



Education Department Finalizes New Title IX Regulations: Sexual Orientation and Gender Identity

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Title IX of the Education Amendments of 1972 (Title IX) [prohibits](#) sex discrimination in education programs that receive federal financial assistance. In updated regulations, the Department of Education (ED) has defined the [scope](#) of sex discrimination under Title IX to include sexual orientation and gender identity discrimination. The regulations also contain a [provision](#) specifying that, absent an exception, even in situations where differential treatment or separation based on sex is otherwise permitted, policies that prevent individuals from participating in education programs consistent with their gender identity violate Title IX. The regulations [cover](#) all education programs that ED funds, including all K–12 public school districts and most colleges and universities. The [regulations](#) go into effect August 1, 2024. [Various states](#) have [already challenged](#) them [in court](#).

ED’s interpretation of Title IX’s sex discrimination ban follows a Supreme Court decision from 2020, [Bostock v. Clayton County](#), that interpreted a different statutory prohibition against sex discrimination in the workplace, [Title VII](#) of the Civil Rights Act of 1964 (Title VII). ED’s updated regulations draw on the [reasoning](#) of this [decision](#) in determining the scope of Title IX’s bar against sex discrimination. To place the regulations in context, this Sidebar begins with a brief introduction to Title IX and its relevant exceptions, followed by an overview of [Bostock](#) and lower courts’ interpretation of Title IX following that decision. This Sidebar then discusses the updated regulations, including the provisions defining the scope of sex discrimination and requiring schools to treat individuals consistent with their gender identity. It concludes with some considerations for Congress.

Title IX: Prohibition and Exceptions

Title IX [prohibits](#) discrimination “on the basis of sex” in education programs or activities that [receive](#) federal financial assistance. The statute and its implementing regulations impose a variety of obligations on covered schools, ranging from how they [respond](#) to sexual harassment to how they [administer](#) their athletics programs. Title IX’s statutory text [exempts](#) certain entities from its sex discrimination ban in particular situations. For instance, educational institutions controlled by a religious organization need not comply when application of the law would conflict with the organization’s religious tenets, and

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fraternities or sororities may maintain sex-based membership practices. The statute also permits certain sex-based distinctions across the board. Recipients [may](#) “maintain[] separate living facilities for the different sexes.” Long-standing regulations implementing the statute [provide](#) that recipients may maintain sex-segregated bathroom facilities as long as those facilities are comparable. Regulations also [permit](#) separate athletics teams based on sex, as well as single-sex [classes](#) in certain circumstances. The text of Title IX does not define the term “sex.”

***Bostock* and Title VII’s Sex Discrimination Ban**

In *Bostock v. Clayton County*, the Supreme Court ruled that Title VII’s ban on sex discrimination in the workplace extends to discrimination based on sexual orientation and gender identity. That statute, among other things, [prohibits](#) covered employers from discriminating against employees “because of . . . sex.” It does not explicitly mention sexual orientation or gender identity. The Court in *Bostock* reasoned that the phrase “because of” incorporates the “but-for” standard of causation: if an outcome would not have occurred “but-for” the purported cause, causation is established. The Court’s decision assumed, but did not decide, that the term “sex” in Title VII refers to biological distinctions between females and males. According to the Court, even [proceeding](#) on that assumption, an employer cannot discriminate based on people’s sexual orientation or gender identity without considering their sex. If an employer fires a man for being attracted to men, but not a woman who is also attracted to men, the employer is treating the first employee differently because of his sex. Likewise, if an employer fires a transgender man for being transgender, the employer penalizes that person for traits that it would tolerate in a person assigned the male gender at birth. In the Court’s view, sex is thus a [but-for cause](#) of sexual-orientation and gender-identity discrimination, rendering such treatment a violation of Title VII. The Court did not indicate how its reasoning would apply when a law prohibits sex discrimination but allows limited sex-based differential treatment, as that question was not before the Court. The majority opinion explained that, even with respect to Title VII, it did “not purport to address bathrooms, locker rooms, or anything else of the kind.”

Application of *Bostock* to Title IX in Appellate Courts

Following the Court’s decision in *Bostock* (but before adoption of the updated Title IX regulations discussed below), a number of [federal](#) appellate [courts](#) applied the reasoning of that case to Title IX, including in contexts like bathroom access that *Bostock* did not address. The U.S. Court of Appeals for the Fourth Circuit, for example, [addressed](#) a Title IX claim brought by a transgender male student challenging a school board policy that prohibited him from using the bathroom consistent with his gender identity. The panel concluded that the reasoning of *Bostock* guides consideration of Title IX claims and ruled that the school board’s policy excluding the student from using the boys’ bathroom necessarily relied on his sex, rendering sex a “but-for” cause of the board’s actions. The panel rejected the argument that Title IX’s [regulation](#) authorizing separate bathrooms based on sex justified the policy. The court [reasoned](#) that the regulation simply reflected that creating sex-separated bathrooms, by itself, is not discriminatory, “not that, in applying bathroom policies to students . . . the Board may rely on its own discriminatory notions of what ‘sex’ means.” The panel decided that the school board’s application of the bathroom policy to the student was unlawful discrimination under Title IX.

That approach has not been uniform across the federal appellate courts. In another post-*Bostock* case, the en banc U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) ruled that separating school bathrooms based on “biological sex” does not violate Title IX. The court first observed that the school board bathroom policy at issue [separated](#) male and female students and distinguished between them on the basis of biological sex, determined by reference to documents such as birth certificates submitted when enrolling in the district. The board did not accept updated documents conforming to a student’s gender identity. Sex-neutral bathrooms were also available to students. The Eleventh Circuit observed

that, unlike Title VII, Title IX contains express **statutory** and **regulatory** carve-outs permitting sex-segregated facilities. Because of this **distinction**, the majority opinion reasoned that it was not enough for the court to decide whether discrimination based on transgender status constitutes sex discrimination (as the *Bostock* Court did under Title VII). Instead, the court **framed** the applicable question as whether the regulatory provision **authorizing** separate bathroom facilities on the basis of sex “means to provide separate bathrooms on the basis of *biological sex*.” The court **concluded** that Title IX prohibits discrimination based on “biological sex,” and its implementing regulations authorize bathrooms separating students on that same basis. The court **ruled** that because the school board policy separated bathrooms along those lines, it complied with Title IX.

New Title IX Regulations: Sexual Orientation and Gender Identity

ED’s updated Title IX regulations, among other things, add a **provision** concerning the scope of prohibited sex discrimination and a provision **specifying** that, absent an exception, policies that prevent individuals from participating in education programs consistent with their gender identity violate Title IX.

Scope of Title IX’s Sex Discrimination Prohibition

The updated **regulations** provide that sex discrimination encompasses, among other things, discrimination based on sexual orientation and gender identity. The preamble **observes** that *Bostock* determined that sex discrimination in the Title VII context includes discrimination on those bases and that lower federal courts have applied *Bostock*’s reasoning to Title IX. ED also supports its decision by pointing to the textual similarity between Title VII and Title IX. It explains that banning discrimination “because of . . . sex” (Title VII) and prohibiting discrimination “on the basis of sex” (Title IX) are **phrases** that both “simply refer to discrimination motivated in some way by sex.” ED also points out that the Supreme Court in *Bostock* used the phrases interchangeably. Just like Title VII, Title IX “**clearly**” covers sexual orientation and gender identity discrimination “given that such bases of discrimination meet the same but-for causation test relied upon in *Bostock*,” according to ED. As in *Bostock*, ED does not purport to “resolv[e] the meaning of sex” and **states** that this interpretation holds even if the term is interpreted strictly “in terms of certain physiological sex characteristics.”

Although the preamble recognizes that *Bostock* was limited to interpreting Title VII and did not address other federal antidiscrimination laws, ED **observes** that this scope is consistent with the principle that courts are limited to resolving the cases before them. Given the statutory similarities between Title VII and Title IX, ED notes that courts often look to interpretations of the former to inform the latter. Accordingly, in ED’s view, *Bostock*’s interpretation of Title VII properly informs ED’s regulatory interpretation of Title IX.

Permissible Differential Treatment: De Minimis Harm Standard and Exceptions

One significant question is how ED’s interpretation will interact with Title IX’s statutory and regulatory exceptions that explicitly permit differential treatment based on sex. *Bostock* **did not** address how its reasoning might apply where sex-based distinctions are allowed, because that issue was not before the Court. In contexts where Title IX **permits** sex separation, may a school separate students according to their sex assigned at birth, even if such treatment is inconsistent with a student’s gender identity? The updated regulations address this issue with a new **provision**. It states that in the limited situations in which differential treatment or separation based on sex are allowed, recipients may **not do so** in a manner that subjects someone to more than de minimis harm, “except as permitted by” Title IX.

The preamble **explains** that Title IX does not bar all sex-based distinctions; only those that cause an injury or harm constitute “discrimination.” Sex-separated bathrooms and locker rooms are, according to ED, contexts in which sex separation is generally permissible. However, the regulations provide that a policy

or practice that prevents people from participating in education programs or activities consistent with their gender identity constitutes more than de minimis harm. According to the regulations, [denying](#) transgender students access to a separated activity or facility (such as a bathroom or locker room) consistent with their gender identity would violate the statute absent an exception.

The preamble also explains that with respect to [determining](#) someone's gender identity, some schools rely on students' "consistent assertion" of their gender identity or written confirmation by students or their parents. ED cautions that requiring students to undergo "invasive medical inquiries or burdensome documentation requirements" to participate in an activity consistent with their gender identity imposes more than de minimis harm.

By contrast, Title IX allows for separation or differential treatment that causes more than de minimis harm, ED states, under

- the various exceptions in the [statutory text](#) and their corresponding regulations, including the religious institutions exception;
- the [statutory exception](#) allowing for sex-separated living facilities; and
- Title IX's athletics [regulations](#) that allow separated athletics teams (discussed further, below).

Recipients [may](#) apply sex-specific policies in those contexts, even if they do cause more than de minimis harm to individuals. The preamble [observes](#) that the statutory living facilities exception extends no further than its own terms. That carve-out does not apply to contexts like bathrooms, locker rooms, or shower facilities.

Permissible Differential Treatment: Athletics

As mentioned above, athletics is a context in which, according to the [new](#) regulations, Title IX allows for differential treatment that may cause more than de minimis harm. The other areas in which the regulations permit sex separation that may cause harm are [explicitly](#) rooted in the [statutory](#) text. ED's position on athletics comes from the Javits Amendment, a bill passed in 1974 specifically [directing](#) the promulgation of Title IX regulations with "reasonable provisions considering the nature of particular sports." Under those long-standing [regulations](#), individuals may be excluded from a sports team based on their sex as long as they have equal opportunities to access a school's athletics program as a whole. ED has [issued](#) a separate notice of proposed rulemaking on school athletics that would establish a standard for determining eligibility to participate in sex-separated teams. The proposed rule would prohibit categorical bans on transgender athletes competing consistent with their gender identity. It would [allow](#) schools to use some tailored criteria that, for each grade or education level, sport, and level of competition, are (1) substantially related to an important government objective and (2) geared to minimize harm. That separate rulemaking is ongoing. (The proposal is discussed in this [CRS Sidebar](#)).

Considerations for Congress

Consistent with the Supreme Court's [interpretation](#) of discrimination because of sex in the Title VII context, ED's new Title IX regulations [provide](#) that discrimination on the basis of sex in educational programs encompasses discrimination based on sexual orientation and gender identity. The regulations also [provide](#) that schools may not engage in differential treatment based on sex that imposes more than de minimis harm, except as permitted by Title IX. Preventing individuals from participating in education programs consistent with their gender identity, according to ED, imposes more than de minimis harm.

If Congress disagrees with the new regulations, it has several avenues to alter applicable legal requirements. Congress can amend the [text](#) of Title IX to expressly address the meaning of sex discrimination under the statute. Such legislation could track the regulations or supersede them with different provisions. Congress may also alter, remove, or add to the various exceptions within Title IX and could refine how those exceptions should be applied under the statute. Congress could address how allowances for differential treatment based on sex apply to transgender students. Alternatively, under the [Congressional Review Act](#), Congress could pass a joint resolution of disapproval of the regulations within the time limits that statute requires. Enforcement of certain aspects of a regulation may also be limited through passage of [appropriations](#) riders, although such provisions generally expire at the end of the applicable appropriations cycle.

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