

Fall Forum 2023
Bracing For Significant Regulatory Changes

TITLE IX REGULATIONS: NAVIGATING CHANGING INTERPRETATIONS

Julia Martin, Esq.
jmartin@bruman.com



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- Title IX Background
- The new rules:
 - Education program and activity
 - Athletics
- Challenges from States and Congress
- What's Next

AGENDA



TITLE IX BACKGROUND



TITLE IX BASICS

- Comes from Title IX of the Education Amendments of 1972
- Enacted as follow-up to Civil Rights Act of 1964
- Originally just applied to those entities receiving direct aid
 - The Civil Rights Restoration Act (1988) extended Title IX coverage to all programs of any educational institution that receives *any federal assistance, both direct and indirect*



"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."



DEFINITION OF "SEX"

- Lack of definition of "sex" in Title IX (and similar civil rights laws of the period)
- Leaves statute open to interpretation by courts and administrative regulations






THE BOSTOCK DECISION

- Bostock v. Clayton County (SCOTUS, 2020)
- Discrimination on the basis of sexual orientation or gender identity is necessarily also discrimination "because of sex" as prohibited by Title VII (employment discrimination):
 - "An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands."



TIMELINE OF ACTION: FROM BOSTOCK TO NOW

- January 20, 2021: [Executive Order issued making *Bostock* decision precedent governmentwide](#)
 - Says that Civil Rights Act of 1964 protects employees from discrimination based on gender identity or sexual orientation
- March 8, 2021: [Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity](#)
 - Directs ED to review all policies related to sex discrimination (including Title IX) within 100 days
- March 26, 2021: [DOJ memo to federal agencies](#)
 - Concludes that Title IX protects from discrimination based on gender identity or sexual orientation
- April 6, 2021: [ED announces plans for comprehensive rewrite](#) of Title IX rule

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- June 22, 2021: ED publishes a “[Notice of Interpretation](#)” in Federal Register
 - “OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.”
 - August/ September 2021: 20 Attorneys General write to ED contesting NOI, file lawsuit arguing that:
 - States face a “credible threat” of losing federal funding due to existing laws and policies which are not in compliance
 - Bostock is “inapplicable to Title IX’s materially different language”
 - July 15, 2022: Judge issues injunction against ED enforcing NOI, saying it infringes on States’ ability to make and enforce own laws
 - Too big a question to answer in non-regulatory guidance



THE NEW TITLE IX RULES

- Draft regulations on discrimination in a recipient’s “educational program or activity” published July 12, 2022
 - Received more than 250,000 public comments
 - Final version expected in May 2023
- Draft regulations on athletics published separately (April 13, 2023)
 - Received more than 142,000 public comments
- Final rules expected October 2023





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Office of Information and Regulatory Affairs (OIRA)

Executive Order Submissions Under Review

November 08, 2023

Department of Education

AGENCY: ED-OPEPD

TITLE: EDGAR Revisions

STAGE: Proposed Rule

RECEIVED DATE: [09/08/2023](#)

RIN: [1875-AA14](#)

Section 3(f)(1) Significant: Yes

Economically Significant: No

LEGAL DEADLINE: None

Status: [Pending Review](#)

AGENCY: ED-OPE

TITLE: Fulbright-Hays Doctoral Dissertation Research
Abroad and Faculty Research Abroad Fellowship Program

STAGE: Final Rule

RECEIVED DATE: [10/19/2023](#)

RIN: [1840-AD90](#)

Section 3(f)(1) Significant: No

Economically Significant: No

LEGAL DEADLINE: None

Status: [Pending Review](#)



ADVOCATES' LETTER

- Over 100 advocacy groups signed October letter pushing for “immediate” release of final rules
 - Express concerns about multiple delays
 - Urgency for impacted students
 - <https://nwlc.org/wp-content/uploads/2023/10/Advocate-letter-Title-IX-rule-10.23.23-vF-127-orgs.pdf>
- Why the letter?
 - Push from women’s advocates moved up pre-publication release of Title IX draft rule, clearly hoping for same result here



THE NEW RULES



THE NEW RULE: EDUCATION PROGRAMS AND ACTIVITIES

- Propose new definition of “sex” as inclusive of gender identity and sexual orientation, prohibit discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions
- Adds those “attempting to participate” in activities (includes admissions)
- New protections for pregnancy
- Covers some off-campus conduct that contributes to a hostile environment
- Changes standard for action (not just avoiding deliberate indifference) → active obligation to respond to and prevent



THE NEW RULE: ATHLETICS

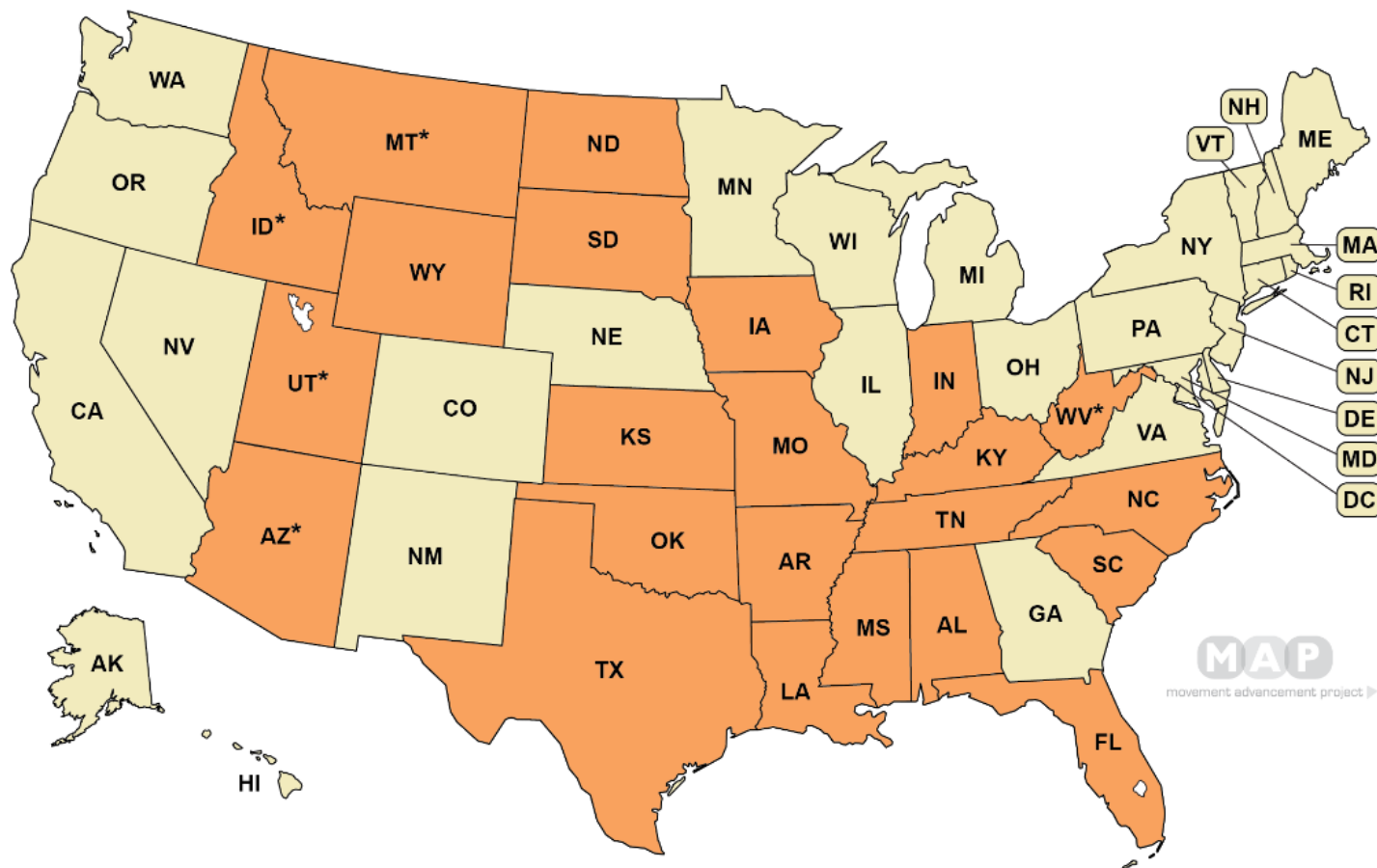
“If a recipient *adopts or applies* sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, *for each sport, level of competition, and grade or education level*: (i) be *substantially related to the achievement of an important educational objective*, and (ii) *minimize harms* to students whose opportunity to participate on a *male or female* team consistent with their gender identity would be limited or denied.”



COMING CHALLENGES



POTENTIAL STATE CHALLENGES



Map of state laws which ban transgender athletes from participating in the sport of their gender identity, as of October 2023

-  State law bans transgender students from participating in sports consistent with their gender identity (23 states)
-  State law does not ban transgender students from participating in sports consistent with their gender identity (27 states, 5 territories + D.C.)





LIKELY FURTHER CHALLENGES

- States that won temporary injunctions to NOI will sue over definitions that conflict with State/local law
 - i.e. how to define sex
- Question ultimately becomes which is more important: States' rights to "make and enforce their own laws" or federal law that conflicts with States
 - Brings in "Major questions doctrine"



COLLISION COURSE WITH CONGRESS?

- Protection of Women and Girls in Sports Act (H.R. 734)
- Passed House Committee on April 20, 2023
- Amends Title IX of the Education Amendments of 1972
- Applies to all “recipients” of federal financial assistance
- Prohibits students from participating in women’s or girls’ sports if their reproductive biology and genetics are “designated male at birth”



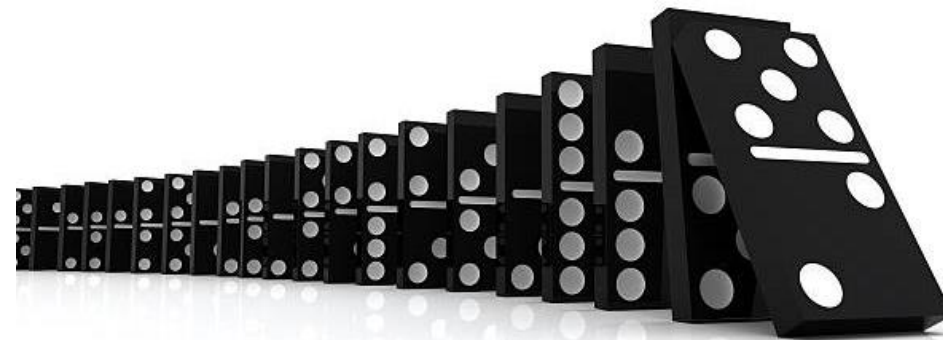
PROTECTION OF WOMEN AND GIRLS IN SPORTS ACT

- White House threatened veto
 - “As a national ban that does not account for competitiveness or grade level, H.R. 734 targets people for who they are and therefore is discriminatory.... At a time when transgender youth already face a nationwide mental health crisis, with half of transgender youth in a recent survey saying they have seriously considered suicide, a national law that further stigmatizes these children is completely unnecessary, hurts families and students, and would only put students at greater risk”
- Senate says it will not take up the legislation



CURRENT STATUS: STALEMATE

- One of these actions will trigger others to break the stalemate:
 - Supreme Court gets involved through:
 - Final rule on educational programs OR athletics will trigger lawsuit
 - Appeal in existing NOI lawsuit will yield decision that impacts other States
 - Election could change Congressional/Presidential balance of power





WHAT'S NEXT?



TIMELINE FOR REGULATION

- Customary to publish regulations for colleges in November prior to the school year in which they go into effect
 - Only occasionally followed
- Other factors
 - Time for colleges, school districts, and States to:
 - Review regulations
 - Conduct required trainings
 - Draft/ amend existing policies
 - Legal challenges
- Still potentially effective in the 2024-25 school year but TBD



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