



BOISE STATE UNIVERSITY

Idaho Code §§ 33-138 and 33-139 FAQs
Boise State University
Updated 8-19-21

Our faculty are at the core of our university mission. This FAQ document has been prepared to support our faculty members by addressing questions they may have related to the new law passed last spring (formerly House Bill 377, now Idaho Code §§ 33-138 and 33-139). We know that, for many people, guidance feels especially vital in this challenging and contentious time, and several faculty asked us specifically for direction.¹ We hope faculty will find this document to be useful. We know that our faculty are committed to supporting their students and have taught in good faith, bringing their considerable knowledge and skill to the support of student learning across our curriculum. In order for this good work to continue and as we navigate the current context, it is important that we ensure academic freedom for both our faculty and students.

We have clear guidance in the Idaho State Constitution, which protects the right of “Every person [to] freely speak, write and publish on all subjects, being responsible for the abuse of that liberty” and Idaho State Board of Education Policy III.B. and Boise State Policies 1100 and 2020, which encourage the honest and open discussion of issues. As a university, we are committed to these principles.

As always, it is important to encourage students to express their viewpoints and make it clear that you support their right of free expression. Faculty should make that encouragement clear - through the syllabus, through their pedagogy, and through the class culture.

If you have a question about any of the FAQs or the responses, please don't hesitate to submit feedback/questions to the Office of the Provost, who will consult with the Office of General Counsel and other experts on campus to add to the document or clarify questions and responses.

Can I teach critical race theory?

Idaho Code § 33-138 does not prohibit teaching students about any particular content, including critical race theory, so you may. In fact, the bill's sponsor noted in her presentation of the bill, "You will notice this bill does not prohibit teaching any particular content. From the Civil War to the Holocaust to

¹ It may be helpful to note that, unlike First Amendment law, there is not yet court interpretation of this law that can be used to understand the law's implications.

the French Revolution to sexism, racism, Communism, or any other ‘ism.’” The law is narrowly focused on three tenets the legislature attributes to the theory, and prohibits directing, or otherwise compelling students to personally affirm, adopt or adhere to any of those three tenets. Since we teach students how to think critically, and do not tell students what to think, avoiding violations or even alleged violations of this law should be readily attainable.

What is prohibited under HB 377 (now Idaho Code § 33-138)? The prohibitions under § 33-138 are twofold, and drafted narrowly.

- The first provision prohibits the University from directing or otherwise compelling students to personally affirm, adopt, or adhere to the following “tenets,” as defined by the Legislature:
 - **Tenet 1** (comparisons/judgments): that any sex, race, ethnicity, religion, color, or national origin is “inherently superior or inferior”
 - **Tenet 2** (adverse treatment): that individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin.
 - **Tenet 3** (past bad acts): that individuals are “inherently responsible” for the actions committed in the past by members of their same sex, race, ethnicity, religion, color, or national origin
- The second prohibition bars the University from:
 - making distinction or classification of students on account of race or color
 - This means that students should not be divided up or distinguished from one another based on race or color in course work, discussions, or assignments.

Can I ask students to identify their sex, race, ethnicity, religion, color, or national origin?

Yes. The law does not prohibit you from asking students to state an identity. As with any other elements of a well-designed assignment or activity, the inclusion of identity categories should be purposeful and relevant to the learning experience. Keep in mind that the relevance and importance of different identities of a person will vary by student and perhaps also the privacy or sensitivity of their own identities.

Can I teach about sexism, feminism, and patriarchy?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that males or females are inherently superior or inferior, the proposition that males or females should be adversely treated on the basis of their sex, or the theory that males or females are inherently responsible for the actions committed in the past by members of their same sex.

Can I teach about racism, including systemic, institutional, and/or structural racism?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any race is inherently superior or inferior, the proposition that any race should be adversely

treated on the basis of their race, or the theory that members of any race are inherently responsible for the actions committed in the past by members of their same race.

Can I teach about the history of religious discrimination in the U.S.?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any religion is inherently superior or inferior, the proposition that a person of any religion should be adversely treated on the basis of their religion, or the theory that members of any religion are inherently responsible for the actions committed in the past by members of their same religion.

Can I teach about immigration policy?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any national origin is inherently superior or inferior, the proposition that a person of any national origin should be adversely treated on the basis of their national origin, or the theory that members of any national origin are inherently responsible for the actions committed in the past by members of their same national origin.

Can I teach about inequality?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any that any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior, the proposition that any individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin, or the theory that individuals are inherently responsible for the actions committed in the past by members of their same sex, race, ethnicity, religion, color, or national origin.

Can I teach about diversity?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any that any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior, the proposition that any individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin, or the theory that individuals are inherently responsible for the actions committed in the past by members of their same sex, race, ethnicity, religion, color, or national origin.

Can I teach about inclusivity?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any that any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior, the proposition that any individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin, or the theory that individuals are inherently responsible for the actions committed in the past by members of their same sex, race, ethnicity, religion, color, or national origin.

Can I teach about privilege?

Yes. You can assign reading materials, ask students to demonstrate their understanding, and test their understanding. You can provide scholarly evidence which supports the idea that some individuals experience privileges based on particular aspects of their identity. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any that any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior, the proposition that any individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin, or the theory that individuals are inherently responsible for the actions committed in the past by members of their same sex, race, ethnicity, religion, color, or national origin.

Can students examine and explore the idea of privilege (their own or others')?

Yes. Students can explore, examine, and reflect on their identity and on the idea that aspects of their identity may grant them more or less privilege based on the culture and systems in which we live. For example, after asking students to consider aspects of their identity, questions such as the following would very likely be allowed by the law:

- With which descriptors do you identify most strongly? Why is that?
- Describe a time when one of the elements of your identity may have worked to your advantage, either in your educational experience or in other areas of your life.
- Describe a time when one of the elements of your identity appeared to hold you back, either in your educational experience or in other areas of your life.
- Talk about a time your identity heightened or diminished your awareness of an inequity.

It is possible that students could respond to these questions with “this has never happened to me.”

Likewise, students can be asked to analyze a situation (data, a case study, or their own experience) in light of a framework or theory that uses ideas about oppression, privilege, and marginalization to explain observed inequities. The course should support students to learn how to conduct such an analysis, and students should be assessed based on the effectiveness of their analysis. Our focus should be on teaching students *how* to think, rather than *what* to think. In other words, students should demonstrate an understanding of the course material to be successful in the course, but must reach their own conclusions about whether and how they will apply that material outside of the context of any coursework.

Can I use assignments or prompts that require students to acknowledge their privilege?

No. Requiring students to acknowledge their privilege as it relates to one of the categories described in the new law is prohibited. Requiring or asking a student to acknowledge their privilege would likely be construed to be equivalent to a student being directed or compelled to personally affirm, adopt, or adhere to the belief that any that a particular sex, race, ethnicity, religion, color, or national origin is

inherently superior or inferior. Faculty are free to engage students in questions around this issue, which may be useful and powerful for both students and faculty. For example, engaging in a meta-analysis of how people define or articulate the concept of “privilege,” and with what cultural assumptions that can be freighted, could be a useful exercise.

Can I teach about oppression?

Yes. However, you may not direct or compel students to personally affirm, adopt, or adhere to the belief that any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior, the proposition that any individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin, or the theory that individuals are inherently responsible for the actions committed in the past by members of their same sex, race, ethnicity, religion, color, or national origin.

For coursework or an assignment, can I divide my class by students that identify as white and students that identify as non-white?

No, classifying students on this basis, or similar bases, would violate the law.

What can I do about a student’s own beliefs, expressed as part of the class, that one sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior?

In this scenario, *you* haven’t compelled the statement, and the student is merely expressing their viewpoint, so as long as you aren’t directing or compelling the statement, there would be no violation of law.

In addition, according to Boise State Policy 3240 - Maintaining Effective Learning Environments, “Instructors have the professional responsibility and authority to maintain effective Learning Environments.” If a student engages in any behavior(s) so pervasive or persistent, or a single egregious offense that materially and substantially interferes with the Learning Environment this policy may be applicable. If a student violates classroom agreements that have been established to respect the humanity of others (for example, if a student states “All [*fill in the group*] are lazy” or “[*fill in the group*] are ruining this country” and repeats the statement again after being asked to adhere to the course agreements of respecting the humanity of others), then a consequence of that behavior could be that the student may be dismissed from class. Follow-up should follow the guidelines in [Policy 3240](#).

If I can teach critical race theory and the data underlying the theory, can I then test the student to see whether they understand the material, without fear of some later claim that the test question itself or the assignment is compelling their belief?

You can certainly test students on the material that you teach. Attention should be paid, however, to the nature of the questions in order to avoid later claims that testing itself -or even assignments- required some affirmation of a particular belief prohibited by the law.

What if a student feels “uncomfortable” talking about their views on these subjects?

The law cannot, and does not, protect against discomfort in the learning environment. Some of the topics in the courses taught will make students uncomfortable regardless of their beliefs or feelings on a particular subject.

Faculty members should encourage students to express their viewpoints and make it clear that you support their right of free expression. Again, make that clear through the syllabus, through the pedagogy, and through the class culture.²

What if a student disrupts the class setting during conversations about these subjects?

Boise State [Policy 3240](#), Maintaining Effective Classroom Environments, states that “Instructors have the professional responsibility and authority to maintain effective Learning Environments” free from material and substantial disruption associated with student behaviors.

If a student engages in any behavior(s) so pervasive or persistent, or a single egregious offense that substantially interferes with the Learning Environment this policy may be applicable. For example, if a student violates classroom agreements that have been established for this purpose (for example, if a student states “All [fill in the group] are criminals” or “[Fill in the group] can’t be as good at school because they don’t value education” and repeats the statement again after being asked to adhere to the course agreements of respecting the humanity of others), then a consequence of that behavior can result, under the Policy, in a dismissal of the student. Follow-up should follow the guidelines in Policy 3240.

What if a disruption follows something a student has said? The courts have established a high bar for abridging free speech and free expression and the university is fully committed to the free expression of ideas for all our students. If a student offers an opinion or makes a statement that is repugnant or disagreeable generally, and a classroom disruption follows (e.g, students shouting at each other), the student making the original statement is not necessarily responsible for the disruption which follows the otherwise protected speech.

² The First Amendment to the US Constitution, State Board of Education Policy, and Boise State policy protect unpopular, offensive, and even repugnant speech. “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.” Texas v. Johnson, 491 U.S. 397, 404 (1989).

Any disruptive situation will require your professional assessment and pedagogical skill to respond in a way that works to preserve the learning environment for your students, embraces academic freedom and free speech, and respects the humanity of each student in the course. Additional support for responding to challenging moments or having difficult discussions in class is available by contacting staff in the BUILD Program or the Center for Teaching and Learning. Finally, faculty are encouraged to find the “learning moments” that often emerge out of disruption by inviting students to revisit and reflect on what made a conflict difficult and to work together to identify ways to recommit to a positively engaged learning environment for all students.

Can I use course materials that espouse a particular point of view? Instructors can choose to include material that is purposefully provocative and/or challenging, as well as material that advances a particular point of view. It is important that instructors frame their assignments about this kind of course material intentionally to make clear what students should do with it (e.g., compare and contrast? reflect?).

Faculty should be aware that there is potential for an argument to be advanced that the university is, at least impliedly, requiring students to adopt or adhere to one of the prohibited tenets based on encountering these ideas in course materials. Again, framing is essential to help students understand the purpose of their encountering these ideas. For example, asking students to “provide examples from the reading of the ways that demonstrate the ways in which our educational system advantages some and disadvantages others” is distinct from affirmation. Importantly, instructors are advised to avoid requiring students to respond to a test question or assignment prompt in such a way that appears to require that a student personally affirm their agreement with the viewpoint of the course material, if the course material involves one or more of the three “tenets.”

What will the University do to protect me if a complaint is made about me based on the course and the classroom conversation or an assignment?

In the event a claim is actually filed, defense of the case, and the University’s employee, would be undertaken, assuming a “course and scope of employment” analysis indicates that the instructor was acting within the bounds of the law, was lawfully performing their duties, and was acting without malice or criminal intent. Thus, employees acting in the “course and scope” of employment, *i.e.* teaching a class or any other activity they are expected to engage in as part of their job duties, are entitled to a defense if any claim is asserted against them.

It is also likely that the University would be bound to investigate a complaint alleging violation of a state law. While the individual circumstances surrounding a complaint (including the nature of the allegations, who they are received from and who they are alleged against) would dictate the office responsible for investigation, the Office of Institutional Compliance is primarily responsible for

investigating an allegation that a University employee violated state law. The due process protections afforded those complainants and respondents are those same due process protections afforded to all public employees and would involve notice to the employee and an opportunity to be heard.