



Association of
Title IX Administrators

Dec 9, 2020

SEVERE, PERVASIVE, and OBJECTIVELY OFFENSIVE (SPOO)

SEXUAL HARASSMENT POLICY



- Title IX regulations require each recipient to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:
 - **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.
 - **SEXUAL HARASSMENT:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the recipient's education program or activity
 - Education program or activity means employment, too!

“SEVERE”



*“The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”
—(2001 Guidance)*

- Physical is more likely to be severe without need for repetition:
 - “attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks” (2001 Guidance).
- Non-consensual sexual intercourse or contact (e.g., physical/sexual assaults) are almost always sufficiently severe.
- Consider the circumstances: e.g. the ability for Complainant to remove themselves from the harassment.
- Accompanied by threats or violence.

“PERVASIVE”



- Widespread.
- Openly practiced.
- Well-known among students or employees — reputation of a department etc.
- Occurring in public spaces (more likely to be pervasive).
- “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance – Footnote 44).
- Frequency of the conduct is often a pervasiveness variable.
 - Intensity/duration.
- Unreasonable interference.
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986).

“OBJECTIVELY OFFENSIVE”



- Reasonable person standard in context.
- “I know it when I see it...”
- Age and relationships of Complainant and Respondents.
- Number of persons involved.
- Frequency.
- Severity.
- Physically threatening.
- Humiliation.
- Intimidation.
- Ridicule.
- Abusive.

CASE STUDIES

CASE STUDY #1

While in Complainant's residence hall room, Respondent allegedly engaged in unwelcome touching, kissing, and taking pictures of Complainant's feet all while Complainant was intoxicated and asleep. Respondent allegedly promised to provide alcohol to the Complainant in order to gain access to Complainant's room. Respondent then over-served Complainant alcohol until he passed out. The Respondent has also been the subject of complaints about several incidents of touching others' feet in public without consent.

CASE STUDY #1

ATIXA VERDICT:

Not SPOO, even if proven. Where pervasiveness is an indispensable element of the offense, a single incident like this won't be enough to meet that element, even accepting severity and objective offense, for the sake of argument.

CASE STUDY #2

A male student was walking across campus when he heard sounds coming from a window. Approaching the window, he realized it was a ground floor residence hall window, partially open (as were the blinds), and that the sounds coming from the room were sex sounds. He looked in and saw one of his good friends having sex with a female student. He took out his iPhone and began video recording them. As he was recording, an RA walked by and stopped him. When questioned, the student denied sharing the recording with anyone else, and agreed to delete it on the spot at the RA's behest. Both students who were recorded declined to file a complaint, saying they thought it was funny.

CASE STUDY #2

ATIXA VERDICT:

Not SPOO, even if proven. The fact that both “victims” were not offended could undermine an objective offense conclusion. This conduct was also likely neither pervasive nor unwelcome. It is severe.

CASE STUDY #3

An instructor of religion is teaching a class on the Old Testament. A trans student taking the class has frequent friction with the instructor over the instructor's narrow interpretations of scripture and conservative beliefs about the value of religion as a tool of social control. In class, the instructor has twice failed to use the student's chosen name, and has defended herself, saying that she uses the name on the class registration roster for all students. The student finds out from classmates that the instructor misgenders the student in conversations with these classmates. The student approaches the instructor to address the misgendering and is told by the instructor that there are only two genders, and that the instructor only refers to students by their birth-assigned sex.

CASE STUDY #3

ATIXA VERDICT:

Not SPOO, even if proven. This conduct is likely protected speech. It's arguably not severe, though it would be objectively offensive. Pervasiveness is open to debate. Some courts have taken the position that conduct needs to be more widespread than this, while others have not.

CASE STUDY #4

Eleanor waited for the elevator on the third floor of the library. As the elevator reached the third floor, the doors opened, revealing a flasher and his penis. The doors closed and Eleanor decided to take the stairs down. She has complained that this exposure was sexual harassment. The flasher (a non-student) was arrested and barred from campus.

CASE STUDY #4

ATIXA VERDICT:

Not SPOO, even if proven. This conduct is borderline severe, not pervasive, and arguable as to objective offense. Eleanor may be fearful, or consider this inappropriate, but she is not being discriminated against by having seen a penis in unwelcome circumstances. If this exposure involved minors in any way in a K-12 setting, SPOO would be possible, if proven.

CASE STUDY #5

During class, a Professor assigned homework that required students to watch a show on Netflix that depicts numerous sexual acts (including same sex acts, which the complaining student mentioned as one of their objections to the assignment), nudity, drug use, suicide, marital infidelity, etc. The student found the content to be disturbing. The student is a devout Catholic and was so appalled they went to confession and reported the matter to the Title IX Coordinator. The department chair informed the Title IX Coordinator that the Netflix show did not meet any learning objectives and the professor could have chosen a variety of content through university resources.

CASE STUDY #5

ATIXA VERDICT:

Could be SPOO, if proven. Extended and repeated exposure to gratuitous sex-based content could be severe, pervasive, and objectively offensive. The captive audience requirement here enhances the argument for SPOO. While the faculty member has the academic freedom to assign what they want, that's only true if the assignment is both germane to the subject matter and pedagogically appropriate. Here, the department chair's testimony shows that the content was not within those protections, and an opt-out should have been offered to students, at least.

CASE STUDY #6

A female student used SnapChat to ask a male student to have sex with her. He refused. She then responded that she would rape him if he did not have sex with her. He took a screenshot and brought a complaint against her. As a result of the exchange, he is avoiding her on campus and dropped the class in which they were both enrolled.

CASE STUDY #6

ATIXA VERDICT:

Could be SPOO, if proven. The content is sex-based; the threat could be severe and objectively offensive, if a reasonable person would consider it a true threat. Her capacity for carrying it out matters, as far as First Amendment analysis is concerned. While the one-time comment itself is not pervasive, the effect arguably is, because he is now avoiding her on campus and has dropped the class.

CASE STUDY #7

An 11th grade female student complainant stated that a male student approached her at the school and they exchanged phone numbers because he was interested in study materials and outlines for a class. She said they texted a bit, he asked if she was single, and she told him she was interested in being just friends. They walked out of school together at the end of the day, and when they got to their vehicles, she said he cornered her between his body and her car door and she said he “grabbed my face and shoved his tongue down my throat forcefully.”

CASE STUDY #7

ATIXA VERDICT:

Probably not SPOO, even if proven. This conduct is sex-based and unwelcome. The forcefulness and cornering tip the balance toward severity. The conduct is not pervasive unless a pervasive effect in the educational program can later be shown through investigation (perhaps this was public or humiliating?), but as an isolated incident, this is unlikely to be pervasive. The conduct is objectively offensive.

CASE STUDY #8

Coach Gandy was trying to motivate her players. The guys were just too lazy. When frustrated, she would berate them as being “wusses,” “pussies,” “douchebags,” “bitches,” and “pussycakes.” She did this many times to most of the players. Two of the players filed a complaint.

CASE STUDY #8

ATIXA VERDICT:

Probably not SPOO, but whether it could ultimately be proven, or whether it would be premature to dismiss it before investigation might necessitate going through an investigation and/or hearing before that is clear. While these comments were sexualized, that may not be enough to make them sexual or sex-based (see footnoted case). The fact that not all players chose to make a formal complaint could undermine the argument for objective offense, though interviews will show whether they were offended or not, even if not all players spoke out. Severity is arguable, as well.[1] Pervasiveness is clear. Because this conduct is unprofessional, our preference would be to have it addressed by HR as a professionalism issue, not on the content of the speech as a Title IX matter (but that depends on the dismissal).

CASE STUDY #9

Professor Tom becomes increasingly informal with his class throughout the semester, both with male and female students. Some students describe Professor Tom as being a bit “creepy” with the female students. And some male students say Professor Tom stays after class and chats with the male students about which female students are “hot.” According to one male student, Professor Tom called one female student, Mary, a “hot piece of ass” in a conversation with him and one other male student. The next week Professor Tom told the whole class that his girlfriend is “very experienced” in the bedroom, and that he doesn’t use condoms because none of them fit him right.

CASE STUDY #9

That same day, he asked Mary to stay after class, and with several other students still in the room, told Mary that he knew she had been partying a lot, that she should be careful, and he gave her his cell number in case she ever needed help or a ride home at night. As he told her this, he brought his hand into contact with her back and down to the small of her back, leaving his hand in contact with her for 5-10 seconds just above her buttocks. Mary made a complaint about his inappropriate attention and contact.

CASE STUDY #9

ATIXA VERDICT:

Not SPOO, even if proven. The physical contact with Mary is not inherently sexual, though it might arguably be sex-based. It is not severe, and probably not pervasive. It's arguably objectively offensive. The state of creepiness is not severe. The comments to other students about Mary are offensive and inappropriate, but could not have denied Mary educational access, as they were not directed to, or known to her. The comment is likely not severe or pervasive, though it is objectively offensive. The comments Professor Tom made in his class are sexual and unwelcome because they have been reported. The comments are not severe or pervasive. The investigation may or may not show objective offense, depending on the class reaction.

CASE STUDY #10

One day while drinking at a bar, Assistant Athletic Director Kelly divulged to Coach Scott that she often has sexual fantasies that begin with female students having a water balloon fight. The next semester, Coach Scott found out that Director Kelly had scheduled a charity water balloon fight between the girls volleyball team and the girls softball team. Director Kelly had even purchased team shirts for both teams, and Coach Scott noted that the shirts were all white tank tops. The water balloon fight took place, raised \$2,000, and all the participants seemed to have a great time. Two months later, Coach Scott divulged to one of the participants what he believes were the true motives behind the fight, and that participant subsequently filed a Title IX complaint as a result.

CASE STUDY #10

During the preliminary assessment, the TIXC uncovered that Director Kelly also recorded a video of the water balloon fight that may or may not have been sent to others over the university email system.

CASE STUDY #10

ATIXA VERDICT:

Not SPOO, even if proven. While the conduct is sexualized, it's reasonably welcome because we don't know what the coach is doing with the video, though we might suspect it. Also, it would be the fantasizing, not the water balloon fight that might be unwelcome. The conduct is not severe, pervasive, or objectively offensive. What the coach might be doing with the video or experiencing from the voyeurism is not something that is being done to the female athletes.

CASE STUDY #11

Johnny and Mary live next door to one another on a co-ed residential floor, and Mary complains that Johnny watches pornography in his room very loudly, and that she can hear the videos very clearly through the walls. In fact, she believes Johnny intentionally watches porn at an increased volume when he knows Mary is home. Sometimes if she leaves, Johnny seems to pause the pornography, pokes his head out of his room, watches her walk down the hallway, and she can hear him then return to watching porn. On Tuesday, Mary caught Johnny staring at her while she returned from the showers. She confronted him about this, and he said, “I’m just getting a mental image.” She could then hear him immediately start watching porn in his room.

CASE STUDY #11

Later, Johnny said to Mary, “Thanks for earlier,” and smiled. Mary and several of her male and female floor mates (who also are upset with the pornography audio levels) file complaints with the TIXC.

CASE STUDY #11

ATIXA VERDICT:

Not SPOO, even if proven. Johnny is conducting himself lawfully in his private space. If the walls are too thin or his audio levels unreasonably high for the residence hall environment, a disruption charge in the halls may be appropriate. Johnny's use of porn appears to be pervasive but is not severe or objectively offensive. Johnny's comments to Mary are obnoxious, inappropriate, and unwelcomed, and should be addressed to ensure they stop, but are not severe, pervasive, or objectively offensive.

CASE STUDY #12

A group of five women stand outside the cafeteria rating the “skankiness” of other women as they walk by, using a ten-point scale. They each write their ratings on individual small whiteboards, then hold them up for all to see. They also make comments on the white boards about the number of partners the rated women have had, who they have been with, their preferred positions, etc. The comments are snapped and shared amongst a large group of students watching the spectacle, some of whom know that the comments are accurate, but are not things these women would want widely circulated. Several of the women who are rated file complaints.

CASE STUDY #12

ATIXA VERDICT:

Yep, you knew it. This could be SPOO. The conduct is severe and pervasive. It's arguably objectively offensive, but that can really only be determined by pursuing the formal resolution process. Violations of privacy are usually going to satisfy the severity element, but there is likely an interesting First Amendment debate to be had here.

CASE STUDY #13

Ras is a male first-year student. He likes to give the students living on the same floor nicknames. He takes to calling the gay guys the “BBs” (butt buddies), and he nicknames all the women “CDs” (cum dumpsters). The nicknames spread, and occasionally other male students are heard referring to the BBs or the CDs. Everyone knows what the nicknames mean. Despite being asked and told to stop, Ras continues to use these terms frequently and publicly. He occasionally calls a woman “Dumpster” to her face and refuses to use their actual names.

CASE STUDY #13

ATIXA VERDICT:

Ras is a truly crappy human being. He's also engaging in conduct that could be SPOO, if proven. The terms are graphic and demeaning enough to make the recipients objects (of ridicule), satisfying the severity element. The conduct is pervasive, and arguably objectively offensive, but that can really only be determined by pursuing the formal resolution process.

CASE STUDY #14

QUID PRO QUO BONUS QUESTION:

Professor Doug and student Cindy have grown fairly close throughout the semester, and according to others, their relationship seems “inappropriate” and overly flirtatious. Many students believe Cindy (who is not a very good student) is flirting with Professor Doug to garner favor from him, as Professor Doug is extremely influential in this academic field. Finally, one day, Professor Doug tells Cindy that if she has sex with him, he will give her an A-grade. Cindy welcomes this offer, and she has sex with Professor Doug. She receives an A-grade, and it propels her into an internship and ultimately her dream job.

CASE STUDY #14

To this day, Cindy says that having sex with Professor Doug was the best decision she ever made and is very happy with how her life and career turned out as a result. No other student ever becomes aware of this arrangement, and there was no grade curve, thus, no other student's grade was affected. Without worrying about the fact that Professor Doug's behavior is concerning as it could be repeated, is this one particular incident quid pro quo sexual harassment?

CASE STUDY #14

ATIXA VERDICT:

This is not QPQ sexual harassment because unwelcomeness is an indispensable element of the offense. Here, Doug's overtures to Cindy were welcomed.

CASE STUDIES

Are most of these coming out as **not** SPOO? Good. The same will likely be true of your campus complaints, meaning Title IX does not apply. However, in a number of these cases, the behavior described may violate other conduct-based policies at your institution.



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Questions?



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