



Association of
Title IX Administrators

Protecting Gender Diversity in Education

An ATIXA Best Practices Workshop

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

Content Advisory

The content and discussion in this training 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.

Workshop Introduction



The primary focus of this workshop is to assist practitioners in understanding and navigating complex challenges related to gender identity and expression in educational environments.



Gender identity and expression impact many aspects of an institution or school's program and in some areas of the country are affected by conflicting federal and state legal mandates.



Our goal is to provide practitioners with practical skills and best practices to comply with relevant federal laws and court decisions to support individuals across the gender spectrum.

Introduction and Terminology

Common Issues

- Chosen term, name, and/or pronouns
- Navigating name changes
 - Legal name vs. chosen name
 - Privacy concerns; avoiding “outing” an individual
- Transgender students’ and employees’ bathroom use
- Transgender students’ athletic participation
- Employee transitions during employment
- Resources, services, facilities, and programs based on gender binary

Legal and Cultural Tensions

- Discomfort vs. Discrimination
- Educating communities and constituencies may be prohibited or restricted under state laws
- Faith-based institutions asserting Title IX exemptions
- Faculty, staff, teachers asserting personal rights under First Amendment
 - Free speech
 - Academic freedom
 - Religious freedom
- Parents' rights issues

Key Terms

Sex

Chromosomes, hormones, reproductive organs, and genitalia

Gender

Attitudes, feelings, and behaviors that a given culture associates with biological sex

Gender Identity

Internal sense of gender

Gender Expression

Outward expression of gender, often through clothing, behavior, mannerisms, speech patterns, and activities

Sexual Orientation

Sexual or romantic attraction, existing on a continuum (e.g., gay, lesbian, bisexual, heterosexual, asexual)

Transgender

A person whose sense of identity and gender does not correspond with their sex assigned at birth

Key Terms

Cisgender

Gender identity consistent with the sex assigned at birth

Gender Fluid

One's sense of not having a fixed gender

Gender Variant

Behavior or appearance varying from cultural or social expectations

Nonbinary

A gender identity that does not fit within the binary

Queer

Sex or gender identity not corresponding to established norms

Intersex

Born with genital and/or reproductive anatomy outside typical definitions of male/female

Key Terms

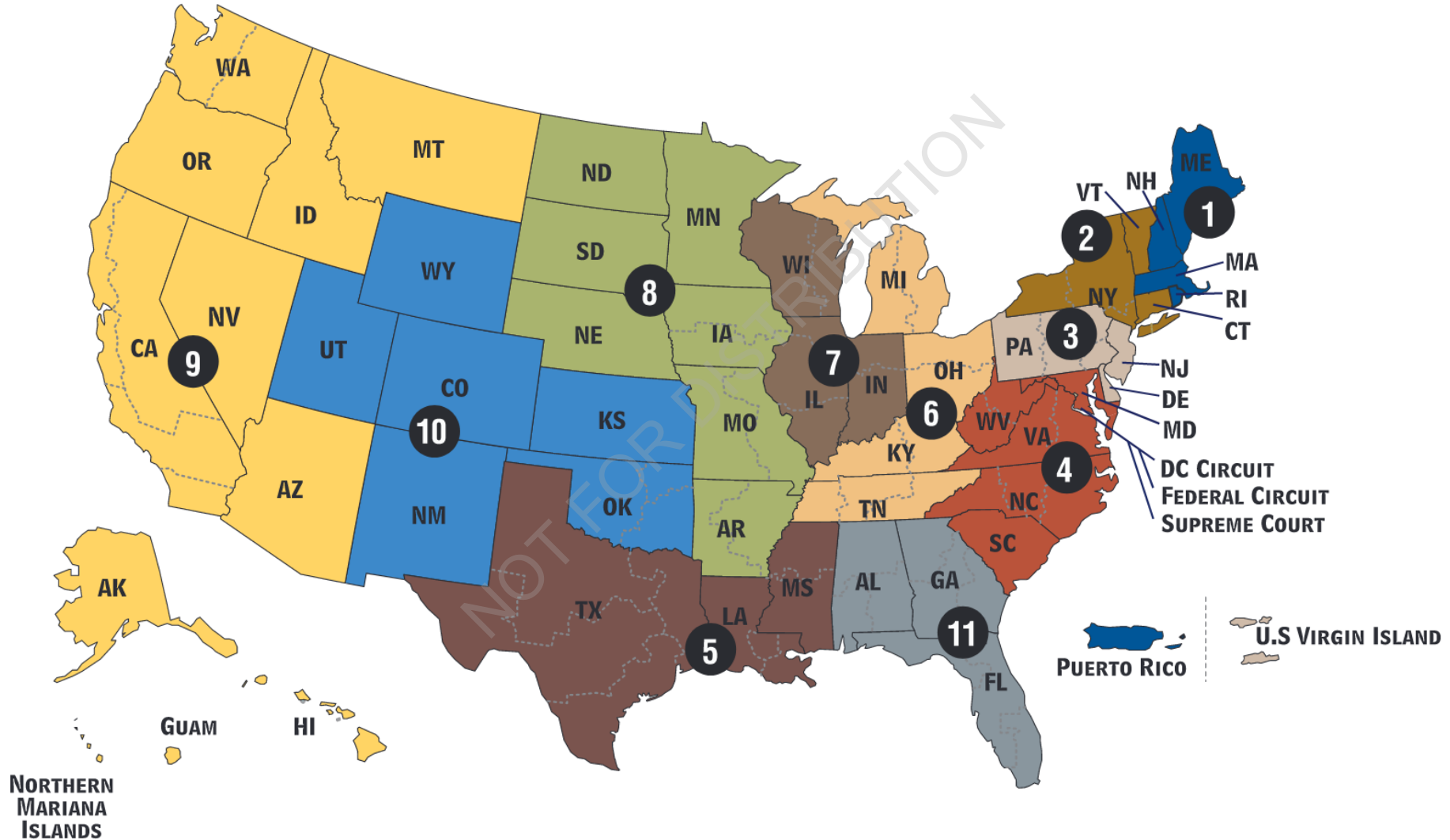
- **Misgendering:** Reference to a nonbinary, transgender, or transitioning person by a binary sex assignment or pronouns that do not match their gender identity or expression, or that are not their chosen pronoun(s)
- **Deadnaming:** The use of the birth or other former name of any of the above categories of people without their consent when the individual has identified a different name or pronoun

Applicable Case Law and Evolving Legal Analysis

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Geographic Boundaries

of United States Courts of Appeals and United States District Courts



Source: https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Facts

- Case against Shawnee State University (SSU)
- Meriwether is a tenured faculty member who has worked at SSU for 25 years
- In 2016, SSU instructed faculty to refer to students by their “preferred pronouns”
 - School used existing policy re: discrimination based on gender identity
- Meriwether complained to Dept. Chair who told him, “Christians are primarily motivated by fear”
- Meriwether taught without incident until 2018

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Facts

- In the first class of the term, Meriwether referred to a student, who presented as male, as “sir”
- Following class, the student approached Meriwether and demanded to be referred to using female titles and pronouns
- Meriwether said his religious beliefs prevented him from complying
- The student became hostile and threatening
- Meriwether reported incident; the Title IX Office was informed
- Meriwether was advised to eliminate use of all sex-based pronouns

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Facts

- Meriwether proposed a compromise to call Doe by her last name
- This worked for two weeks, but Doe again complained
- Meriwether was told to comply or be in violation of school policy
- Meriwether proposed using the preferred pronouns if he could put a disclaimer in his syllabus saying he was compelled to do so
 - Proposal was rejected

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Facts

- SSU initiated an investigation and found Meriwether responsible for creating a hostile environment
 - He was given a formal, documented warning that could lead to additional progressive discipline
- Doe received a high grade in Meriwether's course
- Meriwether filed a grievance
 - The Provost refused to discuss academic freedom and religious discrimination aspects of the case
- Meriwether filed a lawsuit under the First Amendment

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Decision

- Meriwether lost in the initial lawsuit
- The Court of Appeals overturned the decision and found in favor of Meriwether
- The Court held that the First Amendment protects the academic speech of university professors
 - “The First Amendment protects the right to speak freely and right to refrain from speaking...and the government may not compel affirmance of a belief with which the speaker disagrees”

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Decision

- Citing to the *Tinker* 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*, 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

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
Keyishian v. Board of Regents, 385 U.S. 589 (1967).

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Considerations

- Balancing test between applying the First Amendment rights of the professor vs. the rights of the institution to maintain a non-disruptive learning environment
- The professor may not create a hostile environment, but what constitutes a hostile environment may be limited by free speech rights, religious freedom, and/or academic freedom
- Consider the rights of the student and the obligations of the institution
- Compare to Taft College OCR Resolution
 - The U.S. Department of Education held Taft accountable for lack of response to deadnaming/misgendering

Kluge v. Brownsburg Comm. Sch. Corp.

64 F. 4th 861 (7th Cir. 2023)

Facts

- Brownsburg, a public school, adopted a Name Policy requiring its high school teachers to call students by their names identified in the student database
- The Name Policy was part of a larger plan to address transgender students' needs
- For religious reasons, Kluge, a teacher, objected to using transgender students' first names, arguing the school should not treat gender dysphoria as a protected status
- Kluge worked with the school to establish an accommodation whereby Kluge could address students by their last names

Kluge v. Brownsburg Comm. Sch. Corp.

64 F. 4th 861 (7th Cir. 2023)

Facts

- Kluge also did not want to distribute band uniforms to transgender students if he thought those band uniforms were inconsistent with their sex assigned at birth
 - The school assigned this task to someone else
- Transgender students, cisgender students, student organizations, and faculty all brought concerns about Kluge's practice to the principal
- When it became apparent the practice negatively impacted the learning environment for transgender students, other students, the school community, and other faculty, the school withdrew the accommodation

Kluge v. Brownsburg Comm. Sch. Corp.

64 F. 4th 861 (7th Cir. 2023)

Facts

- The school gave Kluge the option to comply with the Name Policy, resign, or be terminated
- Kluge resigned
- Kluge sued for discrimination on the basis of religion and failure to accommodate under Title VII
 - Under Title VII, short of undue hardship, an employer must make reasonable accommodations on the basis of religion

Kluge v. Brownsburg Comm. Sch. Corp.

64 F. 4th 861 (7th Cir. 2023)

Decision

- A district court concluded that the school was unable to accommodate Kluge's religious beliefs and practices without imposing an undue hardship on the school's business of educating all students
- The appeals court determined that Kluge established an initial case of failure to accommodate a sincerely held religious belief
 - The court also found that Brownsburg demonstrated it could not reasonably accommodate Kluge without inflicting undue hardship on the operation of the school
 - The "last names" practice frustrated efforts to educate all students because the practice negatively impacted students and the learning environment

Kluge v. Brownsburg Comm. Sch.

64 F. 4th 861 (7th Cir. 2023)

Considerations

- Title VII requires reasonable accommodations, but not all requested accommodations
 - Accommodations are always contextual and measured against competing considerations
- Lawsuits brought under Title VII are analyzed differently than those brought under the First Amendment
 - Brownsburg only needed to establish that Kluge's requested accommodation created an undue hardship
 - This differs from the balancing test used in *Meriwether*

Kluge v. Brownsburg Comm. Sch.

64 F. 4th 861 (7th Cir. 2023)

New Developments

- In July 2023, the Court of Appeals for the Seventh Circuit reversed its previous decision
 - The U.S. Supreme Court issued a new undue hardship test in *Groff*
 - Employers must now show a religious accommodations imposes a burden that is “substantial in the overall context” of the employer’s business
 - “Substantial increased costs in relation to the conduct of its particular business”
- This is a much higher bar than the former “de minimis” standard

Bostock v. Clayton County, Georgia

590 U.S. ____ (2020)

- Employment case decided by the U.S. Supreme Court in June 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
- Several courts have applied this Title VII ruling to Title IX cases, but not all
 - Following this ruling, the Fourth, Sixth and Seventh Circuits reached decisions supporting trans and gender diverse individuals
 - The Eleventh Circuit (in an en banc decision) reached the opposite conclusion

Dodds v. U.S. Department of Education

845 F.3d 217 (6th Cir. 2016)

Facts

- Jane Doe, an 11-year-old transgender girl with a disability was denied the right to use the girls' bathroom at Highland Local School District in Ohio
- Doe's parents sought and received a preliminary injunction directing the school district to treat her as a female and permit her to use the girls' restroom
- The school district asked an appeals court to pause the injunction
- The court took into consideration Doe's personal circumstances – her age, mental health history, and unique vulnerabilities

Dodds v. U.S. Department of Education

845 F.3d 217 (6th Cir. 2016)

Decision

- The court held that finding in favor of the school would disrupt the significant improvement in Doe's health and well-being that resulted from the injunction allowing her to use the girls' bathroom and further confuse her
- The court upheld the injunction, and Doe retained the right to use the girls' bathroom

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
 - Barred him from using the boys' restroom and monitored his restroom use
 - Pulled him out of class to threaten him with disciplinary action
 - Refused to call him by his chosen name
 - Referred to him with female pronouns
 - Isolated him from his peers on overnight school trips
 - Refused to let him run for prom king
- Whitaker sued under Title IX and the Equal Protection clause

7th circuit: WI, IL, IN

Whitaker v. Kenosha Unified School Dist.

858 F.3d 1034 (7th Cir. 2017)

Decision

- The Seventh Circuit issued a unanimous ruling in favor of Whitaker
 - “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 requires public schools to permit transgender students to use restrooms corresponding to their gender identities

Grimm v. Gloucester County School Bd.

972 F.3d 586 (4th Cir. 2020)

Facts and Decision

- Gavin Grimm, assigned female at birth, transitioned to male during high school
- Initially permitted to use the restroom of his identified gender
 - The school later rescinded that decision
- Following *Bostock*, the Fourth Circuit upheld Grimm's right to use the restroom corresponding to his gender identity
- The Supreme Court denied *cert*, allowing Grimm's protections to stand
 - Effectively established those protections for all students by implying that *Bostock* controls the Title IX analysis of sex encompassing gender

4th circuit: MD, NC, SC, WV, VA

Adams v. School Bd. of St. Johns County

No. 18-13592 (11th Cir. 2022)

Facts

- A trans male student prohibited from using the restroom consistent with his gender identity
- Policy required students to use the neutral restrooms or the gendered restrooms that corresponded to their biological sex, only, or risk discipline
- Adams sued, alleging the bathroom policy was discriminatory

Adams v. School Bd. Of St. Johns County

No. 18-13592 (11th Cir. 2022)

Facts

- The Eleventh Circuit originally decided in Adams's favor in 2020; however, the appeals court decided to rehear the case *en banc* in 2022, to answer these questions:
 - Does the School District's policy of assigned bathrooms based on sex violate the Equal Protection Clause of the Constitution?
 - Does the School District's policy of assigning bathrooms based on biological sex violate Title IX?

Adams v. School Bd. Of St. Johns County

No. 18-13592 (11th Cir. 2022)

Decision

- The Eleventh Circuit upheld the district policy
- **Equal Protection Clause**
 - The court held that the bathroom policy advances an important governmental objective of protecting student privacy in school bathrooms
- **Title IX**
 - Regulatory carve-out to Title IX's general prohibition on sex discrimination for "living facilities"
 - The carve-out, to the court, meant that *Bostock* was not relevant

President Biden's Executive Orders

- [EO 13988](#): issued January 20, 2021
 - Prohibited discrimination on the basis of gender identity or sexual orientation
 - 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”
 - Guarantees students an educational environment free from discrimination in the form of sexual harassment, including sexual violence and 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
 - Binding on residential colleges and schools
 - Exception for single-sex residence halls
 - Possible religious exemption impact
- On March 26, 2021, the U.S. Department of Justice declared that the ruling in *Bostock* would also be applicable to Title IX
 - Impact unclear

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)
 - Title IX enforcement regarding discrimination based on sexual orientation and gender identity
 - Guides the Department in processing complaints and conducting investigations
 - Consistent with the Supreme Court's ruling and analysis in *Bostock*

Title IX Proposed Regulations: Sex-Related Eligibility Criteria for Male and Female Athletic Teams

Proposed Title IX Regulation: § 106.41(B)(2)

If a Recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

- (i) **be substantially related** to the achievement of an **important educational objective**, and
- (ii) **minimize the harms** to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied

Effect of the Proposed Rule

- The proposed rule **effectively** prohibits categorical bans applied to entire groups of student-athletes based on gender identity:
 - Examples of Prohibited Laws and Policies:
 - A state law that would require that all students participate on athletic teams consistent with their sex assigned at birth
 - A state law that prohibits all student-athletes who are trans girls or trans women from participating on girls' or women's athletic teams
 - A district policy that requires all prospective trans female student-athletes to submit to hormonal testing but does not require the same of trans male or cisgender student-athletes

Activity: Case Studies

Instructions

- For each of the following case studies, identify three possible solutions or approaches, and then select one that is your preferred approach
- Please be prepared to share why you chose that one instead of the other options you identified, once we return to group discussion

Case Study 1: Samantha

- A male faculty member has been intentionally and repeatedly misgendering a student
- Samantha is a trans female, but the faculty member insists on using the student's deadname when calling on her in class, and always calls the student "Mr.," both in class and in one-on-one conversations
- Samantha has clarified her identity with the faculty member, who politely but firmly informed the student that they do not recognize chosen pronouns and will not use them
- Last week, another student spoke out in class, telling the professor that he needed to call Samantha by her chosen name

Case Study 1: Samantha

- The faculty member was dismissive and told the student that in his classroom, he can call anyone anything he wants, and that he will not be dictated to by “woke” students who think they’re the gender police
- Samantha was embarrassed, and has now sought out the Title IX office, and told the TIXC that she wishes to file a formal complaint

What should the Title IX Coordinator do?

Case Study 2: A Variation on Samantha

- Samantha comes to the registrar's office to make sure her name is listed correctly for her courses
- She's concerned because she changed her name to reflect her identity in the student information system but is unsure whether the registrar has accurately carried over the change to her course assignments
- It turns out that the registrar erred, and her birth-assigned name has already been provided to all of her faculty members
- Samantha approaches the Title IX office about this, feeling like she is in an impossible position

Case Study 2: A Variation on Samantha

- If she does not correct her name with her faculty members, they'll be deadnaming her all semester
- But, if she does correct her name with them, it's possible she'll be outing herself to them as trans and she does not want to do that, if possible, because she fears they may discriminate against her

As a Title IX team member, what would you do to assist Samantha and to help her resolve the problem?

Case Study 3: June and Randee

- June walks into the Title IX office, irate
- Her colleague, Randee, is now using the women's restroom in their department
- Randee is a trans woman, and June refuses to use the restroom along with “someone who has a penis”
- June feels unsafe and thinks anyone with a penis should be required to use the men's room
- June files a complaint that she's being deprived of the ability to safely use the women's restroom in her department, which is discrimination on the basis of her sex

How should the Title IX office respond?

Case Study 4: Barry

- Barry is a nonbinary student who complains that they failed a religion course
- The main graded assignment was a paper, and Barry's submission was an exploration of gender in the Bible
- Barry's scholarship "explores agender characters in the Bible" and "delves into mistranslations of scripture that are misused to support a Biblical belief in the immutability of sex"
- Their professor, Sonia Dolittle, fails them on the paper and for the class because of the "patently false theological arguments" Barry made in their writing

Case Study 4: Barry

- Barry files a Title IX complaint arguing that the F grade is rooted in discriminatory beliefs held by Dolittle, a Christian theologian

Explore variations of this case where Dolittle both admits and denies that her Christian beliefs influenced her grade decision

What should the Title IX office do?

Case Study 5: Mo's Teammates

- Mo's teammates consider Mo's sex assigned at birth and gender identity to be ambiguous
- The teammates shower together in the locker room, but the school has created a separate enclosure inside the larger shower area to provide privacy, which Mo always uses when showering
- Mo comes to the Title IX office concerned that teammates are spying on Mo in the shower
- When questioned, the teammates explain that they are not spying on Mo with any sexual intent, but rather to try to verify whether Mo is in fact eligible to play on their team
- While this is unfolding, the coach raises the issue of questions related to Mo's eligibility and how the school can appropriately verify that Mo is qualified to play on this team

Case Study 5: Mo's Teammates

- Any wins for the team could be forfeited if it is later shown that league rules were violated, and the coach does not want all the players to suffer because of one
- The coach proposes that he should confront Mo and require Mo to prove eligibility or else be removed from the team
- The coach recognizes that Mo has privacy rights, but the rights of all members of the team are also at stake here

What's your plan?

Case Study 6: Frankie

- Frankie is gender-fluid and has chosen the pronouns ze, zir, and zirs
- Ze does not identify by a fixed gender and believes that gender is a construct society forces on people
- Ze says, “We should all just be what we are, whatever that is”
- Some days, that means Frankie identifies and expresses as male
- Some days Frankie identifies and expresses as female
- Some days both, and some days neither
- Sometimes, the identity and expression do not match
- Many people are frustrated by Frankie, because they are often corrected by zir for not using correct identifiers, pronouns, etc.

Case Study 6: Frankie

- Numerous Title IX complaints have been filed alleging that Frankie’s fluidity is a game and is just an excuse for zer to do anything ze wants, anywhere ze wants
- They assert Frankie is a gender-fraud and needs to “pick a side”
- One allegation is that because Frankie’s gender identity and expression do not always match, ze can be found dressed as a male in a women’s restroom but protests when questioned about it there
- Frankie won’t reveal any details of zir anatomy when questioned in the restroom
- Frankie responds to such concerns by telling the Title IX office that no one knows how to deal with an extreme “bender” like zir, and that ze doesn’t have to verify anything to anyone about anything

What should the Title IX office do?

Case Study 7: Frankie's Complaint

- Amidst all of the complaints against Frankie, ze brings forward their own complaint to the Title IX office
- Frankie has a nonbinary sexual partner, Zeke
- Frankie has made it clear that Zeke can have sex with zir when ze is male but not when ze is female or neither
- Frankie comes to the Title IX office to file a formal sexual assault complaint against Zeke for having sex with zir when Zeke knew ze was expressing as a female

What should the Title IX office do?

Case Study 8: Simpson & Tau Iota Xi

- Simpson rushed Tau Iota Xi, a male fraternity, and was initiated
- In late April, the fraternity discovered that Simpson is a trans male
- On that basis, the fraternity reversed its decision to admit Simpson and expelled him from the chapter
- The Dean of Fraternity and Sorority Life has filed a complaint against Tau Iota Xi for violating the university's non-discrimination policy
- Tau Iota Xi explained that it has the right by charter to admit only males
- The Dean has countered that Simpson is a male, and that the charter does not require that members be assigned male at birth

Case Study 8: Simpson & Tau Iota Xi

- Some fraternities have charters that explicitly exclude cisgender females, but this fraternity does not
- The fraternity executive board explained that they don't have a choice, as Tau Iota Xi national headquarters staff told them they must expel Simpson
- Simpson responds that he was not born female, but intersex, and had gender confirmation surgery

Did Tau Iota Xi discriminate against Simpson on the basis of sex?

What should the Title IX office do?

Case Study 9: Jana & Selene

- Jana and Selene are both track stars
- They file a complaint with the Title IX office that they are being discriminated against by the district, on the basis of sex, for forcing them to compete against two trans females, one of whom is a teammate, and the other of whom is enrolled in another school district against which their district competes
- Both Jana and Selene have not won a race since these two trans females joined their respective teams, though they won frequently prior to competing against the trans athletes

Case Study 9: Jana & Selene

- Jana and Selene both show clear statistical proof that their times are the fastest female times in the league, eclipsed only by the times of the two trans females
- No other cisgender female has beaten either of the trans females all season
- The trans females are compliant with the league requirements for participation

How should the Title IX office analyze and address this complaint?

Case Study 10: Professor Petersen

- Professor Petersen is a linguist, a public intellectual, and a noted cultural conservative with a very broad following on social media
- His views on trans rights are well-known, often written about (by himself and others), and not inclusive
- Petersen’s employer, looking to find creative ways to ensure the use of inclusive language, enacts a civility code (adopted by the Faculty Senate) that requires all employees to avoid name-calling and to honor the use of “nicknames” whenever requested
- The code is neutral and does not mention sex

Case Study 10: Professor Petersen

- Petersen is incensed by the adoption of this policy, and writes about it with condemnation in his blog, on X (formerly known as Twitter), and on other social media outlets, calling it a speech code
- The Faculty Senate president tells Petersen that they enacted the civility code with him in mind, primarily because of his outspoken online anti-trans rhetoric
- Petersen approaches the Title IX office with a complaint that the code is retaliatory against him specifically, for his exercise of free speech rights to be openly anti-trans

Roadmap how your office would address this complaint, if at all

Practical Takeaways

Best Practices and Recommendations

- Training and education
- Informal Resolution
- Disruption policies
- Name-calling or nickname policies
- Policies on outing someone without consent
- Bullying policies

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Final Considerations

- Discuss risk strategy with legal counsel
- Clarify policy intersections and roadmap complaints
 - Retaliation, disparate treatment, and disparate impact
 - Consider when disparate treatment/impact becomes SPOO
- Distinctions between public and private universities and schools
- Speech as a matter of public concern versus speech directed at one individual



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Questions?

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