

HUSCHBLACKWELL

Advanced Title IX Training

Title IX and the First Amendment

Fall 2023

Agenda

- First Amendment and Free Speech Basics
- The Intersection Between Title IX and the First Amendment
- Hostile Environment Harassment Predicated on Student Speech
- Faculty Conduct and Academic Freedom



First Amendment and Free Speech Basics

The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”



What is speech?

- Spoken words
- Written words
- Expressive imagery, movies, and other works of art
- Songs
- Clothing with messages
- Expressive performance
- Others?



Freedom of Association



- Right to associate with persons of like mind/perspective
- Complimentary right to speak collectively

Government Actors



- The First Amendment only restricts the actions of federal, state, and local governments
- State universities; municipal universities; community colleges; state-operated technical schools; K-12 public schools; etc.
- Private institutions are governed by their policies and contracts

Key Free Speech Concepts

- Hierarchy of speech
- Viewpoint discrimination
- Fora analysis
- The government's own speech
- Regulation of speech due to non-expressive qualities
- Unprotected categories





Hierarchy of Speech

- The most protected forms of speech include
 - Political speech
 - Religious speech
 - Speech on matters of public concern
- Speech on personal issues and petty grievances least protected

Example: Political Speech

Student at a public university
wears the campaign t-shirt of a
prominent candidate for president.



Example: Personal/Petty Grievance

Faculty member complains to department chair that color of beige in the hallway is too dark.



Viewpoint discrimination

- Targeting speech because of the viewpoint that is articulated
- Viewpoint discrimination rarely allowed under First Amendment



Student A wears t-shirt of conservative political candidate and Student B wears t-shirt of liberal political candidate. Dean of Students tells Student B that he cannot wear t-shirt because Dean of Students is a conservative and hates liberal candidates.

Example: Viewpoint Discrimination



Faculty member gives interview to national newspaper and states opinion that Title IX procedures are “kangaroo courts that rarely get it right.” Institution terminates faculty member because institution believes Title IX procedures are essential and reliable.

Example: Viewpoint Discrimination

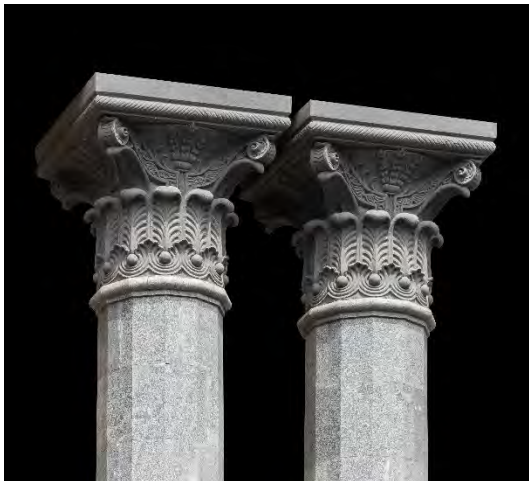


Institution allows student group that supports trans rights to pass out pamphlets on the quad. But when student group that opposes trans rights seeks to pass out pamphlets, the institution bans the group because it is “bigoted.”

Example: Viewpoint Discrimination



Fora Analysis



- Speech in certain “forums” is more protected than speech in other forums
- Hierarchy
 - Traditional public forum
 - Non-traditional public forum
 - Limited forum
 - Closed forum

Large sidewalk and steps in front of administration building have been used by speakers and pamphleteers since university's inception without the need for permits. The university's campus is open to the public and students and non-students alike have historically used the space.

Example: Traditional Public Forum



Institution erects a bulletin board in the student union that may be used for registered student groups to post flyers on upcoming events they are hosting.

Example: Limited Forum



Athletics department hosts a “dinner with the AD” event for student athletes to dine with the athletic director and share concerns about their experiences as student athletes.

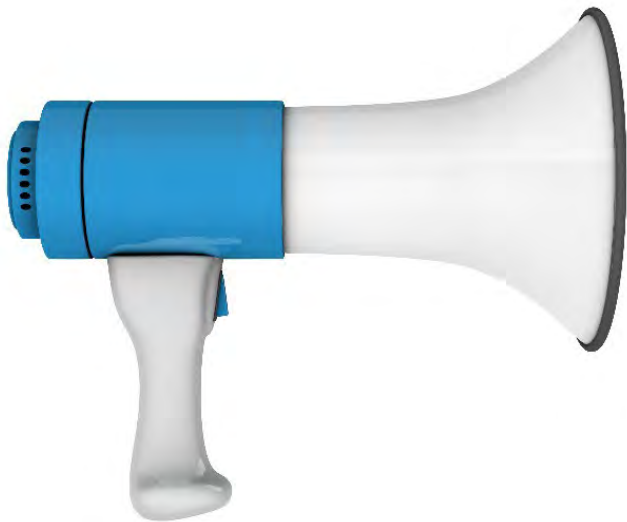
Example: Limited Forum



President's office is located behind a secure door and persons wishing to speak to the President must request and be granted an appointment to enter the office.

Example: Closed Forums





Government's Own Speech

- Government is allowed to speak its own viewpoints
- Government may heavily regulate speech of employees that is part of their duties

University issues a public statement supporting sexual assault awareness month and stating that “sexual violence has no place on our campus.”

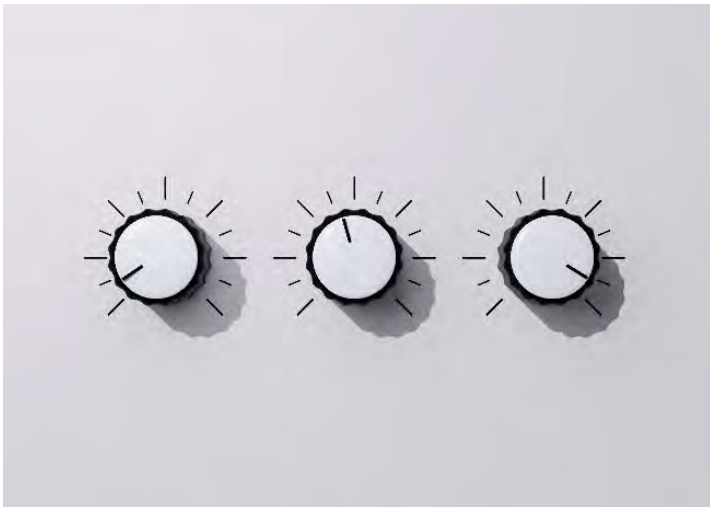
Example: Government Viewpoint



Title IX Coordinator has grown disaffected and instead of encouraging the reporting of sexual assault begins to tell victims only to report to police because “the university’s process sucks, and you will probably not like the outcome.” University can discipline Title IX Coordinator for her speech.

Example: Employee Speech Within Duties





Non-Expressive Qualities

- Expressive speech can be regulated based on its non-expressive qualities
- Reasonable time, place, and manner restrictions

Students supporting a certain political candidate rent a massive speaker system and blare their message loudly at the front of a residence hall at all hours of the day.

Example: Non-Expressive Quality



Student entirely covers the back window of their car with various bumper stickers asserting political and religious positions so that student cannot see out of the rear-view mirror.

Example: Non-Expressive Quality



Unprotected Speech



- Defamation, slander, libel
- “Fighting words”
- “True threats”
- Incitement
- False advertising
- Child pornography
- Obscenity*

Student A publicly accuses Student B of rape. In fact, Student B never had sexual intercourse and wasn't even in the same town with Student A on the night Student A claims the rape occurred.

Example: Defamation



Student A accuses Student B of “taking advantage” of Student A by pursuing Student A when Student A was “fresh off a breakup and looking for companionship.” Student B admits to pursuing Student A but disagrees that Student A was vulnerable.

Example: Not-Defamation



Faculty member walks into colleague's office, accuses colleague of having an affair with faculty member's wife, grab's colleague by the collar and says "I'm going to beat your ass. Let's go in the hallway right now."

Example: Fighting Words



Respondent gets into an argument with a witness in a Title IX case who supports complainant's account of sexual assault.

Respondent says: "If you show up and say that at the hearing, I'm going to kill you. I have a .45 in my car, I know how to use it, and I'll shoot you dead as soon as the hearing is over."

Example: True Threats



Hate Speech

- No general “hate speech” exception to the First Amendment
- First Amendment allows speech that is subjectively offensive, inappropriate, nasty, etc.



Bedrock Principle

“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar, or profane.”

Dambrot v. Central Michigan University (E.D. Mich. 1993)

Local religious group comes onto public areas of campus and pickets with signs that have various anti-gay and anti-trans messages, including signs that use vulgar epithets.

Example: No Hate Speech Exception



Fraternity hosts comedy night that includes an “ugly woman” skit where fraternity members dress as “ugly women” and parade across the stage to whoops and cheers.

Example: No Hate Speech Exception



Scenario



Central State University has a large quad where students and various groups, including outside groups, have always been allowed to speak and set up information tables. A student group named A New Tomorrow USA (ANTU) advocates for “traditional” values and frequently criticizes legal and policy efforts dealing with gender identity. One day, the group sets up a table on the quad and passes out pamphlets titled “Transgender Surgery is Mutilation.” Joining the group at the table is a prominent provocateur who posts strident videos on social media and gives on-campus lectures that frequently draw protests. Several passing students are offended by the group’s table and the presence of the provocateur. The students begin to gather around the table blocking the sidewalk. The students denounce the group as bigoted and shout some obscenities at the provocateur, who records the exchange on his cell phone for later use on social media. A passing faculty member grabs the group’s pamphlets and walks off with them, claiming the pamphlets violate the institution’s anti-discrimination policy. ANTU calls campus police to report the theft of its pamphlets. When police arrive, they direct ANTU to vacate the table or be charged with disorderly conduct.



Questions

The Intersection Between Title IX and the First Amendment

Nature of the Constitution



- Foundational document that defines the authority of the three branches of federal government
- Preserves certain power to the states
- Imposes express limits on the federal government (Bill of Rights)
- Imposes express limits on state governments (14th Amendment)

Nature of Federal Statutes

- Effectuate some legitimate exercise of Congressional power
- Within the boundaries set by the Constitution itself
- Title IX is enacted pursuant to the Spending Clause





Constitutional Supremacy

- Where the U.S. Constitution and federal statutes (like Title IX) are in conflict, the federal statute gives way
- Judicial review established in seminal case *Marbury v. Madison* (1803)

Title IX Codification of Constitutional Supremacy

Nothing in [the Title IX regulations] requires a recipient to:

- (1) Restrict any rights that would otherwise be protected from government action by the First Amendment to the U.S. Constitution;
- (2) Deprive any person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
- (3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

34 C.F.R. § 106.6(d)

Prior versions of Title IX guidance did not require and discouraged live cross examination of sexual assault complainants. Federal courts held that Due Process requires cross examination in certain cases where credibility is at issue.

Example: Constitutional Supremacy



Expression of “offensive” speech

“Free speech rights apply in the classroom (e.g., classroom lectures and discussions.... In addition, First Amendment rights apply to the speech of students and teachers... Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. [T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”

2003 Revised Sexual Harassment Guidance at 22 (emphasis added)

Example Harassment Policy

District's policy states:

Harassment can include any unwelcome verbal, written, or physical conduct which **offends, denigrates, or belittles an individual** because of [sex]. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.

Saxe v. State College Area School District

“The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”



Higher Education Act

“It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this chapter”

Title I, Section 112

Current Title IX Definition of Hostile Environment

Unwelcome conduct 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.





Constitutional Jurisdictional Limits

- Constitution generally limits a school's authority to sanction off-campus speech unless (perhaps) it has a disruptive effect on campus or otherwise in operations
- The fact that people are offended or upset about off-campus speech is probably insufficient to establish a disruptive effect
- Special rules may exist for students in certain professional schools that have adopted professional conduct codes (e.g., law; medicine; counseling; social work; nursing)

Student posts vulgar diatribe on social media attacking feminism and using various expletives to refer to women generally. The post is not directed at any particular person and does not reference the institution. The student made the post at home on a private computer network.

Example: Constitutional Limits



What is the scope of Title IX's jurisdictional reach?

- 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



Scenario

Xander files a formal Title IX complaint accusing Reed of sexual assault. Reed is a prominent student athlete. The student newspaper learns of the complaint and publishes a front-page article summarizing the allegations and advocating that Reed should be immediately dismissed from the team. After the article is published, Reed's attorney, who also is serving as Reed's advisor, sends a letter to the institution threatening to sue the institution for violating Title IX because "your own newspaper has prejudged the case, which indicates the Title IX process is not fair and equitable." Reed's attorney-advisor also sends a letter directly to Xander accusing Xander of defaming Reed through false accusations of sexual assault and demanding that Xander preserve all text messages and emails in anticipation of an eventual lawsuit filed by Reed. Xander, in turn, files a second complaint against both Reed and Reed's advisor accusing them of violating Title IX's prohibition on retaliation. A few days later, a local advocacy organization hires an aggressive attorney to serve as Xander's advisor. The attorney and Xander then hold a news conference on the steps of the student union in which Xander publicly accuses Reed of sexual assault.





Questions

Sexual Harassment Predicated on Student Speech

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro
quo
harass-
ment

Hostile
environment
harassment

Sexual
assault

Dating
violence

Domestic
violence

Stalking

What is hostile environment?

Unwelcome conduct 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.



Potentially Harassing Speech



- Joking
- Lewd comments
- Sexualized emails and social media exchanges
- Unwelcome display of imagery
- Defacing bulletin boards
- Persistent sexual/romantic pursuit
- False gossip and rumors
- Others?

Jane broke up with Jack. Jack repeatedly calls Jane the “C” word whenever he passes her in the hallway, tells loud jokes about Jane’s alleged promiscuity in the presence of others, and leaves sticky notes and memes on Jane’s door with crass statements about genitals.

Example: Hostile Environment



Jack has had several bad breakups in his life and creates a comedy routine he delivers at a fraternity “talent show” that includes jokes about women, refers to certain types of women as “B” words, and includes content (that may or may not be fictitious) about prior sexual experiences Jack has had but without naming his partners.

Example: Likely Protected Speech



Blaze is sexually attracted to Kelly. Blaze sends Kelly unsolicited texts and direct messages referencing various sex acts that Blaze would like to perform on Kelly. When Kelly says to stop, Blaze persists, and when Blaze passes Kelly in the hallway, Blaze rubs their own genitals in a sexual way.

Example: Hostile Environment



Blaze publishes an online blog that discusses Blaze's sexual preferences and describes in detail various sex acts and how to perform them. Many view the content of Blaze's blog as demeaning, overly sexualizing, and offensive.

Example: Likely Protected Speech



Zeke watches pornography on his laptop, including prior to class while waiting for the instructor to show up. Zeke's classmate Dale, who shows up early, has to watch the pornography, which includes extraordinarily graphic depictions. Dale is so troubled by the display that Dale cannot concentrate in class and sees his grade decline.

Example: Hostile Environment



Zeke works part time at an exotic dance club that is frequented by students. A student who saw Zeke dance nude at the club ends up having a class with Zeke and is uncomfortable in Zeke's presence and decides to drop the class because he cannot concentrate.

Example: Protected Speech



Examples of Factors that Matter in Distinguishing Harassing Speech from First Amendment Protected Speech

- Whether accompanied by conduct
- Whether effect is more than subjective offense
- Whether speech is targeted at specific persons
- Setting in which speech is made
- Whether the speech relates to a matter of public concern
- Whether the target of the speech is a public figure
- Whether the speaker is an employee or faculty member outside the context of academic freedom
- Whether the subject matter is personalized and petty
- Whether the speech constitutes an unprotected category



Pronouns and Names

- Failure to use chosen pronouns and names may be a form of harassment in certain instances
- But court decisions are mixed and the First Amendment disfavors compelled speech
- Law is likely to remain unsettled for some time

Cal is a transgender female who previously presented as male. Wade always calls Cal “Calvin”, despite Cal correcting him, and makes a point to call Cal “Dude” and “Bro” in front of others. Wade also refers to Cal with “he/him/his” pronouns, both when speaking to Cal and when speaking about Cal and does so in a mocking tone.

**Example:
Likely
Harassment**



Cal is a transgender female who previously presented as male. Wade is willing to refer to “Cal” as “Cal” instead of the prior name “Calvin” but is unwilling to refer to Cal with “she/her/hers” pronouns and so simply refers to “Cal” by name or uses the gender neutral “they/them/their.”

**Example:
Likely
Protected**



What is stalking?



- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress.

Scenario



Kayla is a transgender female who previously competed on the men's water polo team. After undergoing hormone therapy, Kayla began presenting as female and joined the women's water polo team. Several team members and their parents advocated to the coaches that Kayla be barred from the team, often referring to Kayla as a "man pretending to be a woman." Some of these team members made derogatory comments to Kayla based on Kayla's gender identity during practice, including calling Kayla a "pervert" and a "predator." After an incident in the locker room where Kayla's genitals were briefly exposed, two team members quit the team. These former team members then had t-shirts printed that read "Women's Water Polo is For Women." The former team members began wearing the shirts around campus and sold them to others. The former team members and supporters then began appearing in the stands at water polo competitions, wearing the t-shirts. Eventually, Kayla filed a Title IX sexual harassment complaint against the two former players, accusing them of creating a hostile environment based on their lobbying of the coach and athletic director, their derogatory comments, and their wearing and printing of the t-shirts.



Questions

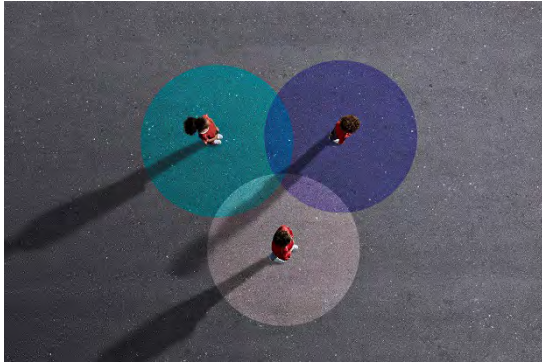
Faculty Conduct and Academic Freedom



WIKIPEDIA
The Free Encyclopedia

Academic Freedom

“Academic freedom is the belief that the freedom of inquiry by faculty members is essential to the mission of the academy as well as the principles of academia, and that scholars should have freedom to teach or communicate ideas or facts (including those that are inconvenient to external political groups or to authorities) without being targeted for repression, job loss, or imprisonment.”



Academic Freedom Protections

- Freedom in research and publication within field of competence
- Freedom in course design and course content within field of competence
- Freedom to set pedagogy and methods of instruction
- Freedom to speak publicly on matters of public concern without fear of reprisal

Sources of Academic Freedom



- First Amendment to the U.S. Constitution
- Contract Law (i.e., faculty handbooks and policies)

Gender studies professor publishes an article documenting misogyny practiced by founding board members of institution and argues that the institution—like higher education in general—is rooted in patriarchy.

Example: Freedom in Research



Faculty member who teaches modern American history devotes little time to the 20th Century suffrage movement and instead focuses on the civil rights movement and Cold War, which several female students view as underemphasizing the importance of the suffrage movement.

Example: Freedom in Course Design and Content



Faculty member who teaches modern American literature requires students to read novels that almost always depict women in domestic roles and include male protagonists. Women in the class believe the novels reinforce obsolete gender stereotypes.

Example: Freedom in Pedagogy and Instruction



Course Content

“[T]he Department [of Education] recognizes that sex stereotyping in textbooks and curricular materials is a serious matter. However, the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. There is no evidence in the legislative history that the proscription in Title IX against sex discrimination should be interpreted as requiring, prohibiting, or limiting the use of any such material.”

40 Fed. Reg. 24135 (1975)

Math instructor frequently places his hand on the shoulders and waists of female students when they ask him questions after class and also comments on their dress and whether they wear perfume.

Example: No Protection



Male physical therapy instructor believes it is essential to demonstrate certain techniques on the students so they can experience the patient perspective. Some students are uncomfortable being touched by any other person.

Example: Academic Freedom Applies



***Meriwether v. Hartop* (6th Cir. 2021)**

(1 of 3)

- Institution adopts mandatory chosen pronouns policy that applies to all employees
- Faculty member wishes to refer to transgender students by last name in class instead of chosen honorific or pronouns
- Or alternatively, to put a disclaimer in the syllabus indicating his use of preferred pronouns was under compulsion
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination

***Meriwether v. Hartop* (6th Cir. 2021)**

(2 of 3)

- 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].”

***Meriwether v. Hartop* (6th Cir. 2021)**

(3 of 3)

“Any teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously. That is especially so here because Meriwether’s choices touch on gender identity—a hotly contested matter of public concern that ‘often’ comes up during class discussion in Meriwether’s political philosophy course. . . . By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion.”

Scenario

Professor Stedman is a tenured faculty member. Stedman teaches “Crisis Comms 101.” Stedman’s course is structured around scenarios, including a scenario where the CEO of a company is publicly accused of committing a rape when he was in business school. Stedman’s scenario includes a fictitious social media post by the rape victim with graphic details. Stedman requires students to work in mixed-gender groups and to prepare a crisis communication plan. The groups must discuss how different factions in a communications audience might perceive the allegations. Stedman also requires students to hold a mock news conference, where randomly chosen students must field aggressive questions. Jane is a sexual assault victim, is distressed by the scenario, and asks to be assigned alternative work. Stedman denies the request saying, “you won’t have that option in the real world.” Jane is also randomly chosen to answer questions in the press conference. When Jane’s turn comes, she breaks down crying and leaves the room when a classmate asks whether “the victim should be believed after all this time has passed.” Stedman tells the class that Jane’s behavior is unprofessional and that you “have to put your personal history aside.” Stedman gives Jane an F on the exercise.





Questions