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# What School Boards Need to Know About Title IX

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## Key Points

- The Biden administration is expected to issue final regulations on Title IX this fall, which are expected to redefine "sex" to encompass "gender identity," lower the standard for what constitutes harassment, and pressure schools to predicate sports participation on gender identity.
- These new regulations will face substantial legal challenges on no fewer than seven grounds. Although an effective date is expected to be announced in the fall, it could be years before the new regulations are implemented, depending on the anticipated litigation challenging them.
- In the meantime, school boards may face pressure from advocacy organizations and possibly the Department of Education's Office for Civil Rights to comply with a regulation that is not actually in full force. Doing so will expose them to litigation risk. School boards need not comply with a regulation that is not actually in effect.

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This fall, the US Department of Education (ED) plans to release the final federal rules that are expected to amend Title IX by changing the definition of "sex discrimination" to include discrimination on the basis of "gender identity." A separate set of rules is expected to pressure school districts to predicate sports participation on the basis of "gender identity."

These changes will be controversial and difficult to implement. School boards may consider adopting policies that conflict with the regulations, and if so, they need to be willing to litigate these issues. As school board members look ahead, they should be aware of what changes are expected, what legal claims are likely, what could happen if school board policies do not comply with the anticipated final rules, and what to do if they are in a state that has passed laws in conflict with the new ED rules.

## Coming to a School near You: Anticipated Changes

Title IX of the Education Amendments of 1972 establishes that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[1] In 1972, everyone understood "sex" to mean either male or female.[2] But that interpretation could soon be turned on its head.

ED has promulgated proposed regulations to implement Title IX. Certain guidelines must be followed when an executive agency promulgates regulations, and the proposed regulations arguably run afoul of those guidelines. Aside from concerns as to whether correct procedure was followed, the proposed new regulations

subvert the original law's meaning and infringe on Congress's legislative authority. The proposed regulations change the interpretation of Title IX that has been in place for over 50 years and jeopardize the rights, safety, and well-being of women and girls.

The expected changes will affect athletic and nonathletic policies. First, the proposed regulations are expected to expand the definition of "discrimination on the basis of sex" to include discrimination on the basis of gender identity, sexual orientation, sex stereotypes, and sex characteristics. These terms are not clearly defined; the proposed regulations offer no definition for "gender identity." Second, the proposed athletics regulations are expected to prohibit schools from adopting or enforcing policies that categorically ban students from participating on teams that do not correspond with the student's biological sex. The notice of proposed rulemaking (NPRM) for the nonathletic regulation received nearly a quarter million public comments,[3] and the NPRM for the athletics rule received over 150,000.[4]

The regulations also raise a serious concern of chilled and compelled speech based on a lower threshold for what constitutes "harassment." The traditional understanding of harassment is conduct "so severe, pervasive, and objectively offensive that it *effectively bars* the victim's access to an educational opportunity or benefit."[5] (Emphasis added.) The proposed rules define harassment as

> unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated *subjectively* and objectively, denies or *limits* a person's ability to participate in or benefit from the recipient's education program or activity.[6] (Emphasis added.)

Essentially any conduct could be alleged to "subjectively . . . limit [a] benefit." No lawyer could argue with a straight face that a single instance of "misgendering" or single use of non-preferred pronouns *deprives* a student of *access* to a benefit. But any lawyer worth their salt could successfully argue that it *subjectively limits that benefit.*

The proposed rule on athletics would upend the long-standing rule that educational institutions 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."[7] The proposed regulations hold that schools may not "categorically exclude all transgender girls and women from participating on any female athletic teams" and must thoroughly evaluate every sport for transgender participation, and they note that "few, if any, sex-related eligibility criteria applicable to students in elementary school" would comply.[8]

The final rule was initially expected to be released in May, but it was delayed until October so ED could review the hundreds of thousands of public comments.[9]

## The Regulations Will Be Challenged

Once final Title IX regulations are published, there will be a wave of litigation challenging them. Twenty state attorneys general, led by Tennessee, have already filed a lawsuit challenging the legality of a guidance document that informs educational institutions that the department will enforce Title IX to include gender identity within the definition of discrimination "on the basis of sex."[10] As recently as June 14, 2023, Texas filed a lawsuit challenging the legality of the same guidance document.[11] There are at least seven potential claims that will likely be made in litigation against the proposed rule; four of them are listed in this section, and the remaining three are listed in the next section.

First, and arguably most important, the proposed regulations violate Title IX's text. For instance, the federal law explicitly allows educational institutions to maintain separate living facilities in accordance with sex.[12] Requiring schools to allow biological males into female spaces or on female athletic teams denies women equal protection and pits the regulation directly against the law. When a federal law and a federal regulation conflict, a court may find the regulation to be invalid or unenforceable. Courts have held that the public has an interest in the "correct application of the law."[13]

The Biden administration relies on the Supreme Court's decision in *Bostock v. Clayton County* as authority to redefine sex to mean gender identity. In that case on Title VII (a federal law pertaining to *employment discrimination*), the Court found that it is discrimination "because of sex" under Title VII for an employer

to fire an employee "simply for being homosexual or transgender."[14] The Biden administration's reliance on *Bostock* to change Title IX may not hold up given that the Court explicitly held that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."[15]

Second, there are substantial procedural problems. ED is required to conduct the rulemaking process in accordance with the Administrative Procedure Act.[16] In an April 2022 letter, several attorneys general urged the department to abandon its efforts to change Title IX, in part because they believe the department has already made its mind up and therefore the rulemaking process could be found to be biased.[17] Bias would support a conclusion that the department has engaged in arbitrary and capricious rulemaking.[18]

Third, federalism concerns abound, perhaps nowhere more than in the context of athletics. At least 20 states have passed laws that prevent males from joining female athletic teams.[19] The ED acknowledges that its proposal "may have federalism implications" or "substantial direct effects" on the relationship between states and the federal government.[20] If and when the proposed rule is finalized, litigation between the department and those states is all but certain.

Fourth, the proposed regulations may be a violation of separation of powers. Generally, if Congress wants to give an administrative agency the authority to make "decisions of vast economic and political significance," it must say so clearly.[21] This is referred to as the major questions doctrine. Congress does not "hide elephants in mouseholes," and agencies cannot confer authority on themselves that Congress never granted.[22] Here, Congress did not grant power to the ED that would permit it to make such a major policy decision, and therefore it was unlawful—or so litigants are all but certain to argue.

The proposed regulations could be enjoined from going into effect while litigation is ongoing. If that occurs, a federal district court would likely issue a preliminary injunction, which could apply to one or several states or be nationwide. If a nationwide injunction is issued, ED would have to interpret Title IX consistent with the May 2020 version of the regulations while litigation proceeds, and ED would not be permitted to withhold federal funds from school districts that interpret Title IX as consistent with the 2020 regulations.

## Complying with the Regulation Poses a Litigation Risk

Beyond litigation directly challenging the anticipated Title IX regulations, litigation is also expected based on the regulations' interpretation and enforcement. School districts inclined to faithfully implement the spirit of the regulations should be aware of at least three scenarios that could expose them to litigation risk.

First, First Amendment claims are likely. Several organizations have already raised concerns about infringement of free speech.[23] In Wisconsin, three eighth-grade boys were informed they were being investigated for sexual harassment under Title IX for "mispronouning" a classmate.[24] The Wisconsin Institute for Law & Liberty (WILL) urged the district to dismiss the complaints, explaining the mere use of biologically accurate pronouns, without anything more, cannot be considered sexual harassment under Title IX and that treating "mispronouning" of another student as punishable speech under Title IX is a clear First Amendment violation.[25] Because the proposed rules infuse gender identity into the meaning of sex discrimination and include subjectivity as part of the definition of verbal harassment, more school districts may compel students to use their classmates' preferred pronouns.

Under existing case law, "students do not shed their constitutional rights to freedom of speech or expression, even at the school house gate."[26] The use of pronouns is protected speech, as courts have recognized, because pronouns "convey a powerful message implicating a sensitive topic of public concern."[27] Federal regulations essentially requiring districts to act as the "classroom thought police"[28] could be a constitutional violation.

Second, the rules raise religious liberty concerns. If religious schools are pressured to comply with the new regulations in a way that violates their religious beliefs, those schools could claim that the regulations infringe their First Amendment rights. Similarly, if religious students or teachers in nonreligious institutions are pressured to violate their religious beliefs, those individuals could also claim the government is interfering with their right to freely practice their religion.[29] Private religious schools that receive federal financial assistance are subject to Title IX requirements, but importantly, an educational institution controlled by a religious organization[30] is exempt from Title IX to the

extent that compliance would not be consistent with the organization's religious tenets.[31]

Third, the new rules could substantially impair parents' rights. The proposed rules could be interpreted to mean that a decision by schools to not endorse a gender transition constitutes sex discrimination. If a parent does not want to immediately affirm their child transitioning to another gender, construing the proposed rules in this manner would create a problem. It could lead to school personnel going along with the gender transition to avoid liability, resulting in the loss of parental authority over that decision.

The Supreme Court has long recognized parents' fundamental right "to direct the upbringing and education of children under their control."[32] Parents have the ultimate authority to decide, for their own minor children, whether a social transition to another gender would be in the child's best interests. The proposed regulations could be interpreted to deprive parents of their input on these important decisions.

## Conflicting Policies: Considerations for School Boards

As school boards consider implementing changes related to the proposed Title IX regulations, they should first know that proposed regulations are not binding authority. Once a final rule is released, it will include an effective date. Presently, recipients of federal financial assistance to which Title IX applies must comply with the May 2020 version of the regulations.[33] School boards nonetheless may receive advice to update their policies to comply with these proposed regulations, but again, there is no legal obligation to do so. In fact, doing so may create additional issues for the district.

Even though the proposed rules do not have the force of law, school boards should be aware of the possibility of Office of Civil Rights (OCR) investigations while anticipated litigation is pending. If OCR investigates an institution and determines it has failed to comply with Title IX, OCR will first attempt to secure willingness to negotiate a voluntary resolution agreement. Similar to a consent decree, this involves a written resolution agreement and monitoring by OCR of implementation of its terms.

If the district does not agree to a voluntary resolution or does not comply with the terms of an agreement, then OCR may initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance, or it may refer to the Department of Justice for litigation.[34] In other words, Title IX imposes strings on the receipt of federal funds. If an institution does not follow regulations, it could—in a worst-case scenario—lose federal funding. This threat is almost invariably enough to compel a school district to agree with OCR's terms. However, it does not appear OCR has ever actually issued an adverse judgment related to Title IX that led to a school district losing federal financial assistance.

The Supreme Court has not yet weighed in on the issues related to participation in athletics for students with a different gender identity than their biological sex. School boards should be mindful of the law in their area, any rules from their state athletic associations, and legal developments nationwide. There are several cases currently pending on this issue, and the law is developing.

Additionally, because several states have laws in effect that are expected to conflict with the proposed Title IX regulations, school boards should be mindful of their state laws when considering whether to comply with state laws or the anticipated federal regulations. Generally, when state law and federal law conflict, federal law preempts state law.[35] Here, even though the federal *law* will not change, federal *regulations* can still preempt state law.[36]

School boards considering enforcing policies that could conflict with the Biden administration's Title IX regulations should review that decision carefully with counsel and consider their willingness to litigate these issues. In the process of weighing this decision, they should understand that full compliance with the regulation may also yield litigation risk. Organizations such as WILL continue to monitor these developments and, depending on the facts and circumstances, may be willing to defend a school district in the event of a lawsuit.

## About the Author

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# Notes

1. 20 U.S.C. § 1681(a) (2023), https://uscode.house.gov/view.xhtml?req=(title:20%20section:1681%20edition:prelim).

2. Judicial opinions interpreting Title IX sometimes used the word "gender" as a synonym for "sex." See, for example, *North Haven Board of Education v. Bell*, 456 US 512, 521 (1982).

3. eRulemaking Program, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," https://www.regulations.gov/docket/ED-2021-OCR-0166/comments.

4. US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams," *Federal Register* 88, no. 71 (April 13, 2023): 22860–91, https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf.

5. *Davis v. Monroe County Board of Education*, 526 US 629 (1999). See also 34 CFR §106.30, "Definitions."

6. US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," *Federal Register* 87, no. 132 (July 12, 2022): 41566, https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf.

7. US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," *Federal Register* 85, no. 97 (May 19, 2020): 30178, https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal; and US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Athletics," *Federal Register* 45, no. 92 (May 9, 1980): 30962, https://www.govinfo.gov/content/pkg/FR-1980-05-09/pdf/FR-1980-05-09.pdf.

8. US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams," 22860.

9. US Department of Education, "A Timing Update on Title IX Rulemaking," May 26, 2023, https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking.

10. The department was enjoined from implementing, via guidance document, its proposed regulations against several states in *State of Tennessee v. US Department of Education*, No. 3:21-cv-308 (E.D. Tenn.), ECF No. 86 (July 15, 2022).

11. *Texas v. Cardona*, No. 4:23-cv-604 (N.D. Texas), ECF No. 1.

12. See Interpretation with Respect to Living Facilities, 20 U.S.C. § 1686 (1972).

13. *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022); and *Priorities USA v. Nessel*, 860 F. App'x. 419, 23 (6th Cir. 2006).

14. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020).

15. *Bostock*, 140 S. Ct. at 1753.

16. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019); and *Commonwealth of the Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (DC Cir. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA").

17. Austin Knudsen et al., "Re: U.S. Department of Education's Title IX Rulemaking," April 5, 2022, https://dojmt.gov/wp-content/uploads/Title-IX-Coalition-Letter-4.5.22.pdf.

18. See, for example, *Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 420 (1971) (a strong showing of bad faith may require the administrative officials who participated in a decision to give testimony explaining their action); and *United States v. Oregon*, 44 F.3d 758, 772 (9th Cir. 1994) (a decision maker cannot possess "an unacceptable probability of actual bias"). See *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (it is uncontested that a decision resting on a "pretextual basis . . . would warrant a remand to the agency").

19. Bianca Quilantan, "House Republicans Pass Bill Restricting Transgender Athletes from Women's Sports," *Politico*, April 20, 2023, https://www.politico.com/news/2023/04/20/house-gop-bill-transgender-athletes-00093044.

20. US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 41566; and US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams," 22890.

21. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022).

22. *West Virginia*, 142 S. Ct. at 2607–08.

23. See Wisconsin Institute for Law & Liberty, "Public Comment on Document Number 2022-13734 and Docket ID ED-2021-OCR-0166," September 12, 2022, https://will-law.org/wp-content/uploads/2022/09/Public-Comment-2022-13734-WILL.pdf; Rachel N. Morrison and Mary Rice Hasson, "EPPC Scholars Comment Opposing 'Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,' RIN 1870-AA16, Docket ID ED-2021-OCR-0166," September 12, 2022, https://eppc.org/wp-content/uploads/2022/09/EPPC-Scholars-Comment-Opposing-Title-IX-Proposed-Rule.pdf; Robert S. Eitel, Paul R. Moore, and Paul F. Zimmerman, "Comment on the Department's Notice of Proposed Rulemak-

ing Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Agency/Docket Number: ED-2021-OCR-0166 RIN: 1870-AA16 Document Number: 2022-13734," September 11, 2022, https://dfipolicy.org/wp-content/uploads/2022/09/DFI-Public-Submission-on-Title-IX-NPRM-website-9-12-22.pdf; and Katherine L. Anderson, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Docket ID ED-2021-OCR-0166: The Rule Will Harm Parental Rights and Endanger Children," September 11, 2022, https://adflegal.org/sites/default/files/2022-09/Title-IX-Public-Comment-2022-09-11-Undermines-Parental-Rights.pdf.

24. Luke Berg and Cory Brewer, email to Brad Ebert, Megan Kautzer, and Chad Ramminger, May 12, 2022, https://will-law.org/wp-content/uploads/2022/05/KASD-Title-IX-Mispronouning-Letter.pdf.

25. Fortunately, the district eventually ended its investigation. See Wisconsin Institute for Law & Liberty, "Kiel Drops Title IX Complaint Against Middle Schoolers After WILL Defense," https://will-law.org/kiel-drops-title-ix-complaint-against-middle-schoolers-after-will-defense.

26. *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2044 (2021).

27. For an instance of reversing dismissal of First Amendment free speech and free exercise claims by a professor disciplined by a university for not following the university's gender identity nondiscrimination policy when he refused to address a transgender-identifying student by preferred title and pronouns and instead only used the last name, see *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021).

28. *Meriwether v. Hartop*, 992 at 507.

29. US Const. amend. I.

30. The Department of Education in 2020 added a subsection addressing how educational institutions may demonstrate that they are "controlled by a religious organization" within the meaning of the religious exemption. See US Department of Education, "Direct Grant Programs, State Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program," *Federal Register* 85, no. 185 (September 23, 2020): 59916, 59918, https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-20152.pdf.

31. 20 U.S.C. § 1681(a)(3); and US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Educational Institutions Controlled by Religious Organizations.," *Federal Register* 45, no. 92 (May 9, 1980): 30958.

32. *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 US 510, 534–35 (1925).

33. US Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 30955–64.

34. As one recent example, the Department of Justice recently investigated the University of Maryland, Baltimore County, related to its compliance with Title IX and following a report that the university's head swim coach inappropriately touched male swimmers and mishandled accusations of sexual misconduct among team members.

35. US Const. art. VI, cl. 2.

36. Where Congress has delegated authority to promulgate regulations, regulations intended to preempt state law have that effect unless the agency exceeded statutory authority or acted arbitrarily. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 US 141, 154 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes").