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Association of
Title IX Administrators

Gender Identity in Education

An ATIXA Workshop

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Strategic Risk
Management Solutions



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

CONTENT ADVISORY

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

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



AN EXAMPLE TO INITIATE OUR DISCUSSION

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

What is the Title IX office to do?

AGENDA

- 1 Introduction & Terminology
- 2 Litigation Impact on College and School Policy Enforcement
- 3 Title IX Proposed Regulations for Athletics
- 4 Case Studies
- 5 Group Discussion: Case Studies and Emerging Best Practices

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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

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 his religious beliefs prevented him from communicating about gender identity that he believes to be false and therefore couldn’t comply with the student’s demands.

MERIWETHER V. HARTOP

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

Facts (Cont.)

- 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.
- Meriwether argued that he couldn't use the female pronoun with Doe because of his religious convictions.

MERIWETHER V. HARTOP

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

Facts (Cont.)

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

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

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

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.

MERIWETHER V. HARTOP

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

Considerations (Cont.)

- 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?

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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

KLUGE V. BROWNSBURG COMM. SCH.

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

Facts (Cont.)

- 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

KLUGE V. BROWNSBURG COMM. SCH.

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

Decision (Cont.)

- 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.

DODDS V. U.S. DEPARTMENT OF EDUCATION

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

Decision

- The court distinguished this case from the *Grimm*³ 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.

³*Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020).

WHITAKER V. KENOSHA UNIFIED SCHOOL DIST.

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

Facts

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

WHITAKER V. KENOSHA UNIFIED SCHOOL DIST.

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

Decision

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

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 11th 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?

ADAMS V. SCHOOL BD. OF ST. JOHNS COUNTY

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

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

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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.

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

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



CASE STUDIES

Ten Scenarios for Practice

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.

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1 – SAMANTHA

A male faculty member has been intentionally and repeatedly misgendering a student. Samantha is an openly 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.

1 – SAMANTHA (CONT.)

Last week, another student spoke out in class, telling the professor that he needed to call Samantha by her chosen name. 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 office do?

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 in the student information system to reflect her identity 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.

2 – A VARIATION ON SAMANTHA (CONT.)

Samantha approaches the Title IX office about this, feeling like she is in an impossible position. 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?

3 – JUNE AND RAFI (ruh-fee)

- June walks into the Title IX office, irate. Her colleague, Rafi, is now using the women's restroom in their department. Rafi is a trans woman, and June refuses to use the restroom along with someone who has a penis. She 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?

4 – BARTOK (baar-taak)

- Bartok is a nonbinary student who complains that they failed a religion course. The main graded assignment was a paper, and Bartok’s submission was an exploration of gender in the Bible.
- Bartok’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 Bartok made in their writing.

4 – BARTOK (CONT.)

Bartok 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?

5 – ISTVAN’S (ish-t-v-aa-n) TEAMMATES

- Istvan’s teammates consider Istvan’s sex assigned at birth and gender identity to be ambiguous.
- The teammates shower together in the locker room, but the school has jury-rigged a separate enclosure inside the larger shower area to provide privacy, which Istvan always uses when showering.
- Istvan comes to the Title IX office with concerns that his teammates are spying on Istvan in the shower.

5 – ISTVAN'S TEAMMATES (CONT.)

- When questioned, the teammates explain that they are not spying on Istvan with a sexual intent, but rather to try to verify whether Istvan is in fact eligible to play on their team.
- While this is unfolding, the coach also comes to you to raise the issue of questions related to Istvan's eligibility and how the school can appropriately verify that Istvan is qualified to play on this team.
- Any wins for the team could be forfeited if it is later shown that league rules were violated, and coach does not want all the players to suffer because of just one.

5 – ISTVAN'S TEAMMATES (CONT.)

- Coach proposes that he should confront Istvan and require Istvan to prove eligibility or else be removed from the team.
- Coach recognizes that Istvan has privacy rights, but the rights of all members of the team are also at stake here.
- You thank the coach for his thoughts, tell him you will confer with your colleagues in the Title IX office, and get back to him with a game plan.

What's your plan?

6 – FRUITIA (froo-e-sha)

GENDER FLUIDITY

- Fruitia is gender-fluid. 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.”
Fruitia has chosen the pronouns ze, zir, and zirs.
- Some days, that means Fruitia identifies and expresses as male.
- Some days Fruitia identifies and expresses as female.
- Some days both, and some days neither. Sometimes, the identity and expression do not match. Continued on the next slide...

6 – FRUITIA (CONT.)

GENDER FLUIDITY

- Fruitia also identifies/expresses as a Macaque, (zir monkey fursona).
- Many people are frustrated by Fruitia, because they are often corrected by zir for not using correct identifiers, pronouns, etc.
- Numerous complaints have been filed with the Title IX office, alleging that Fruitia’s fluidity is a game and is just an excuse for zer to do anything ze wants, anywhere ze wants. They assert Fruitia is a gender-fraud and needs to “pick a side”.
- Continued next slide...

6 – FRUITIA

GENDER FLUIDITY

- One particular complaint is that because Fruitia’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. Fruitia won’t reveal any details of zir anatomy when questioned in the restroom.
- Fruitia 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?

7 – FRUITIA’S COMPLAINT

CONSENT

- Amidst all of the complaints against Fruitia, ze brings forward their own complaint to the Title IX office.
- Fruitia has a nonbinary sexual partner, Zolo. Fruitia has made it clear that Zolo can have sex with zir when ze is male or female, and when ze is neither, but not when ze is a monkey (because monkeys cannot consent to sex with humans).
- Fruitia comes to the Title IX office to file a formal sexual assault complaint against Zolo for having sex with zir when Zolo knew ze was expressing as a Macaque.

What should the Title IX office do?

8 – SIMPSON & NU NU NU

PEER-TO-PEER BIAS

- Simpson rushed the Nu Nu Nu 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.
- The Dean of Fraternity and Sorority Life has filed a complaint against Nu Nu Nu for violation of the university's non-discrimination policy.
- Continued on the next slide...

8 – SIMPSON & NU NU NU (CONT.)

PEER-TO-PEER BIAS

- Nu Nu Nu 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 brothers be assigned male at birth.
- Some fraternities do have charters that explicitly exclude cisgender females, but this fraternity does not.
- The fraternity exec board explained that they don't have a choice, as Nu Nu Nu national HQ told them they must expel Simpson. Continued on next slide...

8 – SIMPSON & NU NU NU (CONT.)

PEER-TO-PEER BIAS

- Simpson responds that he was not born female, but intersex, and had gender confirmation surgery.

Did Nu Nu Nu discriminate against Simpson on the basis of sex?

What should the Title IX office do?

9 – JANA & SELENE

COMPETITION MEANS THE RIGHT TO WIN

- Jana and Selene are both track stars. They file a complaint with the Title IX office that they are being discriminated against by the college, 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 college against which their college competes.
- Both Jana and Selene have not won a race since these two trans females joined their respective teams. They won frequently before.

9 – JANA & SELENE (CONT.)

COMPETITION MEANS THE RIGHT TO WIN

- 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 both asserted to be compliant with the applicable hormone suppression regimen required by the league.

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

10 – PROFESSOR PETERSEN

FREE SPEECH

- 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.

10 – PROFESSOR PETERSEN (CONT.)

FREE SPEECH

- Petersen is incensed by the adoption of this policy, and writes about it with condemnation in his blog, by tweet, 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, 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.

10 – PROFESSOR PETERSEN (CONT.)

FREE SPEECH

This is an advanced and complex case study.

Let's see how you do with it.

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

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ARE THERE BEST PRACTICES?

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

ARE THERE BEST PRACTICES? (CONT.)

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

ARE THERE BEST PRACTICES? (CONT.)

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



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Questions?

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