

Disclaimer

We can't help ourselves. We're lawyers.

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training satisfies both annual Clery training and Title IX regulations training.*
- Use the chat function to ask general questions and hypotheticals, or raise your hand—this is a meeting setting so we can discuss issues.
- This training is not being recorded, but we will provide you with a packet of the training to post on your websites for Title IX compliance.

Presentation Rules



- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Aspirational Agenda Day 1



Level 1: Higher Education: Annual Clergy Training And Introduction to Title IX Basics

Day 1: (all times are EST)

- 2:00-2:10 Introduction: Overview of training requirements
- 2:10-2:20 Ethic of Care and Themes of Title IX
- 2:20-3:15 Sexual Violence Data and Statistics
- 3:15-3:30 Break
- 3:30-5:00 Law & Regulation: Overview of law, existing guidance, and the new Title IX Regulations with focus on “educational program or activities”

Aspirational Agenda Day 2



Level 1: Higher Education: Annual Clergy Training And Introduction to Title IX Basics

Day 2: (all times are EST)

- 2:00-3:15 **Sexual Harassment** under Title IX, employees, mandatory and discretionary definitions
- 3:15-3:30 Break
- 3:30-5:00 Continue **Sexual Harassment**: Mandatory and Discretionary/
Avoiding Sex and Cultural Stereotypes

Posting these Training Materials



- Yes!
- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on it’s website
- We know this and will make this packet available to you electronically to post.

Training Requirements

– Title IX Regulations



“A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training of **sexual harassment in §106.30**, the scope of the recipient’s **education program or activity**, how to **conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable**, and how to serve **impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**”

§106.45(b)(1)(iii)

Training Requirements

- Clery Act



Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

Training Requirements

- **Today's Training**



Additional specific training requirements may apply to each of these categories. All require training on the definition of “sexual harassment” under the Regulations.

Today's training covers:

- “educational program or activity,”
- the definitions under §106.30 for “sexual harassment,”
- annual Clery training, and
- avoiding cultural and sex stereotypes.

TITLE IX TODAY: Themes

Title IX is an Equity Statute



EQUALITY

VS



EQUITY

Ethic of Care



- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?

Overview of Themes



Pie chart showing no bias, access, protect, transparency, evidence, and improvements

Themes - Access



- It is meant to ensure ACCESS to your programs and activities, regardless of sex.
- “What we do for one, we do for the other” (or at least consider whether it is appropriate under the circumstances)
- Why are you treating someone differently?

Themes - Duty to Protect



- We have an obligation to **PROTECT** our campus.
 - **“They are all our students.”**
 - Supportive measures
 - Any action by a recipient that results in changes or removal of access to education for respondents require a process to respond (if interim emergency measure) or engage in live cross-examination (if formal process that could lead to disciplinary action).

Themes - Transparency



- **TRANSPARENCY** is key to trusting the process.
 - Know your grievance process
 - Help them understand next steps.

Themes – Evidence Based Decisions



- We base decisions on **EVIDENCE.**
 - **“Don’t weigh your gut.”**
 - We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.

Themes – Always Room for Improve



Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

Themes – Avoid Conflicts of Interest, Bias



- Always be working to avoid actual or perceived:
 - Conflict of interest:
 - Bias

Institution Duties and Interests vs. Personal interests

Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to reset them to neutral.

SEXUAL VIOLENCE:

Data and statistics

Data and Statistics - Disclaimer



- More Disclaimers
 - Should not influence your decision in any particular Title IX case
 - We didn't do the research ourselves and can't vouch for it
 - Some of the studies use the terms Offender, Victim, and Rape
 - Okay but really, this **SHOULD NOT** influence your decision in any particular Title IX case

Sexual Assault Data 1 of 3



- Nearly 1 in 2 women and about 1 in 4 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.

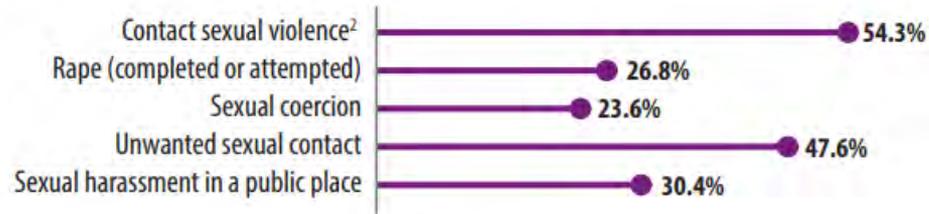
Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)

Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data 2 of 3

Figure 1

Lifetime Reports of Sexual Violence — U.S. Women, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.

² Contact sexual violence includes rape, sexual coercion, and/or unwanted sexual contact.

Types of Sexual Contact Reported by U.S. Women:

- 54.3% reported sexual violence;
- 26.8% experienced completed or attempted rape;
- 23.6% experienced sexual coercion;
- 47.6% reported experiencing some form of unwanted sexual contact other than those specifically identified elsewhere.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)

Located at: [Link to survey; CDC website](#)

Sexual Assault Data 3 of 3

Figure 2

Lifetime Reports of Sexual Violence — U.S. Men, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.

² Contact sexual violence includes rape, being made to penetrate, sexual coercion, and/or unwanted sexual contact.

Types of Sexual contact reported by U.S. Men:

- 30.7% reported some form of sexual violence
- 3.8% experiencing completed or attempted rape,
- 10.7% made to penetrate, 10.9% experiencing sexual coercion,
- 23.3% experiencing some other form of unwanted sexual contact.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)

Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data:

Prevalence Data for Postsecondary Institutions



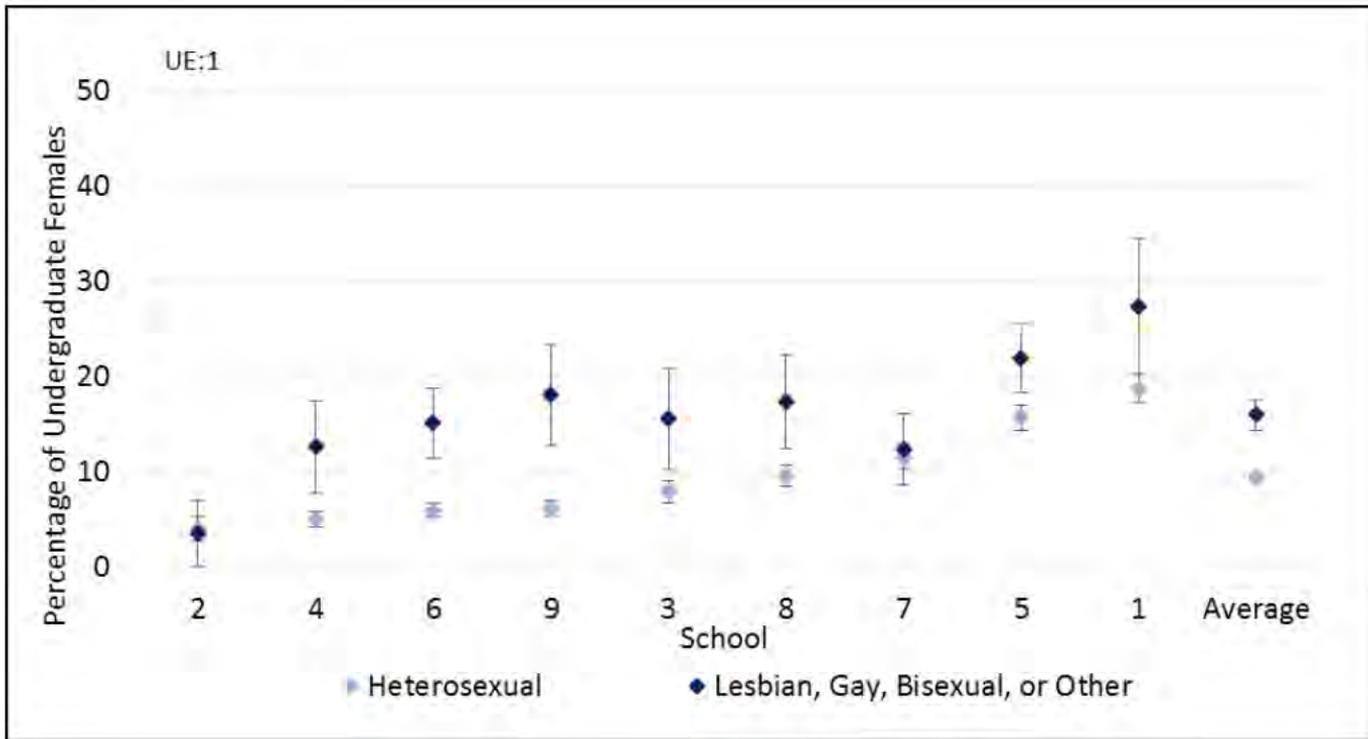
- More than **50 percent** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in **September or October, particularly for first year students.**

Statistic one: "Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics.*" RAINN Sourced from: "Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsiu, et. Al, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, Journal of American College Health (2008)."

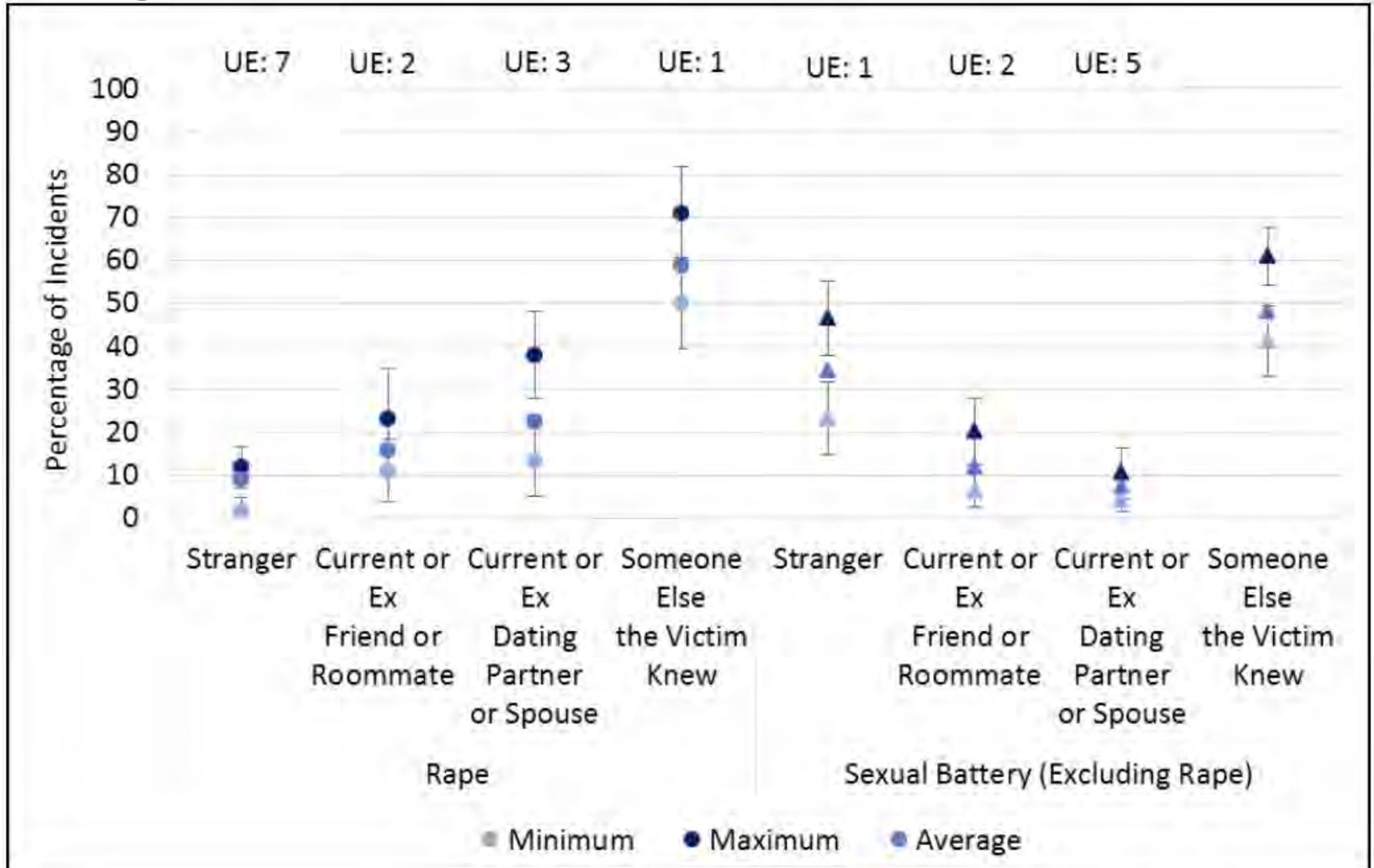
Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

Sexual Assault Data

Prevalence of Sexual Assault reported by Non-heterosexual female students



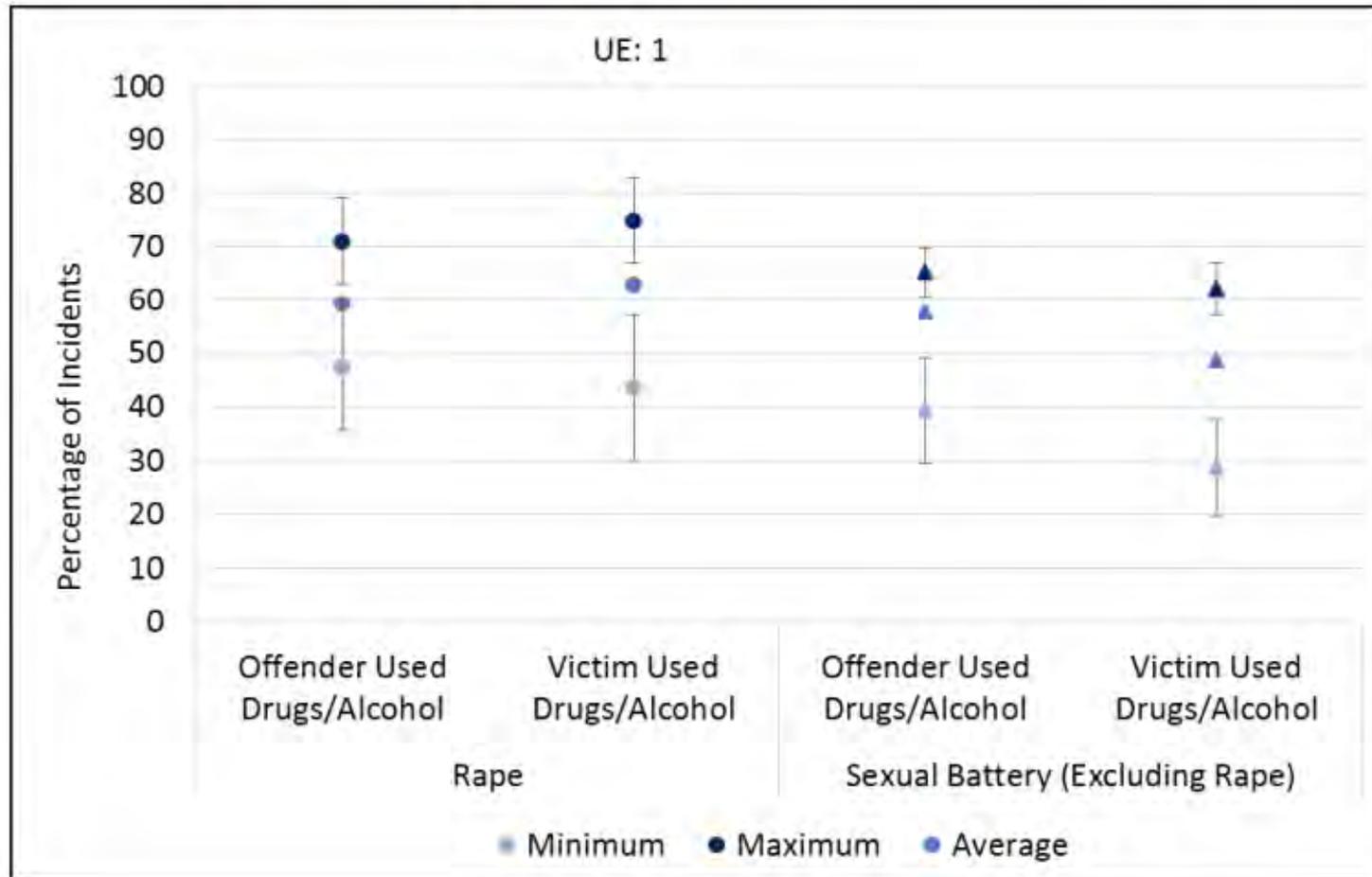
Sexual Assault Data: Identity of Perpetrator



Sexual Assault Data Alcohol/Drug Use



Figure 28. Minimum, maximum, and overall average estimates of the percentage of rape and sexual battery incidents experienced by undergraduate females that were believed to involve offender and victim alcohol/drug use, 2014–2015 academic year



Sexual Assault Data: Alcohol/Drug Use



“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.

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.

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).

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 Harassment Data



Percentage of females versus males on experiencing different forms of sexual harassment:

Sexual harassment: Female Gender 62%; Male gender 61%

Sexual comments: Female gender 57%; male gender 48%

Grabbed: Female 28%; Male 22%

Called homophobic name: Female 13%; male 37%

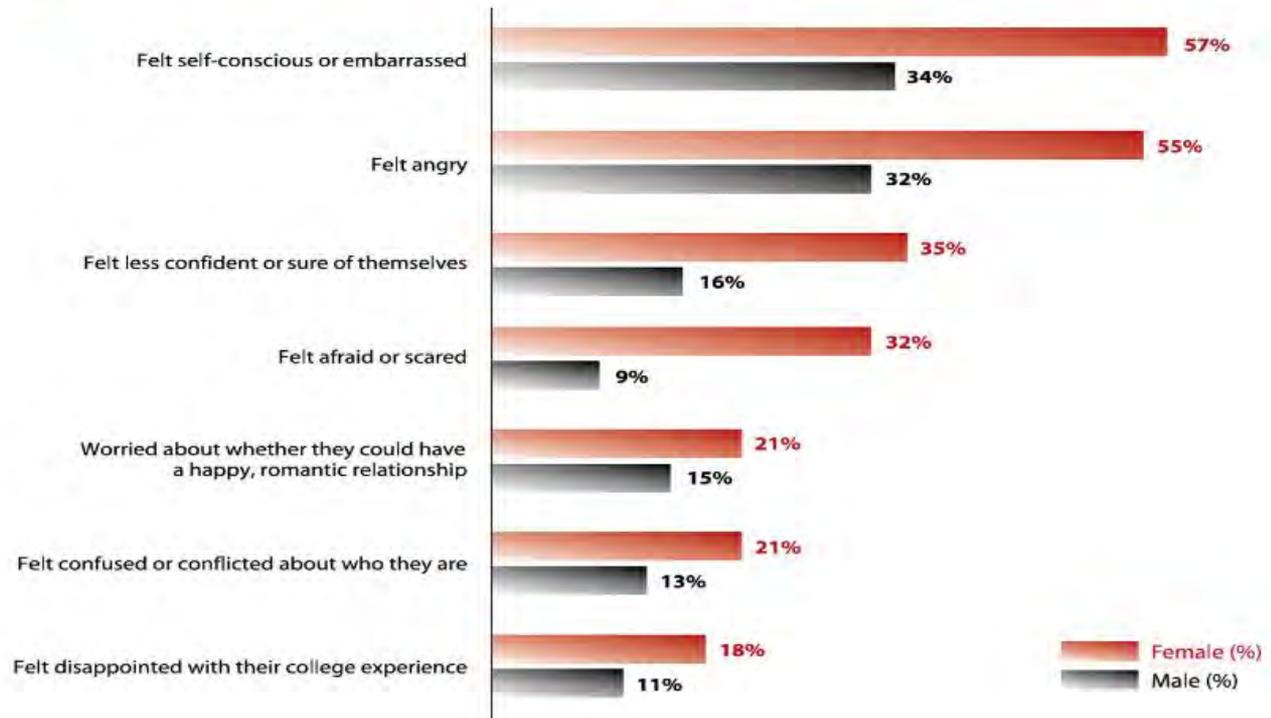
Cornered sexually: Female 13%; male 10%

Forced to kiss: Female 7%; male 8%

Sexual postings: Female 6%; male 12%

American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus (2005).*”

Figure 7. Reactions to Sexual Harassment Experiences (By Gender)



Sexual harassment has a statistically significant heavier toll on female students

Returning to the subject of impact – this report from the American Association of University Women showed that sexual harassment has a statistically significant heavier toll on female students when it comes to feeling embarrassed, angry, less confident in themselves, afraid, worried about future relationships, confused, and disappointed with their college experience.

American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus (2005).*”

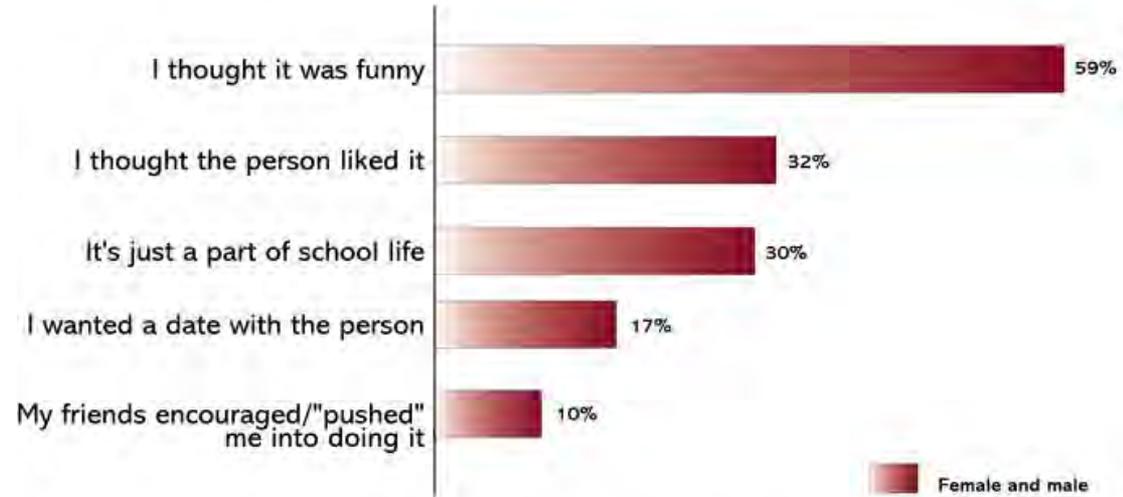
Sexual Harassment Data



- LGBT students are more likely to be sexually harassed and have negative emotional and behavioral responses to harassment.
- 73% of the LGBT students report harassment (versus 62% of heterosexual students).

American Association of University Women Educational Foundation,
Drawing the Line: Sexual Harassment on Campus (2005).”

The most common rationale for harassment (59%) is “I thought it was funny.”



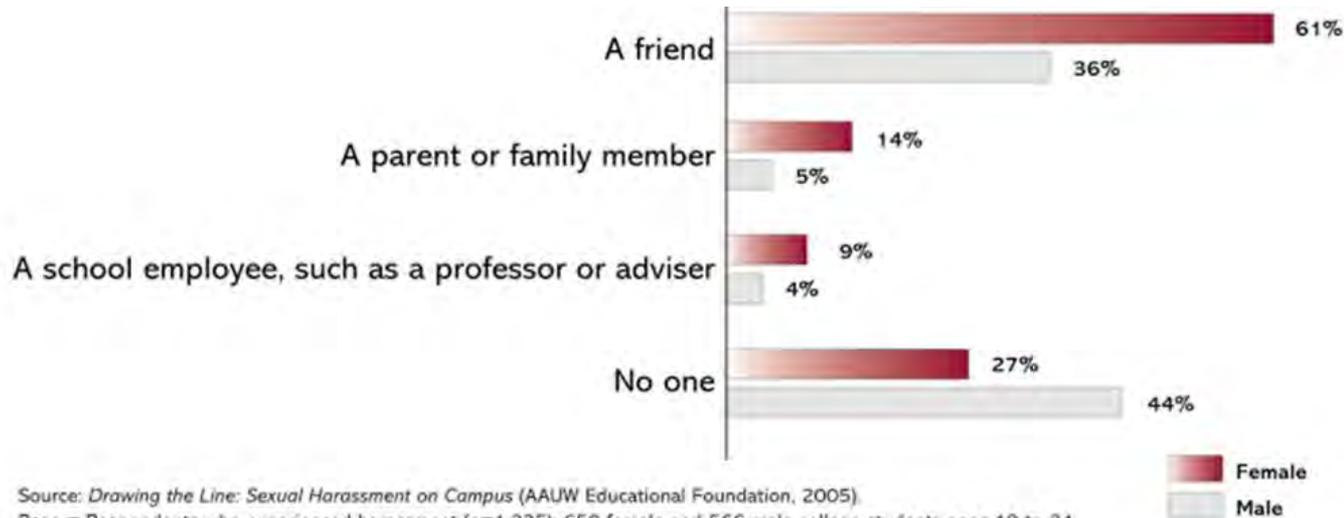
Source: *Drawing the Line: Sexual Harassment on Campus* (AAUW Educational Foundation, 2005).

Base = Those who say they ever harassed someone (n=776); 451 male and 325 female college students ages 18 to 24

32% said “I thought the person liked it.” 30% said “It’s just a part of school life.” 17% said “I wanted a date with the person.” and 10% said “My friends encouraged/pushed me into doing it.”

Less than one-fifth (17%) admitted to harassing others *because they wanted a date with the person*

Many students do not report to anyone that they have been harassed



61% of females and 36% of males report the harassment to a friend. 14% of females and 5% of males report to a parent or family member. 9% of females and 4% of males report it to a school employee such as a professor or adviser. And 27% of females and 44% of males report it to no one.

Why are males less likely to report?

Data and Statistics: Reporting Data.



Research shows that students are deterred from reporting sexual harassment and assault for the following reasons:

- Policies that compromise or restrict the victim's ability to make informed choices about how to proceed;
- A desire to avoid public disclosure
- Concerns about confidentiality
- Uncertainty as to whether they can prove the sexual violence or whether the perpetrator will be punished
- Campus policies on drug and alcohol use
- Policies requiring victims to participate in adjudication
- Trauma response
- The desire to avoid the perceived or real stigma of having been victimized

U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities are Doing About It (2005).*"

Stalking Data 1 of 2



- **31.2%** of women and **16.1%** of men in the U.S. reported stalking victimization at some point in their lifetime.
- **43.4%** of female victims and **32.4%** of male victims of stalking are stalked by a **current or former intimate partner**.
- Over **85%** of stalking victims are stalked by **someone they know**.

First and second statistics: Smith, S.G., Basile, K.C., & Kresnow, M. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking — Updated Release*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

Third statistic: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

Stalking Data 2 of 2



- **11%** of stalking victims have been **stalked for 5 years or more.**
- **46%** of stalking victims experience **at least one unwanted contact per week.**

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011")

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7])

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

Impact of Stalking on Victims

1 of 2



- **46%** of stalking victims fear not knowing what will happen next.
- **29%** of stalking victims fear the stalking will never stop.

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

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.

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJJS, 2009).]

- 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.]

LAW AND REGULATION

Terminology 1 of 3



- “Complainant” – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)
- “Respondent” – “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)

Terminology 2 of 3



- “Recipient” – “means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, **any public or private** agency, **institution**, or organization, or other entity, or any person, **to whom Federal financial assistance is extended** directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.”

§106.2

Terminology 3 of 3



- “Post-secondary institution”- “an institution of graduate higher education as defined in §106.2(l), and institution of undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o).” §106.30(b)

What applies? 1 of 3



- Law – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106
 - Athletics, employment, admissions, housing, etc.
- Clery – 20 U.S.C. 1092(f); 34 C.F.R. 668.46; Clery Handbook* (Appendix)

What applies? 2 of 3



Guidance Documents from USED:

- T9 Q&A - July 2021 (Updated June, 28, 2022)
- Notice of Interpretation – Gender Identity in Light of Bostock (Enjoined in certain states due to litigation)
- Limiting Use of Statements by Parties and Witnesses Not Subject to Cross-Examination at Live Hearing – 8/24/2021
- OPEN T9 Q&A Parts 1 and 2 - January 15, 2021

All in effect guidance may be found on USED's Policy Guidance Portal located at:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

Rescinded Guidance



- 2017 DCL + T9 Q&A on Campus Sexual Misconduct
-> Rescinded on 8/26/2020
- 2011 DCL on Sexual Violence
-> Rescinded on 9/22/2017
- 2016 DCL on Transgender Students
-> Rescinded on 2/22/2017

Database of all Rescinded Title IX Guidance available at:
[Dept of Education OCR; Rescinded Guidance website](#)

What applies? 3 of 3



- Case Law

- Supreme Court, federal courts
- State courts
- Look to other court decisions for persuasive authority

And of course...



The Current Title IX Regulations
effective Aug. 14, 2020.

Current Regulations



“Non-negotiable principles” include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.
(30059 and throughout)

- Training requirements
- Different definitions
- Different processes

Overview of the Process

1 of 2



- Not every employee has to be a mandatory reporter in the postsecondary institution
- This is so complainants can talk to employees without having to initiate the Title IX process

Confer with your GC or Compliance officer on applicable state laws

Overview of the Process

2 of 2



1. Report
2. Supportive Measures
3. Formal Complaint
4. One of three options here –
 - a. Informal resolution;
 - b. Dismissal; or
 - c. Formal grievance process
5. Formal grievance process includes investigation, hearing, determination, and appeal

Overview of the Process: Actual Knowledge



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** (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process

Overview of the Process: Formal Complaint



A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

Overview of the Process:

Formal Grievance Process 1 of 4



Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Overview of the Process:

Formal Grievance Process 2 of 4



- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias

Overview of the Process:

Formal Grievance Process 3 of 4



- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)

Overview of the Process:

Formal Grievance Process 4 of 4



- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege

Overview of the Process: Written Notice 1 of 2



- Recipient's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice

Overview of the Process: Written Notice 2 of 2



- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation

Overview of the Process: Dismissal



- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
 - If conduct alleged would not constitute sexual harassment, even if proven, OR
 - Conduct did not occur within recipient's education program or activity or in the United States

Overview of the Process: Investigation 1 of 4



- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

Overview of the Process: Investigation 2 of 4



- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

Overview of the Process: Investigation 3 of 4



- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party’s advisor with at least 10 days to submit a written response before completion of investigation report

Overview of the Process: Investigation 4 of 4



- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor

Overview of the Process: Hearings



- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

Overview of the Process: Determinations 1 of 3



- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
 - Allegations
 - Procedural steps taken from receipt of formal complaint

Overview of the Process: Determinations 2 of 3



- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

Overview of the Process: Determinations 3 of 3



- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

Overview of the Process: Appeals 1 of 2



- Recipient must offer to both parties the following bases of appeal:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

Overview of the Process: Appeals 2 of 2



- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

Overview of the Process: Informal Resolution 1 of 2



- Informal Resolution is an Optional Process
- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed

Overview of the Process: Informal Resolution 2 of 2



- Recipient can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process
 - Does not offer for employee sexual harassment of a student

Overview of the Process: Retaliation



- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because made a report or complaint, or participated or refused to participate in the process

Overview of the Process: Confidentiality



Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process.**

Jurisdiction



- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

Jurisdiction - Scope



“Education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” §106.30(a)

Education Program or Activity



Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

Online Study



- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in educational program or activity
- And in United States...

Education Program or Activity



Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house

Not an Education Program or Activity



Locations, events, or circumstances without substantial control:

- Anything outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Jurisdiction



- No obligation to address off-campus conduct that does not involve a program or activity of school
BUT
- “Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.”

Off Campus? 1 of 2



Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus;
and

Off Campus? 2 of 2



(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

Study Abroad Programs



- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

Jurisdiction and Mandatory Dismissal 1 of 3



Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, ...

Jurisdiction and Mandatory Dismissal 2 of 3



or did not occur against a person in the United States,

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then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Jurisdictional Hypotheticals



“In an educational program or activity”?

Jurisdictional Hypotheticals Disclaimer



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Jurisdictional Hypotheticals Questions



For each of the following hypotheticals, you will need to determine whether there is jurisdiction under the Title IX Regulations based on the facts as provided.

Jurisdictional Hypotheticals

Answer Options



After review of each hypothetical, you will be prompted via zoom poll to answer by voting whether:

- Yes, there is jurisdiction
- No, there is not jurisdiction
- I'm not sure (because we are nice)