



Title IX's Application to Transgender Athletes: Recent Developments

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On May 15, 2020, the Department of Education's (ED's) Office for Civil Rights (OCR) issued a [Letter of Impending Enforcement Action](#) (Enforcement Letter) to the Connecticut Interscholastic Athletic Conference (CIAC) and various public school districts within Connecticut. OCR determined that CIAC's policy of allowing transgender girls (individuals assigned a male sex at birth but identifying as female) to compete on female athletic teams discriminates against women in violation of [Title IX of the Education Amendments Act of 1972](#) (Title IX). Unless the CIAC and school districts come into compliance (such as through a [resolution agreement](#) with the agency), OCR [stated](#) that it will either suspend financial assistance to them or refer the matter to the Department of Justice (DOJ) for judicial proceedings.

This dispute reflects broad disagreement over how Title IX should apply to transgender athletes, an issue that is also being litigated in the federal courts. Recently, in *Bostock v. Clayton County, Georgia*, the Supreme Court held that discrimination against gay and transgender individuals violates [Title VII](#) of the Civil Rights Act, which bars employment discrimination "because of ... sex." The *Bostock* case will inform how courts construe Title IX's prohibition on sex-based discrimination in education, including their analyses relating to transgender athletes in particular.

This Legal Sidebar examines OCR's decision, its statutory context, applicable regulations, case law, and previous guidance from OCR. It also discusses how *Bostock* may inform judicial assessment of the status of transgender athletes under Title IX.

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Background

Transgender students' participation in athletics has **divided** students, parents, states, and school districts. As a matter of federal statutory law, the debate centers on Title IX, which **prohibits** recipients of federal financial assistance from discriminating based on sex in education programs (the **Equal Protection Clause** of the Constitution may also be relevant, as reviewing courts subject governmental sex-based discrimination to heightened scrutiny, but those issues are beyond the scope of this Sidebar). Most public school districts and universities receive federal funds. They must therefore comply with Title IX or risk losing federal funding if ED finds a violation of Title IX's requirements. But while the statute explicitly prohibits discrimination "because of ... sex," it is silent on whether that term includes a person's asserted gender identity or otherwise prohibits discrimination against transgender students.

Title IX lacks any requirements specific to athletics. But implementing **regulations** provide that recipient schools must not deny the benefits of athletic opportunities based on a person's sex, or treat members of one sex differently than another sex in athletics programs. Yet schools may **field different teams** for each sex if selection is based on competitive skill or the activity is a contact sport. They must also provide "**equal athletic opportunity**" for both sexes; and "**effectively accommodate**" the interests and abilities of each sex. The regulations do not mention transgender students.

Shifting Positions at the Department of Education

ED's OCR has issued a series of nonbinding guidance documents explaining how it interprets Title IX's application to transgender students. Over time, OCR has shifted its position about what the statute requires. During the Obama Administration, OCR and the Department of Justice's Civil Rights Division jointly released nonbinding guidance (2016 Guidance) interpreting a student's gender identity as a student's "sex" under Title IX. The guidance **notified** schools that Title IX prohibits them from treating transgender students differently from how they treat other students of the same gender identity. The guidance **provided** that schools should treat students consistent with their asserted gender identity upon notification by the student or parents; it also noted that requiring students to produce documents that reflect their gender identity could itself violate Title IX. ED also released an **accompanying document** listing examples of transgender policies that some school districts and athletic associations had adopted to support transgender students; the 2016 Guidance encouraged schools to consult those examples for practical advice on complying with Title IX. That document **pointed** to high school athletic associations that permit transgender students to compete in athletics consistent with their asserted gender identity.

The Trump Administration **rescinded** the 2016 Guidance, stating that it did not "contain extensive legal analysis" or undergo a public comment process. To date, the Administration has not replaced the 2016 Guidance with an alternative. But as explained below, the position OCR has taken in its Enforcement Letter to the CIAC indicates a shift from the interpretation of Title IX during the Obama Administration.

State Laws and Policies

Alongside these varying federal approaches, states have adopted their own laws and standards for transgender student athletes. Some state standards stem from enacted laws, others from state-sanctioned athletic associations that govern sports for schools. Requirements range from laws that **prohibit** transgender athletes from participating in sports consistent with their gender identity, to policies that transgender athletes **must** be permitted to do so. Falling somewhere in the middle, some states **authorize** transgender males (individuals assigned female sex at birth but identifying as males) to participate on male sports teams, while requiring certain documentation, such as proof of gender transition treatment for a year, for transgender females to participate on female teams. (This correlates with the **current policy** of the National Collegiate Athletic Association (NCAA)).

Title IX Transgender Claims in the Courts Before *Bostock*

Federal courts have also weighed in on the status of transgender students under Title IX. While ED enforces Title IX against schools that receive federal assistance, the statute is also **enforceable** by private parties subjected to discrimination who may sue recipients of federal aid in federal court. In this context, some federal appellate **courts** have **ruled** in recent years that transgender students may bring claims under Title IX where they were denied access to a school bathroom consistent with their gender identity. In most of those cases, decided prior to the Supreme Court's ruling in *Bostock*, courts largely drew from the Supreme Court's 1989 decision in *Price-Waterhouse v. Hopkins*, in which a plurality of the Court ruled that discriminating against employees based on a failure to conform to stereotypes about their sex is unlawful discrimination under Title VII. As courts often draw upon Title VII principles to inform Title IX, some federal courts have **reasoned** that prohibiting transgender students from using a bathroom that conforms to their asserted gender identity can punish them for not conforming to stereotypes about the sex that they were assigned at birth. Even so, while these cases show that (at least in some circuits) transgender students may prevail under Title IX alleging discrimination, the cases do not necessarily resolve issues of athletics participation.

That participation is the subject of pending litigation. In response to the developments mentioned above at the state level, students have challenged laws and policies that regulate transgender athletes' participation in sports. For instance, one lawsuit **argues** that *prohibiting* transgender students from participating in athletics consistent with their asserted gender identity discriminates against them based on sex, in violation of Title IX's mandate. By contrast, another **claims** that *permitting* certain transgender students to participate according to their stated gender identity discriminates against other student competitors. Because of inherent biological differences between the sexes, according to this argument, permitting transgender females to compete on women's sports teams places the other female participants at a competitive disadvantage. Under this theory, doing so discriminates against biologically female athletes because transgender female athletes retain physiological male characteristics that are likely to give them an unfair competitive advantage. Biological females thus are not afforded equal athletic opportunities as are men, who are not placed at a similar disadvantage.

Education Department Concludes Connecticut Policy Violates Title IX

It is against this backdrop that OCR issued its Enforcement Letter. The center of the dispute is CIAC's policy of permitting transgender students to participate in sports consistent with their gender identity. Of particular concern for OCR, the policy does not appear to require any medical or other documentation for a student to participate on a team whose gender identity does not match the gender assigned to the student at birth. Track and field athletes and their parents filed a **complaint** to ED arguing that the policy violates Title IX because it discriminates against girls by permitting "biological" boys to participate in girls' athletic competitions. OCR investigated and **determined** that CIAC's policy (and certain public school districts who implemented that policy) violated Title IX regulations.

According to OCR, the CIAC policy allows "biologically male" student athletes ("defined by biological sex") to compete against female athletes in track and field events, which denies the latter athletic benefits and opportunities in violation of Title IX's regulations. This policy denies women the opportunity that male athletes have to compete "on a level playing field." The participation of "biologically male" athletes in these competitions, OCR concluded, prevented female athletes from attaining the benefits of athletic competition, such as winning championships and obtaining recognition from college recruiters.

Developing Issues: Applying *Bostock*

Following these developments, on June 15, 2020, the Supreme Court [decided](#) in *Bostock* that Title VII’s [prohibition](#) of discriminating against employees “because of ... sex” bars employers from firing them for being gay or transgender. The Court [acknowledged](#) that its decision would have application outside of the employment context, but left that question for development in the lower courts. Because of the similarity between Title VII’s and Title IX’s prohibitions, courts often look to cases interpreting Title VII to [inform](#) their analysis of Title IX. As discussed above, pre-*Bostock*, some federal appellate [courts](#) had ruled that transgender students could bring challenges under Title IX against school policies under the gender-stereotyping theory of *Price Waterhouse*, though in the context of bathroom and locker room access. After *Bostock*, federal courts will be asked to consider the implications of that decision for Title IX. For instance, in *Drew Adams v. School Board of St. John’s County*, the Eleventh Circuit Court of Appeals recently [ruled](#) that *Bostock*’s interpretation of Title VII applies to Title IX’s similar mandate against discrimination based on sex. The panel [concluded](#) that Title IX thus prohibits discrimination based on transgender status. In that case, the court [ruled](#) that a public school board’s policy prohibiting a transgender boy from accessing the bathroom consistent with his gender identity “singled him out for different treatment because of his transgender status” and caused him harm in violation of Title IX.

Even if other courts follow the Eleventh Circuit and apply the reasoning of *Bostock* to Title IX (i.e., finding that the statute protects against discrimination against transgender students), however, that alone does not necessarily resolve the issues connected to transgender students’ participation in sports. Not every sex-based distinction amounts to discrimination under Title IX. Although the text of the statute prohibits discrimination because of sex, Title IX permits certain sex-based distinctions, including for athletic participation. For instance, the statute’s implementing regulations have long authorized separate athletic teams for each gender in certain situations, as well as separate bathrooms. Title IX’s authorization for fielding separate athletics teams based on gender [presumably reflects general](#) physiological differences between the sexes. Some might argue that requiring transgender students to participate in athletics according to the gender they were assigned at birth [does not impose a harm](#) or injury amounting to discrimination under the statute; others that denying transgender athletes the opportunity to compete consistent with their gender identity [singles them out unfairly](#) in a stigmatizing manner.

And as described above, some student athletes claim that permitting certain transgender students to participate in sports consistent with their gender identity discriminates against *them* under Title IX. In particular, they argue that permitting transgender athletes to participate in sports according to their gender identity denies benefits or “equal athletic opportunit[ies]” to other students. So just as courts have faced questions about access to bathrooms for transgender students, which can have implications for nontransgender students, they will now be asked to resolve similar uncertainty in athletics.

Besides questions on Title IX’s substantive protections and prohibitions in the athletics context, there are also questions regarding the reach of its provisions. While most public school districts and universities are subject to Title IX because they receive federal financial assistance, the athletic associations that govern them may not be similarly situated. In OCR’s letter to the CIAC and school districts, OCR claims [jurisdiction](#) over the CIAC because it receives direct federal funds through a grant, receives certain indirect fees from member schools, and operates as a controlling authority over high school sports in Connecticut. Not all athletics associations, however, necessarily receive direct federal assistance. For instance, in *National Collegiate Athletics Association v. Smith*, the Supreme Court ruled that dues payments from universities that receive federal financial assistance did not subject the NCAA—which governs intercollegiate athletics—to Title IX. In other words, simply receiving money from entities that themselves received federal funds did not constitute financial assistance under Title IX. Likewise, for Title IX to apply to high school athletic associations, they must be recipients of federal financial assistance under the statute.

Considerations for Congress

Title IX does not explicitly address the status of transgender students generally or transgender student athletes specifically, although Congress could amend Title IX to resolve uncertainty about its application in these contexts. In addition, because current Title IX regulations on athletics are also silent as to transgender students, Congress could direct ED to promulgate new regulations that specifically detail schools' responsibilities for transgender student athletes.

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