Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.30(a): Sexual Harassment

June 4, 2020

Note: This document focuses on a summary analysis of Section 106.30(a) of the 2020 Final Title IX Regulations,[1] specifically the definition of "sexual harassment". For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§ 106.30(a): Sexual Harassment

The Final Rule § 106.30(a) defines and applies definitions to the terms "actual knowledge," "complainant," "elementary and secondary schools," "formal complaint," "respondent," "sexual harassment," and "supportive measures." Many terms commonly used in sexual misconduct matters on campuses and throughout the regulations remain undefined, as further discussed throughout the Joint Guidance documents. This document focuses on its definition of "sexual harassment."

The Final Rule § 106.30 defines "sexual harassment" as conduct on the basis of sex that satisfies one or more of the following:

> (i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., *quid pro quo*);
>
> (ii) 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; or
>
> (iii) Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

Following the release of the Notice of Proposed Rulemaking (NPRM), the proposed definition of sexual harassment was one of the most controversial sections, especially the second prong of the definition which applies a standard for "unwelcome conduct" that is heightened significantly from past guidance. In response to concerns and comments, the Department offers important insight into several aspects of its rationale regarding the final definition.

[1] The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

The Department's Three-Prong Sexual Harassment Definition

The Department explains its sexual harassment definition as a three-prong definition that adopts the Supreme Court's formulation of actionable sexual harassment in *Davis v. Monroe County Board of Education* (i.e., conduct that is so severe, pervasive, and objectively offensive that it denies equal access to education), "yet adapts the formulation for administrative enforcement in furtherance of Title IX's broad non-discrimination mandate" by expanding it to add "other categories (*quid pro quo*; sexual assault and three other Clery Act/VAWA offenses) that, unlike the *Davis* formulation, do not require elements of severity, pervasiveness, or objective offensiveness." *See* 85 Fed. Reg. 30026, 30141-30142 (May 19, 2020).

As a whole, this definition sets a threshold for when unwelcome conduct constitutes sexual harassment under Title IX, and for when "serious incidents that jeopardize equal educational access exceed the threshold and are actionable." *See Id.* at 30160. Relatedly, the Department states that this definition is intended to capture "categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom." *See Id.* at 30142.

The Department crafted this three-prong definition, as opposed to solely adopting the *Davis* standard, to address what it viewed as "the distinction between a standard for when *speech* is actionable versus a standard for when *physical conduct* is actionable; the former requires a narrowly tailored formulation that refrains from effectively applying, or encouraging recipients to apply, prior restraints on speech and expression, while the latter raises no constitutional concerns with respect to application of broader prohibitions." *See Id.* (emphasis added).

Thus, as discussed in more detail herein, the Department created a definition where "*quid pro quo* harassment and the four Clery Act/VAWA offenses constitute *per se* actionable sexual harassment" that do not require an evaluation for severity, pervasiveness, and objectiveness, or denial of equal educational access, because, it argues, prohibiting such conduct presents no First Amendment concerns and such serious misconduct is assumed to cause denial of equal education, "while the 'catch-all' *Davis* formulation that covers purely verbal harassment also requires a level of severity, pervasiveness, and objective offensiveness." *See Id*. In other words, the Department's definition narrowly tailors the *Davis* formulation to ensure speech and expression are prohibited only when their seriousness and impact avoid First Amendment concerns.

The Department states that it does not intend this definition to create categories of "legitimate" sexual misconduct nor intended to impose a higher burden of proof on survivors requiring them to prove that their abuse is worthy of attention. *See Id.* at 30153-30154. To address these concerns, the Department states that the burden of proving sexual harassment under any of the three prongs "does not fall on complainants; there is no magic language needed to 'present' a report or formal complaint in a particular way to trigger a recipient's response obligations." *See Id.* at 30156.

Rather, the burden is on the educational institution to evaluate complaints 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." *See Id.*

On the Basis of Sex (Gender-Based Harassment)

Commenters argued that the phrase "on the basis of sex" is limiting because it confines gender discrimination and gender-based violence, applying a binary understanding of sex by aligning it with sex assigned at birth. In the preamble to the Final Rule, the Department includes language aimed at clarifying that the term "sex" is not defined at all in the Title IX statute or existing regulations, and that the Department declines to define it with the Final Rule. The Department explains that the focus of the Final Rule is on prohibited conduct and "any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment." *See* 85 Fed. Reg. at 30178.

Prong One: Quid Pro Quo

As mentioned above, the Department adapts the definition in *Davis* by expressly including *quid pro quo* harassment as a *per se* type of sexual harassment. In doing so, the Department notes that, in some instances, conduct might not be severe, pervasive, and objectively offensive; rather, "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, and although such harassment may involve verbal conduct there is no risk of chilling protected speech or academic freedom by broadly prohibiting *quid pro quo* harassment because such verbal conduct by definition is aimed at compelling a person to submit to unwelcome conduct as a condition of maintaining educational benefits." *See* 85 Fed. Reg. at 30148.

The Final Rule interprets *quid pro quo* harassment to include not only express communications, but also situations where the *quid pro quo* nature of the incident is implied from the circumstances. *See Id.* at 30147. However, under the Final Rule, *Quid pro quo* harassment does not cover conduct by non-employees, even though such conduct would be covered under Title VII. The Department states it was persuaded by Supreme Court precedent that Title IX and Title VII differ in several respects, and that employment environments are notably different than educational environments, particularly regarding agency principles. *See Id.* at 30148. The Department clarifies that this does not mean educational institutions will necessarily be free from liability for unwelcome conduct of a non-employee, because such conduct may fall under the second or third prong of the definition, discussed further herein. *See Id*.

Finally, "unwelcome conduct" is based on "the complainant's subjective statement that the complainant found the conduct to be unwelcome" which the Department explains "suffices to meet the 'unwelcome' element" of this prong. *See Id*. This qualification purports to eliminate the concern that a complainant who states that they found the conduct to be unwelcome, but nonetheless pretended to welcome the conduct solely out of fear, will not be able to maintain a *quid pro quo* claim.

Prong Two: Severe, Pervasive, and Objectively Offensive Standard

The Department states that in the Final Rule it has adopted the articulated *Davis* standard by defining actionable sexual harassment in the second prong as conduct that is "so severe, pervasive, *and* objectively offensive" because unlike the first and third prongs, discussed further herein, the second prong covers conduct that raises First Amendment concerns (i.e., purely verbal conduct),

and these elements are necessary to ensure "that speech and expressive conduct is not peremptorily chilled or restricted, yet may be punishable when the speech becomes serious enough to lose protected status under the First Amendment" (i.e., where the speech is so severe, pervasive, and objectively offensive as to effectively deny equal access to education). *See* 85 Fed. Reg. at 30151.

Importantly, the second prong applies a more difficult standard to meet than had been required in previous Departmental guidance. In response to concerns that the standard is "unfair, misogynistic, will make schools unsafe, leave students vulnerable, retraumatize survivors, promote a hostile environment, or disadvantage LGBTQ students," the Department explains that it believes the severe, pervasive, *and* objective standard more appropriately enforces Title IX while at the same time not interfering with principles of free speech and academic freedom—a crucial quality of educational institutions. *Id.* at 30143.

Moreover, the Department specifically rejected the application of Title VII's standard of "severe *or* pervasive," arguing the differences between an educational and workplace environment warrant a different standard, and that the Supreme Court has rejected the idea that First Amendment protections should apply with less force in the educational setting. *See Id.* at 30151.

Notably, there is no "intent" element for the conduct, which the Department argues protects against sexual harassment being excused as a result of victim-blaming, or attempts to rationalize the perpetrator's behavior. *See Id.* at 30090. The Department does not deny that the *Davis* standard is "narrow," but in response to concerns that this standard fails to cover an appropriate range of misconduct because only very serious situations will be actionable, the Department explains that "stricture is appropriate in educational environments where younger students are still learning social skills and older students benefit from robust exchange of ideas, opinions, and beliefs," and points to the first and third prongs of the definition, stating that even if the *Davis* standard is narrow, "as a whole, the range of conduct prohibited under Title IX is adequate to ensure that abuse of authority (i.e., *quid pro quo*), physical violence, and sexual touching without consent (i.e., the four Clery Act/VAWA offenses) trigger a school's obligation to respond without scrutiny into [the *Davis* elements], while verbal and expressive conduct crosses into Title IX sex discrimination (in the form of sexual harassment) when such conduct is so serious that it effectively denies a person equal access to education." *See Id.* at 30143.

In response to concerns that the definition gives educational institutions too much discretion to decide whether conduct was severe, pervasive, and objectively offensive, or that these elements will lead to arbitrary decisions based on biases of school administrators, the Department explains that the severe, pervasive, and objective elements "must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant." *See Id.* at 30156.

The Department disagrees that educational institutions will "screen out" situations that should be addressed due to lack of guidance on how to apply the "severe and pervasive" element. *See Id.* at 30150. Rather, it states that it "is confident that recipients' desire to provide students with a safe, non-discriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors." *See Id*.

Relatedly, the Department clarifies that an educational institution may publish its own list of conduct that falls within the ambit of the sexual harassment definition or within its own code of conduct. Nevertheless, in drafting the Final Rule, the Department cautions it was not looking to create a "general civility code," and therefore conduct such as microaggression, cat-calling, or creepy behavior may not necessarily fall within this second prong; still, educational institutions are required to evaluate the specific facts of each situation, and such conduct may form part of a course of conduct that is severe, pervasive, and objectively offensive. *See Id.* at 30161.

Reasonable Person Standard

Under the Final Rule, the "objectively offensive" aspect of the *Davis* definition must be evaluated "under a reasonable person standard, as a reasonable person in the complainant's position." *See* 85 Fed. Reg. at 30165. In making this determination, the second prong clearly requires a subjective element (unwelcome conduct) and an objective element (reasonable person), thereby, the Department argues, safeguarding against arbitrary application, "while taking into account the unique circumstances of each sexual harassment allegation." *See Id*. at 30159.

Finally, the Department clarifies that an evaluation of the unwelcome conduct "depends on a constellation of factors including the ages and numbers of parties involved," which it states it has reinforced including the reasonable person standard. *See Id*. at 30150.

Effectively Denies a Person Equal Access to An Education

The Department believes that unwelcome conduct may only be actionable under Title IX where the seriousness (determined by a reasonable person to be so severe, pervasive, and objectively offensive that it negatively impacts equal access) jeopardizes educational opportunities because "Title IX is concerned with sex discrimination in an education program or activity" and "does not stand as a Federal civility code that requires [educational institutions] to prohibit every instance of unwelcome or undesirable behavior." *See* 85 Fed. Reg. at 30170.

However it does not apply this severe, pervasive, and objectively offensive requirement to the first or third prong of the sexual harassment definition, and it does not require that a complainant have already suffered loss of education before being able to report sexual harassment, exhibit certain manifestations of trauma, or have suffered a concrete injury to prove this element, nor does it contemplate restricting protected speech that is merely offensive in violation of the First Amendment. *See Id.* The Department clarifies that this element requires that a person be denied *equal*, not total access to an education. *See Id.* at 30167-30168.

Prong Three: Sexual Assault, Dating Violence, Domestic Violence, Stalking

The third prong describing covered conduct once again adapts the *Davis* definition, this time by expressly including Clery Act/VAWA sex offenses in the definition (i.e., sexual assault, dating violence, domestic violence, and stalking) *per se*. The Department makes clear that conduct under this prong "is assumed to deny equal access to education and its prohibition raises no constitutional concerns," i.e., constitutes *per se* sexual harassment, and thus evaluating severity, pervasiveness, and objectiveness, and denial of equal access is not required. *See* 85 Fed. Reg. 30151.

By including the conduct covered by the Clery Act and VAWA, the Final Rule obligates "recipients to respond to *single instances* of sexual assault and sex-related violence more broadly than employers' response obligations under Title VII, where even physical conduct must be severe or pervasive and alter the conditions of employment, to be actionable." *Id.* (emphasis added). In sum, any such conduct does not need to demonstrate severity, pervasiveness, objective offensiveness, or denial of equal access to education, because denial of equal access is assumed." *Id.*

While commenters expressed concerns about the lack of precision to capture sexual assault that centers around whether the complainant genuinely consented or only consented due to coercion, the Department notes that it "intentionally leaves recipients flexibility and discretion to craft their own definitions of consent." *See Id.* at 30174. Regardless of how broadly or narrowly "consent" is defined, conduct specified in prong three "would constitute conduct jeopardizing equal access to education in violation of Title IX without raising constitutional concerns." *See* Id. at 30176.

Overall Takeaways

The Department argues that adopting the *Davis* standard and adapting it to include the *per se* categories of sexual harassment (i.e., *quid pro quo* harassment and the Clery Act/VAWA offenses) "will help prevent infringement of First Amendment freedoms, clarify confusion by precisely defining sexual violence independent from the *Davis* definition, clarify the intersection among Title IX, the Clery Act, and VAWA with respect to sex-based offenses, and ensure that recipients must respond to students and employees victimized by sexual harassment that jeopardizes a person's equal educational access." 85 Fed. Reg. at 30037. The Department recognizes that not every instance of subjectively unwelcome conduct falls within its three-prong definition; however it believes the conduct captured as actionable under the definition "constitutes precisely the sex-based conduct that the Supreme Court has indicated amounts to sex discrimination under Title IX, as well as physical conduct that might not meet the *Davis* definition (e.g., single instance of rape, or a single instance of *quid pro quo* harassment)." *See* 85 Fed. Reg. at 30145.

In drafting the Final Rule, the Department stated that it recognized the need for a definition that is broad enough to prohibit sex-based discrimination in education programs or activities amounting to actionable sexual harassment, while also noting that "expressive speech, and not just physical conduct, may be restricted or punished as harassment," and thus "it is important to define actionable sexual harassment under Title IX in a manner consistent with respect for First Amendment rights, and principles of free speech and academic freedom, in education programs and activities." *See* 85 Fed. Reg. at 30142.

To address the asserted tension between freedom of speech and regulation of speech to prohibit sexual harassment, the Department crafts a definition that prohibits *per se* categories of harassing and assaultive physical conduct and unprotected speech (i.e., the first and third prongs, including non-verbal sexually harassing conduct, or speech used to harass in a *quid pro quo* manner, stalk, or threaten violence against a victim), while setting a standard for when harassment in the form of speech and expression crosses a line from protected speech into sexual harassment that denies a person equal access to education by ensuring that it is evaluated for severity, pervasiveness, objective offensiveness, and denial of equal access to education (i.e., the second prong). *See Id*.

Relatedly, it argues that this definition comports with the purpose of Title IX by providing "precise standards for evaluating actionable harassment focused on whether sexual harassment has deprived a person of equal educational access." *See Id.* at 30152. For example, a person is assumed to have been deprived of equal access where conduct is covered by the first or third prongs due to the inherently serious nature of such conduct. Whereas, the seriousness of conduct covered by the second prong must be evaluated for severity, pervasiveness, and objective offensiveness to determine whether a person has been deprived of equal access because such conduct includes speech and/or expression, thereby raising First Amendment concerns.

Overall, the Final Rule's three-prong sexual harassment definition "is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the *Davis* standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met." *See Id.* at 30165. However, this definition only provides the minimum standard for conduct that educational institutions must respond to: the Final Rule allows educational institutions to exercise discretion to address misconduct that does not meet one of the prongs in the definition of sexual harassment through codes of conducts outside the Title IX context. *See Id.* at 30143. The Department also cautions that "the fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which recipients may address through a variety of actions." *See Id.* at 30154.

The Joint Guidance on the 2020 Title IX Regulations is prepared as a service by in-house and firm attorneys, but does not represent legal advice. The Joint Guidance is compliance advice and no attorney/client relationship is formed with any contributor or their organization. Legal advice for specific situations may depend upon state law and federal and state case law and readers are advised to seek the advice of counsel. The Joint Guidance is available absolutely free pursuant to a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license (meaning that all educational institutions are free to use, customize, adapt, and re-share the content, with proper attribution, for non-commercial purposes, but the content may not be sold).