



Association of  
Title IX Administrators

Dec 9, 2020


# SEVERE, PERVASIVE, and OBJECTIVELY OFFENSIVE (SPOO)

# CASE STUDIES

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.

## **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.



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.

## **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.




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.

## **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.






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.

## **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.



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.

## **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.

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.

## **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.

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.”

## **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.






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.

## **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).




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.


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.

## **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.



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.




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.

## 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.






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.

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.

## **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.



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.

## **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.



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.


## **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.

## 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.





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?

## **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.

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.

# RELEVANT V. DIRECTLY RELATED EVIDENCE


Complainant alleged that her boyfriend of two years physically abused her (punching, slapping, and pushing) periodically over the last 12 months – on average once or twice a month. Complainant wants to introduce a text message between them from 15 months ago with the following exchange:

C – “hey now! Rude. You best watch urself, u know I can beat you up!”

R – “psh, I boxed all through high school, u wouldn’t stand a chance... better not make me mad! [winky-face]”

**Directly Related. Not relevant.** Complainant contends this text message demonstrates Respondent's propensity for violence, that he had prior training and experience hitting people (club-level), and that the text message was essentially a threat. The context is important here – the conversation occurred 15 months ago, three months prior to any of the alleged violence, and appears to be in jest. Joking in this fashion should not be considered relevant to whether Respondent engaged in particular incidents of physical violence toward Complainant. It does not contain any legitimate threat, and indicates nothing more than a propensity for boxing, not dating violence. Whether someone has prior experience training and hitting people does not make it more likely that they will engage in dating violence.

Respondent testifies that the morning after (allegedly non-consensual) sexual intercourse with Complainant, the Complainant performed consensual oral sex on the Respondent. Respondent alleges that Complainant filed a complaint because the Respondent won an elected student leadership position for which the Complainant was also running. Respondent believes that the consensual oral sex provides context to demonstrate that sexual intercourse the previous evening was consensual.




**Relevant.** It does not provide direct information about the alleged sexual assault, but it provides context surrounding the incident and may serve as important information in assessing the credibility of the Complainant. While subsequent consensual sexual acts may not prove prior acts were consensual, they might do so, and that is for the decision-maker to determine. The information about the election may provide a motive to file a complaint, or to fabricate one. While Complainant's prior sexual history is barred by the 2020 Title IX regulations, subsequent sexual history is not, and here it is offered by the Respondent to show consent.



Complainant wants to introduce that she is an officer in the College Christian Students Club and has always been outspoken in word and writing about the need to remain a virgin until marriage, including reminding Respondent of this on the evening in question. Complainant wants to introduce this club status and writings to bolster her credibility regarding her claim of not being inclined to consent because of her religious beliefs, NOT to prove that she is a virgin. She also argues that while introduction of sexual history is prohibited by the college's policy, she is not prohibited from introducing non-history.

Relevant evidence tends to prove or disprove an issue in the complaint. Is it an issue in the complaint that the complainant was predisposed to consent or not consent? No; people can change their minds. The issue is whether, regardless of predisposition, she did in fact consent. This information is **directly related, not relevant**, as it does not prove or disprove consent. It is also barred by the 2020 Title IX regulations as evidence about Complainant's sexual predisposition.

Respondent counters that he wants to introduce her ex-boyfriend as a witness who will testify that he had sex with her when they were together, NOT to introduce that she has a sexual history, but to show she lacks credibility as to her proposed testimony about the importance of virginity. This is **not relevant, and really not even directly related** (defined as connected to the complaint, neither inculpatory nor exculpatory), and is barred by the 2020 Title IX regulations prohibition on the introduction of Complainant's sexual history.




Complainant alleged that they invited Respondent to come to their residence hall room to watch a movie. Respondent and Complainant engaged in consensual kissing and touching before Complainant decided to go to sleep. Complainant invited Respondent to “crash” there as well since it was so late and Respondent’s residence hall was on the other side of campus. Complainant subsequently alleged that Respondent sexually assaulted Complainant by penetrating Complainant with their fingers while Complainant was asleep.

Complainant wants to introduce testimony from Witness 1 that Respondent has frequently made positive and excited comments about how active the hookup culture is at school, how individuals like Complainant are “easy” and “trusting,” how many people Respondent has had one-night-stands with at school, and how many times Respondent has been able to “convert” an interaction that began in a friendly manner into one that involved sexual interactions.

Let's break this down:


1. Positive and excited comments about how active the hookup culture is at school: **Neither relevant nor directly related to consent.**
2. How individuals like Complainant are “easy” and “trusting”. This may be **relevant** to targeting of Complainant or predatory aspects of the complaint.
3. How many people Respondent has had one-night stands with at school – **neither relevant nor directly related to consent.**
4. How many times Respondent has been able to “convert” an interaction that began in a friendly manner into one that involved sexual interactions. This may be **relevant** to targeting of Complainant or predatory aspects of the complaint.




Respondent wants to introduce evidence that the Complainant has only alleged sexual assault because she was failing three of her four classes and used the allegation as an excuse to obtain supportive measures to offset her bad grades. Should the investigator determine this evidence is relevant, directly related, or neither?



This evidence goes to a key defense of the Respondent and is **relevant** because it could disprove the allegations of the complaint. Whether it is true goes to credibility.



A witness who was identified by the Complainant tells the investigator that their friend was also sexually assaulted by the Respondent earlier that year. The witness provides an account of what their friend shared with them and the description is similar to the Complainant's allegations against the Respondent. However, the witness refuses to identify their friend so the investigator is unable to interview the friend. Is this evidence relevant, directly related, or neither?



The ATIXA think tank is split on this answer. Some of us argue this is **relevant** as the information may speak to pattern behavior of the Respondent which can tend to prove an issue of fact related to the Complainant's allegation. However, the reliability of this information is in question given the investigator's inability to interview the friend directly. Thus, the investigator would need to account for that in their credibility assessment and the decision-maker(s) would have to do the same in their credibility determination.

Others argue, compellingly, that this evidence is going to be valueless, so why not exclude it by categorizing it as **directly related**? You'll have to decide which approach makes more sense, but sometimes the question of whether some evidence is relevant is something not even judges agree on.




Respondent testifies that about an hour prior to (allegedly non-consensual) sexual intercourse with Complainant, Complainant performed consensual oral sex on him. Setting aside prior sexual history issues for a moment, would this evidence be relevant, directly related, or neither?

This evidence is **directly related, but not relevant**. It does not tend to prove or disprove consent related to the intercourse. It is connected to the complaint, but absent any other nexus to the intercourse an hour later, is neither inculpatory nor exculpatory.



Respondent alleges that Complainant has told him they have a mental disorder that manifests in paranoia; Respondent wants to introduce that evidence in a stalking complaint. Would that evidence be relevant, directly related, or neither?




That evidence would be **relevant**, as it could directly prove or disprove whether there was a course of conduct directed by Respondent toward Complainant. While we tend to get nervous around introducing evidence related to disability or mental health, this kind of evidence can have salience. While questioning Complainant's doctor about this information or relying on records made or maintained by the Complainant's doctor without Complainant's permission would be out-of-bounds under the regulations, Complainant can be asked about it.

Complainant wants to testify that since a dating violence incident, she has recurrent nightmares about being attacked. Is this evidence relevant, directly related, or neither?



This is best included in an impact statement that is considered during sanctioning. As evidence to be introduced in the resolution process, it is **directly related, but not relevant**. While connected to the complaint, it is neither inculpatory nor exculpatory.

Bobby's advisor wants to cross-examine Annie about why she waited to make a report of a sexual assault until after her mother got the bill from the university for her birth control pills.

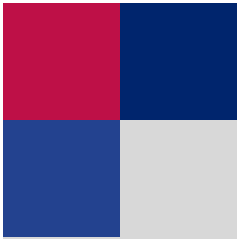


This evidence may go to a key defense of the Respondent, that Complainant did not want her mother to know she was sexually active and is **relevant** because it could disprove the allegations of the complaint. Whether it is true goes to credibility.

He also wants to ask if it's true that Annie and Bobby had been having sex for several weeks before the alleged incident (arguing that all behaviors were the same on each occasion, and the only differentiator was the bill)?

This information goes to prior sexual history, but it is history between the parties, and if it goes to the issue of consent, **it is relevant**. It could tend to prove or disprove the complaint.





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# Questions?





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