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Association of  
Title IX Administrators

# Title IX Update

The University System of Georgia

2023 Training



Strategic Risk  
Management Solutions



Any advice or opinion provided during this training, 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.

# JUST A HEADS UP....



Use of Humor



Victim/Survivor/Reporting Party/Complainant



Gendered Pronouns



Prevention Terminology



Content Warning



# CONTENT ADVISORY

The content and discussions in this course will necessarily engage with sex-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 Title IX Coordinators and Title IX team members encounter in their roles including slang, profanity, and other graphic or offensive language.



# **TITLE IX NOTICES OF PROPOSED RULEMAKING 2022 & 2023**

# TITLE IX REGULATIONS

- **1972:** Congress passed Title IX of the Education Amendments
- **1980:** the Department of Education's Office for Civil Rights (OCR) given primary responsibility for enforcing Title IX
- **November 2018:** OCR proposed the most detailed and comprehensive Title IX regulations to date, which focused on sexual harassment response
- **August 2020:** Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- **June 2022:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on sexual harassment response and pregnancy and related conditions

# NPRM PROCESS TIMELINE

- **July 2022:** NPRM published in the Federal Register and the 60-day comment period began
- **September 2022:** Review and comment period ended
- Final Rule expected to be issued in 2023
- Effective Date: TBD?
- **April 2023:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on gender identity and athletic participation; notice of a 30-day comment period
- **May 2023:** Review and comment period ended
- Athletics Final Rule anticipated Spring 2024
- Athletics Effective Date anticipated Summer/Fall 2024



# PREPARING FOR IMPLEMENTATION

- Continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new sexual harassment and pregnancy-related Title IX regulations before the start of or during the 2023-2024 academic year.

## **Steps to Take Now:**

- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach



# **SCOPE & APPLICABILITY**

# KEY TITLE IX-RELATED ISSUES

## Sex-Based Discrimination

- Program Equity
- Recruitment, Admissions, & Access
- Pregnancy
- Athletics
- Employment, Recruitment, & Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries & Benefits
- Financial Assistance
- Facilities
- Funding
- Sex, Sexual Orientation, & Gender Identity

## Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

## Retaliation

# SCOPE (§ 106.10)

- NPRM is broader than the 2020 Regulations
- Discrimination on the basis of sex includes
  - Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Sex discrimination includes **sex-based harassment**
  - Replaces “**sexual harassment**” and includes
    - Quid pro quo, Hostile Environment, Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- ED has announced a proposed rule regarding athletic eligibility based on gender may come later

# APPLICABILITY

- **Education program or activity**
  - Broadly interpreted to include:
    - Academic, extracurricular, and athletic programs
    - Activities on school network, bus, class, or facilities
- De Minimis Harm
  - Policy or practice preventing participation in a program or activity consistent with gender identity “subjects a person to more than de minimis harm on the basis of sex”

§ 106.31; NPRM pg. 668

# HOSTILE ENVIRONMENT

- Hostile Environment Harassment (pg. 657-58)
  - Unwelcome sex-based conduct that is
  - Sufficiently severe **OR** pervasive, that, based on the totality of the circumstances **AND**
  - Evaluated subjectively and objectively
  - Denies or limits a person's ability to participate in or benefit from the recipient's education program or activity

# SPOO VS. SORP

## SPOO (2020 Regulations)

Severe **AND** Pervasive **AND** Objectively Offensive

## SORP (2022 NPRM)

Sufficiently Severe **OR** Pervasive **AND** Evaluated Objectively  
**AND** Subjectively

# HOSTILE ENVIRONMENT (CONT.)

- OCR's proposed definition also provides factors for evaluating whether a hostile environment exists including:
  - Complainant's ability to access the education program or activity
  - The type, frequency, and duration of the conduct
  - The parties' ages, roles, and previous interaction(s)
  - The location and context of the conduct
  - The control the Recipient has over the Respondent
- Potential intersection with First Amendment



# HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

# HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

# HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe without need for repetition
  - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
  - Other physical conduct that does not meet the 34 C.F.R. § 106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of “severe”
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation

# HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

# HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

- Reasonable person standard in context
  - “I know it when I see it...”
  - Age and relationships of Complainant and Respondent
  - Number of persons involved
  - Frequency
  - Severity
- Physically threatening
  - Humiliating
  - Intimidating
  - Ridiculing
  - Abusive

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

There has been an increasing issue of conflating discomfort or being offended with the higher standard of sexual harassment. There is a high bar for meeting this definition.

## **The circumstances to consider include:**

- The nature, pervasiveness, and severity of the conduct
- Whether the conduct was reasonably physically threatening
- Whether the conduct was objectively and subjectively humiliating
- The objective and subjective reasonable effect on the Complainant's mental or emotional state
- Effective denial of education or employment access
- If SPOO, a discriminatory effect is presumed (proven)

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Whether conduct was directed at more than one person
- Whether a reasonable person would see/experience/determine the conduct to be SPOO?
  - What does it mean to be a reasonable person? Who is?
  - A reasonable person sits in the shoes of the Complainant
- Whether the statement only amounts to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment, which means it is not sexual harassment

# PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- The role of the Decision-maker is to determine whether all the elements of a hostile environment are present
  - When conduct does not meet the elements, applying the standard of evidence, then the Respondent is “not responsible”
- Remember that the sex, gender identity, gender expression, and/or sexual orientation of the individuals do not matter in how we apply the relevant evidence to the policy elements



# IF THE CONDUCT...

Occurred in your program  
or activity

**AND/OR**

Is subject to your  
disciplinary authority

**AND/OR**

Has led to a hostile  
environment within your  
program or activity

**AND** would meet Title IX, if proven...

**YOU LIKELY HAVE JURISDICTION**

# OTHER POLICIES & LAWS

- The proposed regulations will likely overlap with existing policies and laws
  - Title VII
  - Fair Housing Act
  - Violence Against Women Act Amendments to the Clery Act
  - State statutory definitions of sexual harassment applicable to students and/or employees
  - State or jurisdiction requirements for sexual harassment investigations and/or reporting requirements
- Work with your legal counsel to figure out the best way to ensure all institutional policies co-exist cohesively

**TITLE IX PROPOSED  
REGULATIONS:  
GRIEVANCE  
PROCEDURES**

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# WHICH GRIEVANCE PROCEDURES TO USE?

	§ 106.45	§ 106.46
<b>K-12</b>	Everything	N/A
<b>Higher Education</b>	<p>Sex discrimination complaints that are <b>NOT</b> sex-based harassment</p> <p>Sex-based harassment complaints that do not involve a student</p>	<p>All sex-based harassment complaints involving a student Complainant or Respondent, including:</p> <ul style="list-style-type: none"> <li>▪ Student-on-student</li> <li>▪ Student-on-employee</li> <li>▪ Employee-on-student</li> </ul>



## BEST PRACTICE

Offer a streamlined, § 106.46-compliant, process to provide for a consistent response to stop, prevent, and remedy all forms of discrimination, including:

- Written Notice
- Right to an Advisor of choice
- Comprehensive, written investigation report
- Opportunity for report review and response
- Separation between investigator and decision-maker
- Cross examination
- Written determination
- One level of appeal

# GRIEVANCE PROCEDURES

- Section 106.45 outlines a list of requirements for written grievance procedures that generally apply to both § 106.45 and § 106.46.
- Prohibits conflicts of interest or bias
- Allows for single-investigator model
  - No requirement for a separate Decision-maker
  - Permissible for the Investigator to serve as the Decision-maker
  - Permissible for the TIXC to serve as the Investigator (and/or DM)
- Conflicts of Interest?



## BEST PRACTICES

Provide a process that includes a separation between investigation and decision-making responsibilities.

# GRIEVANCE PROCEDURES (CONT.)

- Notice must be provided to parties at the beginning of an investigation

## § 106.45

- Notice does not have to be written
- No waiting period between notice and interview

## § 106.46

- Written notice required
- Sufficient time to prepare before an interview required
- May be accompanied by an Advisor of choice
- Presumption of non-responsibility
- Prohibition against false statements, if any



# INVESTIGATING

- Adequate, reliable, and impartial investigations of complaints
- Equal opportunity for parties to present inculpatory and exculpatory evidence
- Investigators must collect evidence and determine relevance

## § 106.45

- Written or verbal description of relevant evidence
- Reasonable opportunity for parties to respond

## § 106.46

- Equitable access to all relevant evidence **or** to an investigation report that summarizes the evidence
- Reasonable opportunity to review and respond
- Review must take place before the hearing, if any



## BEST PRACTICES

Allow parties to offer expert witnesses.

Provide a comprehensive investigation report to all parties and their Advisors.

Provide all relevant evidence to parties prior to the completion of the investigation report and offer an opportunity to respond to the evidence.

# DECISION-MAKING

	§ 106.45	§ 106.46
<b>Second 10-day period</b>	<ul style="list-style-type: none"> <li>• Not required</li> </ul>	<ul style="list-style-type: none"> <li>• Not required</li> </ul>
<b>Credibility Assessment</b>	<ul style="list-style-type: none"> <li>• Decision-maker is required to assess credibility</li> <li>• Does not have to occur during a hearing or live questioning</li> </ul>	<ul style="list-style-type: none"> <li>• Decision-maker(s) required to assess credibility through live questioning during a <b>live hearing</b> or through <b>individual meetings</b></li> </ul>
<b>Live Hearing</b>	<ul style="list-style-type: none"> <li>• Not required</li> </ul>	<ul style="list-style-type: none"> <li>• Permissible</li> <li>• Required in some jurisdictions</li> </ul>

NPRM pg. 682-90

# DECISION-MAKING (CONT.)

	§ 106.45	§ 106.46
<b>Cross-examination</b>	<ul style="list-style-type: none"> <li>• Not required</li> </ul>	<ul style="list-style-type: none"> <li>• Required</li> <li>• Can occur through the Decision-maker or through party Advisors (during a live hearing)</li> </ul>
<b>Written Outcome</b>	<ul style="list-style-type: none"> <li>• Permitted but not required</li> </ul>	<ul style="list-style-type: none"> <li>• Required</li> </ul>
<b>Appeal</b>	<ul style="list-style-type: none"> <li>• Permitted but not required</li> <li>• May be otherwise required</li> </ul>	<ul style="list-style-type: none"> <li>• Required</li> </ul>

# INDIVIDUAL MEETINGS

- Under § 106.46 if a Recipient chooses to conduct individual meetings, Decision-makers must be permitted to pose their own relevant questions and relevant questions from the parties
  - Parties may provide questions directly to Decision-maker or, if separate, to the Investigator
- What's Unclear?
  - If an institution utilizes the same administrator for investigating and decision-making, can cross-examination take place during the investigation?
  - Does cross-examination have to occur after the investigation has concluded?

§ 106.46(f); NPRM pg. 694

# LIVE HEARINGS

- Under § 106.46 if a Recipient conducts live hearings:
  - Decision-makers must be allowed to pose their own relevant questions and relevant questions from the parties, **OR**
  - Each party's Advisor must be allowed to ask **any party** and any witnesses all relevant questions
- Can include questions going to credibility
- Parties can never ask questions directly

§ 106.46(f); NPRM pg. 694

# OUTCOME DETERMINATION

- After making a determination as to whether the sex-based harassment occurred, the Recipient must provide that determination to the parties
  - Under § 106.45
    - Does not have to be in writing
  - Under § 106.46
    - **Written** determination must include:
      - Description of alleged sex-based harassment
      - Information about policies and procedures
      - Decision-maker's evaluation of credible evidence and determination
      - Disciplinary sanctions and/or remedies, as appropriate
      - Appeal procedures

NPRM pg. 696

# APPEALS

- Under § 106.46 institutions are required to offer an opportunity to request an appeal after a final determination
  - Outcome becomes final on the date the Recipient provides a written determination of an appeal, or if an appeal is not filed, the date on which appeal would no longer be timely
- Appeal Decision-maker(s) cannot be the Investigator or Decision-Maker





## BEST PRACTICES

Provide a written outcome notification including the determination, any sanctions or remedies, and any opportunities for appeal.

Offer one level of appeal and ensure comparable procedures for complaints other than sex discrimination also offer one level of appeal.

# STANDARD OF PROOF

- Standard of Proof
  - Language shift from “burden of proof” or “standard of evidence”
- Must use preponderance of the evidence *unless*
  - Clear and convincing is used in all other **comparable proceedings, including other discrimination complaints (Title VII, Title VI)**
    - Employee Respondent vs. Student Respondent complaints are not comparable

§ 106.6(g); NPRM pg. 688



## BEST PRACTICES

Adopt the “preponderance of the evidence” standard in all complaints unless it conflicts with other contract rights.

Negotiate future contract rights to allow for the preponderance of the evidence to be used.



## BEST PRACTICES

Permit access to Advisors for all parties in all formal processes.

If an institution provides Advisors, provide them with adequate training on the institution's policies and procedures.

**TITLE IX PROPOSED  
REGULATIONS:  
PREGNANCY AND  
RELATED CONDITIONS**

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# PREGNANCY DISCRIMINATION

- Pregnancy or related conditions:
  - 1) Pregnancy, childbirth, termination of pregnancy, or lactation
  - 2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
  - 3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
- Nondiscrimination
  - Cannot adopt policies, practices, or procedures
    - To treat a student **OR** employee differently based on current, potential, or past pregnancy related conditions

§ 106.2; NPRM pg. 655  
§ 106.21; NPRM pg. 667

# PREGNANCY DISCRIMINATION (CONT.)

- Admissions/Enrollment
  - No pre-admission or enrollment inquiries regarding marital status
    - Including asking “Miss or Mrs.”
    - Self-identification of sex is permissible if required from all applicants
- What’s Unclear?
  - Non-birthing parents
  - Scope of parental protections

§ 106.40; NPRM pg. 669-72  
§ 106.57; NPRM pg. 698-99

# RESPONSE TO PREGNANCY

- Providing Information
  - When an employee acquires knowledge of a student's pregnancy or related conditions by the student...the employee must inform that person of Title IX support
- TIXC required response:
  - Prohibit sex discrimination
  - Reasonable modifications (document it!)
  - Allow voluntary access to separate and comparable program, if desired
  - Voluntary leave of absence
  - Availability of lactation space
  - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72





## BEST PRACTICES

Offer support to non-birthing parents in the event of a medical need for a birthing parent or newborn.

Provide information on institutional website including:

- The rights of pregnant students under Title IX
- How to request support for pregnancy or related conditions
- The processes available for requesting assistance and for challenging when a denial of assistance occurs.

# REASONABLE MODIFICATIONS

- Reasonable modifications may include:
  - Breaks to attend health needs
  - Breaks for breastfeeding or expressing breast milk
  - Absences for medical appointments
  - Access to online or homebound education
  - Changes in sequence or schedule of courses
  - Extensions or rescheduling examinations
  - Counseling
  - Elevator access

§ 106.40; NPRM pg. 669-72

# PREGNANCY-RELATED LEAVE

- Pregnancy or related conditions serve as a justification for a reasonable, voluntary leave of absence
  - Can be unpaid
  - Applies to employees and students
    - Even if there is no policy **or** the person does not qualify under the policy
- Upon return, the person should be reinstated to their prior or a comparable status
  - For employees, there should be no decrease in compensation
  - For students, this includes academic and extracurricular status

§ 106.40; NPRM pg. 670  
§ 106.57; NPRM pg. 699

# LACTATION TIME & SPACE

- Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk
- Lactation Space
  - Not a bathroom
  - Clean, shielded from intrusion
  - Can be used by a student or employee, as needed

§ 106.40; NPRM pg. 669-72  
§ 106.57; NPRM pg. 699



## BEST PRACTICES

Offer multiple spaces that include access to sinks, outlets, and refrigerators.

Provide access to the lactation room without having to request permission.

Add lactation spaces to cleaning schedules in that facility.

Ensure space is available during evening and weekend classes or programs.



# SEXUAL ORIENTATION AND GENDER IDENTITY ISSUES

- Terminology
- Litigation Impact on Policy Enforcement
- OCR Notice of Interpretation and Injunction
- Athletics NPRM



# 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 institution to support chosen names/pronouns?
- What are the rights of faculty 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 COLLEGE AND SCHOOL POLICY ENFORCEMENT**

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# MERIWETHER V. HARTOP

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

## Facts

- Case against Shawnee State University (SSU) (Ohio)
- Meriwether is a tenured faculty member who has worked at SSU for 25 years
- In 2016, SSU informed faculty “they had to refer to students by their ‘preferred pronouns.’” If not, they were subject to discipline.
- 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 V. HARTOP

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

## Facts (Cont.)

- Meriwether taught without incident until 2018. In the first class of the term, Meriwether referred to a student (Doe) who presented as male as “sir” (he used formal pronouns for all students).
- Following class, Doe approached Meriwether and demanded to be referred to using female titles and pronouns. Meriwether said he couldn’t comply because of his religion.
- 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 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 V. HARTOP

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

## Facts (Cont.)

- Meriwether proposed using the preferred pronouns if he could put a disclaimer in his syllabus saying he was compelled to do so, and it was against his religious beliefs. This proposal was rejected.
- 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, but the Provost would not discuss academic freedom and religious discrimination aspects of the case. Meriwether alleged he could not address a “high profile issue of public concern that has significant philosophical implications.” He filed a lawsuit under the 1<sup>st</sup> Amendment.

# MERIWETHER V. HARTOP

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

## Decision

- Meriwether lost at the trial court level.
- The Court of Appeals overturned the decision and found in favor of Meriwether.
- The Court held that under Supreme Court decisions & 6th Circuit precedent, 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 (Cont.)

- Citing to the *Tinker*<sup>1</sup> 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*<sup>2</sup> 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.

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

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

# MERIWETHER V. HARTOP

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

## Considerations

- There may be a balancing test to 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 guard-railed by free speech rights, religious freedom, and/or academic freedom.
- What are the rights of the student?
- What are the obligations of the institution?
- Would the use of a racial epithet be treated differently? Should it? How are misgendering and racism different?

# KLUGE V. BROWNSBURG COMM. SCH.

NO. 21-2475 (7TH CIR. 2023)

## Facts

- Kluge, an orchestra teacher, was terminated for refusing to follow school guidelines for addressing students by name
- 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 the needs of transgender students
- Kluge objected to using the first names of transgender students, due to religious reasons, arguing the school should not treat gender dysphoria as a protected status

# KLUGE V. BROWNSBURG COMM. SCH.

NO. 21-2475 (7TH CIR. 2023)

## Facts (Cont.)

- Kluge worked with the school to establish an accommodation whereby Kluge could address students by their last names.
  - Kluge also did not want to pass out 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.
- The school gave Kluge the option to comply with the Name Policy, resign, or be terminated. Kluge resigned

# KLUGE V. BROWNSBURG COMM. SCH.

NO. 21-2475 (7TH CIR. 2023)

## Decision

- 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
- A district court concluded that the school was unable to accommodate Kluge' religious beliefs and practices without imposing an undue hardship on the school's business of educating all students that come through its doors.
- The appeals court determined that Kluge established a prime facie 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.

NO. 21-2475 (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*

# 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

# DODDS V. U.S. DEPARTMENT OF EDUCATION

845 F.3D 217 (6TH CIR. 2016)

## Facts

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

## Decision

- The court distinguished this case from the *Grimm*<sup>3</sup> case which upheld the stay of the injunction requested by the Gloucester County School Board requiring them to allow a trans male student to use the boys' bathroom.
- In *Dodds* the court held that staying the injunction against 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, thus the injunction was upheld, 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. These included:
  - Barring him from using the boys' restroom and monitoring his restroom use and threatening discipline for using the boys' restroom
  - Refusing to call him by his chosen name, misgendering him
  - Isolating him from his peers, refusing to let him run for prom king

## Decision

- Whitaker filed a lawsuit under Title IX and the Equal Protection clause of the 14<sup>th</sup> 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.

# GRIMM V. GLOUCESTER COUNTY SCHOOL BD.

972 F.3D 586 (4TH CIR. 2020)

- Case involving restroom access in the K-12 environment
- Case has been litigated since 2016, with *cert* requested twice (granted, then dismissed, then finally denied in June 2021)
- Gavin Grimm, assigned female at birth, transitioned to male during his freshman year in 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 of his gender identity
- Gloucester County petitioned *cert* to the U.S. Supreme Court
- After Grimm's response, the Supreme Court denied *cert*, allowing Grimm's protections to stand (and effectively establishing those protections for all students by impliedly suggesting that *Bostock* controls the Title IX analysis of sex encompassing gender.

# ADAMS V. SCHOOL BD. OF ST. JOHNS COUNTY

3:17-00739, 2022 WL 18003879 (11TH CIR., 2022)

## Facts

- Case involving a trans male student who was prohibited from using the restroom consistent with his gender identity
- In addition to his medical and social transition, he amended legal documents including his driver's license and birth certificate
- The school developed policy after a comprehensive review of LGBTQ student issues.
- 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

3:17-00739, 2022 WL 18003879 (11TH CIR., 2022)

## Facts

- The 11<sup>th</sup> circuit originally found for the trans student 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?

## Decision

- The Eleventh Circuit upheld the district policy and overturned the district court's decision that determined the school district's bathroom policy violated both Title IX and the Equal Protection Clause of the 14th Amendment

# ADAMS V. SCHOOL BD. OF ST. JOHNS COUNTY

3:17-00739, 2022 WL 18003879 (11TH CIR., 2022)

## Decision (Cont.)

- Equal Protection Clause
  - The court cited the “long tradition” in this country of separating sexes in public bathrooms
  - The court held that the bathroom policy advances an important governmental objective of protecting student privacy in school bathrooms (sex=intermediate scrutiny)
  - Whereas the district court held that the availability of private stalls in all bathrooms protected privacy interests, the appeals court disagreed
  - No purposeful discrimination against trans students because no student was excluded from a bathroom

# ADAMS V. SCHOOL BD. OF ST. JOHNS COUNTY

3:17-00739, 2022 WL 18003879 (11TH CIR., 2022)

## Decision (Cont.)

- Title IX
  - The court cited a regulatory carve-out to Title IX's general prohibition on sex discrimination
    - “living facilities” – authority to provide separate toilet, locker room, and shower facilities on the basis of sex
  - The carve-out, to the court, meant that *Bostock* was not relevant
  - This carve out will likely be removed by the 2023 regulations, meaning this case may be not one that the Supreme Court is inclined to take on, though it now creates a circuit split with *Grimm*.

# 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.
- Proposed Title IX Regulations may make this NOI moot.

# PRELIMINARY INJUNCTION

- Following the Executive Order, the attorneys general of 20 states filed suit and sought a preliminary injunction
  - The lawsuit was based on the legality of the ED guidance documents
- The Court found that the ED did not comply with the Notice and Comment period and thus, the States were likely to succeed on the merits of their case and therefore, the Court issued a preliminary injunction preventing ED from enforcing the guidance document in the Plaintiff States
  - AL, AK, AR, GA, ID, IN, KS, KY, LA, MS, MO, MT, NE, OH, OK, SC, SD, TN, and WV
  - Proposed Title IX Regulations will likely invalidate the basis for the injunction and suit
- Title IX still prohibits against sexual orientation and gender-based discrimination that relies on sex stereotyping

**TITLE IX PROPOSED  
REGULATIONS: SEX-  
RELATED ELIGIBILITY  
CRITERIA FOR MALE AND  
FEMALE ATHLETIC TEAMS**

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# CURRENT TITLE IX REGULATION - § 106.41(B)

(b) **Separate teams.** Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

# 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



Association of  
Title IX Administrators

# Group Discussion

Questions and Thoughts





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