

Lawyer Insights

Transgender Students and Sports – Title IX Compliance in an Uncertain World

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A national debate currently rages over whether transgender athletes should be permitted to compete on sports teams that correspond to their gender identities. Title IX applies to any higher education institution that receives federal financial assistance and prohibits discrimination on the basis of gender, but the law does not address transgender students.

Recently, in mostly Republican-led states (Montana, North Dakota, South Dakota, Minnesota, Iowa, Wisconsin, Michigan, Ohio, Missouri, Kentucky, West Virginia, Utah, Arizona, Arkansas, Tennessee, Mississippi, New Mexico, Hawaii, Kansas, Oklahoma, Texas, Louisiana, Alabama, Georgia, Florida, South Carolina, Connecticut, New Jersey, Pennsylvania, Maine and New Hampshire) lawmakers have introduced a flurry of legislation that generally regulates the ability of transgender athletes to play on their schools' sports teams. Meanwhile, the legal landscape is far from certain, as the Supreme Court has not yet taken up the issue of whether Title IX applies to transgender students. Given the conflicting lower court rulings, Department of Education Office for Civil Rights guidance, and state legislation, the obligations that schools and universities have toward their transgender students under Title IX is unclear. Nonetheless, there are certain steps that schools and universities can take to feel more certain about their federal funding.

The Biden Administration's Take: Upending the Trump Administration, Affirming Obama-era Guidance

On June 16, 2021, the Department of Education issued a Dear Colleague letter that sets forth the Biden administration's interpretation of Title IX. Notably, this guidance has changed depending on the party in office: in 2016, the Obama administration issued similar guidance stating that Title IX protected transgender students. In 2017, the Trump administration reversed course and rescinded the guidance, and additionally threatened to withhold federal funding from schools that allowed transgender students to participate in sports consistent with their gender identities. Although the Biden administration's notice does not create new law, it provides notice to institutions that the Office of Civil Rights will review any complaints that transgender students may bring with the same level of scrutiny as claims for gender discrimination that are clearly covered under Title IX.

The Rush to Legislate Transgender Students' Participation in Sports

To date, over 30 states have introduced bills that prohibit transgender students from playing sports that correspond to their gender identities. Some states (in particular, Arkansas, Mississippi, Tennessee, Idaho and Florida) have implemented bans that prohibit transgender athletes from participating in sports that correspond to their gender identities. Proponents of these bills argue that they are necessary to protect

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opportunities to obtain athletic scholarships. Specifically, they claim that transgender women have higher levels of testosterone, which creates a competitive advantage. Opponents of transgender bans in female sports point to inconclusive scientific studies on the topic; difficulty quantifying the effect that elevated testosterone levels may have on performance; and the fact that competitors with other physical advantages (for example, extremely long legs or large feet) are not precluded from participating. Moreover, some females have naturally high testosterone levels. For example, Namibian athletes Christine Mboma and Beatrice Masilingi were recently precluded from competing in the 400 meters (but not the 200 meters) at the Olympics after testing revealed high testosterone.

The Complicated Legal Landscape

The Supreme Court has not addressed whether Title IX provides protections to transgender students, and lower courts have reached differing opinions. On June 28, 2020, the U.S. Supreme Court elected to keep in place a Fourth Circuit Court of Appeals decision that a Virginia school board violated Title IX when it prohibited a transgender former public high school student from using the bathroom that corresponded to his gender identity. The Court's order indicates that Justices Thomas and Alito would have agreed to hear the case.

The Fourth Circuit's ruling took into account the Supreme Court's June 15, 2020, ruling in *Bostock v. Clayton County*, which held that Title VII's protections extend to transgender employees. In the 6-3 ruling, Justice Gorsuch's majority opinion clearly stated that employment discrimination on the basis of sexual orientation is prohibited under Title VII, but the Court left quite a few questions open, such as whether employers must permit employees to use the bathroom or locker room that corresponds with their gender identities. Given the questions left open in the *Bostock* decision, is it difficult to predict how the Supreme Court will rule if it addresses the issue of whether Title IX's protections apply to transgender students. Indeed, courts have come to different conclusions regarding whether sex discrimination laws (either Title IX or Title VII) extend protections to transgender people. See *Etsitty v. Utah Transit Auth.*, 502 F. 3d 1215 (determining that Title VII does not provide protections to transgender workers in all cases); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019) (stating in dicta that Title VII does not prohibit discrimination against transgender people); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. Aug. 21, 2016) (holding that Title IX does not apply to transgender people).

Steps that Educational Institutions Can Take to Ensure Compliance

Due to the constantly changing landscape in federal, state, and local law, the first step that educational institutions should take is to ensure that they are apprised of the latest guidance from the Department of Education's Office of Civil Rights ("OCR"). The OCR's guidance should be considered alongside any changes in federal or state law. Where the laws conflict, educational institutions should work with their counsel to determine an appropriate course of action.

Next, educational institutions should address any policies that they have on a wholesale level if those policies could implicate transgender rights. Some of these are obvious—for example, whether gender identity and expression are addressed (and how) in Title IX and antidiscrimination policies. Others are less obvious and involve evaluating how the information that is provided in a student's record (such as name and gender) might limit the student's ability to participate on certain sports teams and in other activities.

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Educational institutions should also evaluate the facilities such as locker rooms, and allow transgender students to use the locker rooms that correspond to their gender identity. Additionally, schools should also implement and enforce policies regarding locker room etiquette that protect students' privacy and prohibit behavior that contradicts student and athletic codes of conduct. Educational institutions may also wish to explore establishing private areas (such as single occupancy restrooms) that students may use if they wish.

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