



## Sexual Harassment — for Misgendering?

A Wisconsin middle-schooler and two others have been accused of sexual harassment under Title IX for misgendering a classmate.

Braden Rabidoux, one of the students, was [charged](#) because he allegedly used the wrong pronoun when talking to a non-binary classmate. Rabidoux and the two other students were [berated](#) by the classmate for not respecting the person's preferred pronouns. Rabidoux claimed that he had a First Amendment right to refer to his classmate using whatever pronoun he preferred to use.



Elad Hakim

As a result, the three students were accused of sexual harassment under Title IX because they misgendered the student. As reported by [BizPacReview](#), Brad Ebert, the superintendent for the Kiel Area School District (which includes Rabidoux's middle school) issued the following statement:

The KASD prohibits all forms of bullying and harassment in accordance with all laws, including Title IX, and will continue to support ALL students regardless of race, color, religion, national origin, ancestry, creed, pregnancy, marital status, parental status, sexual orientation, sex (including transgender status, change of sex or gender identity), or physical, mental, emotional or learning disability ("Protected Classes") in any of its student programs and activities; this is consistent with school board policy. We do not comment on any student matters.

In essence, the school appears to be arguing that any use of the wrong pronoun constitutes sexual harassment under Title IX. Such an interpretation would clearly raise serious First Amendment concerns.

According to [Luke Berg](#), deputy counsel for the Wisconsin Institute for Law and Liberty, the charges are a "gross misapplication of Title IX sexual harassment charges." [Berg](#) added that "sexual harassment covers really egregious stuff, not simply using the so-called wrong pronoun." In a May 12 [letter](#) to the school superintendent, counselor, and principal, the Wisconsin Institute for Law and Liberty stated:

The mere use of biologically correct pronouns not only does not constitute sexual harassment under Title IX or the District's own policy, it is also speech protected by the First Amendment.

The District has also violated Title IX procedures and its own policy in its handling of the complaint. The District should promptly end the investigation, dismiss the complaints, and remove them from each of the boys' records.

"Mispronouncing" is also not sexual harassment under Title IX because gender identity is not included within the definition of sex within Title IX. In fact, the Department of Education is



Written by [Elad Hakim](#) on May 19, 2022

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currently attempting to amend Title IX to add it.

Presently, gender identity is not specifically included under Title IX. However, some have applied it to Title IX in light of the Supreme Court's opinion in [Bostock v. Clayton County, Georgia](#), where the Supreme Court ruled that the term "sex" includes a person's "gender identity" in cases of discrimination pursuant to Title VII. However, the [high court](#) specifically indicated that the ruling was limited to Title VII, noting:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."

Notwithstanding this language, and in light of the opinion, on January 20, 2021, Joe Biden issued an [executive order](#) in which, in essence, he threatened to "take federal education funds away from any state that refuses to allow transgender athletes to compete in whatever category they feel like choosing." On June 16, 2021, the Department of Education also [announced](#) that transgender students are protected under Title IX. Again, the decision was based on the court's decision in *Bostock* and the broad definition of "sex." The Department of Education is in the process of [rewriting](#) Title IX to "codify the rights of trans students." This will create a legal battle between the states and the federal government.

Due to the school's decision, Rabidoux has been worried, upset, and very concerned about his future. As reported by the [Daily Mail](#), Rabidoux stated, "I was anxious and scared and upset because I didn't know what was going to happen. But mostly anxious for my present self and my future self because a charge like that on my record could shatter my chances at getting into a college when I grow up."

No child should have to go through this. Rabidoux was exercising his rights under the First Amendment. Moreover, and as noted in the [letter](#) to the school district, his conduct did not amount to the sort of "severe, pervasive, and objectively offensive" conduct that crosses the line into sexual harassment.



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