

Jurisdictional Hypotheticals Analysis



To answer these questions, think through the elements for jurisdiction:

- In an educational program or activity?
 - In the United States?
 - On campus?
 - If off campus,
 - Exercise substantial control over Respondent and context?
 - Off campus building owned or operated by student group recognized by institution?

Hypothetical 1

Charlie, a student, informs the Title IX Coordinator or designee that she was sexually assaulted at a party over the weekend, by another student she knows, Rook. Charlie states that the party and assault occurred at In-between apartments. Charlie believes this is part of campus. In-between apartments is a complex directly behind the university and sits in between two university-owned senior apartment complexes, but In-between is owned by a private landlord.

Hypo 1 - Answer

Charlie, a student, informs the Title IX Coordinator or designee that she was sexually assaulted at a party over the weekend, by another student she knows, Rook. Charlie states that the party and assault occurred at In-between apartments. Charlie believes this is part of campus. In-between apartments is a complex directly behind the university and sits in between two university-owned senior apartment complexes, but In-between is owned by a private landlord.

Zoom Poll:

Yes, there is Jurisdiction;

No, there is not Jurisdiction;

I'm not sure

Hypothetical 2

Taylor, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted him at a fraternity party over the weekend. The fraternity house is affiliated with the university, but the university does not own the house and the house is located off-campus.

Hypo 2 - Answer

Taylor, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted him at a fraternity party over the weekend. The fraternity house is affiliated with the university, but the university does not own the house and the house is located off-campus.

Zoom Poll:

Yes, there is Jurisdiction;

No, there is not Jurisdiction;

I'm not sure

Hypothetical 3

The university has partnered with the city for an improvement district along the main street that runs through campus. The improvement district removes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime. Kayla, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted her on the main street in front of campus over the weekend.

Zoom Poll:

Yes, there is Jurisdiction;

No, there is not Jurisdiction;

I'm not sure

Hypo 3 - Answer

The university has partnered with the city for an improvement district along the main street that runs through campus. The improvement district removes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime. Kayla, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted her on the main street in front of campus over the weekend.

Zoom Poll:

Yes, there is Jurisdiction;

No, there is not Jurisdiction;

I'm not sure

Hypothetical 4

Rebecca, a student, calls the Title IX Coordinator or designee frantically from Argentina, where she is enrolled in the university's "Argentina Program," in which professors and students from the university hold courses at a sister university in Buenos Aires. Charlie states that one of the university's professor's told her that she could only get an A in the course if he slept with the professor.

Hypo 4 - Answer

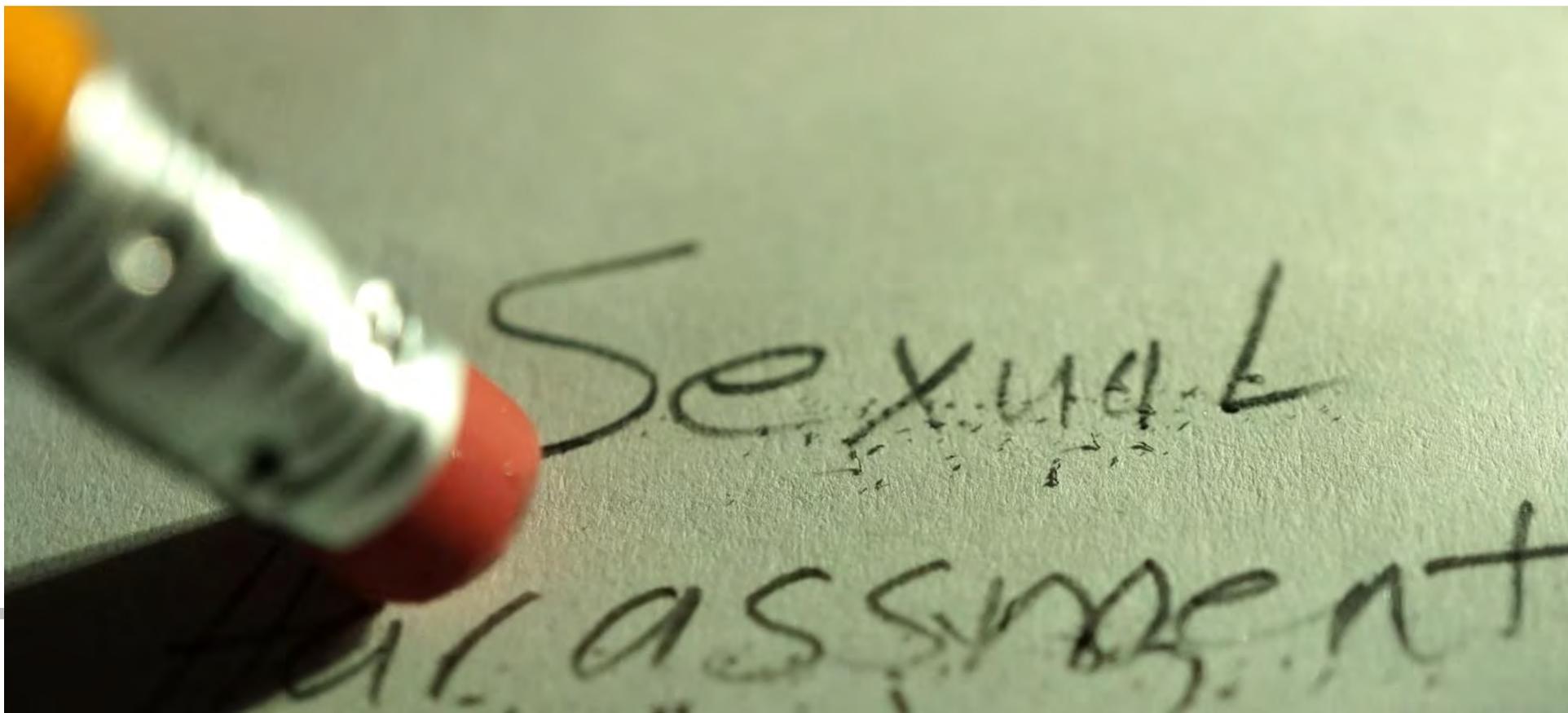
Rebecca, a student, calls the Title IX Coordinator or designee frantically from Argentina, where she is enrolled in the university's "Argentina Program," in which professors and students from the university hold courses at a sister university in Buenos Aires. Charlie states that one of the university's professor's told her that she could only get an A in the course if he slept with the professor.

Zoom Poll:

Yes, there is Jurisdiction;

No, there is not Jurisdiction;

I'm not sure



Sexual Harassment

Sexual Harassment

- 3 Classifications



- **Sexual harassment** means 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;
 - [**Hostile environment**] 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; or
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

Sexual Harassment: *Quid Pro Quo*



- Only applies to employee respondents (can be any complainant)
- USED interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

Sexual Harassment: Davis/Gebser



- The second prong: severe, persistent, and objectively offensive and deny equal access (vs. Title VII: severe, persistent, or pervasive)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe



- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics/protected classes
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive



- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that Quid Pro Quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive



Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Sexual Harassment Considerations



The preamble notes that the Regulations do not prohibit postsecondary institutions from:

- Publishing a list of situations that would violate Title IX as “sexual harassment”
- Advising when similar conduct has been found to violate Title IX
- Publishing a list of situations that would violate code of conduct (30158)

Applies to Employees 1 of 5



- Whether Employees could bring suit under Title IX was unsettled in most Circuits. Now, several Circuits have addressed this issue and are split on it. While the Title IX policy applies to employees, some courts have ruled that they cannot bring a private lawsuit under Title IX, only Title VII.
- Enter **Title VII**
 - Commentary notes that “severe or pervasive” definition (Title VII) shouldn’t apply because elementary, secondary, and postsecondary schools are unlike the adult workplace. (Pages 43-44)
 - Davis – 5th grade students
 - Instead - “**severe, pervasive, and objectively offensive**”

Applies to Employees 2 of 5



Near the beginning of the preamble, the Department noted:

“The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application **would equate workplaces with educational environments**, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments.”
(30037 of preamble).

Applies to Employees 3 of 5



But towards the end of the preamble, the Department clarified:

- “The Department appreciates support for its final regulations, which apply to employees.” (30439)
- No “inherent conflict” between Title VII and Title IX (30439)
- Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students (30440)

Applies to Employees 4 of 5



The preamble clarified:

- Recipients that are subject to both Title VII and Title IX must comply with both (30440)
- “Deliberate Indifference” standard “most appropriate” for both Title VII and Title IX (30440)
- Because Title IX recipients are “in the business of education”
- “Marketplace of ideas” makes postsecondary institutions special

Applies to Employees 5 of 5



- Conflicts between Title VII and Title IX noted by Commenters:
 - Formal complaint requirement
 - Notice requirement
 - Deliberate Indifference Standard (noted above)
 - Definition of Sexual Harassment
 - Live hearing if public (as opposed to notice and opportunity to respond)

Definitions Disclaimer



This section uses the terms “rape,” “victim,” and “perpetrator”, “Sodomy”-- CRIMINAL, not POLICY, from FBI Criminal Definitions (what Clery and VAWA refer to for their definitions)

Mandatory: Sexual Assault, Dating Violence, Domestic Violence, & Stalking



Third prong refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
- Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

Sexual Assault Definition

- FBI UCR & NIBRS



- The FBI UCR provided definitions for Sexual Assault under two different databases, the SRS and the NIBRS.
- The FBI retired the SRS in January of 2021, so the NIBRS database is the safest source of Sexual Assault definition available.

Consider:

- The specific offenses covered in the NIBRS definitions of Sexual Assault must be prohibited, but the actual verbiage may be altered in some capacity to be more inclusive or sensitive to certain communities based on campus demographics.
- **Ex – Sodomy may be viewed as a derogatory term in the LGBTQ Community.**

Sexual Harassment: Sexual Assault as Found in NIBRS Manual 2021



“Sexual Assault” includes:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

Sexual Assault: Rape - NIBRS Manual 2021



“Rape” means the **carnal knowledge** of a person, 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 or physical incapacity. **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

Sexual Assault: Rape USED Guidance 2020



- “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of complainant, without the consent of the complainant.”

Sexual Assault: Sodomy



“Sodomy” means **oral or anal sexual intercourse** with another person, 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 or physical incapacity.

Sexual Assault: With an Object



“Sexual Assault with an Object” means 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 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 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.

Sexual Assault: Fondling



“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 or physical incapacity.

Sexual Assault: Incest



“Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Sexual Assault: Statutory Rape



“Statutory Rape” means sexual intercourse with a person who is under the statutory age of consent.

Ex. In Ohio:

- Under 13 → can't consent
- Under 16 → can't consent to those older than 18

*Consult with your GC or Compliance office on your state's Age of Consent rule.

Sexual Harassment: Dating Violence



“**Dating Violence**” means an act of violence committed by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

Sexual Harassment: Domestic Violence



“Domestic violence” is an act of violence committed by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction

Sexual Harassment: Stalking



“**Stalking**” is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

Stalking: On the basis of sex



The preamble distinguishes between stalking and stalking on the basis of sex (only the latter of which falls under Title IX):

- Recognition that stalking does not always relate to sex and therefore do not always fall under Title IX (ex. celebrity stalking)
- See footnote 772 on 30172– “Stalking that does not constitute sexual harassment because it is not ‘on the basis of sex’ may be prohibited and addressed under a recipient’s non-Title IX codes of conduct”

Stalking: Course of Conduct



“Course of Conduct”

- Under VAWA regulations: 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: Reasonable Person



“Reasonable person”

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

Stalking: Substantial Emotional Distress



“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Sexual Harassment Hypotheticals



Is this “sexual harassment”
under Title IX?

Sexual Harassment 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.

Sexual Harassment Hypotheticals Questions



For each of the following hypotheticals, you will need to determine whether the allegations, if proven true, would constitute sexual harassment under the Title IX Regulations based on the facts as provided. Assume jurisdiction exists.

Sexual Harassment Hypotheticals Answers



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

- Yes, this is sexual harassment
- No, this is not sexual harassment
- I'm not sure (because we are nice)

Sexual Harassment Hypotheticals Reference



- **Sexual harassment** means 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;
 - [**Hostile environment**] 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; or
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

Hypothetical One



Complainant tells the Title IX Coordinator that Respondent, a fellow student in her ceramics class, commented that her sculpture could, “lose some weight.” Complainant stated that this piece was meant to be a self-portrait, and that the comment was devastating to her because she considers herself overweight and interpreted this as an attack on her about her weight.

Hypo One - Answer



Complainant tells the Title IX Coordinator that Respondent, a fellow student in her ceramics class, commented that her sculpture could, “lose some weight.” Complainant stated that this piece was meant to be a self-portrait, and that the comment was devastating to her because she considers herself overweight and interpreted this as an attack on her about her weight.

Zoom Poll:

Yes, this is Sexual Harassment;

No, there is not Sexual Harassment;

I’m not sure

Hypothetical Two



Complainant tells the Title IX Coordinator that his boyfriend hit him in the face after they returned from drinking downtown, and wants to file a complaint against him.

Complainant states that this occurred two years ago in the beginning of their relationship, but they just broke up and he felt he should report it.