon at the top of the screen that looks like someone raising their hand. You can click on this same icon to lower your hand.



## RESOURCE

If you participated in last week's session and would like to ask additional questions of Cara, please stay connected through the end for a group discussion.

# Responding to Complaints of Sexual Harassment & Terminology

Cara Hardin, J.D.

Title IX Deputy Coordinator | Marquette University

Thursday, June 11, 2020

1:00 - 2:30 PM - Eastern

## ■ Final Regulations Definitions § 106.30

- The definitions promulgated within the Final Regulations at § 106.30 will be uniform across all Title IX policies.
  - Note what is absent:
    - Definition of “consent”
    - The terms “victim” or “accused”

# ■ Sexual Harassment

## § 106.30

Conduct on the basis of sex that satisfies one or more of the following:

- Quid Pro Quo harassment. 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.
- Hostile environment harassment. "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 school's education program or activity."
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under the Clery Act and VAWA



## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).



- 20 U.S.C. § 1092(f)(6)(A)(v) states: “The term ‘*sexual assault*’ means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting (UCR) system of the Federal Bureau of Investigation (FBI).”
- Note that the FBI has stated that “rape” includes attempts to commit “rape.”  
<https://ucrdatatool.gov/offenses.cfm>

*Reference: Preamble (unofficial version), pp. 541 (see fn. 779); 547 (see fn. 791).*

## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).

*Definition of “sexual assault” within the Summary Reporting System (SRS) as recommended by the Clery Act regulations at 34 CFR 668.46(a):*

- 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 [Complainant].

Definition from SRS, which the FBI intends to retire in 2021;  
<https://ucr.fbi.gov/nibrs/summary-reporting-system-srs-user-manual>)

## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).

*Definition of “sexual assault” within the National Incident-Reporting System (NIBRS):*

- “A sex offense is “any sexual act directed against another person, without the consent of the [Complainant], including instances where the [Complainant] is incapable of giving consent.”

(Definition from NIBRS; <https://ucr.fbi.gov/nibrs/nibrs-user-manual>)

## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).

- Rape (except Statutory Rape): The carnal knowledge of a person, without the consent of the [Complainant], 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.
  - There is carnal knowledge if there is the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis). However, for UCR purposes, this offense includes the rape of both males and females as long as at least one of the offenders is the opposite sex of the [Complainant].

(Definition from NIBRS;  
<https://ucr.fbi.gov/nibrs/nibrs-user-manual>)

## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).

- Sodomy: Oral or anal sexual intercourse with another person, without the consent of the [Complainant, including instances where the [Complainant] is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

(Definition from NIBRS; <https://ucr.fbi.gov/nibrs/nibrs-user-manual>)

## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).

- Sexual Assault With An Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the [Complainant], 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.
  - An "object" or "instrument" is anything used by the offender other than the offender's genitalia, e.g., a finger, bottle, handgun, stick.

(Definition from NIBRS;

<https://ucr.fbi.gov/nibrs/nibrs-user-manual>)

## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).

- Fondling: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, without the consent of the victim, including instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

(Definition from NIBRS); <https://ucr.fbi.gov/nibrs/nibrs-user-manual>)

## ■ Sexual assault

The Clery Act 20 U.S.C. § 1092(f)(6)(A)(v).

- Incest: Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law. [Insert your state].
- Statutory Rape: Non-forcible sexual intercourse with a person who is under the statutory age of consent. [Insert age of consent in your state].

(Definitions from UCR's National Incident-Based Reporting System (NIBRS);  
<https://ucr.fbi.gov/nibrs/nibrs-user-manual>)



## ■ Dating Violence

### VAWA 34 U.S.C 12291(a)(10)

- Dating Violence. Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the [Complainant].
  - The existence of such a relationship shall be determined based on the [Complainant'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.

## ■ Dating Violence

VAWA 34 U.S.C 12291(a)(10)

– 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.

## ■ Domestic Violence

### VAWA 34 U.S.C 12291(a)(8)

- Domestic violence. A felony or misdemeanor crime of violence committed—
  - A. By a current or former spouse or intimate partner of the [Complainant];
  - B. By a person with whom the [Complainant] shares a child in common;
  - C. By a person who is cohabitating with, or has cohabitated with, the [Complainant] as a spouse or intimate partner;

## ■ Domestic Violence

### VAWA 34 U.S.C 12291(a)(8)

- 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.

## ■ Stalking

VAWA 34 U.S.C 12291(a)(30)

- 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

VAWA 34 U.S.C 12291(a)(30)

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.

## ■ Stalking

VAWA 34 U.S.C 12291(a)(30)

For the purposes of this definition (con't)—

- Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require, medical or other professional treatment or counseling.

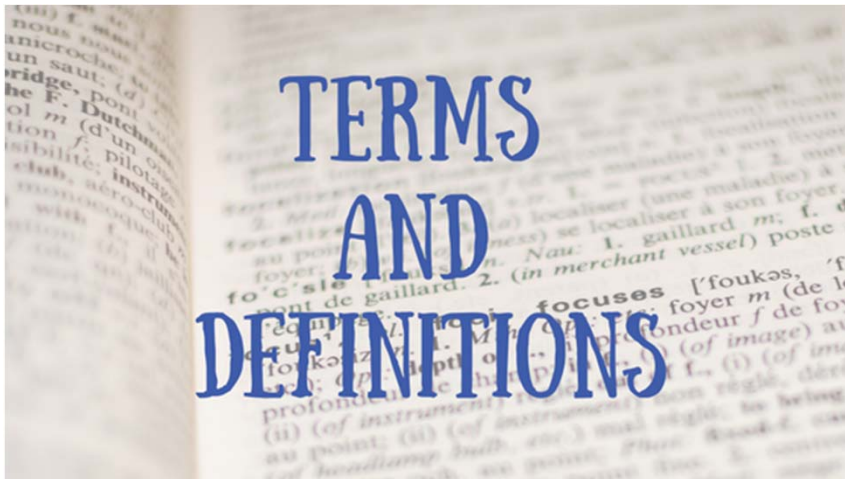


# QUESTIONS



## ■ Other Terminology

### § 106.30



*Do not have to be to be subject to 106.45 grievance process; can be filed according to “prompt and equitable” grievance procedures for sex discrimination under 106.8(c)*

- Actual knowledge
- Complainant
- Formal complaint
- Respondent
- Supportive measures
- Retaliation (§ 106.71)
- Sex discrimination



## CHAT

**What other terminology should you define within your policy?**

## ■ Other Terminology (recommended)

- Advisor
- Coercion
- Consent
- Confidential resources
- Faculty
- Force
- Grievance process
- Employee
- Hearing officer/Hearing panel
- Investigator
- Incapacitation

## ■ Other Terminology (recommended)

- Preponderance of the Evidence/Clear and Convincing Evidence
- Presumption of innocence
- Relevant evidence
- Reporting party
- Preponderance of the Evidence/Clear and Convincing Evidence
- Presumption of innocence
- Relevant evidence
- Student
- Title IX Coordinator
- Witness



CHAT

# Consent Policy

What are some of the components of your consent definition? How do you define incapacitation?



# QUESTIONS

## ■ Standard of Proof §106.45(b)(1)(vii)

- Can choose whether to use either the “preponderance of the evidence” or “clear and convincing evidence” standard of proof for sexual harassment cases.
- Must apply the same standard of evidence for *all* formal complaints of sexual harassment against students and against employees, including faculty.  
§ 106.45(b)(1)(vii)

## ■ Standard of Proof

### §106.45(b)(1)(vii)

- Burden of proof v. standard of proof
  - “Burden of proof” refers broadly to a party's duty to present evidence and argument to prove their allegations.
  - “Standard of proof” refers to the level of proof needed to prove a specific allegation (e.g., preponderance of the evidence/clear and convincing evidence).



## ■ Standard of Proof

### §106.45(b)(1)(vii)

- Under either the preponderance of the evidence or clear and convincing standard of proof:
  - § 106.45(b)(5)(i) requires that “the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest[s] on the recipient and not on the parties.”



## POLL

What standard of proof will your institution employ for sexual harassment cases?



## POLL

What standard of proof does your institution employ for faculty discipline and suspension/termination proceedings outside of Title IX?



## POLL

Does your current Title IX policy provide authority to suspend or terminate faculty members?



## CHAT

Based on your answers to the poll questions, how will the grievance procedure or process proceed when a tenured faculty member is the Respondent?



## RESOURCE

If no authority to suspend/terminate faculty members, must acknowledge such in the policy:

*Sample language:*

*This policy does not provide the authority to terminate a tenured faculty member due to the contractual rights that accompany a faculty member's tenured faculty appointment. Accordingly, if the outcome of an adjudication under this policy results in a sanction calling for separation/termination from the university, a recommendation will be made to the Provost of the University to pursue the separation/termination.*



# QUESTIONS

## ■ Supportive measures § 106.30



- Available before or after the filing of a formal complaint.
- Available to both Complainants and Respondents.
- Title IX Coordinator responsible for coordination and implementation.
- Supportive measures must keep confidential to the extent possible to allow implementation of the supportive measures.



## ■ Supportive measures

### § 106.30

- Non-disciplinary
- Non-punitive
- Free of charge
- Individualized
- Reasonable
- Maintained as confidential as possible

## ■ Supportive measures

### § 106.30

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of campus
- "Other similar measures"



## ACTIVITY

# Case Study

In early October of the Complainant's sophomore year, the Complainant reported to the Title IX Coordinator that they were sexually assaulted in the Respondent's dorm room on campus. The Complainant did not file a formal complaint and refused to provide the name of the Respondent. The Complainant simply wanted support measures such as access to counseling and an academic accommodation that would provide them additional time to study for their mid-term exams. The University granted the requested academic accommodation. A month later, the Complainant made the same academic accommodation request relating to their final exams and again the University allowed the Complainant additional time to study for final exams. The Complainant studied abroad second semester of their sophomore year. In October of the Complainant's junior year, the Complainant told the Title IX Coordinator that they had been "triggered," and asked for more time to study for their mid-term exams. The University granted the requested accommodation. A month later, the Complainant asked for the same academic accommodation relating to their final exams.



# CHAT

1. How do you implement supportive measures to ensure they are as confidential as possible?
2. If no formal complaint is ever filed, how will you address the potential for expiration of those measures?

## ■ Notice of Allegations

### § 106.45(b)(2)

Upon receipt of a formal complaint, a school must provide the following written notice to BOTH parties:

1. Identify the Complainant and Respondent. § 106.45(b)(2)(B)
2. Provide notice of the grievance process, including the informal resolution process (if applicable). § 106.45(b)(2)(A)

## ■ Notice of Allegations

### § 106.45(b)(2)

3. Provide notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time (i.e., time and location) and that the respondent will have sufficient time to prepare a response before an initial interview. § 106.45(b)(2)(B)
4. Inform the parties that they may have an advisor of their choice to accompany them throughout the grievance or informal resolution process (can, but does not need to be an attorney). § 106.45(b)(2)(B)

## ■ Notice of Allegations

### § 106.45(b)(2)

5. Inform the parties of the relevant Conduct Code prohibiting knowingly making false statements or knowingly submitting false information. § 106.45(b)(2)(B)
6. Inform the parties that they may have an advisor of their choice to accompany them throughout the grievance or informal resolution process (can, but does not need to be an attorney). § 106.45(b)(2)(B)

## ■ Notice of Allegations

### § 106.45(b)(2)

7. Explain the rights of the parties, including to present witnesses, including fact and expert witnesses, other evidence and to review all evidence collected.

§ 106.45(b)(2)(B)

8. Inform the parties that the Title IX Coordinator reserves the right to amend the allegations and charged offenses within the Notice as more information becomes available throughout the investigation. § 106.45(b)(2)(B)







## ACTIVITY

Final regulations require that a Notice of Allegations be sent upon receiving a formal complaint. What if you are aware of a pending criminal investigation and the police have requested that you not communicate allegations with the Respondent until they communicate with the Respondent?

## ■ Notice of Allegations (additional provisions recommended)

9. Identify the relevant policy offenses at play.
10. Identify the investigators and their purpose.
11. Inform the parties of the burden of proof and that gathering evidence rests on the institution and not the parties
12. Address confidentiality (within the process; no gag orders)
13. Discuss availability/continued availability of support measures
14. Explain the prohibition against retaliation against any person involved in the investigation

## ■ Notice of Allegations

(additional provisions recommended)

15. Instruct the parties not to destroy any evidence (including electronic communications and photographs) in any format.
16. Provide a reasonable timeframe for the conclusion of the grievance or informal resolution process.
17. Notification that other school policies may pertain once the investigation is completed and that allegations not falling within this policy may be referred for review/possible action under other University policies/procedures (e.g., the Employee Handbook or Faculty Handbook).
18. Include a link to or provide a copy of the policy.

## ■ Notice of Allegations (additional provisions recommended)

19. Investigation is ongoing and no decisions have been made as to responsibility.
20. Proposed dates for interview (with sufficient time to prepare).
21. Potential for dismissal
22. Any other rights provided to the parties per the policy.
23. Provide point of contact available for immediate support.



# QUESTIONS



## RESOURCE

# Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)



## RESOURCE

If you participated in last week's session and would like to ask additional questions of Cara, please stay connected through the end for a group discussion.



# EVALUATION

## Thank you!

Please remember to complete the event evaluation. Your comments will help us continually improve the quality of our programs.

