



Association of
Title IX Administrators

Gender Identity in Education

Idaho Title IX Professional Learning Communities

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Strategic Risk
Management Solutions



Any advice or opinion provided during this workshop, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.



AN EXAMPLE TO INITIATE OUR DISCUSSION

Sam comes to the Title IX office with a complaint that he's being both publicly misgendered and deadnamed in class by his history professor. The professor asserts that there are only two genders and refuses to use the name and pronouns by which Sam identifies

What is the Title IX office to do?

THE ISSUES

- Individuals who identify differently from their sex assigned at birth may wish to be addressed by a chosen term, name, and/or pronouns
- What is the obligation of the school to support chosen names/pronouns?
- What are the rights of teachers and administrators to refuse to honor a student's chosen name or pronouns?
- Navigating legal name changes so as not to out someone as trans or transitioning
- A trans person is in MY bathroom – whose rights are at risk?
- Do you investigate or dismiss a complaint?

TERMINOLOGY

- Cisgender: Denoting or relating to a person whose sense of personal identity and gender corresponds with their sex assigned at birth
- Transgender: Denoting or relating to a person whose sense of personal identity and gender does not correspond with their birth sex. A trans male has transitioned or is transitioning F→M. A trans female has transitioned or is transitioning M→F.
 - A person's current identity is likely the only identity that matters, unless they make it point to make sure you know they are trans
- Gender-Variant/Diverse: Denoting or relating to a person whose behavior or appearance varies or is diverse from prevailing cultural and social expectations about what is appropriate for their gender

TERMINOLOGY (CONT.)

- Gender Fluid: Denoting or relating to a person who does not identify themselves as having a fixed gender
- Nonbinary: a term used to describe individuals who may experience a gender identity that is neither exclusively woman or man or is in between or beyond both genders
- Queer: Denoting or relating to a sexual or gender identity that does not correspond to established ideas of sexuality and gender, especially heterosexual norms
- Intersex: A term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male

TERMINOLOGY (CONT.)

- Misgendering: Refers to an inadvertent -- or more commonly intentional -- reference to a nonbinary person or transgender or transitioning person by a binary sex assignment or pronouns that do not match their gender identity or expression, or that are not their chosen pronoun(s)
 - Those who are cisgender should consider how it would feel if others insisted on calling you by a pronoun, name, or title that did not reflect your sex/gender
- Deadnaming: The use of the birth or other former name of any of the above categories of people without their consent when the individual has identified a different name or pronoun

LITIGATION IMPACT ON SCHOOL POLICY ENFORCEMENT

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts

- Case against Shawnee State University (SSU) (Ohio)
- In 2016, SSU informed faculty “they had to refer to students by their ‘preferred pronouns.’” If not, they were subject to discipline.
- Meriwether is a tenured faculty member said his religious beliefs prevented him from communicating about gender identity that he believes to be false.
- Meriwether suggested 2 compromises (adding a caveat to his syllabus or just using last names) and both were rejected.
- Meriwether filed a grievance, but was denied an opportunity to be heard.
- Meriwether alleged he could not address a “high profile issue of public concern that has significant philosophical implications.” He filed a lawsuit under the 1st Amendment.

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Decision

- The Court held that the First Amendment protects the academic speech of university professors.
- Citing to the *Tinker*¹ case the court said, “Government officials violate the First Amendment whenever they try to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.”
- Citing to *Keyishian v. Bd of Regents*² the court said the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”
- This decision was returned to the district court for trial, resulting in a \$400,000 settlement in 2022.

¹*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

²*Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. (2020)

- Employment case decided by the U.S. Supreme Court June 15, 2020.
- The Court ruled that Title VII's prohibition on discrimination "because of sex" covers discrimination on the basis of gender identity and sexual orientation.
- Following this ruling, the Fourth, Eleventh, Sixth and Seventh Circuits reached decisions supporting trans and gender diverse individuals

WHITAKER V. KENOSHA UNIFIED SCHOOL DIST.

858 F.3D 1034 (7TH CIR. 2017)

Facts

- After Ash Whitaker came out as transgender during his sophomore year, the school engaged in a series of discriminatory acts against him. These included:
 - Barring him from using the boys' restroom and monitoring his restroom use
 - Pulling him out of class to threaten him with disciplinary action if he continued to use the boys' restroom
 - Refusing to call him by his chosen name
 - Referring to him with female pronouns
 - Isolating him from his peers on overnight school trips
 - Refusing to let him run for prom king

WHITAKER V. KENOSHA UNIFIED SCHOOL DIST.

858 F.3D 1034 (7TH CIR. 2017)

Decision

- Whitaker filed a lawsuit under Title IX and the Equal Protection clause of the 14th Amendment
- The Seventh Circuit issued a unanimous ruling in favor of Whitaker, stating, “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”
- This represented the first federal appellate decision to find that Title IX, as a matter of law, requires public schools to permit transgender students to use restrooms corresponding to their gender identities.

PRESIDENT BIDEN'S EXECUTIVE ORDERS

- [EO 13988](#): issued January 20, 2021, citing to the Equal Protection clause of the Constitution set forth the prohibition of discrimination on the basis of gender identity or sexual orientation and declared a policy to prevent and combat discrimination on these bases
- [EO 14021](#): issued March 8, 2021, “Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.”
 - This order declared that all students should be guaranteed an educational environment free from discrimination in the form of sexual harassment, which encompasses sexual violence and includes discrimination on the basis of sexual orientation or gender identity.

OTHER ADMINISTRATIVE ACTIONS

- Following Executive Order 13988, the U.S. Dept of Housing and Urban Development incorporated prohibitions on discrimination on the basis of gender identity or sexual orientation in housing on February 11, 2021.
 - While regulations and/or specific guidance is still forthcoming, and enforcement has not yet been announced, this rule will be binding on residential colleges and schools.
 - At this point, no religious exception has been announced, but one is likely to be recognized, as is an exception for single-sex residence halls.
- On March 26, 2021, the U.S. Department of Justice declared that the ruling in *Bostock* would also be applicable to Title IX, but it is unclear what force that opinion carries.

OCR NOTICE OF INTERPRETATION

- On June 16, 2021, the U.S. Department of Education’s Office for Civil Rights issued a Notice of Interpretation (NOI) for enforcement of Title IX with respect to discrimination based on sexual orientation and gender identity
- “This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.”
- “Consistent with the Supreme Court’s ruling and analysis in *Bostock*, the Department interprets Title IX’s prohibition on discrimination “on the basis of sex” to encompass discrimination on the basis of sexual orientation and gender identity.”

OCR NOTICE OF INTERPRETATION (CONT.)

- “[T]he Department finds no persuasive or well-founded basis for declining to apply *Bostock’s* reasoning — discrimination “because of . . . sex” under Title VII encompasses discrimination based on sexual orientation and gender identity — to Title IX’s parallel prohibition on sex discrimination in federally funded education programs and activities.”
- The NOI and Title IX apply to both employees and students.
- The NOI is effective upon publication in the Federal Register.

ARE THERE BEST PRACTICES?

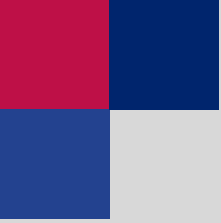
- Training, education, empathy induction
- Working one-on-one with informal resolutions
- Disruption policies (can you disrupt your own classroom?)
- Name-calling or nickname policies (not gender-specific)
- Policies on outing someone without consent
- Bullying policies
- Are there distinctions between public and private institutions that are worth considering?
- Is there a difference between speech that touches on a matter of public concern and speech directed to one individual only?

ARE THERE BEST PRACTICES? (CONT.)

- Discuss with your legal counsel – what is worth fighting for, and what’s worth litigation risk?
- Clarify policy intersections and how you will approach complaints (have a clear, consistent roadmap)
- Many complaints related to trans rights will invoke retaliation
- The 2020 Title IX regulations allow retaliation to be addressed by a separate process, outside the regulations.
 - Is that something that you should consider/prefer?

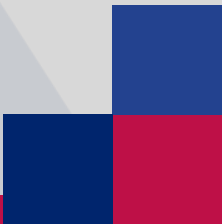
ARE THERE BEST PRACTICES? (CONT.)

- How does your institution clarify the policy basis for disparate treatment and/or disparate impact?
 - Both of these offenses could also be policies that are invoked in trans rights complaints.
 - Are they addressed in a regulation-compliant context? Do you want them to be?
- If a disparate treatment allegation is also severe, pervasive, and objectively offensive (SPOO), must the regulations apply? Is that a lens to consider in all such allegations?



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Questions?





CONTACT INFORMATION

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Thanks for joining us today.



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