

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

September 23, 2022

Title IX of the Education Amendments of 1972 (Title IX) [bars](#) discrimination “on the basis of sex” in education programs that receive federal financial assistance. As explained in a previous [Sidebar](#), the Department of Education (ED) has [issued](#) a Notice of Proposed Rulemaking (NPRM) that would, if adopted, alter a recipient school’s responsibilities when responding to allegations of sex discrimination, including sex-based harassment. This Sidebar examines another regulatory change the NPRM would make—defining the scope of Title IX’s prohibition against sex discrimination in ED regulations to include, among other things, discrimination based on sexual orientation and gender identity.

The proposal follows a Supreme Court [case](#) from 2020, *Bostock v. Clayton County*, that examined a different [statutory](#) ban on sex discrimination that applies in the employment context, Title VII of the Civil Rights Act of 1964 (Title VII). The NPRM proposes to apply the reasoning of that case to Title IX. To flesh out the changes proposed, this Sidebar begins with a brief examination of *Bostock*, as well as subsequent judicial and agency application of that decision to Title IX. This Sidebar then describes the NPRM’s proposal to establish in ED’s regulations that the scope of Title IX’s prohibition against discrimination based on sex includes discrimination based on gender identity and sexual orientation. This Sidebar also examines how the NPRM addresses the question of how the proposed regulatory change, if adopted, may interact with Title IX’s various exceptions, which permit differential treatment based on sex in certain circumstances.

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

On June 15, 2020, the Supreme Court [ruled](#) in *Bostock v. Clayton County* that Title VII forbids employers from discriminating against employees based on sexual orientation or gender identity. That statute, among other things, [prohibits](#) covered employers from discriminating in employment against individuals “because of ... sex.” The statute’s text does not explicitly mention sexual orientation or gender identity. The Court’s majority opinion concluded that Title VII’s prohibition of discrimination “because of” sex

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LSB10830

extends to discrimination based on sexual orientation or gender identity, emphasizing both Title VII's causation standard and its focus on individual harm.

The phrase “because of,” the Court explained, incorporates the “but-for” standard of causation: if an outcome would not have occurred “but-for” the purported cause, causation is established. It doesn't matter, the Court explained, if an employer also considered factors other than sex when discriminating against an employee; as long as an employee's sex was one but-for cause of the employer's decision, the test is met. The Court also emphasized that Title VII's prohibition against discrimination focuses on individuals. That is, the law prohibits discrimination against an individual employee even if an “employer treated women as a group the same when compared to men as a group.” The focus on individuals means an employer cannot successfully defend its discrimination by maintaining that both sexes were subject to the same discriminatory policy.

Applying this analysis to discrimination based on sexual orientation or gender identity, the Court ruled that singling out an employee and firing that person on either basis violates Title VII's prohibition against discrimination because of sex. The Court reasoned that it is impossible to discriminate based on sexual orientation or gender identity without considering an employee's sex. It was no defense to argue that in firing gay or transgender employees, an employer was still treating men and women the same overall. Rather, Title VII renders each instance of discriminating against an individual a violation of the statute. Importantly, the Court did not probe how its reasoning should interact with statutory [exceptions](#) under the law that expressly permit sex-based considerations in certain circumstances. For instance, Title VII contains an [exception](#) permitting sex discrimination when sex is a “bona fide occupational qualification reasonably necessary to the normal operation” of the employer's business. Generally this means that employers may, in narrow circumstances, make employment decisions based on an individual's sex when the “essence” of a job would be undermined by hiring members of both sexes, such as [requiring](#) prison guards at a maximum-security men's prison to be male. The Court in *Bostock* did not suggest how its reasoning would apply to that or any other exceptions.

## Applying *Bostock* to Title IX: Federal Courts

One question [raised](#) by *Bostock* is whether the Court's reasoning could apply to other federal statutes that also bar sex discrimination in contexts other than employment. In particular, federal appellate courts have been asked to apply *Bostock*'s reasoning to claims alleging sex discrimination under Title IX. 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 prohibiting 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 of 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 also rejected the argument that a Title IX [regulation](#) authorizing separate bathrooms based on sex justified the policy. The court reasoned that the regulation simply reflected that creating separate bathrooms based on sex, 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 thus decided that the school board's application of the bathroom policy against the student was unlawful under Title IX.

The Eleventh Circuit at first [reached](#) a similar result in another Title IX case also challenging a bathroom policy that barred a transgender male student from using the bathroom consistent with his gender identity. The panel rejected the argument that the Title IX bathroom regulation authorizing sex-separated bathrooms “foreclosed” a discrimination claim. The court observed that the regulation “sheds no light” on whether the plaintiff's “‘sex’ is female as assigned at his birth or whether his ‘sex’ is male as it reads on his driver's license and his birth certificate.” For the court, because “Title IX and its regulations do not declare which sex should determine a transgender student's restroom use ... the language of [the regulation] does not insulate the School Board from [the plaintiff's] discrimination claim based on his

transgender status.” That decision was [vacated](#) in an opinion that did not reach the Title IX question but concluded that the policy violated the U.S. Constitution’s Equal Protection Clause. The full Eleventh Circuit then vacated *that* decision and voted to [rehear](#) the case en banc. No final decision has been issued as of the date of this writing.

## Applying *Bostock* to Title IX: Agency Guidance

In March 2021, the Department of Justice (DOJ) issued a [memorandum](#), consistent with a January 2021 [Executive Order](#), to federal agency general counsels concluding that Title IX prohibits discrimination based on sexual orientation and gender identity. DOJ explained that because the statutory prohibitions against sex discrimination in Title VII and Title IX are similar, courts often look to Title VII to inform interpretation of Title IX. Looking to *Bostock*’s reasoning to inform its analysis of Title IX’s text, the DOJ memorandum noted that both statutes prohibit discrimination against individuals, a key feature that the *Bostock* Court focused on in interpreting Title VII. In addition, in DOJ’s view, Title VII’s “because of” sex provision is similar enough to Title IX’s “on the basis of sex” language to make them interchangeable.

In June 2021, ED released a [notice](#) explaining that, although it had in the past sometimes claimed that Title IX “does not encompass discrimination based on sexual orientation and gender identity,” it was now releasing an interpretation to clarify Title IX’s scope in light of *Bostock*. Drawing on arguments like those relied on in the DOJ memorandum, and pointing to the cases mentioned above, as well as the DOJ memorandum itself, the notice took the view that *Bostock*’s interpretation of Title VII sex discrimination guides the agency’s interpretation of sex discrimination under Title IX. Thus, the notice concluded that Title IX bars discrimination based on sexual orientation and gender identity. A federal district court in Tennessee later [issued](#) a preliminary injunction barring implementation of the notice against 20 plaintiff states on the grounds that the interpretation was a legislative rule and should have gone through the notice and comment rulemaking process required for such rules under the [Administrative Procedure Act](#).

## NPRM: Sexual Orientation and Gender Identity

In line with the reasoning given in the previous ED notice and DOJ memorandum described above, the NPRM would [establish](#) in ED’s Title IX regulations a section on the scope of what sex discrimination entails, providing that it includes discrimination based on gender identity and sexual orientation. Thus the regulations would, if the NPRM were adopted, require that recipient schools not discriminate on those bases absent an applicable exception.

The NPRM also proposes to amend another section of current Title IX regulations to address how the requirements would interact with Title IX’s [exceptions](#), including when treating an individual inconsistently with their gender identity violates Title IX.

## Interaction with Title IX’s Exceptions

One relatively novel interpretive question implicated by ED’s NPRM is how its proposal to include sexual orientation and gender identity as prohibited bases of discrimination should interact with the existing Title IX [statutory](#) and [regulatory](#) exceptions that explicitly permit differential treatment based on sex. As mentioned above, in *Bostock* the Supreme Court concluded that firing an employee based on their sexual orientation or gender identity violated Title VII’s prohibition against sex discrimination. But the Court did not address the interaction of that interpretation with any statutory exceptions to the statute permitting sex-based distinctions.

## Title IX Exceptions

The statutory text of Title IX [prohibits](#) discrimination “on the basis of sex” in educational programs or activities that [receive](#) federal financial assistance. Certain sex-based distinctions, however, are expressly permitted under the statute. Title IX contains nine specific [exceptions](#) to its sex discrimination ban, including for admissions at private educational institutions and for educational institutions controlled by a religious organization when application of the law would be inconsistent with the organization’s religious tenets. In addition, Title IX’s text expressly [provides](#) that the statute does not ban recipients from “maintaining separate living facilities for the different sexes.” Long-standing regulations implementing the statute [provide](#) that recipients may maintain separate bathroom facilities based on sex as long as those facilities are akin to one another. Regulations also [permit](#) separate athletics teams based on sex.

Assuming that the NPRM is adopted, and ED’s Title IX regulations provide that discrimination based on sex includes discrimination based on sexual orientation and gender identity, how should that prohibition interact with contexts in which Title IX permits sex-based distinctions? As *Bostock* did not purport to resolve how its reasoning applied to Title VII exceptions, even if that decision’s reasoning applies to Title IX, it is unclear how it will interact with Title IX’s [statutory](#) and regulatory exceptions. Does, for instance, Title IX’s express [exception](#) allowing separate living facilities based on sex permit a college to divide dorms in a manner that requires students to occupy rooms according to their gender assigned at birth?

Likewise, does the [regulation](#) allowing separate bathrooms authorize schools to require that students use a bathroom facility based on their gender assigned at birth? Or does preventing students from using the bathroom consistent with their gender identity instead constitute prohibited sex discrimination? As noted above, the Fourth Circuit concluded that, despite the Title IX bathroom regulations, barring a transgender student from accessing a bathroom consistent with their gender identity can violate Title IX, while the Eleventh Circuit initially did the same in a now-vacated decision.

## NPRM’s Provision on De Minimis Harm and Gender Identity

The NPRM appears to partly address the issue of Title IX’s exceptions by proposing to add a new provision to an existing Title IX regulation. The text of the proposed regulations would [require](#) that, in the “limited circumstances in which Title IX” or the regulations permit “different treatment or separation on the basis of sex,” recipients “must not carry out such different treatment or separation in a manner” that subjects a person “to more than de minimis harm.” Importantly, the provision is caveated with the phrase: “*unless otherwise permitted by Title IX or this part*” (emphasis added). In addition, the proposed regulation would explicitly provide that preventing someone “from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm.”

As reflected above, this provision specifies that in the limited cases when Title IX permits differential treatment, that treatment may not cause more than de minimis harm, “unless otherwise permitted by Title IX or this part.” Given this phrasing, the proposed regulatory text appears to express the view that in some cases Title IX authorizes differential treatment based on sex, but only when such treatment results in no or only de minimis harm; yet in other contexts (“unless otherwise permitted by Title IX or this part”), Title IX permits differential treatment based on sex that can cause more than de minimis harm.

For example, the accompanying discussion in the NPRM states that the “Department’s regulations have recognized limited contexts in which” sex-based distinctions are permissible under Title IX because, in general, such treatment does not generally impose a harm on students. ED [points](#) to current Title IX [regulations](#) authorizing sex-separated bathroom facilities and human sexuality classes as examples of sex-based distinctions that generally do not amount to discrimination. Nonetheless, according to ED, in some [circumstances](#), even though a sex-based distinction does not harm *most* students, “Title IX prohibits its application to those individual students who would suffer more than de minimis harm on the basis of sex.” In those situations, ED believes that such treatment would be unlawful under Title IX. The NPRM states that courts have found that recipient schools subject students to such a harm when prohibiting them from “accessing otherwise permissible sex-separate facilities or activities consistent with their gender identity.”

In contrast, ED [asserts](#) that “there are circumscribed situations in which Title IX or the regulations permit a recipient to separate students on the basis of sex, even where doing so may cause some students more than de minimis harm.” The NPRM cites the statutory [exceptions](#) in Title IX’s text as examples, such as for membership practices of social fraternities or sororities. The NPRM also points to Title IX’s statutory [exception](#) for separate living facilities as an example, because, according to ED, excluding someone from a facility based on their sex might cause more than de minimis harm, but Congress has still permitted the practice.

However, beyond the examples given in ED’s discussion of its proposed rule, the NPRM’s proposed regulatory text does not precisely delineate the circumstances in which a permissible sex-based distinction under Title IX authorizes only differential treatment that causes no or only de minimis harm, or instead authorizes a distinction that can cause a harm above that threshold. That said, the NPRM does indicate that at least in the former context, treating students inconsistent with their gender identity can violate Title IX, as doing so causes more than de minimus harm.

## Athletics

ED’s discussion accompanying the proposal also [states](#) that excluding an individual from a male or female athletics team may cause more than de minimis harm, yet current Title IX [regulations](#) on athletics, which permit sex-separated teams in certain situations, authorize such treatment. The agency states that it will consider, in a separate rulemaking, amendments to athletics regulations, “including what criteria, if any,” schools may use to establish eligibility to participate on a male or female athletics team.

## Conclusion and Considerations for Congress

In light of the Supreme Court’s *Bostock* decision interpreting Title VII’s prohibition against sex discrimination in employment, the NPRM proposes to amend ED’s regulations to define the scope of Title IX’s ban on sex discrimination to include discrimination based on sexual orientation and gender identity. In addition, the proposal would provide that preventing an individual from participating in education programs consistent with their gender identity imposes more than de minimis harm, which can constitute discrimination under Title IX “unless otherwise permitted by Title IX” or regulations.

Congress can amend the text of Title IX to expressly address the meaning of sex discrimination under the statute. Such legislation could track the NPRM’s provisions or supersede them with a different definition. Congress may also alter the various exceptions to Title IX’s mandate and further define how those exceptions should be applied under the statute. Alternatively, if the NPRM were adopted and Congress wished to limit its effect, pursuant to the [Congressional Review Act](#), Congress could pass a joint resolution of disapproval 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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