



2024 Joint Guidance on Federal Title IX Regulations Analysis on Section 106.2: Definition – Sex-Based Harassment

July 3, 2024

Note: This document focuses on a summary analysis of Section 106.2, specifically Definition – Sex-Based Harassment.¹ For a full overview of the changes from the 2020 Regulations and the 2024 Final Regulations, see *Title IX Text for Text 2020 and 2024 Regulation Final Comparison*, available at <https://system.suny.edu/sci/titleix/>.

§ 106.2: Definition of Sex-Based Harassment

34 C.F.R. sets forth the definition of Sex-Based Harassment, which is a prohibited type of Sex Discrimination under Title IX. The definition reads in its entirety:

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in 106.10, that is:

(1) *Quid pro quo harassment*. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct;

(2) *Hostile environment harassment*. Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (*i.e.*, creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

- (i) The degree to which the conduct affected the complainant’s ability to access the recipient’s education program or activity;
- (ii) The type, frequency, and duration of the conduct;
- (iii) The parties’ ages, roles within the recipient’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

¹ The effective date of these Regulations will be August 1, 2024 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

- (iv) The location of the conduct and the context in which the conduct occurred; and
- (v) Other sex-based harassment in the recipient's education program or activity; or

(3) *Specific offenses.*

(i) *Sexual assault* meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;

(ii) *Dating violence* meaning violence committed by a person:

(A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:

(1) The length of the relationship;

(2) The type of relationship; and

(3) The frequency of interaction between the persons involved in the relationship;

(iii) *Domestic violence* meaning felony or misdemeanor crimes committed by a person who:

(A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;

(B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;

(C) Shares a child in common with the victim; or

(D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or

(iv) *Stalking* meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(A) Fear for the person's safety or the safety of others; or

(B) Suffer substantial emotional distress.

Note 1 to the definition of sex-based harassment: The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.

The first two provisions of the definition will be considered in further detail below. The third provision is not substantially different from the 2020 regulations and therefore will not be addressed here.

Overview and Analysis

The 2024 Title IX Regulations² mark the first time the U.S. Department of Education (“the Department”) has moved away from the long-used term, “sexual harassment.” Instead, the new regulations adopt the term “sex-based harassment” and broaden the definition to encompass additional conduct not included under the 2020 Title IX regulations.

Breadth of the Definition

As noted above, this definition is broader than prior definitions of sexual harassment. The Department noted in the Preamble that this was intentional, indicating that the statutory reference to conduct “on the basis of sex” does not require that such conduct be sexual in nature.³ Therefore, it would be inappropriate to limit the definition of prohibited conduct to include only behavior that is sexual in nature, as opposed to harassing behavior that may be, more generally, harassing “on the basis of sex” but not sexual in nature.⁴

Quid Pro Quo Harassment

Whereas the 2020 Title IX Regulations indicated that only an employee of the recipient could be a respondent in a quid pro quo case, the 2024 Title IX Regulations note that others at the recipient likely hold sufficient power to create the power differential that is at the heart of a quid pro quo analysis.⁵ For example, the 2024 Title IX Regulations now allow contractors and volunteers to be respondents in a quid pro quo case, and the definition could even expand to students who have the power to provide an aid, benefit, or service to other students.⁶ While the language is not formulated as broadly as the pre-2020 regulatory definitions used, it represents a shift in that general direction.

Recipients should recall that Title VII also prohibits quid pro quo sexual harassment against employees. Under that regulation, 29 C.F.R. § 1604.11(a), the equivalent of quid pro quo sexual harassment is defined as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”).

³ 2024 Title IX Final Rule, 89 Fed. Reg. 33493.

⁴ *Id.*

⁵ 2024 Title IX Final Rule, 89 Fed. Reg. 33496.

⁶ *Id.*

conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) [hostile environment].

The Department did not choose identical language for purposes of Title IX, but notes in the Preamble that “the Department recognizes the differences between educational and workplace environments.”⁷ No more specific information is provided with regard to the differences between Title IX and Title VII in relation to quid pro quo harassment.

Hostile Environment Harassment

The 2024 Title IX Regulations adopt a lower standard than the 2020 Title IX Regulations to establish the presence of a hostile environment. Rather than require a showing of “severe, pervasive, and objectively offensive,” the new definition requires “severe or pervasive” behavior that is both subjectively and objectively offensive.⁸ This is expected to bring additional conduct under the purview of Title IX jurisdiction.⁹

As above, Title VII uses a different definition for hostile environment sexual harassment, defining it in 29 C.F.R. § 1604.11(a) to constitute:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The Title VII regulations further note, at 29 C.F.R. § 1604.11(b):

In determining whether alleged conduct constitutes sexual harassment, the [Equal Employment Opportunity] Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

The Preamble notes that the Title VII factors are not identical to the factors listed in the new Title IX definition.¹⁰ The Department stated that “The factors the Department has included in the final regulations, like those used by courts and other agencies, reflect an effort to consider the ‘constellation of surrounding circumstances, expectations, and relationships’ ... that can inform

⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33500.

⁸ 2024 Title IX Final Rule, 89 Fed. Reg. 33498.

⁹ *Id.*

¹⁰ 2024 Title IX Final Rule, 89 Fed. Reg. 33512.

whether conduct creates a hostile environment in a particular context.”¹¹ Of course, both Title VII and Title IX offer protections to employees of institutions of higher education; institutions should consider whether the Title IX definition of “sex-based harassment” sufficiently encompasses conduct prohibited by Title VII, or whether separate definitions are necessary to ensure compliance with both laws.

In the Preamble, the Department discusses each of the five factors to consider regarding hostile environment.¹² The first factor, labeled “Degree of Impact,” is where the Department cited favorably to its explanation in the 2020 Preamble to the Final Regulations, stating that equal access

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. School officials turning away a complainant by deciding the complainant was “not traumatized enough” would be impermissible.¹³

Regarding the second factor, labeled “Type, Frequency, and Duration,” the Department notes that “a single request for a date or a single gift of flowers from one student to another” would be sex-based but not pervasive.¹⁴ The Department declined to offer further examples, noting that a fact-based analysis is required.

Regarding the third factor, labeled “Ages, Roles, Previous Interactions, Other Factors,” the Department acknowledged that the reference to ages and roles applies more to elementary and secondary schools, but notes that the “relative power dynamics and ages of the parties in the postsecondary context could still be a factor, particularly if the conduct involves a student and employee.”¹⁵ The Department further opined that developmental levels (for example, regarding students with disabilities) may be an appropriate “other factor” to consider.¹⁶

Regarding the fourth factor, labeled “Location and Context,” the Department noted that conduct occurring in confined spaces or personal and secluded areas may be more threatening, while the same conduct in public may be more humiliating.¹⁷

Regarding the fifth factor, labeled “Other Sex-Based Harassment,” the Department noted that where a hostile environment is created by a series of incidents involving a series of respondents,

¹¹ *Id.*

¹² See 2024 Title IX Final Rule, 89 Fed. Reg. 33513-14.

¹³ 2024 Title IX Final Rule, 89 Fed. Reg. 33153 (Apr. 29, 2024), citing Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,170 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (hereinafter “202 Title IX Final Rule”).

¹⁴ 2024 Title IX Final Rule, 89 Fed. Reg. 33513.

¹⁵ *Id.*

¹⁶ 2024 Title IX Final Rule, 89 Fed. Reg. 33513-14.

¹⁷ 2024 Title IX Final Rule, 89 Fed. Reg. 33514.

the recipient has an obligation to address the hostile environment such as through training or supportive measures.¹⁸ The Department also clarified that a respondent's past sex-based harassment of people other than the complainant would not be part of the analysis as to whether respondent created a hostile environment for the complainant, but it could be relevant as pattern-based evidence.¹⁹

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¹⁸ *Id.*

¹⁹ *Id.*