

January 24, 2024

POLICY MEMORANDUM: ELIMINATING COMPELLED PRONOUN POLICIES IN SCHOOLS

In recent years, school trustees, administrators, and teachers have increasingly found themselves thrust into the middle of an ideological battle over new theories of gender identity.

One major flashpoint in this cultural struggle revolves around the use of preferred pronouns in school settings. As one federal appeals court has observed, school pronoun policies represent the “struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.”¹

Against this backdrop, more and more teachers who conscientiously object to using preferred pronouns are getting ensnared in the trap of school pronoun policies. In some states, educators have faced discipline for their insistence on using biologically accurate pronouns. And even in school districts with no written compelled pronoun policy, some educators feel pressure from administrators, parents, and students to use preferred pronouns—and these teachers rightly fear what might happen if they continue disregarding such demands.

Recognizing the threat posed by compelled pronoun

KEY POINTS:

- *Compelled preferred pronoun policies force educators to choose between acting on their sincerely held beliefs or betraying their convictions to keep their jobs*
- *At least six states have enacted laws protecting teachers from legal and professional consequences for using biologically accurate pronouns*
- *These statutory protections are consistent with constitutional rights like freedom of speech and religious liberty, as well as federal laws like Title IX*

policies to fundamental constitutional rights like freedom of speech and religious liberty, some state legislatures enacted laws in 2023 that protect educators from professional or legal consequences for using biologically accurate pronouns:

- Arkansas lawmakers passed House Bill 1468, which protects teachers from adverse employment actions for declining to use a person’s preferred pronouns;

- Florida lawmakers passed House Bill 1069, which declares that “it is false to ascribe to a person a pronoun that does not correspond to [biological sex],” protects school employees and students from discipline for declining to use preferred pronouns, and bars teachers from sharing their own preferred pronouns with students or asking students to reveal their preferred pronouns;
- Kentucky lawmakers passed Senate Bill 150, which bars the Kentucky Board of Education, the Kentucky Department of Education, and public school districts from adopting policies that require teachers or students to use preferred pronouns;
- Montana lawmakers passed Senate Bill 518, which protects school employees that use biologically accurate pronouns for students;
- North Dakota lawmakers passed House Bill 1522, which prohibits public schools from adopting a policy that “requires or prohibits” the use of preferred pronouns;
- Tennessee lawmakers passed Senate Bill 466, which prohibits public schools from requiring teachers to use preferred pronouns, and grants teachers immunity from civil liability that might arise as a result of using biological accurate pronouns.

Considering the increasing pressures that educators face when it comes to using preferred pronouns, Idaho lawmakers should take notice and follow the lead of these other states by enacting protections here in the Gem State.

LEGAL ANALYSIS

In what follows, this memorandum will explain why protecting school employees from professional and legal discipline for using biologically accurate pronouns is not only good policy, but also constitutionally defensible and legally sound.

FREE SPEECH. The Free Speech Clause of the First Amendment to the U.S. Constitution protects “both the right to speak freely and the right to refrain from speaking at all.”² Under this principle, the U.S. Supreme Court has declared that the Free Speech Clause prevents government officials from “compel[ing] a person to speak its own preferred messages.”³ In some ways, coerced speech is worse than coerced silence; as the Supreme Court has recognized, “forcing free and independent individuals to endorse ideas they find objectionable is always demeaning” and all the more concerning.⁴

These constitutional protections extend to teachers in the classroom, who do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵ With few exceptions,

1. Meriwether v. Hartop, 992 F.3d 492, 508 (6th Cir. 2021).

2. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

Importantly, this remains true even when speech communicates messages that cause personal offense, insult, or sadness. After all, “[i]n an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because one finds it offensive, insulting, or even wounding.” Texas v. Johnson, 491 U.S. 397, 414 (1989).

3. 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023).

4. Janus v. American Federation of State, County, & Municipal Employees Council, 138 S. Ct. 2448, 2464 (2018).

5. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

government officials may not force teachers to communicate messages with which they disagree.

Historically, pronouns were used to identify the biological sex of the subject being discussed. Still today, a speaker communicates a message about how he understands human nature when he chooses which pronouns to use. When a speaker uses biologically accurate pronouns, he communicates his belief that gender is objectively rooted in biological sex. Alternatively, using preferred pronouns conveys the belief that gender is simply an expression of a person's subjective feelings and desires.

Put simply, forcing speakers to use preferred pronouns violates the protections of the First Amendment by requiring them to communicate messages that may violate their sincerely held beliefs—and this applies to teachers in the classroom as well.⁶ For example, the U.S. Court of Appeals for the Sixth Circuit held that Shawnee State University violated the free speech rights of a professor when it disciplined him for refusing to refer to a biologically male student as a woman.⁷

The Shawnee case underscores the constitutional problems with compelled pronoun policies at schools and universities. Teachers who use biologically accurate pronouns deserve protection from adverse employment action—and these

protections are both justified and necessary under the Free Speech Clause of the First Amendment.

FREE EXERCISE OF RELIGION. In addition to safeguarding freedom of speech, the First Amendment to the U.S. Constitution also “provid[es] broad protection for the free exercise of religion except where public ‘peace’ or ‘safety’ would be endangered.”⁸

People of many faiths – including Christians who hold to biblical teaching on sexuality and gender – believe that God has created each person with an immutable biological sex of either male or female. Furthermore, they believe that affirming gender identities inconsistent with biological sex is not only harmful to the gender-confused individuals, but is also a rejection of God’s plan.

When biblically minded teachers are subjected to compelled pronoun policies, they often must choose between adherence to their sincerely held beliefs or adverse employment action. In light of this dilemma, forcing a public school teacher to speak that which violates their conscience in order to keep a job violates the spirit of the Free Exercise Clause, which “protects not only the right to harbor religious beliefs” but also the “ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance (or abstention from) physical acts.”⁹

6. “Compelling an educator’s ‘speech or silence’ on such a divisive issue [that is, ‘gender-identity-based pronouns’] would cast ‘a pall of orthodoxy over the classroom’ on a topic that has ‘produced a passionate political and social debate.’” Vlaming v. West Point School Board, 895 S.E.2d 705, 740 (Va. 2023) (citations omitted).

7. Meriwether v. Hartop, 992 F.3d 492, (6th Cir. 2021).

8. Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. ___ (2021) (Alito, S.A., concurring) (slip op., at 36).

9. Kennedy v. Bremerton School District, 597 U.S. 507, 524, (2022) (citation omitted).

Moreover, Idahoans enjoy the constitutional protections for religious liberty afforded by both the U.S. Constitution and the Idaho Constitution.¹⁰ And like some other state constitutions, the Idaho Constitution's guarantee of religious freedom offers even greater protection than the Free Exercise Clause in the U.S. Constitution in that it bars government officials from "den[ying] any civil or political right, privilege, or capacity on account of [a person's] religious opinions."¹¹ Importantly, this provision would likely be interpreted by the Idaho Supreme Court to protect teachers from adverse employment action for using biologically accurate pronouns. Notably, the Supreme Court of Virginia held that a similar provision in that state's constitution prevented school officials from "diminish[ing]" a high school teacher's "'civil capacity' as a tenured employee" for declining to use preferred pronouns because of his religious beliefs.¹²

No teacher should fear that their religious beliefs may cost them their job. Statutory protections for teachers who use biologically accurate pronouns would provide real-world application to the religious freedom protections found in both the U.S. and Idaho constitutions.

TITLE IX. Enacted by the U.S. Congress in 1972, Title IX is the federal law that requires equal opportunities in education for girls and women.

According to some schools, Title IX's prohibition on sex-based discrimination actually mandates compelled pronoun policies and demands observance of such policies by school employees. However, this radical interpretation flies in the face of both the statutory text of Title IX and its implementing regulations. For sex-based harassment to be actionable under the provisions of Title IX, the harassment must be so "severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."¹³ In light of this, the U.S. Court of Appeals for the Sixth Circuit denied that a college professor's unwillingness to use a student's preferred pronouns violated the requirements of Title IX. According to the court, "there is no indication" that the professor's speech and behavior was "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity."¹⁴ For this reason, using biologically accurate pronouns when referring to students simply does not entail the type of discrimination that is prohibited under Title IX.

Furthermore, the term 'sex' in Title IX was always intended and interpreted to mean biological sex, not gender identity. According to the U.S. Court of Appeals for the Eleventh Circuit, "[r]eputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in

10. "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." Arizona v. Evans, 514 U.S. 1, 8 (1995).

11. Idaho Const. art. I, § 4.

12. Vlaming v. W. Point School Board, 895 S.E.2d 705, 754 (Va. 2023).

13. Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

14. Meriwether v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021).

15. Adams v. School Board of St. Johns County, 57 F.4th 791, 812 (11th Cir. 2022)

education, it meant biological sex, i.e., discrimination between males and females.”¹⁵ It is therefore clear that Congress intended Title IX to uphold the binary classification of sex and gender—and under Title IX, biological males can be addressed as men, and biological females can be addressed as women.

CONCLUSION

In summary, there are both strong constitutional and legal justifications for laws protecting school employees who use biologically accurate pronouns

in classroom settings. These laws, already in effect in at least six other states, provide assurance that educators will not be compelled to compromise their convictions as a condition of employment. There is also much public support for these protections, with more than 62% of likely Idaho voters supporting this type of legislation.

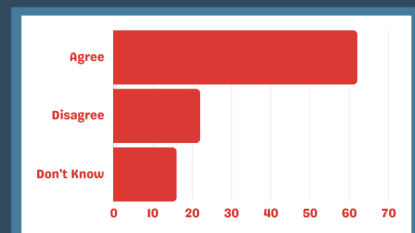
Considering the stakes, it’s crucial that Idaho lawmakers act quickly to establish similar protections for teachers here in the Gem State.

62%



believe Idaho law should protect public school teachers who use biologically accurate pronouns to refer to students

411 likely Idaho voters | Margin of error +/- 4.8%
IVR phone survey conducted from November 14-21, 2023



ABOUT IDAHO FAMILY POLICY CENTER

Idaho Family Policy Center is a ministry that advances the lordship of Christ in the public square through engaging the church, promoting God-honoring public policy, and training statesmen.

As the premier conservative Christian policy research and educational organization in the state, IFPC is working to promote biblically sound public policy that protects the sanctity of life, safeguards religious freedom, strengthens parental rights, recognizes biblical truths in sexuality and gender, and stimulates economic opportunity.

Only the gospel can transform the culture, but the Great Commission involves a cultural mandate to prophetically point people back to God's good design by teaching the nations to obey everything Jesus has commanded. IFPC engages the church, discipling Christians in biblical worldview so that they can stand winsomely for truth and make a positive impact for God's kingdom in their communities.

A member of the nationwide family policy council movement, IFPC works closely with an alliance of pro-family groups in other states, as well as national groups including Family Research Council, Focus on the Family, Family Policy Alliance, and Alliance Defending Freedom.



1116 S. Vista Ave, Suite 227, Boise, ID 83705

208.260.5844 | info@idahofamily.org

— www.IdahoFamily.org —