

Status Update on Title IX Proposed Regulation by the U.S. Department of Education

September 23, 2022

Title IX of the Civil Rights Act of 1972, which prohibits discrimination on the basis of sex, applies when a recipient participates in a program or activity that receives federal financial assistance. Under the Biden Administration, the U.S. Department of Education proposed new regulations that would negatively impact women and girls, undermine parental rights, and have a chilling effect on speech, including speech related to religious freedom and academic freedom. To date, the proposed rule has not taken effect.

Leading up to the proposed regulations, the United States Supreme Court in June 2020 issued a decision in *Bostock v. Clayton County*. Importantly, that case concerned Title VII, pertaining to employment discrimination, not Title IX. In its interpretation of Title VII, the Supreme Court found that protecting an individual against sex discrimination includes gender identity and sexual orientation. 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 Department of Education began the process of issuing new regulations.

The Department of Education issued its [proposed regulations](#) on June 23, 2022. Notably, the Department proposes that discrimination on the basis of sex be expanded to include discrimination on the basis of characteristics such as gender identity, sex stereotypes, sex characteristics and sexual orientation.

The proposed changes to Title IX are exactly that – *proposed* regulations. Currently, the proposed regulations are not binding authority. The May 2020 version of Title IX is currently in effect ([20 U.S.C. section 1681](#)). Recipients of federal financial assistance to which Title IX applies must therefore comply with the current version of the regulations.

WILL submitted a comment to the Department outlining significant concerns pertaining to the proposed changes to Title IX. Specifically, WILL highlighted three issues that it asked the Department to address. First, the reinterpretation of the definition of sex within Title IX is an illegal action by an executive agency because the proposed regulations are antithetical to the intent of the law – namely, to protect and support women and girls. Second, the proposed regulations will have a chilling effect on speech, including speech motivated by sincere religious beliefs, and academic freedom. Third, the proposed regulations undermine parental rights. WILL has requested that the Department respond to each of these concerns and reject the proposed rules.

At this time, the Department must review the public comments and then finalize the regulations. If and when the Department issues final regulations, an effective date will be included. For reference, in 2020 when the Trump Administration proposed changes to Title IX, more than 125,000 comments were submitted, and it took the Department more than 15 months to respond to those comments and finalize the regulations. Over 210,000 [public comments](#) were submitted



in relation to the regulations proposed by the Department under the Biden Administration. It is probably fair to assume that it will be many months before the proposed regulations become effective. **Until they are, the May 2020 version of Title IX remains in effect.**

As school districts consider their potential and future liability, they should consider more than just the pending proposed rules. Across the country, there is active litigation that is challenging existing policies by school districts that actively keep parents from knowing if the district is referring to a child by a different pronoun as a violation of parental rights. Cases challenging similar district policies are ongoing in several states, including [Wisconsin](#), [Florida](#), [California](#), [Massachusetts](#), [Virginia](#) and [Iowa](#).

WILL has [model policies](#) available to school districts, including a [model policy on student pronouns](#).