



**HUSCH BLACKWELL**

# **Advanced Title IX Training**

Participants in policy processes

Summer 2022

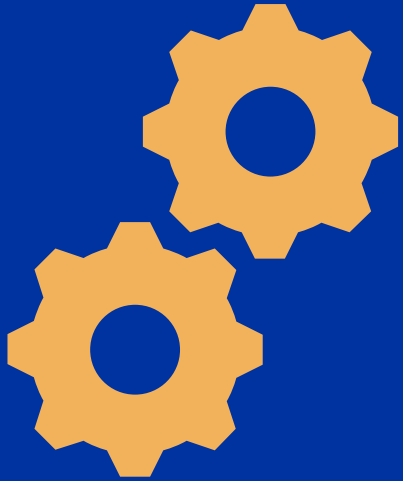


# Housekeeping

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- **Recording is not permitted**
- Change Zoom name to match registration
- Please list your institution with your name
- Raise hand or use chat function to ask questions
- Anticipated break at 3:00 pm
- Other breaks—take individually as needed

## Group Scenario



# Breakout Groups

- 4 Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today’s training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Add your institution to your displayed name



## A word on terminology . . .

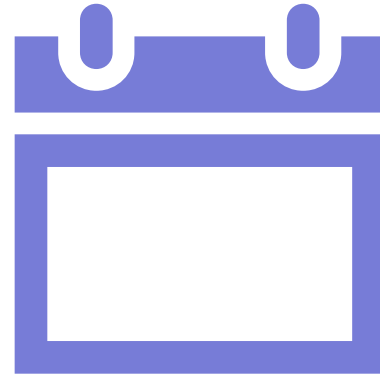
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Vocabulary concerning gender identity and sexual orientation continues to evolve. There is not universal agreement on the meaning of all terms or the best terms to use to refer to certain concepts. We strive to utilize language and examples that are respectful and appropriate. But we welcome your feedback on how we can improve. Please be patient with your colleagues today and assume their good faith even if they use language or terms that you would not.



## Agenda

- Gender identity and sexual orientation discrimination and harassment
- Preferred names and pronouns
- Gender identity and sexual orientation in housing
- Religious liberty rights





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**Gender Identity and  
Sexual-Orientation  
Discrimination and  
Harassment**

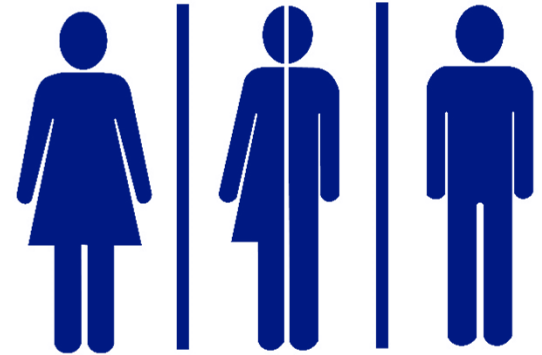
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# What is Title IX?

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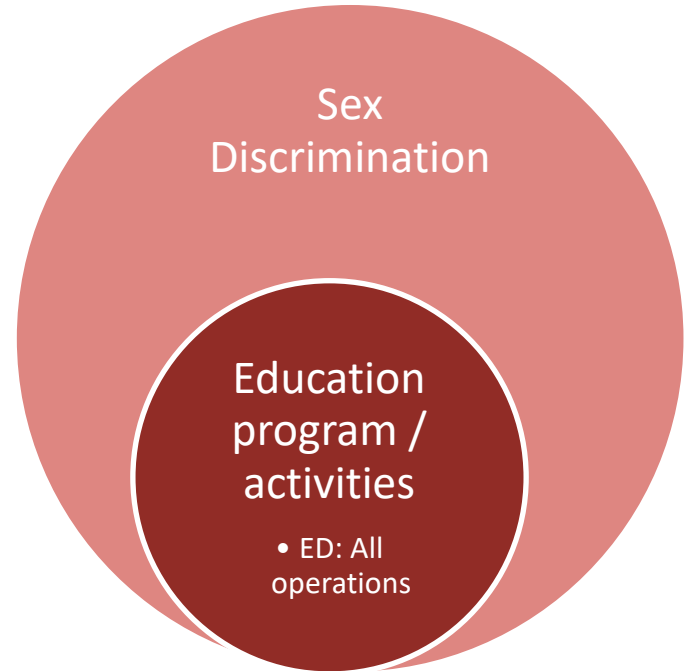
“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

32 C.F.R. § 106.31



# What sex discrimination does Title IX apply to?

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
  - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity







# What are the two types of sex discrimination?

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- Adverse treatment discrimination
- Sexual harassment



# Example of Adverse Treatment



Supervisor consistently gives male employees raises while holding salaries for female employees flat, despite all employees being similarly situated in terms of responsibility, experience, and performance.

# Example of Sexual Harassment



Supervisor tells sexual jokes to subordinate employees, displays sexual imagery, propositions them, and frequently comments on whether subordinate employees' dress is "sexy."



# What is the key distinction between these two concepts?

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- Sexual harassment involves unwelcome conduct that is either sexual in nature or meets the definition of the VAWA crimes.
  - Quid pro quo; hostile environment; sexual assault; domestic violence, dating violence, stalking
- Adverse treatment involves adverse action that does not have to be sexual in nature but that is motivated by the target's sex and that excludes or limits their participation



# Is all adverse treatment and all harassment discrimination?

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- Civil rights laws like Title IX and Title VII prohibit material adverse action based on sex
  - That which has a material effect on a person's participation in programs and activities
- “Harassment” must rise to the level of quid pro quo; hostile environment; sexual assault; or a VAWA crime



## Example



On a handful of occasions, a male supervisor invites a male subordinate to eat with him in the cafeteria. The supervisor does not invite a female subordinate to eat with him. The male and female subordinates are comparably compensated and have received similar promotions.

B  
—  
H  
B

## Example



Student A tells one offensive sex joke to Student B in the shared common room of a dormitory. Student B tells Student A the joke is offensive. Student A apologizes and doesn't tell any more sex jokes.



# What constitutes “sex” for purposes of Title IX?

- Biological sex (a/k/a “assigned sex”)
- Gender identity
- Sexual orientation

Department of Education Interpretive Guidance

June 2021

Applying *Bostock v. Clayton County* (U.S. 2020)



## Example



Engineering faculty member systematically grades female students more harshly than male students because faculty member believes women simply aren't "wired" to be engineers.

# Example



Faculty member refuses to serve as advisor for any transgender student because faculty member believes gender identity is “made up” and anyone who believes in it is “delusional.”

## Example



Faculty member intentionally writes an overly harsh and factually inaccurate letter to undermine openly gay student's scholarship application because faculty member believes sex should only be between a "biological male" and a "biological female" who are married.

B  
—  
H  
B

## Example



Student A places his penis in Student B's mouth when Student B is incapacitated due to alcohol and drug use. Student A is a cis man and straight while Student B is a trans woman and bisexual.



# What is sodomy?

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Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# What is hostile environment?

Unwelcome conduct based on sex, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



# H-B

## Example



Student A is straight and Student B is straight. Student A frequently makes comments about how Student B is promiscuous and “sleeps around.” Student A also comments publicly about Student B’s breasts and how Student A would love to “fu\*\*” Student B.

## Example



Student A is straight and Student B is gay. Student A repeatedly refers to Student B as a “f\*g” and “queer” in front of others.



## Example



Student A is a trans woman who frequently wears dresses. Student B publicly berates Student A for dressing “like a woman when you’re a man” and tells Student A to “quit wearing makeup and put on some pants.”

# What is gender stereotyping?

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- Adverse treatment discrimination against a person because they do not conform to stereotypes about a person of a given sex/gender.
- Harassment of a person that targets their failure to conform to stereotypes about a given sex/gender.
- Gender stereotyping can occur against any person—even cisgender persons.

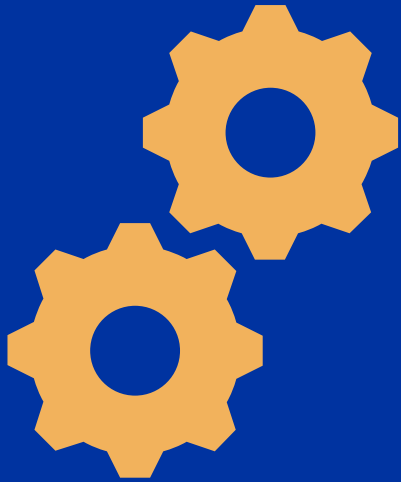
## Example

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Jane is a cis woman and straight. Jane has short hair and doesn't wear makeup. Jane's male supervisor tells Jane if she wants to get promoted, she'll have to stop looking like a "tom boy" and "wear a dress every now and then."

## Group Scenario



Casey is a cis man and straight. But Casey does not discuss his gender identity or sexual orientation with others. Casey is shy, speaks quietly, and wears sleek clothing. One of Casey's classmates, Jeb, tells other students in the class that Jeb has great "Gaydar" and that he's certain Casey is a "hom\*." Over several weeks before, during, and after class, Jeb tells explicit gay jokes in Casey's presence; comments on Casey's "nice highlights;" and repeatedly asks Casey whether Casey likes certain movies with prominent gay characters. Casey frequently observes Jeb snickering to others about Casey. One day while leaving class Jeb squeezes Casey's rear-end and says "I'll bet you liked that!" The faculty member for the class has observed all this conduct. The institution has a mandatory reporting policy. But the faculty member chooses not to report because she dislikes when men are "weak" and believes Casey has "brought this on himself" by not "standing up" to Jeb.

# Questions





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# Preferred Names and Pronouns





# Does the law require the use of preferred names and pronouns?

- The law does not (presently) mandate the use of preferred names or pronouns for any student (cisgender, transgender, or otherwise)
- But the refusal to use preferred names and pronouns based on protected status and/or the use of non-preferred names and pronouns based on protected status may constitute discrimination or harassment based on the facts

## Example



Faculty member is concerned they will not be able to remember every student's preferred pronouns. Faculty member chooses never to use pronouns for any student and refers to all students by their preferred first name.





## Example



Faculty member is concerned they will not be able to remember every student's preferred pronouns and elects to refer to every student by either their preferred first name or by the gender-neutral "they/them/their."



## Example



Faculty member dislikes transgender students. Faculty member's default practice is to refer to students by first name but when addressing transgender students, faculty member intentionally uses a misgendered honorific and always uses the transgender student's legal name instead of their preferred name.



# Remember, there are two types of discrimination under Title IX . . .

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- Adverse treatment discrimination
- Sexual harassment





# *Meriwether v. Hartop* (6<sup>th</sup> Cir. 2021) (1 of 2)

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- Institution adopts mandatory preferred pronouns policy
- Faculty member wishes to refer to transgender students by last name instead of preferred honorific or pronouns
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination



# *Meriwether v. Hartop* (6<sup>th</sup> Cir. 2021) (2 of 2)

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- Faculty member files lawsuit asserting free speech, freedom of religion, and due process claims
- Faculty member's claims survive a motion to dismiss
- Court says: “there is no suggestion [faculty] member’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits.”
- “[Faculty member’s] decision not to refer to Doe using feminine pronouns did not have a [systematic effect of denying the victim equal access to an education program or activity].”



# What factors could suggest systematic discrimination?

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- Repeated and pervasive conduct
- Reduction in academic performance
- Need to transfer class
- Conduct prompts others to harass/discriminate
- Disruption in class
- Need for counseling
- Others????



## *Meriwether* takeaways

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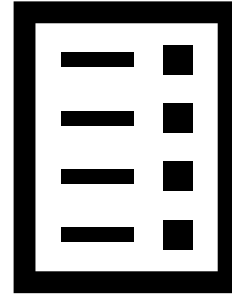
- Misgendering or failure to use preferred names is not inherently discrimination as defined by law (but may be)
- Faculty members have First Amendment academic freedom rights that limit institutional ability to compel language
- Faculty members with religious beliefs may be entitled to an accommodation (more on that later)



# Preferred name/pronoun policy

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- Not required nationally
- Distinction between advisory policies (“should”) and mandatory policies (“must”)
- Consider distinctions between employees and non-employees
- Think about practicality





## Example



Institution enacts policy that states:  
“Employees shall refer to all students  
by their preferred names and  
preferred pronouns.”



# What are potential challenges?

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- How will employees know?
- How will the institution track?
- Will the institution itself abide by the policy? (i.e., transcripts; official communications)
- How frequently are changes allowed?
- What about non-binary pronouns?
- What if the preferred name is vulgar or disruptive?
- Are there exceptions?



## Example

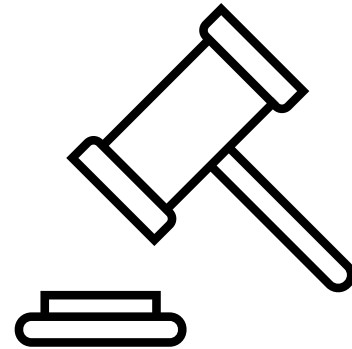


Institution's policy states: "A student's preferred first name will be used when it is unnecessary for the legal name to be used, it is technically feasible to use the preferred name, and the preferred name is not being used for an improper purpose.\*"

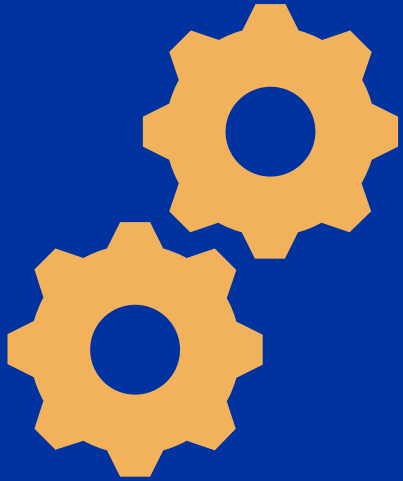
# Are there alternatives to a policy?

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- Rely on general non-discrimination and harassment policies and address complaints as made
- Prepare and publish guidance/educational documents



## Group Scenario



Xander is a second-year student who is a trans man. During first year, Xander presented as female and used “she/her/hers” pronouns but now wishes to use “he/him/his.” Professor Johnson taught Xander during Xander’s first year and is now teaching Xander in an American history class. It is mid-semester. Professor Johnson’s syllabus for the class states: “I will refer to students by whatever name and pronouns they identity to me at the start of class.” Professor Johnson’s reason for the rule is that he does not want confusion and disruption by changing names and references mid-semester. After Xander notifies Professor Johnson of Xander’s desire to use “he/him/his” pronouns, Professor Johnson tells Xander it is “too late” to change because the course is “half over.” Professor Johnson offers to refer to Xander simply by preferred name, but without pronouns, for the remainder of the class.

# Questions





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# Gender Identity and Sexual Orientation in Housing





# What does Title IX say about housing?

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- An institution cannot apply different rules, regulations, fees, or services based on sex
- An institution may provide “separate housing on the basis of sex”
- Housing provided to students of one sex must be comparable to housing offered to students of another sex



## Example



Institution charges a baseline housing application fee of \$100 but charges transgender students an additional fee of \$200 to account for the “extra administrative work” of arranging housing for a transgender student.

## Example



Institution enacts a rule that transgender students are only allowed to stay in single-occupancy rooms and must always pay the single-occupancy rate, which is more expensive than double-occupancy.

## Example



Institution sets aside a basement floor in the oldest dormitory, furthest from campus, and designates the floor as “LGBTQ friendly.” This floor is the only floor in any dormitory with single-occupancy bathrooms and showers. Any student who self-identifies as LGBTQ is automatically assigned to the floor.

## Example



Institution has two male dormitories and two female dormitories. Students are required to live in a dormitory that aligns with their sex as indicated on their birth certificate, irrespective of whether the sex on their birth certificate aligns with gender identity.



# What we know . . .

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- Supreme Court has not resolved this issue
- ED takes the position that denying students use of locker rooms and restrooms aligned with their gender identity violates Title IX
  - Supported by *Grimm v. Gloucester County Sch. Bd.*
- By extension, ED takes the position that denying students use of dormitories aligned with their gender identity violates Title IX
- But ED has not promulgated specific regulations; and
- ED continues to recognize the viability of religious exemptions



## What we also know . . .

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- Fair Housing Act prohibits sex discrimination in housing
- Federal government considers residence halls to be subject to the FHA
- February 11, 2021 memo says discrimination in housing based on gender identity and/or sexual orientation violates FHA
- But Title IX's more specific provisions governing housing may preempt application of FHA on campus
- And the federal Religious Freedom Restoration Act may further limit the FHA's application to religious institutions



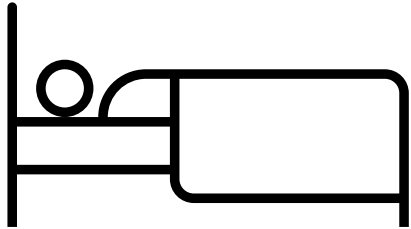
# What does Title IX say about facilities within dormitories?

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- An institution may provide separate toilet, locker rooms, and shower facilities based on sex
- But facilities provided to students of one sex must be comparable to facilities offered to students of another sex
- ED considers it discrimination to block a student from using a facility aligned with their gender identity

# What are institutional approaches?

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- “Gender-inclusive” or “gender-neutral” housing
- Retain same-sex housing but allow selection based on gender identity
- Some combination of one or two
- Retain same-sex housing but make ad hoc accommodations for specific instances that arise (less common; challenging)
- Rely on a religious exemption (for private, religious institutions)





## Example



All institution's dormitories are gender-neutral with both biological sexes living in the same building. Students utilize a match system and may be paired with a roommate of the same or different gender identity, at their option. Facility includes both gender neutral and gender specific restrooms and showers.

# Example

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Institution retains sex-specific dormitories but allows selection based on gender identity. Institution also has designated “gender inclusive” dormitories that house students in shared rooms irrespective of gender and paired by a matching system.



# Example



Private Christian college believes God created only men and women as reflected by biological sex and that men and women should not live in the same building unless they are married. Institution claims a Title IX exemption and segregates dormitories by biological sex. It's conduct code prohibits members of one sex from entering another-sex's dormitory without a chaperone.



## Example



Institution has eliminated sex-separated dormitories in favor of gender-inclusive dormitories with a roommate match. A cis woman objects to living on a floor that contains trans women and demands to be housed on a floor with only other cis women.

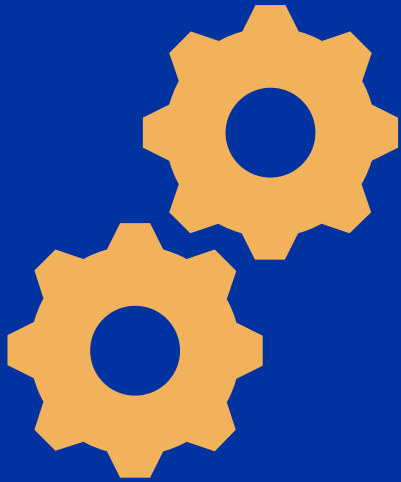


# Example



Institution has sex-separated floors but permits selection based on gender identity. A cis man does not want to share male designated bathroom with a trans man and claims requiring him to do so is sexual harassment.

## Group Scenario



Private, non-religious institution has numerous sex-separated dormitories but allows selection based on gender identity. It has a single, gender-inclusive dormitory that houses up to 50 residents in suites. The institution requires students to sign a housing contract for the entire academic year that references the specific room and dormitory to which the student has been assigned. At the start of the academic year, Jordan, a trans man, chose to live in a male-designed dormitory and signed a housing contract. In October, Jordan met with the housing director and requested to be moved to the gender-inclusive dormitory. Jordan reported feeling unwelcome in the building, which is predominantly occupied by cis men. But there were no open rooms in the gender-inclusive dormitory. Jordan then requested to be placed in a female residence hall. The housing director denied this request because Jordan had already signed a housing contract for a male dormitory and because Jordan did not self-identify as female. In November, Jordan files a Title IX complaint accusing two cis men of sexually harassing Jordan by repeatedly joking about Jordan's transgender status and writing gender-based epithets on Jordan's white-board.

# Questions





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Religious  
Liberty







# The Title IX religious exemption

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Title IX “does not apply to an educational institution which is controlled by a religious organization to the extent application of [Title IX] would not be consistent with the religious tenants of such organization.”

20 U.S.C. § 1681(a)(3)

# Claiming the religious exemption

- Religious exemption is self-executing and may be asserted directly when needed
- Institution may voluntarily seek assurance of exemption through application to ED





# What does it mean to be “controlled by a religious organization”?

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- Defined broadly to include:
  - Divinity schools and seminaries
  - Institution controlled by a particular denomination or religious body
  - Institution is not controlled by a particular denomination or religious body but is a religious institution in its own right



# What factors matter?

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- Required membership in religious organization
- Required religious practices
- Statements of faith
- Charters and bylaws
- Selection of board members
- Financial support
- Institutional mission
- Marketing content
- Others?

## Example



Institution is self-described as a Catholic university. President is an ordained priest and teachings of the Catholic Church are incorporated into mission statement that all employees must sign. Majority of institution's board are either priests, deacons, or nuns.

# Example



Institution is a self-described “non-denominational Christian college.” Mission statement requires adherence to “Biblical teachings” for all employees and students. All employees and students must attend weekly chapel service. Institution’s mission statement references multiple Biblical passages and states that “leading people to Christ” is a core priority of institution.

## Example

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Institution is a rabbinical college that enrolls students in rabbinical ordination programs and offers related degrees in Talmudic law.



# What are the most commonly-sought religious exemptions?

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- Gender identity and sexual-orientation related aspects of Title IX
  - Locker rooms; bathrooms; housing; dress; names; etc.
- Sex-specific religious programs or degrees
- Sex outside of marriage
- Pregnancy



## Example



Religious institution seeks exemption from Title IX to the extent it would require institution to allow students to select dormitory based on gender identity rather than biological sex.



# Do civil rights laws protect religious liberty?

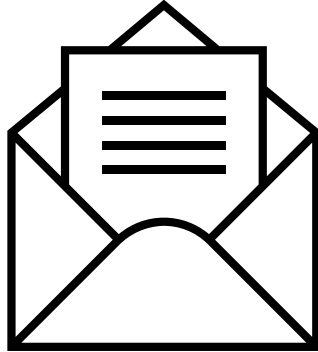
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- Title VII prohibits employment discrimination based on “religion”
  - But there is an exemption for religious institutions
- State non-discrimination statutes typically mirror Title VII and may also extend to non-employee students
- Prohibit classic discrimination by adverse treatment as well as failure to accommodate religion
- Apply to both public and private institutions



# What must an employer do to accommodate religious belief?

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- Employer must accommodate employee's sincerely held religious beliefs or practices unless
- The accommodation would impose an “undue hardship”



# What does it mean to have a sincerely held religious belief?

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- Whether the employee has a personal, genuinely held belief
- Belief does not have to be part of organized religion
- Belief does not have to be orthodox to the employee's claimed faith
- Religious belief can still be sincere even if recently adopted or occasionally violated
- Religious belief does not have to be validated by a religious leader (priest, pastor, rabbi, imam, etc.) to be genuine



# What does it mean to create an undue hardship?

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- The burden must be genuine and not speculative
- The burden must be more than *de minimus*. E.g.,
  - Costly
  - Compromises safety
  - Infringes rights of other employees
  - Violates CBA or seniority rights
  - Would place the institution in legal jeopardy
  - Requires other employees to do more than their share of hazardous or burdensome work



## Example



Teacher at K-12 school seeks a Title VII religious exemption from generally applicable rule that requires all teachers and staff to refer to students by preferred pronouns, including pronouns that are not traditionally associated with a given biological sex. Teacher wishes to use student's last names in lieu of pronouns.



## ***Kluge v. Brownsburg Community School Corporation (S.D. Indiana)***

- Holds that granting teacher's request to use last names only would create an undue burden
- Would still make transgender students "feel targeted and uncomfortable"
- Evidence that one transgender student dreaded coming to class and had transferred out of the class taught by teacher to avoid environment



# Where does the Constitution protect religious liberty?

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- First Amendment, Clause 1
- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
- Applies to the federal government and state governments (through “incorporation” by the Fourteenth Amendment)





# What does the free exercise clause protect?

- Government can enforce generally applicable rules that incidentally burden religion as long as there is a rational basis for the action.
- Government cannot take actions specifically targeting free exercise without satisfying “strict scrutiny.”
  - Compelling government interest
  - Narrowly tailored policy that furthers interest
- If the government makes exceptions for non-religious actions, the rule is not generally applicable and subject to strict scrutiny.



## Example



K-12 school has a policy that prohibits faculty or staff from using names or pronouns that are offensive to a student based on gender when the use of such terms is motivated by religious animus.

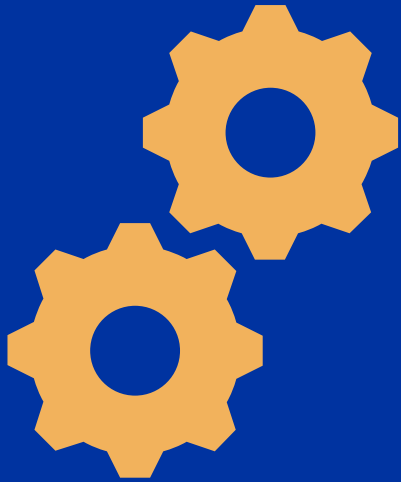


## Example



Education department at public university directs all full-time faculty members to post a sign on their door advertising the department's pride month activities in support of LGBTQ students. Part-time faculty are not required to post signs on the offices they share. Nor are the department chair and staff required to post signs. One faculty member objects on religious grounds.

## Group Scenario



Fatima is a resident assistant at a public university. The university requires all RAs to undergo training on LGBTQ awareness and how to support LGBTQ students in the residence hall. The Housing Department promulgates a handbook that includes a directive that all RAs are expected to provide “full support to LGBTQ students and refer LGBTQ students to appropriate institutional resources for LGBTQ students when requested.” Fatima is a Muslim who believes it violates her religion to take any action that could cause someone to believe she supports sex outside of a “traditional” marriage. Fatima requests an exemption from the handbook’s requirement; she proposes that if any LGBTQ student comes to her for support or resources, she will refer the student to another RA who does not have a religious objection. Another RA, Damian, is an LGBTQ student who recently survived a sexual assault. As an accommodation for PTSD arising from the assault, the Department has exempted Damian from having to engage with students on any issue pertaining to sex, including conversations with LGBTQ students about their gender or sexual orientation. Damian is instead allowed to refer any such students to another RA.

# Questions



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