

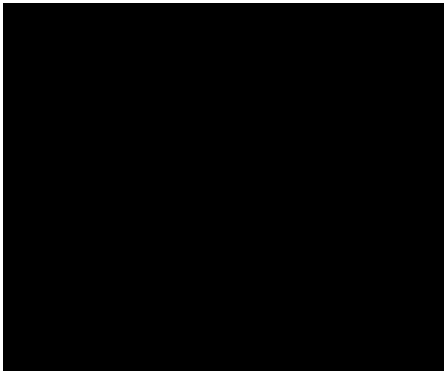




What is Title IX?

—
“[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



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What sex discrimination does Title IX cover?



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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."

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What is the key distinction between these two concepts?

Adverse treatment involves adverse action that does not have to be sexual in nature but that is motivated by the target's sex and

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Is all adverse treatment and all harassment discrimination?

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

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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.

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How does ED define “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)

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Do the courts agree with ED?

Some do and some don't
 Title IX definition of "sex"
 is being actively litigated
 across the country
 Courts are split and
 eventual Supreme Court
 resolution seems likely



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Example

Engineering faculty member
 systematically grades female students
 more harshly than male students
 because faculty member believes
 women simply aren't "wired" t5Tc(simpley)Tj/

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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

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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.

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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.

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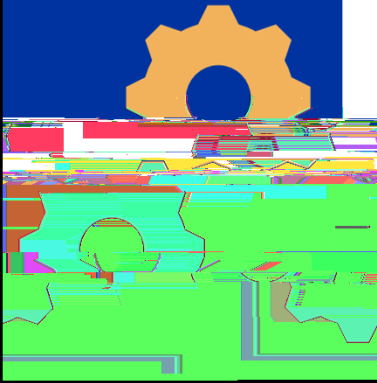
Example

Student A is a trans woman who frequently wears dresses. Student B publicly berates Student A for dressing like a girl.

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Group Scenario



Casey is cis male 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.

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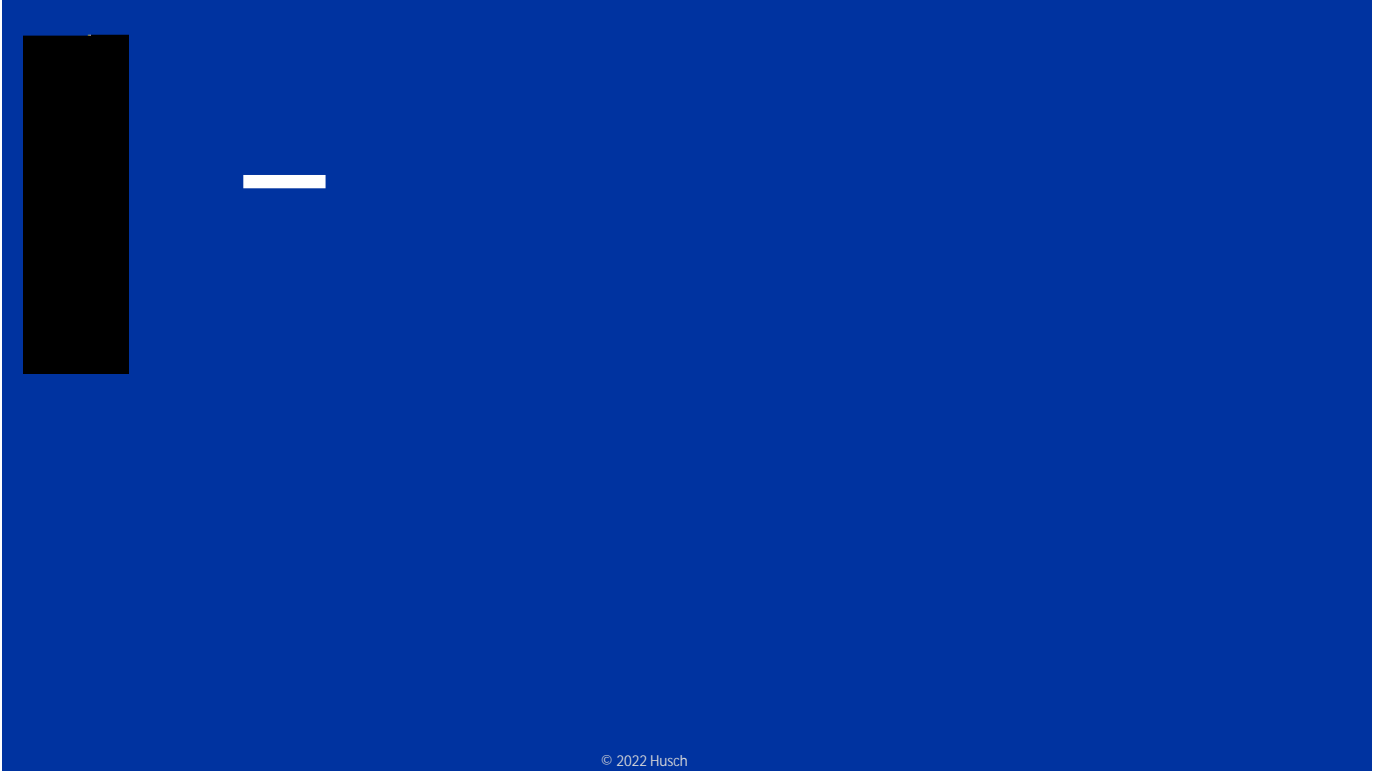
Questions



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Example

Faculty member dislikes transgender students. Faculty member's default

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Meriwether v. Hartop (6th Cir. 2021) (1 of 2)

Institution adopts mandatory chosen pronouns policy

Faculty member wishes to refer to transgender students by last name instead of chosen honorific or pronouns

Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination

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Meriwether v. Hartop (6th Cir. 2021) (2 of 2)

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]."

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Chosen name/pronoun policy

- Not required nationally
- Distinction 2022

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Are there alternatives to a policy?


Rely on

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Questions

?



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**Gender Identity and
Sexual Orientation in
Housing**

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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.

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Example

Institution enacts a rule that transgender students are only allowed to stay in single occupancy rooms and must pay a single occupancy fee.

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What we know . . .

Supreme Court has not resolved this issue
ED takes the position that denying

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And we know. . .

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

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Example



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.

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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.

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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.

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Example



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

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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

dorm



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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



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

Defined broadly to include:

needed

Divinity schools and seminaries

Institution controlled by a particular denomination or religious body

Institution is not by a B\$éq! by

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What factors matter?

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?

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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.

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Example

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What are the most commonly-sought religious exemptions?

Gender identity and sexual orientation related aspects of Title IX

Locker rooms; bathrooms; housing; dress; names; etc.

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Example

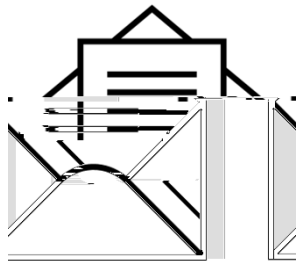
Religious institution seeks exemption

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What must an employer do to accommodate religious belief?



Employer must accommodate employee's sincerely held religious beliefs or practices unless

The accommodation would impose an "undue hardship"

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

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

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What does it mean to create an undue hardship?

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



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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



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.



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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 to


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