

What School Boards Need to Know about the Status of the New Title IX Rule

July 11, 2024

Overview: The changes to Title IX by the U.S. Department of Education under the Biden Administration expand the definition of sex discrimination to include gender identity. This conflicts with the original intent of Title IX to protect the opportunities and safety of girls. Implementation of this new rule, which is facing multiple federal lawsuits and injunctions, would pose litigation risks for school districts. School boards should be cautious and informed, and they should be aware that there are litigation risks on both sides of this issue. This resource aims to empower school board members to make their own decision despite pressure to immediately implement the new Title IX rule.

This should not be construed as legal advice. Wisconsin Institute for Law & Liberty (WILL) is a 501(c)(3) nonprofit organization that is providing this as a resource for anyone to review and use.

Title IX of the Education Amendments 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. Congress enacted Title IX to promote equal opportunity for women.¹ It prohibits educational institutions from discriminating on the basis of sex, while allowing entities to maintain sex separation in some programs to equalize opportunity for girls and to protect the privacy interests of all. Title IX provides:

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[.]

20 U.S.C. § 1681(a).

Title IX is interpreted and applied by the U.S. Department of Education (ED). Under the Biden Administration, ED promulgated a new rule² that would conflict with the Title IX law passed by Congress, negatively impact women and girls, eliminate due process protections, and have a chilling effect on speech. The rule is scheduled to take effect on August 1, 2024. Specifically, the new rule, which is an *implementation* of federal law, has expanded the definition of sex discrimination to include discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.³

¹ Its goal was to give women “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*, 518 U.S. 515, 532 (1996).

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, <https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, § 106.10, <https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

The new Title IX rule is currently being challenged in at least 9 federal lawsuits. To date, there have been three federal court opinions⁴ enjoining the rule (putting it on pause while the rest of the litigation plays out), but, so far, these injunctions only apply to Alaska, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Tennessee, Utah, Virginia, West Virginia, Wyoming, as well as the schools attended by the members of Young America’s Foundation or Female Athletes United, and the schools attended by the children of members of Moms for Liberty. There are other motions pending in the other cases, which, if granted, could result in more injunctions issued against the new rule. Any future injunctions, like the first three, could be limited to the parties in the case, but it’s also possible that a court will issue a nationwide injunction.

Since the most recent injunction applies to “the schools attended by the members of Young America’s Foundation or Female Athletes United, as well as the schools attended by the children of the members of Moms for Liberty,” ED cannot implement, enact, enforce, or take any action to enforce the rule in any such school where this condition applies in any state. Each organization has been directed to file a notice in the record identifying the schools which their members or their members’ children attend on or before July 15, 2024.

Whether or not any of the district courts issue a nationwide injunction, these cases are likely to proceed quickly through appellate review and eventually reach the United States Supreme Court, which will ultimately resolve the issue nationwide.

Whether or not a nationwide injunction is issued before the enforcement date, school boards under pressure to implement the new Title IX rule should consider all relevant information and know that it is ultimately their decision to make.

WILL believes the rule is illegal on several grounds. To name just a few, making a rule of vast economic and political significance requires express Congressional authorization.⁵ The Biden administration does not have that authorization for this rule. The new rule’s treatment of gender identity also conflicts with the definition of “sex” in the Title IX statute. Also, it raises unconstitutional compelled speech concerns by treating as sexual harassment any objection to using the preferred pronouns of another individual.⁶

⁴ *State of Louisiana, et al. v. U.S. Dept. of Education, et al.*, Case No. 3:24-CV-563, Preliminary Injunction Ruling, June 13, 2024, <https://adfmedialegalfiles.blob.core.windows.net/files/RapidesParishSchoolBoardMPIRuling.pdf>; *State of Tennessee, et al. v. Cardona, et al.*, Case No. 2:24-72-DCR, Preliminary Injunction Ruling, June 17, 2024, <https://adfmedialegalfiles.blob.core.windows.net/files/TennesseeCardonaMPI-Ruling.pdf>; *State of Kansas, et al. v. U.S. Dept. of Education, et al.*, Case No. 24-4041-JWB, Preliminary Injunction Ruling, July 2, 2024, <https://www.slfliberty.org/wp-content/uploads/sites/12/2024/07/20240702-Memorandum-and-Order-on-PI-Stay-Doc.-53.pdf>.

⁵ *W. Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 142 S. Ct. 2587 (2022).

⁶ The U.S. Supreme Court defined “sexual harassment” as conduct that is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *David v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). Under the new rule, the standard for harassment is now “unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).” See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, § 106.2,

Does the new rule impact athletics?

Unclear. The text of the rule suggests that it does, but the Department of Education has stated that it does not. This is one of the issues being litigated in the cases around the country. Given that the Department's position is that it does not cover athletics, school districts may take the Department at its word until there is a court decision to the contrary. ED originally proposed two separate rules, one in 2022, and then an additional "Athletics Rule" in 2023. The 2022 rule proposal is set to take effect on August 1. At this time, the Athletics Rule has been delayed indefinitely. This difference is nominal because the 2022 rule covers "extracurricular activity" which arguably includes athletics.

How does this impact schools at the local level?

School boards should know that there is a risk of being investigated by the federal Office of Civil Rights (OCR). In a worst-case scenario, a school or district could lose federal funding. While the application of the rule is going to be broad reaching, loss of federal funding has *never* happened in 52 years of the federal government interpreting and applying Title IX.

How is enforcement likely to play out?

If your school board has decided that it does not want to make changes in response to the new rule until the ongoing litigation is resolved, any individual may file a Title IX complaint with OCR against a school district. ED also has authority to initiate an investigation of a school district without receiving a complaint. OCR then decides whether to go forward with a complaint and investigation or close it for a lack of foundation. Investigations can take a minimum of 6 to 12 months.

What if a school is found to be in violation of Title IX?

Generally, the school will work with the federal government to come to a resolution. Frequently, OCR will attempt to gain compliance, through email exchanges or sometimes on-site visits, through methods such as changing policies and staff training, prior to divesting federal funds. The U.S. Department of Justice may get involved to implement and enforce Title IX by bringing enforcement actions for noncompliance on behalf of ED. School boards should know that the road to a successful discrimination complaint is long.

What if my administration or legal counsel informs the board that we have no choice but to immediately go along with this interpretation of Title IX?

<https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>. This shifts the standard away from being objective and neutral and allows schools to examine harassment from both an objective *and* subjective perspective. It also lowers the threshold for establishing harassment by only requiring schools to consider whether conduct is severe *or* pervasive, a departure from the *Davis* standard that required *both* elements to be met. Finally, the rule does not merely ban harassment that denies *access* to educational opportunities, but it even bans harassment that merely "*limits* the ability to participate" in an educational program.

School boards should know that several state superintendents and governors have already directed their own schools not to comply with the Biden administration rule and not to make any modifications while waiting to see what happens in the federal lawsuits.⁷ Since some state leaders have already done the heavy lifting, search to see if your governor or superintendent has made such a statement and cite to it. Also check to see if your state has a women's sports law.

If OCR were to open an investigation and try to force a school to enforce the new rule, it would provide another vehicle to challenge the rule.⁸

School board members should consider opinions from all sides. There are parents and community members at the local level who are advocating against this new rule and, in several cases, threatening to pull their children from public school, or file a lawsuit, if the policies are changed.

School boards can make a statement that they are going to abide by the federal Title IX law and not the unlawful regulations passed by ED, at least until the litigation is resolved over whether the new rule survives. One option is for a school board to adopt a practice that all individuals use sex-designated private facilities based on biological sex and may consider having a gender-neutral option as well.

Last, there is a risk of litigation on both sides of the issue. Importantly, implementation of the new rule could open schools up to personal injury or negligence lawsuits or lawsuits for a violation of an individual's civil rights.⁹

Litigation is moving expeditiously and WILL hopes the full rule will soon be enjoined nationwide.

Keep an eye out for a deep dive resource on the new Title IX rule which will be available as a free public resource in July of 2024.

For more information about the ability of public schools to create policies relating to topics like gender identity, pronouns, and bathroom assignment, based on the law in Wisconsin and the Seventh Circuit Court of Appeals, see our memo from January 2023.¹⁰

⁷ See, e.g., *Here are the states refusing to comply with Biden's newest Title IX rules*, NBC Montana, April 26, 2024, <https://www.nbcmontana.com/news/nation-world/here-are-the-states-refusing-to-comply-with-bidens-newest-title-ix-rules-federal-civil-rights-law-sex-discrimination-gender-identity-education-department-miguel-cardona-florida-louisiana-south-carolina-oklahoma-ron-desantis-ryan-walters>.

⁸ For an example of a school board that has challenged the rule, see *Rapides Parish School Board v. United States Department of Education, et al.*, <https://adfmedialegalfiles.blob.core.windows.net/files/RapidesParishSchoolBoardComplaint.pdf>.

⁹ See, e.g., *Doe v. Loudoun County School Board*, Complaint, U.S. Dist. Ct. E.D. Va., October 4, 2023, <https://wila.com/resources/pdf/83a50d66-6a03-4553-a8f4-1fc87e0b144f-JANEDOE1.pdf>; *Vlaming v. West Point School Board*, Virginia Supreme Court Decision, December 14, 2023, <https://dm1119z832j5m.cloudfront.net/2023-12/Vlaming-v-West-Point-School-Board-2023-12-14-VA-Supreme-Court-Decision.pdf>.

¹⁰ See WILL Gender Identity FAQ/Memo, January 25, 2023, <https://will-law.org/wp-content/uploads/2023/02/Title-IX-FAQ-Memo-Final89.pdf>.