

TITLE IX TRAINING

DEFINITIONS OF SEXUAL HARASSMENT

AUSTIN COLLEGE – TITLE IX

DEFINITIONS OF SEXUAL HARASSMENT IN § 106.30

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

- (1) Quid Pro Quo
- (2) Davis Standard— Evaluated for Severity, Pervasiveness, Objective Offensiveness, & Effective Denial to Equal Access.
- (3) Clery Act/VAWA - Sexual Assault, Dating Violence, Domestic Violence, & Stalking

Quid pro quo harassment ^[625] and the four Clery Act/VAWA offenses constitute *per se* actionable sexual harassment, while the “catch-all” *Davis* formulation that covers purely verbal harassment also requires a level of severity, pervasiveness, and objective offensiveness. <https://www.federalregister.gov/d/2020-10512/p-1871>

Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct “on the basis of sex.” <https://www.federalregister.gov/d/2020-10512/p-1914>

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. <https://www.federalregister.gov/d/2020-10512/p-6447>

QUID PRO QUO GUIDANCE

- *Quid pro quo* harassment applies whether the “bargain” proposed by the recipient's employee is communicated expressly or impliedly. <https://www.federalregister.gov/d/2020-10512/p-1924>
- The Department declines to require that *quid pro quo* harassment be severe and pervasive; abuse of authority in the form of even a single instance of *quid pro quo* harassment (where the conduct is not “pervasive”) is inherently offensive and serious enough to jeopardize equal educational access. <https://www.federalregister.gov/d/2020-10512/p-1924>
- When a complainant acquiesces to unwelcome conduct in a *quid pro quo* context to avoid potential negative consequences, such “consent” does not necessarily mean that the sexual conduct was not “unwelcome” or that prohibited *quid pro quo* harassment did not occur. <https://www.federalregister.gov/d/2020-10512/p-1924>
- Even if a complainant in a *quid pro quo* situation pretended to welcome the conduct (for instance, due to fear of negative consequences for objecting to the employee's suggestions or advances in the moment), the complainant's subjective statement that the complainant found the conduct to be unwelcome suffices to meet the “unwelcome” element. <https://www.federalregister.gov/d/2020-10512/p-1931>

QUID PRO QUO GUIDANCE

- The *quid pro quo* harassment description is appropriately and sufficiently broad because it applies to all of a recipient's employees, so that it includes situations where, for instance, a teacher, faculty member, or coach holds authority and control over a student's success or failure in a class or extracurricular activity. <https://www.federalregister.gov/d/2020-10512/p-1929>
- The Department declines to expand the description to include non-employee students, volunteers, or others not deemed to be a recipient's employee. <https://www.federalregister.gov/d/2020-10512/p-1929>

DAVIS STANDARD

- 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. <https://www.federalregister.gov/d/2020-10512/p-6448>

UNWELCOME CONDUCT GUIDANCE

- Unwelcome Conduct that is not *quid pro quo* harassment and is not a Clery Act/VAWA offense included in § 106.30, the *Davis* standard embodied in the second prong of the § 106.30 definition applies. <https://www.federalregister.gov/d/2020-10512/p-1996>
- Severity and pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient's community. <https://www.federalregister.gov/d/2020-10512/p-1996>

UNWELCOME CONDUCT GUIDANCE

- Title IX does not stand as a Federal civil rights law to prevent all conduct that “makes me feel uncomfortable.” <https://www.federalregister.gov/d/2020-10512/p-2000>
- In the higher education context, as some commenters noted, students and faculty must be able to discuss sexual issues even if that offends some people who hear the discussion. <https://www.federalregister.gov/d/2020-10512/p-1968>
- A course of unwelcome conduct directed at a victim to keep the victim fearful or silenced likely crosses over into “severe, pervasive, and objectively offensive” conduct actionable under Title IX. <https://www.federalregister.gov/d/2020-10512/p-1997>

SO SEVERE, GUIDANCE

[HTTPS://WWW.FEDERALREGISTER.GOV/D/2020-10512/P-2120](https://www.federalregister.gov/d/2020-10512/p-2120)

- Determined under a reasonable person standard.^[742]
- Evaluation of whether harassment is “severe” appropriately takes into account the circumstances facing a particular complainant, such as the complainant's age, disability status, sex, and other characteristics.
- This evaluation does not burden a complainant to “prove severity,” because a complainant need only describe what occurred and the recipient must then consider whether the described occurrence was severe from the perspective of a reasonable person in the complainant's position.

PERVASIVE, GUIDANCE

- The Department disagrees that an investigation into every offensive comment or joke is necessary in order to discern whether the isolated comment is part of a pervasive pattern of harassment. <https://www.federalregister.gov/d/2020-10512/p-2125>
- Disseminating “revenge porn,” or conspiring to sexually harass people (such as fraternity members telling new pledges to “score”), or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the elements of the *Davis* standard including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. <https://www.federalregister.gov/d/2020-10512/p-2126>

OBJECTIVELY OFFENSIVE, GUIDANCE

- The Department agrees with commenters who note that whether harassing conduct is “objectively offensive” must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position. <https://www.federalregister.gov/d/2020-10512/p-2140>
- It would be inappropriate for a Title IX Coordinator to evaluate conduct for objective offensiveness by shrugging off unwelcome conduct as simply “boys being boys” or make similar assumptions based on bias or prejudice. <https://www.federalregister.gov/d/2020-10512/p-2142>

EFFECTIVELY DENIES EQUAL ACCESS, GUIDANCE

- This element does *not* require that a complainant has already suffered loss of education before being able to report sexual harassment. This element of the *Davis* standard formulated in § 106.30 requires that a person's “equal” access to education has been denied, not that a person's total or entire educational access has been denied. <https://www.federalregister.gov/d/2020-10512/p-2165>
- Any situation where the sexual harassment “so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.” <https://www.federalregister.gov/d/2020-10512/p-2166>
- Whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment. <https://www.federalregister.gov/d/2020-10512/p-2169>

EFFECTIVELY DENIES EQUAL ACCESS, GUIDANCE

- The § 106.30 definition neither requires nor permits school officials to impose notions of what a “perfect victim” does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is “high-functioning” or not showing particular symptoms following a sexual harassment incident. <https://www.federalregister.gov/d/2020-10512/p-2166>
- School officials turning away a complainant by deciding the complainant was “not traumatized enough” would be impermissible under the final regulations because § 106.30 does not require evidence of concrete manifestations of the harassment. <https://www.federalregister.gov/d/2020-10512/p-2169>

SEXUAL ASSAULT

[HTTPS://WWW.FEDERALREGISTER.GOV/D/2020-10512/P-6449](https://www.federalregister.gov/d/2020-10512/p-6449)

- (A) “Rape” means 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.
- (B) “Fondling” means 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.
- (C) “Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- (D) “Statutory Rape” means sexual intercourse with a person who is under the statutory age of consent.
- (Citation: 20 U.S.C. 1092(f)(6)(A)(v), Defined at 34 CFR 668.46)

SEXUAL ASSAULT GUIDANCE

- Included sexual assault (and, in the final regulations, dating violence, domestic violence, and stalking) as a stand-alone type of sexual harassment that does not need to demonstrate severity, pervasiveness, objective offensiveness, or denial of equal access to education, because denial of equal access is assumed. <https://www.federalregister.gov/d/2020-10512/p-1994>
- The final regulations do not require rape or sexual assault incidents to be “scrutinized for severity,” rated on a pain scale, or leave students to be repeatedly or violently raped before a recipient must intervene. <https://www.federalregister.gov/d/2020-10512/p-1994>
- Any report of sexual assault (including rape) is not subject to the *Davis* elements of whether the incident was “severe, pervasive, and objectively offensive.” <https://www.federalregister.gov/d/2020-10512/p-1994>

DATING VIOLENCE

- Dating Violence means 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 consideration of: 1) length of the relationship, 2) the type of relationship, and 3) the frequency of interaction between the persons involved in the relationship.

Citation: 34 U.S.C. 12291(a)(10)

DOMESTIC VIOLENCE

- Domestic Violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic of family violence laws of the jurisdiction receiving grant monies, or by any other person against the an adult or youth victim who is protected form that person's act under the domestic or family violence laws of Texas.

(Citation: 34 U.S.C. 12291(a)(8))

STALKING

- “Stalking” means 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.

(Citation: 42 U.S.C. 12291(a)(30))