

2022-2023: What is Severe, Pervasive & Objectively Offensive Title IX Sexual Harassment?



This module explores the types of sexually harassing behavior that may constitute severe, pervasive & objectively offensive conduct, rising to the level of requiring institutional action under Title IX as governed by *Davis v. Monroe* and the 2020 Final Rules.

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- ☰ What is Title IX Sexual Harassment & Why Does It Matter?
- ☰ Conduct That is Likely Not Severe, Pervasive & Objectively Offensive
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CONCLUSION

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What is Title IX Sexual Harassment & Why Does It Matter?



Complete the content above before moving on.

What is Title IX Sexual Harassment & Why Does It Matter?

This module explores the types of sexually harassing behavior that may constitute severe, pervasive & objectively offensive conduct, rising to the level of requiring institutional action under Title IX as governed by *Davis v. Monroe* and the 2020 Final Rules.



01:11

Davis v. Board of Education (audio)

Davis v. Monroe County Board of Education (1999)

The idea of conduct needing to be “severe, pervasive, and objectively offensive” to be covered by Title IX is pulled from *Davis v. Monroe County Board of Education*. In this 1999 case, the Supreme Court held that an institution can be liable for damages in a private lawsuit for failing to adequately respond to sexual harassment under Title IX if:

- it is aware of,
- and deliberately indifferent to,
- conduct **“that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”**

For the first twenty years after *Davis*, the Department of Education did not require that conduct be severe, pervasive, and objectively offensive to require institutions to act for the purposes of its administrative enforcement. But, the 2020 Final Rules have now adopted this standard for administrative enforcement as well.



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The 2020 Title IX Final Rules

Definition of Sexual Harassment (34 C.F.R. 106.30)



00:22

So, what is "sexual harassment" under the 2020 Title IX Final Rules? Well, the definition of sexual harassment covered by Title IX under these rules includes **conduct on the basis of sex that satisfies one or more of the following:**

Definition Part 1

Quid Pro Quo (by an employee)



00:15



First, an employee conditioning educational benefits on participation in unwelcome sexual conduct, or what we commonly think of as "Quid Pro Quo Harassment".

VAWA Amendments to the Clery Act Crimes



Second, what we often think of as "Clery Crimes" or the crimes covered by the Violence Against Women Act (VAWA) amendments to the Clery Act. That would include:

- Sexual assault,
- dating violence,
- domestic violence, or
- stalking

(as defined in VAWA and Clery).

Severe, Pervasive, and Objectively Offensive Conduct



00:22



And finally, unwelcome conduct that a reasonable person would determine is **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the educational institution's education program or activity;

Review



00:55

So, in sum, if alleged conduct is on the basis of sex and falls into to *one or more* of the following: (1) quid pro quo, (2) VAWA/Clery Crimes, and/or (3) severe, pervasive, and objectively offensive conduct. Thus, it is Title IX sexual harassment under the 2020 Final Rules. Thus, the Rules govern the process you must use to respond.

According to the preamble to the Rules, the burden is on schools to evaluate complaints in any of these categories by considering the totality of the circumstances, which “includes taking into account the complainant’s age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.”



“Remember! *While not all conduct that we might consider harassing requires schools to act under Title IX, conduct not covered by Title IX can and should be addressed by your school outside of the Title IX Process.”*

- Your Friends at SCI





Complete the content above before moving on.



01:38

So What is Severe, Pervasive & Objectively Offensive Conduct? (audio)

So what is Severe, Pervasive & Objectively Offensive conduct?

Because courts have used this standard for private Title IX lawsuits ever since *Davis v. Monroe*, we do have some hints. In the following sections, we will examine what conduct in higher education federal courts have found may meet this "severe, pervasive, and objectively offensive" standard such that the conduct is covered under Title IX.

A few notes before we get started:

- While there has been a lot of focus on this "severe, pervasive, and objectively offensive" standard, recall that the Title IX 2020 Final Rules pull out quid pro quo harassment by employees and Clery crimes as separately included as Title IX sexual harassment without this severity analysis. These are two categories of conduct that have been examined in quite a lot of case law on this topic. Where such cases are discussed here today, we will note that the conduct the court is discussing would fall under the Title IX rules regardless of severity.
- Second, remember that every situation is unique, and every court's decision here is a fact-specific one. So these examples should serve as general guidelines of the types of facts that courts generally find to be important in making a decision of whether conduct meets this standard. These are not to serve as strict rules on what another court *would* or your school *should* decide in a given case.



Complete the content above before moving on.

Conduct That is Likely Not Severe, Pervasive & Objectively Offensive

So, what are examples of conduct courts have found does not meet the standard?



00:07

What are examples of conduct courts have found *does not* meet the standard?

One incident of allegedly non-consensual kissing.

Doe v. Miami University,
882 F.3d 579 (6th Cir.
2018)

But! This might constitute
sexual assault under
VAWA/Clery and thus
separately fall under the

After University responded to students' complaints, they filed additional complaints regarding respondents' continued presence on campus. This mere presence of the

Kollaritsch v. Michigan State University, 944 F.3d 613, 625 (6th Cir. 2019), cert. denied, No. 20-10, 2020 WL 6037223 (U.S.

One instance of being called a gay slur by another student.

Doe v. Princeton University, 790 F. App'x 379, 384 (3d Cir. 2019)

4 different instances of unwanted touching of complainant by 4 different respondents over time, when each instance ceased as soon as it occurred, and was not repeated.

Adusumilli v. Illinois Institute of Technology (1999) 191 F.3d 455 (7th Cir. 1999)

(But! Depending on the touching itself, each

sexual harassment

incident might constitute

An isolated hug, even if forced upon the recipient.

Mosavi v. Mt. San Antonio College, 805 F. App'x 502 (9th Cir. 2020)

A single comment that someone was "beautiful," along with glancing.

Klocke v. Univ. of Texas at Arlington, 938 F.3d 204, 212 (5th Cir. 2019)



Complete the content above before moving on.

Conduct That Might Be Severe, Pervasive & Objectively Offensive

And what kinds of conduct have made courts say "Yes, a reasonable jury could find this meets the standard?"



00:12

What kinds of conduct have made courts say "yes, a reasonable jury could find this meets the standard?"

As taken all together: a professor engaging in repeated flirting with a student. Upon rejection by the student, the professor fabricated charges of cheating on an exam. Finally, the professor

Papelino v. Albany College of Pharmacy, 633 F.3d 81 (2d Cir. 2011)
Note: the professor's fabricated charges of cheating upon rejection by the student may indicate quid pro quo harassment,

A soccer coach repeatedly and consistently making inappropriate sexual comments to his players.

Jennings v. University of North Carolina, 482 F.3d 686 (4th Cir. 2007)

Multiple incidents of rape committed against the same victim.

Farmer v. Kansas State University, 918 F.3d 1094 (10th Cir. 2019)
Note: each incident of rape would separately be covered as Title IX sexual harassment under the

Respondent luring complainant into his room and conspiring with two friends to commit two separate acts of sexual assault over two hours.

Williams v. University of Georgia, 477 F.3d 1282 (11th Cir. 2007)
Note: each incident of sexual assault would separately be covered as

Title IX sexual harassment

Constant and repeated pattern of in-person stalking and cyberstalking over the course of a month.

Kamila v. University of Kansas, 469 P.3d 106, 2020 WL 4913290 (Kan. Ct. App. Aug. 21, 2020).

Note: stalking would separately be covered as

Harassment that occurred "repeatedly" and "throughout" a nursing student's placement at a university hospital, and included an incident where a nurse "push[ed] his erect penis against" the student's

Davis v. University of North Carolina at Greensboro, No. 1:19CV661, 2020 WL 5803238 (M.D.N.C. Sept. 29, 2020).

(Note: Another student "pushing his erect penis

Richardson-Bass v. State Center Community College

Professor asked a student in his class to have sex with him when alone with the student.

District, No. 19-CV-01566-AWI-SAB, 2020 WL 5658225 (E.D. Cal. Sept. 23, 2020).

(Note: The professor's



Complete the content above before moving on.

Lesson 4 of 5

Quiz

Question

01/02

Which of the following *is likely* to constitute severe, pervasive, and objectively offensive conduct such that it is covered under Title IX?

- A single unwelcome hug by another student
- A professor making repeated sexually suggestive and harassing comments to her students
- A student being subject to repeated harassing comments and one incident of having another student expose their genitals close to her.
- Several unrelated, unrepeat incidents of brief unwanted touching by separate individuals over the course of several years.

Question

02/02

Which of the following could constitute sexual harassment under the 2020 Final Title IX Rules?

- An employee conditioning an educational benefit for a student on unwanted sexual contact;
- a pattern of stalking that meets the definition under VAWA
- unwelcome conduct that a reasonable person would find to be so severe, persistent, and objectively offensive it effectively denies a person equal access to the recipient's education program or activity
- All of the above

Conclusion

Thank you for taking this training!

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