

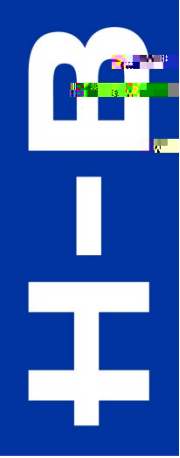


HUSCH BLACKWELL

# Advanced Title IX Training

Participants in policy processes

Summer 2022



# Housekeeping

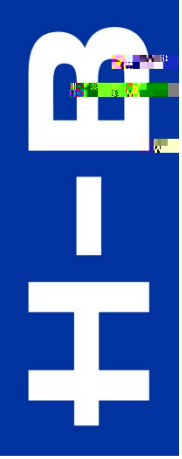
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- Recording is not permitted
- Change Zoom name to match registration
- Please list your institution with your name
- Raise hand or use chat function to ask questions
- Anticipated break at 3:00 pm
- Other breaks—take individually as needed

## Group Scenario

# Breakout Groups

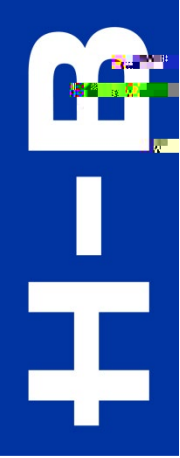
- 4 Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today's training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide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



# A word on terminology . . .

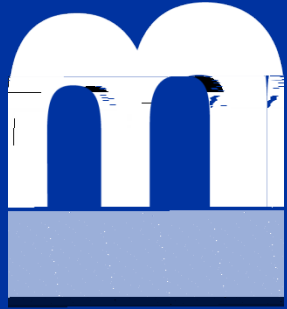
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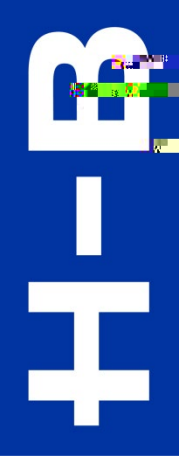
Vocabulary concerning gender identity and sexual orientation continues to evolve. There is not universal agreement on the meaning of all terms or the best terms to use to refer to certain concepts. We strive to



# Agenda







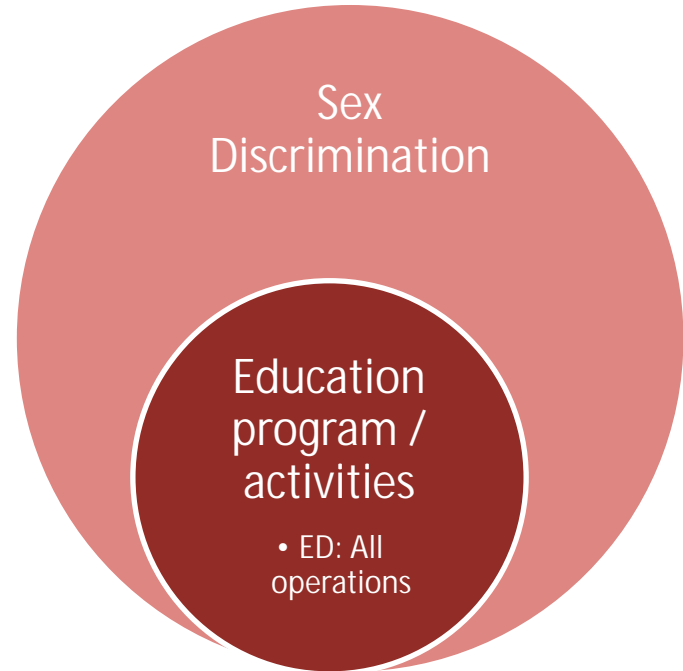
# What is Title IX?

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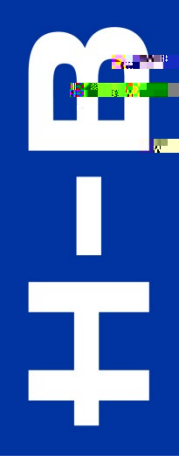
“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program ( 36 -0 0 3 -1.3 )y Tw T\* [(p9 (g)-3.cW (n)-0.

# 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

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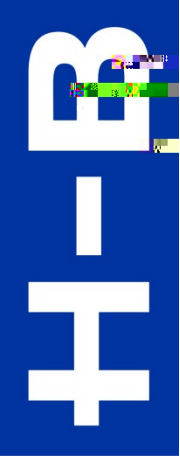
# Example of Adverse Treatment

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# Example of Sexual Harassment

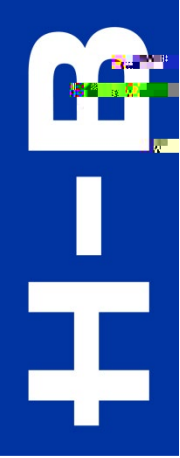
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# What is the key distinction between these two concepts?

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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



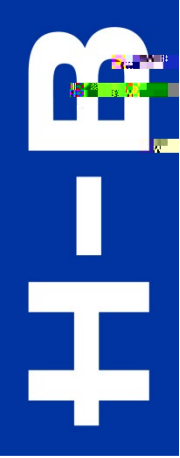


# Example

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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

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# Example

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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

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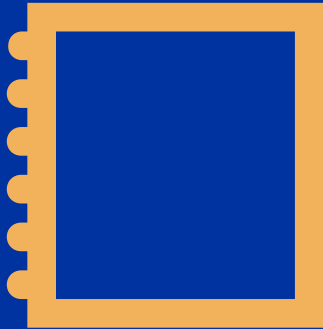
Faculty member refuses to serve as advisor for any transgender student because faculty member believes gender identity is “made up” and anyone who believes in it is “delusional.”



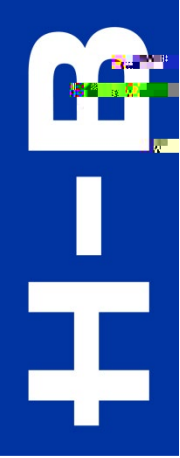


# Example

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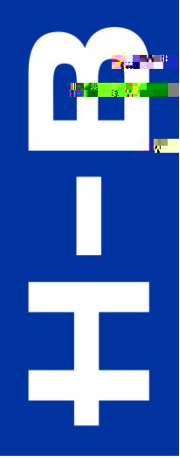


Student A places his penis in Student B's mouth when Student B is incapacitated due to alcohol and drug use. Student A is cis male and straight while Student B is trans female and bisexual.



# What is sodomy?

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# What is hostile environment?

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# Example

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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

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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

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Student A is a trans  $\text{Á} \} u \text{ } v$  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 cis Á } uv 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."

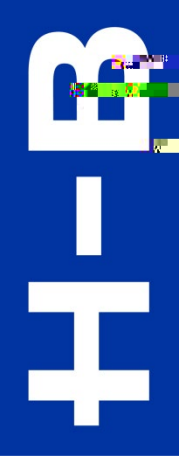
# Group Scenario

Casey is cis male and straight. But Casey does not discuss his his

# Questions







# 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

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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.





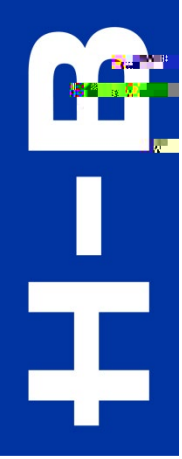


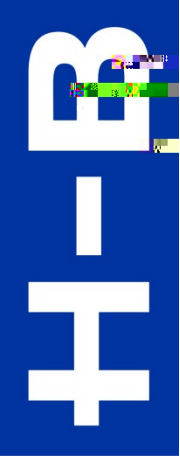
# Example

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Faculty member dislikes transgender students. Faculty member's default practice is to refer to students by first

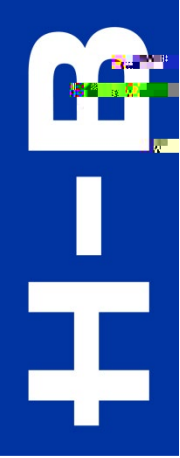




# ***Meriwether v. Hartop* (6<sup>th</sup> Cir. 2021) (1 of 2)**

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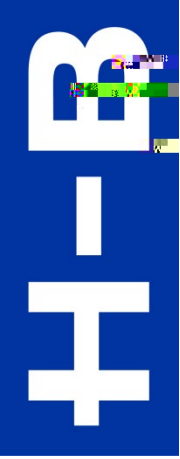
- Institution adopts mandatory preferred pronouns policy
- Faculty member wishes to refer to transgender students by last name instead of preferred honorific or pronouns
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination



# *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

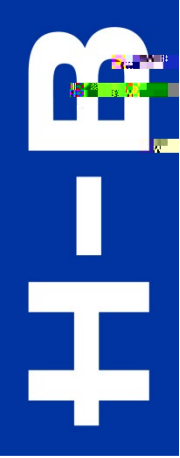


# What factors could suggest systematic discrimination?

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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????

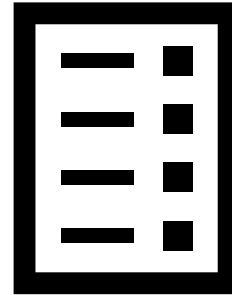




# Preferred name/pronoun policy

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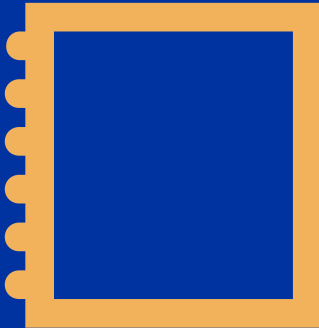
- Not required nationally
- Distinction between advisory policies (“should”) and mandatory policies (“must”)
- Consider distinctions between employees and non-employees
- Think about practicality



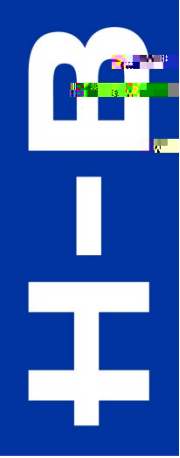




# Example



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?

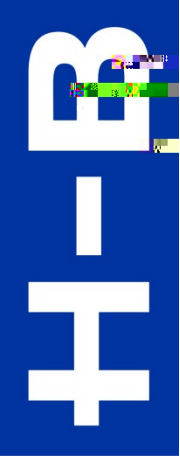


# Example

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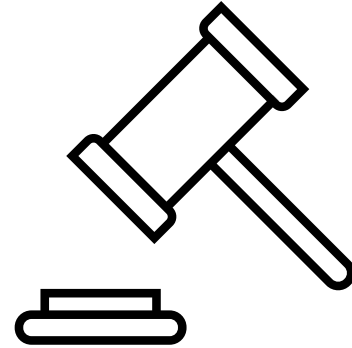


Institution's policy states: "A student's preferred first name will be used when it is unnecessary for the legal name to be used, it is technically feasible to use the preferred name, and the preferred name is not being used for an improper purpose.\*"



# Are there alternatives to a policy?

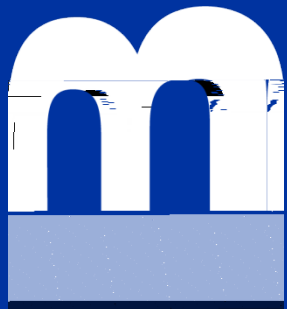
- Rely on general non-discrimination and harassment policies and address complaints as made
- Prepare and publish guidance/educational documents





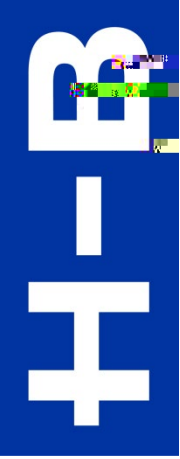
# Questions





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# What does Title IX say about housing?

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- An institution cannot apply different rules,









# Example



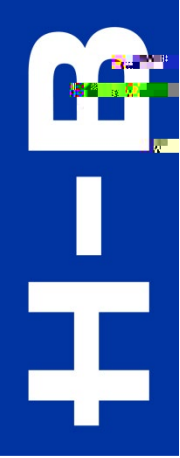
Institution sets aside a basement floor in the oldest dormitory, furthest from campus, and designates the floor as “LGBTQ friendly.” This floor is the only floor in any dormitory with single-occupancy bathrooms and showers. Any student who identifies as LGBTQ is automatically assigned to the floor.



# Example



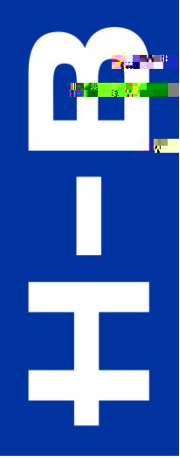
Institution has two male dormitories and two female dormitories. Students are required to live in a dormitory that aligns with their sex as indicated on their birth certificate, irrespective of whether the sex on their birth certificate aligns with gender identity.



# What we know . . .

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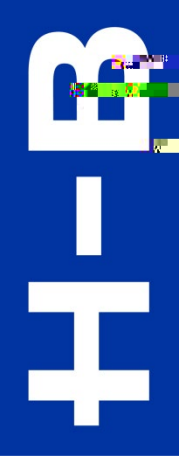
- Supreme Court has not resolved this issue
- ED takes the position that denying students use of locker rooms and restrooms aligned with their gender identity violates Title IX
  - Supported by *Grimm v. Gloucester County Sch. Bd.*
- By extension, ED takes the position that denying students use of dormitories 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 . . .

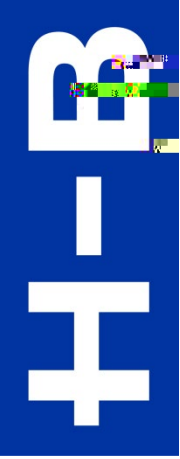
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- Fair Housing Act prohibits sex discrimination in housing
- Federal government considers residence halls to be subject to the FHA
- February 11, 2021 memo says discrimination in housing based on gender identity and/or sexual orientation violates FHA
- But Title IX's more specific provisions governing housing may



# What does Title IX say about facilities within dormitories?

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# What are institutional approaches?

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- “Gender-inclusive” or “gender-neutral” housing
- Retain same-sex housing but allow





# Example





# 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

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Institution has eliminated sex-separated dormitories in favor of gender-inclusive dormitories with a roommate match. A cis  $\hat{A}$  }  $u$   $v$  objects to living on a floor that contains trans  $\hat{A}$  }  $u$  and demands to be housed on a floor with only other cis  $\hat{A}$  }  $u$   $v$ .



# Example

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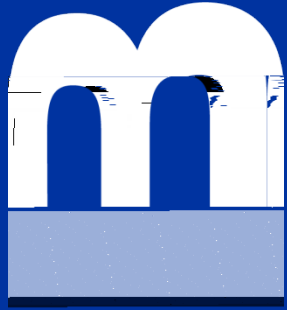
Institution has sex-separated floors but permits selection based on gender identity. isma v doesnot want to share male designated bathroom with a trans ma v and clams requiring him to do so is sexual harassment.

## 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 suite.

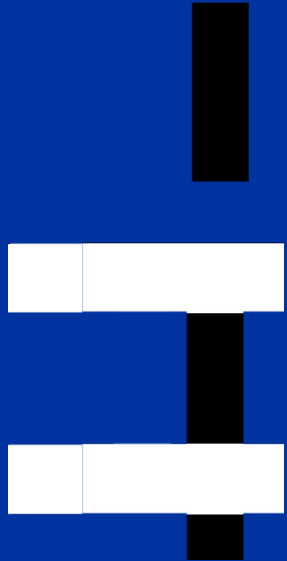
# Questions



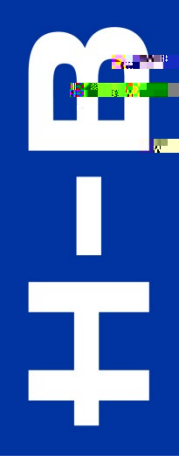


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# Religious Liberty





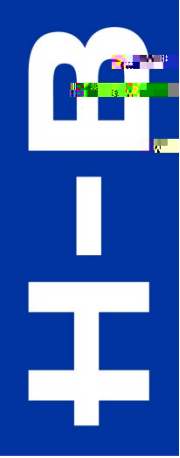


# The Title IX religious exemption

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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)

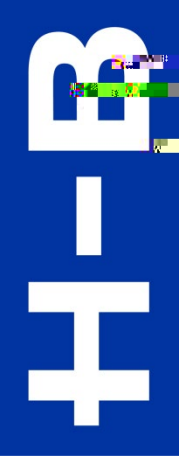


# Claiming the religious exemption

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

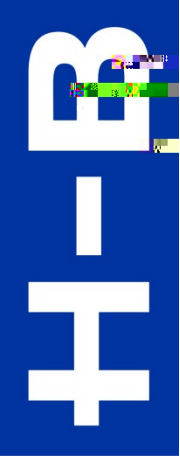




# What does it mean to be “controlled by a religious organization”?

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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







# Example

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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.





# What are the most commonly-

## 6.1 What-



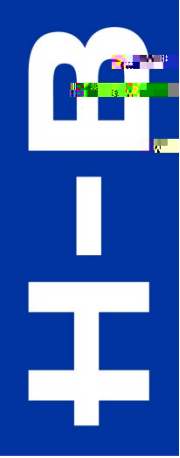


# Example

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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.

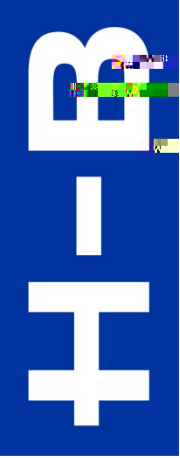


# Do civil rights laws protect religious liberty?

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- Title VII prohibits employment discrimination based on “religion”

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# What must an employer do to accommodate religious belief?

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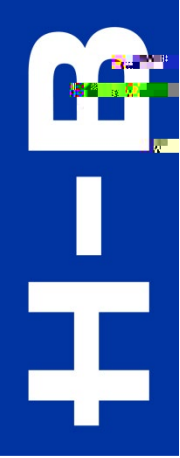
- Employer must accommodate employee's sincerely held religious beliefs that manifest in practices



# 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 a



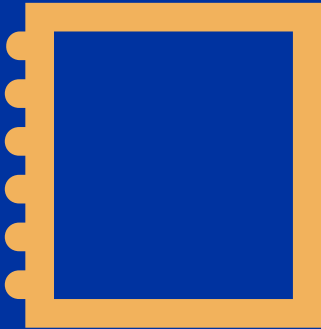
# What does it mean to create an undue hardship?

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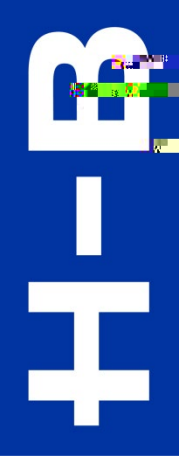
- The burden must be genuine and not speculative
- The burden must be more than *de minimus*. E.g.,
  - Costly
  - Compromises safety
  - Infringes rights of other employees
  -



# Example

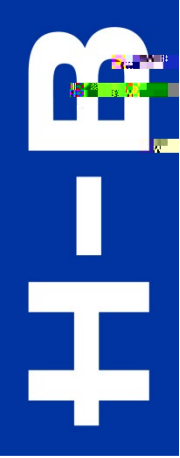


Teacher at K-12 school seeks a Title VII religious exemption from generally applicable rule that requires all teachers and staff to refer to students by preferred pronouns, including pronouns that are not traditionally associated with a given biological sex. Teacher wishes to use student's last names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



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# Example



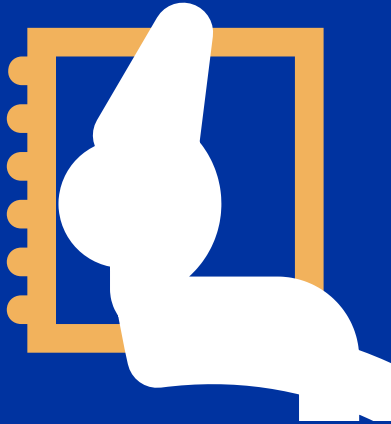
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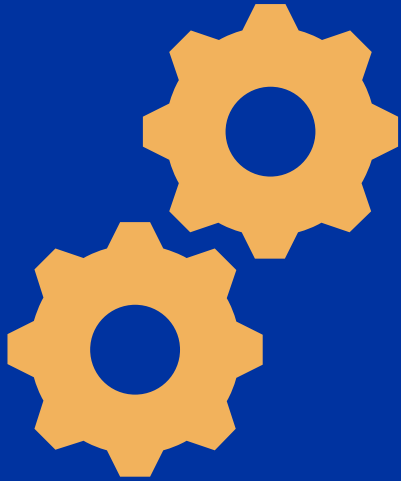
# Example

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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



**HUSCH**  
**RWALMBTAG**