

What Private, Religious Schools Should Know about the New Title IX Rule

October 17, 2024

Overview: The recent 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. This resource aims to clarify recent questions about the impact of this rule on private schools.

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 information as a resource for anyone to review and use.

What is Title IX?

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[.]²

When does Title IX apply to private, religious schools?

Title IX applies to any educational program or activity that receives federal financial assistance, regardless of which federal agency the funding comes from. Some of the types of federal funding that might trigger Title IX for private, religious schools are participation in the National School Lunch Program or Special Milk Program.

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 20 U.S.C. § 1681(a).

Do parental choice programs trigger compliance with Title IX?

No. Only receipt of federal financial assistance triggers compliance with Title IX. While Wisconsin school choice statutes reference compliance with some federal non-discrimination laws—such as 42 U.S.C. § 2000d (which prohibits discrimination on the grounds of race, color, or national origin)—Title IX is not listed in either Wis. Stat. § 118.60 (Wisconsin and Racine Parental Choice Programs), Wis. Stat. § 119.23 (Milwaukee Parental Choice Program), or Wis. Stat. § 115.7915 (Special Needs Scholarship Program).

How is Title IX interpreted and applied?

Title IX is interpreted and applied by the U.S. Department of Education (ED). Under the Biden Administration, ED promulgated a new rule³ that conflicts with the Title IX law passed by Congress, negatively impacts women and girls, waters down due process protections, and has a chilling effect on speech. The rule took 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.⁴

What should schools know about the religious exemption in Title IX?

Religious institutions can claim an exemption on religious grounds to the extent Title IX conflicts with their religious beliefs. The relevant language states: “This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”⁵

The relevant regulation implementing this law is 34 CFR § 106.12. The Department did not change this regulation at all. It states that “[t]his part does not apply to an educational institution which is controlled by a religious organization *to the extent application of this part would not be consistent with the religious tenets of such organization.*”⁶ (Emphasis added.)

³ 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>.

⁴ 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>.

⁵ 20 U.S.C. § 1681(a)(3), <https://www.law.cornell.edu/uscode/text/20/1681>.

⁶ 34 CFR § 106.12(a), <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106/subpart-B/section-106.12>.

Does a school need to be affiliated with a church in order to qualify for a religious exemption?

No. Schools do not need to be officially connected to a church. 34 CFR § 106.12(c) sets forth relatively broad criteria for establishing that an educational institution is controlled by a religious organization and therefore eligible to assert a religious exemption.⁷

Does a private, religious school need to apply for and receive an exemption?

No. Educational institutions controlled by religious organizations have a religious exemption that they can claim as a matter of law.⁸

34 CFR § 106.12 states that a school may, but is not required to, submit a written request for an exemption. This is referred to as an “assurance of exemption” in the regulations, which set forth a process for seeking written assurance from the Department to claim a religious exemption. *This is not required and WILL recommend that schools or religious entities consider not applying for the exemption.*

Private, religious schools should review and update their student handbooks to provide clear provisions relating to their religious beliefs and how those beliefs impact decisions at the school.⁹ Schools should also consider updating their websites to direct individuals to the student handbook where appropriate.

What should schools know about the federal litigation challenging the new rule?

The new Title IX rule is currently being challenged in at least 9 federal lawsuits. To date, there have been eight federal court opinions¹⁰ enjoining the rule (putting it on

⁷ 34 CFR § 106.12(c), <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106/subpart-B/section-106.12>.

⁸ In August of 2022, the U.S. Department of Agriculture (USDA) issued a statement indicating that religious educational institutions do not need to submit a written request for a Title IX exemption in order to claim that exemption. See *Religious Exemptions Under Title IX of the Education Amendments of 1972*, <https://www.usda.gov/sites/default/files/documents/religious-exemption-clarification.pdf>.

⁹ Some private, religious schools have done this effectively. See, e.g., Archdiocese of Milwaukee, *Catechesis and Policy on Questions Concerning Gender Theory*, available at <https://www.archmil.org/ArchMil/attachments/2022GenderTheoryfinal.pdf>.

¹⁰ *State of Louisiana, et al. v. U.S. Dept. of Education, et al.*, No. 3:24-CV-563 (W.D. La. June 13, 2024) (order granting preliminary injunction), <https://adfmedialegalfiles.blob.core.windows.net/files/RapidesParishSchoolBoardMPIRuling.pdf>; *State of Tennessee, et al. v. Cardona, et al.*, No. 2:24-CV-72 (E.D. Ky. June 17, 2024) (order granting preliminary injunction), <https://adfmedialegalfiles.blob.core.windows.net/files/TennesseeCardonaMPI-Ruling.pdf>; *State of Kansas, et al. v. U.S. Dept. of Education, et al.*, No. 5:24-CV-04041 (D. Kan. July 2, 2024) (order

pause while the rest of the litigation plays out), but, so far, these injunctions only apply to Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and 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.

Since one of the injunctions 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 in the *Kansas v. U.S. Dept. of Education* case has been directed to file a notice in the record identifying the schools which their members or their members’ children attend. The preliminary injunction applies to current and future members of these organizations, and the parties can continue to update the list of schools they provide to the court unless an appellate court says otherwise. Several lists have already been filed in the case, identifying schools covered by the injunction.¹¹ While most of the schools on the lists are public schools, private, religious schools should check to see whether their school is included.

granting preliminary injunction), <https://www.slfliberty.org/wpcontent/uploads/sites/12/2024/07/20240702-Memorandum-and-Order-on-PI-Stay-Doc.-53.pdf>; *Carroll Independent School District v. U.S. Dept. of Education, et al.*, No. 4:24-CV-004610 (N.D. Tex. July 11, 2024) (order granting preliminary injunction), <https://adfmedialegalfiles.blob.core.windows.net/files/CarrollIndependentSchoolDistrictPIStay.pdf>; *State of Texas v. United States of America, et al.*, No. 2:24-CV-86 (N.D. Tex. July 11, 2024) (order granting preliminary injunction), <https://storage.courtlistener.com/recap/gov.uscourts.txnd.389218/gov.uscourts.txnd.389218.48.0.pdf>; *Arkansas v. U.S. Dept. of Educ.*, No. 4:24-CV-636 (E.D. Mo. July 24, 2024) (order granting preliminary injunction), <https://adfmedialegalfiles.blob.core.windows.net/files/ArkansasDistrictPIStay.pdf>; *State of Alabama v. U.S. Secretary of Education*, No. 24-12444 (11th Cir. 2024) (order granting administrative injunction), https://www.iwf.org/wp-content/uploads/2024/07/24-12444_Documents.pdf; *Oklahoma v. Cardona*, 5:24-CV-461 (W.D. Okla. July 31, 2024) (order granting preliminary injunction), <https://oklahoma.gov/content/dam/ok/en/oag/documents/newsdocuments/2024/july/Order%20Granting%20PI.pdf>.

¹¹ <https://www.slfliberty.org/wp-content/uploads/sites/12/2024/07/20240715-Notice-of-Plaintiff-Organizations-List-of-Schools-and-Lists-Doc.-67.pdf>; <https://www.slfliberty.org/wp-content/uploads/sites/12/2024/07/20240726-Second-Notice-of-Plaintiff-Schools-and-List-of-Schools-Doc.-72.pdf>; <https://www.slfliberty.org/wp-content/uploads/sites/12/2024/07/20240731-Third-List-of-Schools-Doc.-74.pdf>; <https://www.slfliberty.org/wp-content/uploads/sites/12/2024/07/20240828-Plaintiffs-Fourth-Notice-of-Schools-Doc.-80.pdf>; <https://www.slfliberty.org/wp-content/uploads/sites/12/2024/07/20240913-Notice-of-Corrections-to-July-15-26-and-31-School-Lists-Doc.-83.pdf>.

Whether or not any particular school is covered by one of these injunctions, 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. ED has already filed motions with the United States Supreme Court in an effort to limit some of the injunctions.

Does the new rule impact athletics?

Unclear. The text of the rule suggests that it does, but ED 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, schools 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 the one that took 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.

Further complicating this question are membership athletic organizations like the WIAA. They have their own rules and could decide to revise them to follow the new federal rule.

What can private, religious schools do?

First, schools should conduct a review of the federal funding they receive, if any. This will help clarify if the rule could be applied to the school.

Second, as discussed above, because private religious schools have a religious exemption, schools should review their handbooks and ensure that the handbook clearly states the school's religious beliefs and how those beliefs impact decisions made by administration, teachers and leadership.

Does the exemption apply to private, non-religious schools?

No. If a private, non-religious school receives federal financial assistance, there is not a religious exemption that applies.

More resources from WILL on the new Title IX rule for public schools are available here: [What School Boards Need to Know About the Status of the New Title IX Rule](#),¹² [Title IX and Gender Identity FAQ Memo](#),¹³ and [Amicus Brief of Jane Doe](#).¹⁴

¹² <https://will-law.org/wp-content/uploads/2024/07/School-Boards-Title-IX-Rule-7.11.24.pdf>

¹³ <https://will-law.org/wp-content/uploads/2023/02/Title-IX-FAQ-Memo-Final89.pdf>

¹⁴ <https://will-law.org/wp-content/uploads/2024/09/92-2024-09-03-Amicus-Brief-WILL.pdf>