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Proposed Title IX Regulations Coming to a School Near You Soon

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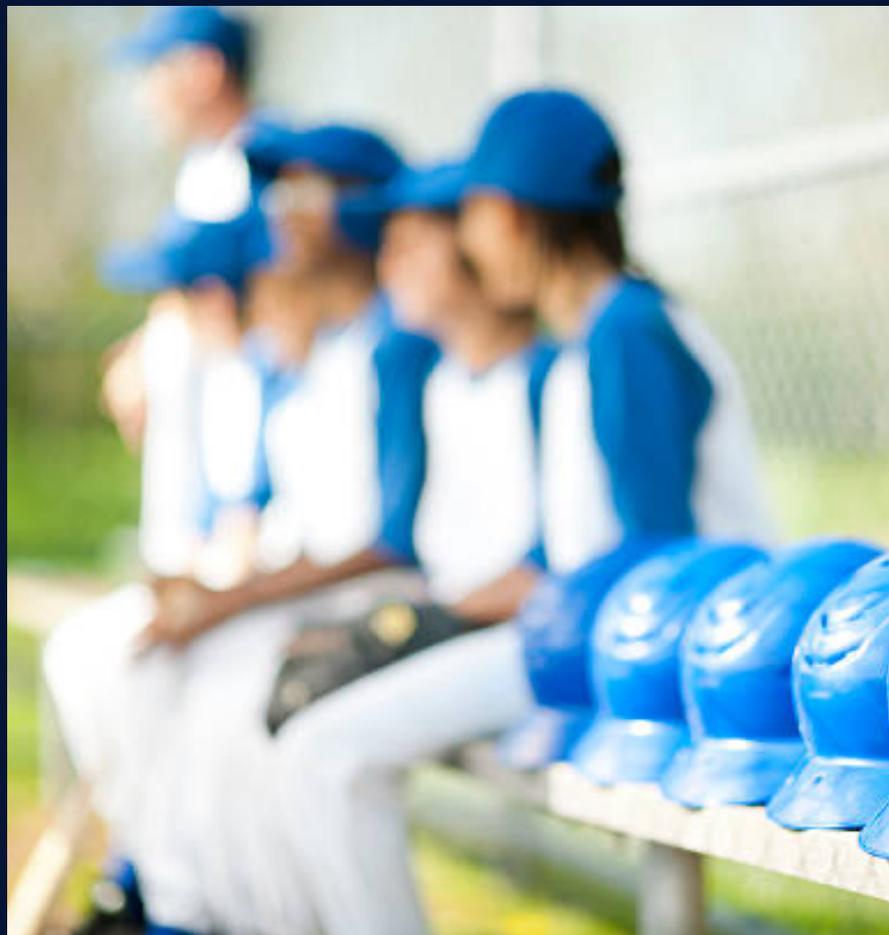


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About WILL

- WILL is a non-profit law and policy center in Milwaukee.
- Through education, litigation and participation in public discourse, we work to advance limited government, free speech, transparency, and education reform.
- We provide timely and comprehensive policy research to advance education reform, election reform, economic freedom, and policies to advance limited government.
- Craft model legislation and advocate for bills in the state capitol.

Title IX Overview



Title IX prohibits discrimination on the basis of sex.

20 U.S.C. 1681–1688

This has historically been interpreted to mean either male or female.

Title IX applies when a recipient participates in any education program or activity that receives federal financial assistance.

U.S. Supreme Court Decision – *Bostock*

In June 2020, the U.S. Supreme Court issued a decision in *Bostock v. Clayton County*.

The Court determined that Title VII, pertaining to employment discrimination, could be interpreted to protect an individual against sex discrimination, including on the basis of gender identity and sexual orientation.

What has changed under the Biden Administration?

Following the *Bostock* decision, President Biden issued an Executive Order directing federal agencies to interpret *Bostock* to apply to any similar federal laws that prohibit sex discrimination.

Following this order, the U.S. Department of Education began the process of issuing new regulations.

Proposed Title IX Regulations



Non-Athletics

- Redefine sex discrimination to include discrimination on the basis of gender identity
- Change due process rights

Athletics

- Limit schools' discretion to limit athletics participation based on students' biological sex

Status of Proposed Regulations

Proposed regulations do not have the force of law.

The Department of Education is in the process of reviewing hundreds of thousands of public comments.

A final rule is expected to be released this fall.

Once the rules are final, expect to see litigation.

Discrimination on the Basis of Sex

Changes are expected to include expanding the definition of discrimination on the basis of sex to include discrimination on the basis of sex stereotypes, pregnancy, sexual orientation and gender identity.

Title IX explicitly allows for sex discrimination in some contexts such as father-son and mother-daughter activities.

Title IX regulations also allow for sex discrimination in contexts such as housing, bathrooms and locker rooms.

Bathrooms and Locker Rooms

Current Rule

“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”

34 C.F.R. 106.33

Anticipated Change

Must allow bathroom and locker room use based on gender identity

No guidance about how schools are supposed to determine gender identity

Due Process Changes Expected

Change in evidentiary standard for proving sexual harassment

Revocation of current requirement that accused students must be offered an opportunity to cross-examine witnesses against them

Allow a single person to both investigate and adjudicate complaints

Abandon the definition of harassment which closely mirrors current U.S. Supreme Court case law

Pronouns

Current litigation is related to parental notification and consent.

The proposed rule does not directly address what schools should do if parents disagree about the name and pronouns a child wants to use while in school.

If the rule is interpreted to mean that students must use one another's preferred pronouns, there will be First Amendment compelled speech implications.



Litigation Around Bathrooms

- Rule: Schools “may provide separate toilet, locker room, and shower facilities on the basis of sex.” 34 C.F.R. 106.33
- Whitaker v. Kenosha Sch. Dist., 858 F.3d 1034(7th Cir. 2017)
 - “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”
- Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020)
 - “[I]n applying bathroom policies to students like Grimm, the Board may [not] rely on its own discriminatory notions of what ‘sex’ means.”
- Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022)
 - “In sum, commensurate with the plain and ordinary meaning of “sex” in 1972, Title IX allows schools to provide separate bathrooms on the basis of biological sex.”

Current Athletics Rule

Schools “may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 C.F.R. 106.41(b)



New Rule

(2) If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

(i) Be substantially related to the achievement of an important educational objective; and

(ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

What Counts as an “important educational objective”?

Yes:

- Fairness in competition
- Prevention of sports related injury

No:

- Communicating disapproval of a students’ gender identity
- Excluding transgender students from all sports
- Pretext for singling out transgender students for harm or disapproval
- Requiring conformity to sex stereotypes
- **Administrative convenience**

What is “substantially related”?

- Must consider each “sport, level of competition, grade or education level.”
- The Department says schools cannot limit sports based on biological sex:
 - Categorically – no overarching rules
 - For elementary or middle school sports
 - For “low-competition” sports, i.e. intramural, J.V., no-cut teams, etc.
- No “generalizations”
- If any other means, will assume pretext

Harm Minimization Requirement

- What harms?
 - Documentation of biological sex
 - Having to play on team with biological sex
- How to minimize? No guidance
- Could swallow the rule

Questions and Discussion



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