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Request: WILL has been asked to put together a FAQ / memo for public school administrators and board members regarding the ability of public schools to create policies relating to topics like gender identity, pronouns, bathroom assignment, etc.

This FAQ / memo will address the following questions:

1. What are the current requirements of Title IX for public schools?
2. Do public schools have to comply with proposed federal regulations?
3. Can a public school limit bathroom use to a student's biological gender?
4. Can a public school limit sport participation by a student's biological gender?
5. What does Wisconsin state law say about discrimination on the basis of sex?
6. Can the federal government impact public school district policies?
7. Can a public school have a policy regarding students' preferred pronouns?
8. Can a public school have a policy regarding a teacher's use of a student's preferred pronoun?
9. What limitations can a public school put on content in the classroom?
10. What can public schools do regarding the current controversies relating to Title IX?

This memo should not be construed as legal advice to any specific person or entity. The Wisconsin Institute for Law & Liberty (WILL) is a 501(c)(3) nonprofit organization that is providing this memo as a general explanation of the law. How the law applies to a specific school district with a specific fact pattern is a question to be discussed with counsel for the school district. This memo was prepared on January 25, 2023 and is based on the current law in Wisconsin at that time. If you are not located in Wisconsin or the Seventh Circuit Court of Appeals, the responses to these questions may be different based on your location.

1. In general, what are the current requirements of Title IX for public schools?

Title IX of the Education Amendments of 1972 (Title IX) is a federal civil rights law that prohibits schools that receive federal funds from discriminating on the basis of sex, which currently means either male or female. The protections of Title IX extend to all aspects of a school's "programs and activities," including admissions, access to courses and classes, and athletics.

Title IX requires both that schools not discriminate on the basis of sex and that schools promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures, follow a fair grievance process to resolve sexual harassment allegations, and provide remedies to victims of sexual



harassment. The regulations implementing Title IX ([34 CFR Part 106](#)) specify how schools are required to address sexual harassment, and they provide a detailed definition for what constitutes sexual harassment.

The regulations also set forth that the Office of Civil Rights (OCR), which is part of the U.S. Department of Education, may require schools to take remedial action for discriminating on the basis of sex or otherwise violating Title IX. OCR has broad discretion when determining what remedial action to take. It is authorized to require corrective action or withhold federal funding for noncompliance. Corrective action may involve a change in policy or procedure, staff training, or other actions.

Public schools should be aware of a few particular requirements. For instance, public schools must designate and authorize at least one Title IX Coordinator to coordinate efforts to comply with responsibilities under Title IX, and schools must notify students and employees of the Title IX Coordinator's contact information. Schools must also adopt and disseminate a policy providing notice that the school does not discriminate on the basis of sex. Schools must publish grievance procedures for how student and employee complaints will be resolved, and schools must provide information about how to report or file a formal complaint.

2. Do public schools have to comply with proposed federal regulations?

No. The *proposed* regulations are not binding authority.

On June 23, 2022, the Department of Education under the Biden Administration [proposed new Title IX regulations](#). To date, the proposed regulations have not taken effect. If the changes take effect, they are expected to redefine “sex” to include gender identity and sexual orientation.

The Department is now in the process of reading and responding to the approximately 240,000 comments received. As for an expected timeline, when Secretary Betsy DeVos implemented new Title IX rules during the Trump Administration, it took the department 18 months to review approximately 124,000 comments before issuing a final rule.

Schools do not need to comply with these proposed regulations unless and until they are approved in final form. Even after the proposed rules become final, there is a very good chance they will face a legal challenge, so school districts will need to follow the legal developments closely.

However, it is possible that the federal government will take the position that Title IX requires an outcome mandated on the rule based upon its own language and without adoption of an enforcing rule. While there are legal objections to such a conclusion, the failure to adopt a rule is not necessarily a “safe harbor” for districts to act inconsistently with its terms.



3. Can a public school limit bathroom use to a student’s biological gender?

Unfortunately, this is an ongoing legal issue that has divided federal courts, and the U.S. Supreme Court has yet to weigh in, so the answer is not entirely clear. From the standpoint of a Wisconsin school district, the problem is based on the decision of the Seventh Circuit Court of Appeals in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 1047 (7th Cir. 2017).

In *Whitaker*, the Seventh Circuit concluded that Title IX covers claims for discrimination based on gender identity and affirmed an injunction that required a public school district to allow a transgender student to use the bathroom associated with the student’s asserted gender identity. While the Court in *Whitaker* acknowledged that sex discrimination has traditionally been understood to mean discrimination “against women because they are women and against men because they are men,” it broadened its view to permit a claim by a transgender boy who was not allowed to use the boys’ restroom and affirmed an injunction in favor of the student and against the district.

While the Seventh Circuit’s decision in *Whitaker* is a binding precedent in the Seventh Circuit (and would be binding on any federal district court judges who decide federal claims in Wisconsin), the decision may be distinguishable in a future case, for any number of reasons, depending on the facts and circumstances in a future case.

To give just one example, the Seventh Circuit itself pointed out that *Whitaker* was “not a case where a student has merely announced that he is a different gender” but rather one where the plaintiff had “a medically diagnosed and documented condition.” Moreover, the Court concluded that “since his diagnosis, he has consistently lived in accordance with his gender identity” and his decision to do so “was not without cost or pain.” *Id.* at 1050. Thus, even *Whitaker* seemed to acknowledge that a school district does not automatically need to allow any student that asserts a transgender identity to use the opposite-sex bathroom, but may require some sort of verification. This is only one example of the ways in which *Whitaker* might be distinguished in a future case on this topic.

While the Seventh Circuit decision, however it is interpreted, would—until altered—be binding in Wisconsin, it is quite possible that the reasoning of that court will not survive U.S. Supreme Court review or review by all of the judges in the Seventh Circuit. For example, the 11th Circuit Court of Appeals just decided a case en banc (meaning all the judges in that circuit weighed in) and came to exactly the opposite conclusion from that in *Whitaker*.

In *Adams v. School Board of St. Johns County, Florida*, __ F.4th __, 2022 WL 18003879 (11th Cir. 2022), the court held that separating the use of male and female bathrooms in public schools based on students’ biological sex does not violate either Title IX or the equal protection clause. The Court came to that conclusion even though



the Court noted that the plaintiff had hormonally and surgically begun to transition to a male, and even obtained a driver’s license and amended birth certificate with a male designation.

Multiple federal district courts have also recently declined to follow *Whitaker*. In *Neese v. Becerra*, ___ F. Supp. 3d ___, 2022 WL 16902425 (N.D. Texas 2022), the court held that Title IX’s prohibition on discrimination on the “basis of sex” did not extend to bases of sexual orientation or gender identity. Likewise, in *D.H. by A.H. v. Williamson Cnty. Bd. of Educ.*, No. 3:22-CV-00570, 2022 WL 16639994 (M.D. Tenn. Nov. 2, 2022), a Tennessee District Court denied a preliminary injunction in a case similar to *Whitaker*.

On the flip side, federal courts in other parts of the country have cited *Whitaker* favorably in similar decisions. See, e.g., *Parents for Privacy v. Dallas School District No. 2*, 326 F. Supp. 3d 1075 (D. Oregon 2018) (upholding a school policy allowing transgender students to use facilities matching their gender identity); *Grimm v. Cloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) (holding that a policy requiring students to use bathrooms based on biological sex constituted sex discrimination under Title IX).

As for the separate issue of whether locker rooms may be separated based on sex, neither *Whitaker* nor any other Wisconsin or Seventh Circuit case explicitly addresses that issue. Proponents of *Whitaker* would likely argue that its holding also applies to locker rooms since the court stated that a policy violates Title IX if it subjects a transgender student “to different rules, sanctions, and treatment than non-transgender students.” *Id.* at 1049–50.

In our opinion, there are sound reasons to disagree with the Court’s legal analysis in *Whitaker*, including that it is inconsistent with the text of Title IX. Such a clear split between federal circuit courts makes it possible that the Seventh Circuit in a future case might well reconsider the issues decided in *Whitaker* in an *en banc* posture and overrule that case. Given this split on the same legal issue and that it involves both the Constitution and a federal statute, the U.S. Supreme Court will likely eventually decide to settle the conflict.

Although we believe *Whitaker* was wrongly decided and could potentially be distinguished in future cases, school districts should be aware that it is a binding precedent in Wisconsin. If a school district were sued over a policy like the school district’s policy at issue in *Whitaker*, to win the lawsuit the district would either need to successfully distinguish that case or ask the Seventh Circuit (*en banc*) or the U.S. Supreme Court to overrule it.

If a school district is considering adopting a bathroom policy similar to the school district’s in *Whitaker*, it should review that decision carefully with counsel and consider its willingness to litigate these issues. If you are considering adopting a



policy limiting bathroom use to a student's biological sex, WILL or other organizations like ours might be willing to defend a school district in the event of a lawsuit, depending on the facts and circumstances.

4. Can a public school limit sport participation by a student's biological gender?

The law here is currently unclear for Wisconsin school districts, and there are different safety and privacy issues present in cases involving sports participation than cases involving restroom accessibility. There is currently no decided case from a federal court in Wisconsin or from the Seventh Circuit on this issue. Of note, a federal court in Indiana (also located in the Seventh Circuit) recently applied the holding in *Whitaker* to a Title IX claim by a transgender student seeking to play on the girls' softball team. *See, A.M. by E.M. v. Indianapolis Public Schools, et al.*, No. 1:22-CV-01075, 2022 WL 2951430 (S.D. Ind. July 26, 2022). While on appeal to the Seventh Circuit, the plaintiff in *A.M.* agreed to dismiss the case. As a result, the decision applying *Whitaker* is vacated, and the Indiana law separating sports by sex remains in effect. This issue is likely to reach the Seventh Circuit again, which will have significant implications for school districts in Wisconsin. WILL is closely following these developments.

On the other hand, public school districts have also been sued for allowing transgender students who are biologically male to participate in female sports, due to the effects on biological females' opportunities for success in their sports. *E.g., Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, __ F. 4th __, 2022 WL 17724715 (2d Cir. Dec. 16, 2022) (dismissed based primarily on standing because the transgender students had graduated before the case was resolved). And multiple states have recently adopted laws requiring athletes in K-12 and collegiate sports to participate based on their biological sex, and some courts have already upheld those laws from legal challenge. *See, B.P.J. v. West Virginia State Bd. of Educ.* No. 2:21-CV-316 (S.D.W.V., Jan 4, 2023) (granting summary judgment to defendants).

School Districts should also be aware that the Wisconsin Interscholastic Athletic Association (WIAA) has developed a [Transgender Participation Policy](#) to address the participation and eligibility of transgender students in WIAA sponsored athletics. Part of the policy requires member schools to "ensure that all students have access and opportunities to participate in athletics without discrimination based on . . . gender, sexual orientation, gender identity, gender expression," etc. The WIAA policy establishes some criteria to determine participation, such as requiring a male seeking to play on a female team to have "one calendar year of medically documented testosterone suppression therapy to be eligible."

WIAA has the authority to impose penalties for rules violations including, but not limited to, suspension of membership for up to one year, issuance of a monetary fine, forfeiture of contests won by the school, and loss of opportunity to host WIAA



tournament events, though if WIAA were to enforce that policy against a school district that required athletes to participate based on their biological sex, that policy could be litigated, and may or may not be upheld.

Any Wisconsin school district considering a policy with respect to transgender participation in sports should work closely with counsel and consider both the implications and details of the WIAA policy, the initial result in the *A.M.* case (although now vacated), and other legal developments around the country. As of right now there is no binding precedent on this issue that covers Wisconsin school districts.

As with the topic of bathroom use, the issue of transgender students participating on sports teams is likely to eventually be heard by the U.S. Supreme Court, though that may not happen in the near future.

5. What does Wisconsin state law say about discrimination on the basis of sex?

Wisconsin law prohibits discrimination against students on the basis of sex and sexual orientation. Public schools may not deny admission to any student on these grounds and may not deny students participation in, or benefits of, “any curricular, extracurricular, pupil services, recreational or other program or activity” on these grounds. *See* Wis. Stat. sec. 118.13(1).

Wisconsin does not yet have any case decisions consistent with *Whitaker* and, as a result, no court has found that a transgender student may bring a claim under the Wisconsin statute. However, students do not need to have a claim under the Wisconsin statute so long as they can bring the claim under federal law.

6. Can the federal government impact public school district policies?

Yes. Public school districts have quite a lot of freedom in choosing which policies to implement, **but** refusing to comply with federal rules could be met with the federal government withholding federal funding for noncompliance.

OCR writes Title IX guidelines and regulations for schools to follow. OCR also investigates complaints and determines whether schools are in compliance with Title IX. According to OCR, any “unwelcome” sex-based incident, including sexual harassment, may be deemed Title IX violations if the conduct impacts the educational environment. [OCR guidelines](#) also assert that Title IX applies to gender identity. Thus, to ensure that a school district continues to receive full federal funding the school district’s independence is limited.

As an example of the federal government influencing local districts, in 2018 OCR initiated a [compliance review](#) at MPS related to the 2014 directive by the Obama Administration to public schools nationwide to decrease student suspension rates for minority students and students with disabilities. To avoid being sued by the federal



government, MPS was one of many schools around the country that agreed to a federal plan to reduce disparities in discipline actions for black students. Suggesting that the agreement was strong-armed by the federal government, former MPS Superintendent Darienne Driver [said](#), “We have to, it’s not optional.”

7. Can a public school have a policy regarding student’s use of an individual’s preferred pronouns?

Only insofar as such a policy does not infringe upon conduct protected by the First Amendment. Every child has the right to free speech, to either speak or not speak or to affirm or not affirm messages or ideas, depending on their beliefs or conscience. Students cannot be compelled to use preferred pronouns.

Under the law, “students do not shed their constitutional rights to freedom of speech or expression, even at the school house gate.” *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 141 S. Ct. 2038, 2044 (2021). This suggests that every student in the district is allowed to refer to themselves by whatever pronouns they prefer but neither the student nor the district may enforce that preference on other students.

However, the use of pronouns is protected speech, as courts have recognized, because pronouns “convey a powerful message implicating a sensitive topic of public concern.” *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021). It is possible (although we think it would be wrong) that a court might hold that at least repeated use of pronouns other than those preferred by a transgender student might be considered harassment. Applying *Whitaker*, this might be found to violate Title IX.

We think it unlikely, even if *Whitaker* is good law, that a harassment claim could be based on pronoun use alone. Moreover, this is not an area where it is “safe” to restrict a student’s use of pronouns since, as noted above, such restriction might violate the First Amendment.

8. Can a public school have a policy regarding a teacher’s use of a student’s preferred pronoun?

Yes. When teachers are performing their duties in the classroom, their speech is the speech of the government and not their own personal speech. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). This is why the First Amendment rights of teachers while instructing in class are limited. Regarding use of students’ preferred pronouns, schools may prohibit teachers and staff from using names or pronouns that differ from students’ biological sex during school hours, without written consent from a parent or legal guardian.

Schools may not force teachers or staff to use a student’s preferred pronouns. Public schools, as government entities, cannot compel speech or require any citizen to affirm a belief they do not hold. As a recent example, a teacher in Kansas that was suspended for not using a student’s preferred pronouns [filed a lawsuit](#) challenging



the suspension, and she [obtained \\$95,000](#) from the district as part of a settlement. As with many related topics, this is an area of law that continues to develop.

However, if the new Title IX regulations take effect, if a public school fails to recognize or accept a student or staff member's gender identity, it could be found to be a violation of federal law. Schools could be forced to apply sexual harassment disciplinary procedures against students and teachers who "misgender" another student or teacher, i.e. fail to use the gender pronoun that person prefers. If this goes into effect, additional litigation on First Amendment grounds is expected.

9. What limitations can a public school put on content in the classroom?

Most states have curriculum requirements. For example, in schools in Wisconsin are required to provide instructional programs designed to give students certain skills as outlined in Wis. Stat. sec. 118.01. Wisconsin law also sets forth certain subjects that schools are required to teach. For instance, the legislature recently passed a law requiring Wisconsin schools to incorporate instruction about the Holocaust and other genocides as part of the social studies curriculum for grades 5 through 12. *See* Wis. Stat sec. 115.28(55m).

The follow up questions are what restrictions may a school district place on teachers with respect to classroom discussion and what rights do parents have with respect to content in the classroom.

With respect to the first question, public schools may create policies governing how controversial issues are discussed in the classroom by district teachers. For example, schools may choose to permit the introduction of controversial issues by teachers provided that their use in the instructional program: (a) is related to the instructional goals of the course of study; (b) is age-appropriate for the students; (c) does not indoctrinate or persuade students to a particular point of view; (d) encourages analytical thinking and open-mindedness; and (e) does not create a hostile school environment.

Schools may also decide whether or not to adopt a human growth and development curriculum, which in Wisconsin is essentially sexual education. *See* Wis. Stat. sec. 118.019(2). If a school *does* adopt a human growth and development curriculum, it needs to follow all requirements in Wis. Stat. sec. 118.019.

With respect to the second question, parents have the right under both the U.S. and Wisconsin Constitutions to direct the upbringing of their children. *See Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S. Ct. 571 (1925).

The federal Protection of Pupil Rights Amendment (PPRA) ([20 U.S.C. 1232\(h\)](#)) establishes the baseline for parent and pupil rights. Under that statute, in very general terms, parents are entitled to know what the content of each course is and to



inspect all instructional materials. Also, students may not be required to submit to a survey relating to political beliefs, mental or psychological problems, sex behavior or attitudes, etc. without the prior written consent of the parent. School districts must also adopt policies, in consultation with parents, to implement the above and to protect student privacy. Last, parents are entitled to notices of various policies and events covered by the statute.

Parents in Wisconsin may opt their children out of certain instruction and assessments. Under state law, parents are permitted to opt their children out of any and all human growth and development instruction. *See Wis. Stat. sec. 118.019(4)*. Additionally, while the PPRA requires notice and active consent before students may be required to take a survey involving one of the eight protected categories, many schools and teachers treat this requirement as requiring an opt *out* rather than an opt *in*. Parents may proactively opt their children out of surveys covered by the PPRA by submitting such a request in writing to their child's school.

10. What can public schools do regarding the current controversies relating to Title IX?

The ongoing discussions about public school education continue to be divisive and difficult. School board members should also know that they cannot be held *personally* liable for adopting policies inconsistent with Title IX. WILL is closely tracking Title IX developments and has drafted model school board policies as an addition and alternative to the limited options that school boards have access to. WILL offers these model policies with goals of increasing parents' rights and involvement, creating transparency, optimizing student academic achievement and improving school governance. WILL plans to periodically provide additional school board resources, including Title IX updates and more model policies, and will update those resources [here](#).