

# **TITLE IX:**

## **Executive Summary:**

The Biden administration's changes to Title IX regulations adopt the definition from Supreme Court precedent, *Bostock v. Clayton County*, to include sexual orientation, gender identity, sex stereotypes, sex characteristics, pregnancy or related conditions among the classifications protected from sex-based discrimination. The new rule is intentionally silent on transgender participation in sports, which will likely be addressed in a separate regulation in the future. Instead, the new rule largely relates to facilities by requiring that schools allow transgender students to use restrooms and locker rooms that align with their gender identity – a policy that has already been instituted by the Hawaii Department of Education for years. Therefore, while many conservative states have been outspoken in their opposition to this rule, the regulations will likely have no noticeable impact on schools in Hawaii.

## **Nature of Research:**

- How has the Biden administration changed Title IX?
  - What happens on August 1 that is widely discussed?
  - How do these changes relate to transgender athlete participation?
- Impact on Hawaii
  - Has DOE implemented any new rules in light of the federal changes?
  - Did Hawaii Legislature consider any legislation or resolutions on this topic?
  - Has Gov. Green issued any memos or executive orders on the topic?

## **Title IX Implementation and Evolution:**

Title IX of the Education Amendments of 1972 protects students and employees in federally funded education from discrimination and harassment based on sex. This connection to federal fundings means that Title IX applies to public education in elementary, middle and high school as well as public universities. Title IX was implemented under the Nixon administration. Hawaii played an integral role in the implementation of Title IX as it was drafted by Hawaii's own U.S. Representative, Patsy T. Mink.

Since its implementation, Title IX has been modified with changes in presidential administrations. Under the Obama administration, the standard of proof was changed to preponderance of the evidence giving a favorable advantage to the victim of sexual harassment. The Trump administration relaxed this standard of proof and gave schools the flexibility to choose between preponderance of the evidence and clear and convincing standards. The Trump administration also narrowed the scope of Title IX to only apply to incidents which happened on campus and require the accuser still be a student at the time of making a claim. Finally, the former president instituted live hearings where accusers must face their harasser during a sexual harassment hearing. Like the administrations before him, President Biden is also making modifications to Title IX.

## **The Biden Administration and Federal Regulations:**

The Biden Administration has issued new Title IX regulations. The proposed rules were released by the U.S. Department of Education in July 2022 for public comment. After consideration of the comments, a final rule was released almost two years later, on April 19, 2024. The regulations will take effect August 1, 2024.

Some provisions in the regulation are aimed at accountability for enforcing Title IX and ensuring schools “take prompt and effective action” to address sex discrimination and harassment. Much of the changes relate to procedures for addressing sex discrimination, sexual violence, and sex-based harassment in schools. The rules repeal the requirement for a live hearing implemented by the Trump administration; instead, it will be one option available for resolving Title IX issues.

One major change noted in the federal regulations is an update to the definition of “sex-based harassment” to include discrimination based on “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” By amending this definition, the U.S. Department of Education adopts the Supreme Court’s precedent from *Bostock v. Clayton County*.

In 2020, the Supreme Court issued a decision interpreting the term “sex” for purposes of discrimination under Title VII of the Civil Rights Act of 1964 to include sexual orientation and gender identity. Title VII pertains to workplace discrimination. The Supreme Court made their decision based on the facts of two cases of wrongful termination cases where one plaintiff was a skydiving instructor, Bostock, fired for being gay while the other was an employee at a funeral home fired for being transgender. The legal argument based on sexual orientation premised that “[plaintiffs] would not have been fired had they been women attracted to men, thus making their sex the crucial factor that influenced their firing.” Justice Gorsuch wrote the opinion, summarizing the issue: “The statute’s message for our cases is equally simply and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

The *Bostock* case elicited a 6-3 decision, where the majority was comprised of Justices Gorsuch, Roberts, Kagan, Ginsburg, Breyer, and Sotomayor. If a similar suit was brought before the Supreme Court today, the legal argument for Title VII could be transferrable to Title IX; However, while Title IX was modeled after the Civil Rights Act, the claims are based in different laws (Title VII, 42 U.S.C. 2000e and Title IX, 20 U.S.C. 1681). Moreover, of the six justices who made up the original majority opinion, four remain on the court. Ruth Bader Ginsburg has since passed away and Breyer retired in 2022, but Justice Ketanji Brown Jackson, the recent Biden appointee, might be the necessary fifth to issue a similar 5-4 ruling if the definition of “sex” in Title IX were taken before the Supreme Court today.

Something highly anticipated, yet strikingly absent from the new regulations, is any guidance on transgender participation in athletics. Many expect these guidelines to be forthcoming after the initial updates to the regulations. According to a U.S. Department of Education press release on April 19, 2024, “[t]he Department’s rulemaking process is still ongoing for a Title IX regulation related to athletics. The Department proposed amendments to its athletics regulations in April 2023, and received over 150,000 public comments, which by law must be carefully considered.” The proposed rule would have prohibited categorical bans to transgender participation in sports but would allow certain determinations of eligibility to be made on a “case by case basis.” Given the two year notice and comment period between proposal and final rule for the recent Title IX regulations, many expect the transgender athlete guidelines will not be available until after the November election.

The U.S. Department of Education explicitly excepts “sex-separate living facilities” and “sex-separate athletic teams” from the areas subject to sex-based discrimination for transgender individuals in the new rule: “*The final regulations further recognize that preventing someone from participating in school (including in sex-separate activities) consistent with their gender identity causes that person more than de minimis harm. This general nondiscrimination principle applies except in the limited circumstances specified by statute, such as in the context of sex-separate living facilities and sex-separate athletic*

teams.” By excepting sex-separate living facilities and athletic teams, the regulation primarily targets bathrooms and locker rooms (a topic which is already addressed in Hawaii’s DOE policies, see below).

Nevertheless, the updated definition of “sex-based harassment” could create some room for the issue to be further interpreted in the meantime through legal challenges or otherwise: *“While the Title IX rule prohibits discrimination against LGBTQ individuals, it does not include a provision to protect transgender students who want to play on a sports team consistent with their identity. O’Hara said advocates believe the Biden administration will issue such a rule separately and that it likely won’t happen before the general election in November. But, that leaves for some gray area since the new rule prohibits discrimination for LGBTQ individuals.”* ([NM Political Report](#))

### **Hawaii Department of Education Policies and State Legislation:**

Hawaii has frequently been ahead of the curve when it comes to LGBTQ+ rights. The updates to Title IX are no different. Hawaii’s Department of Education (DOE) has internal policies similar to that of the Biden administration’s changes to Title IX. [DOE’s Civil Rights Compliance Branch \(CRCB\)](#) website already features similar language for interpreting Title IX: *“Sex based discrimination includes both sexual harassment and gender based harassment. . . . Gender-based harassment is unwelcome conduct based on the individual’s actual or perceived sex; and includes harassment based on gender identity and non-conformity with stereotypical notions of femininity and masculinity. . . .”* (italics added).

Further, DOE issued a guidance document on [Supports for Transgender Students](#) as early as 2016. In the document, DOE identifies the following as examples of transgender discrimination: “being prevented from using preferred names and pronouns, and being required to use the restroom/locker room of their assigned sex at birth.” The guidance document also provides the following:

*“A transgender student who is ready to socially transition, regardless of whether the student is undergoing medical transition, may initiate a process to change how the student is addressed (preferred name, preferred pronoun), their attire, and access to preferred activities and facilities.”*

*“Schools may maintain separate locker room facilities for male and female students. Students should have access to the locker room facility that corresponds to their sincerely held gender identity.”*

However, the Biden administration is not the only one appearing to avoid the larger task of addressing transgender participation in sports. Hawaii’s DOE notes that they are still in discussion about what transgender student support looks like in competitive athletics.

In the absence of a clear DOE directive, many transgender athletes have been able to compete in Hawaii high school sports according to their gender identity. In 2020, a track and field coach in Maui [complained to DOE](#) about the administration’s decision to allow a transgender female student from Kamehameha-Maui to compete in girls’ volleyball and track/field. When a media outlet requested their comment, DOE stated: *“HIDOE guides all public schools to support transgender students and to provide a safe and nurturing environment in both academics and athletics. Students are allowed to participate in recreational gym class activities and in-school sports in accordance with their sincerely held gender identity.”* More recently, earlier this year, a transgender female competed on the girls’ relay team for [Kea’au High School](#) on Big Island. The principal of Kea’au High School and president of the Big Island Interscholastic Federation, Dean Cevallos, allowed the participation and noted that he has received no complaints on the issue and will continue to act according to Title IX and DOE policy.

Further, last year the legislature passed [HB 554 \(Act 76, 2023\)](#). This law appropriated funds to UH for implementation of culturally competent training for the disciplinary process of sexual misconduct on campus in relation to Title IX. Similar to the recent changes by the Biden administration, the law defines “sex” to include “gender identity, gender expression, sexual orientation, and pregnancy or parenting status.”

Governor Green used this recent legislative session to make numerous nominations for the Hawaii State Lesbian, Gay, Bisexual, Transgender, Queer, Plus Commission, which acts as an interface between the LGBTQ+ community and the government. Despite a general support for the LGBTQ+ community, Gov. Green has not otherwise made a statement regarding this Title IX issue.

### **National Response to the Issue:**

Currently twenty-five states prohibit transgender females (male to female) from participating in women’s sports. Similarly, [twenty-six Republican](#) states have sued or otherwise issued statements indicating their intent to block the recent changes to Title IX from taking effect. The states include Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

One suit against the U.S. Secretary of Education, [Tennessee v. Miguel Cardona](#), met success earlier this month in federal court in the Eastern District of Kentucky. The District Court decision declined to apply the *Bostock* reasoning for Title VII to Title IX. Further, the Court suggests that any application of Title IX to this context is more appropriately resolved by Congress instead of an executive agency. *Tennessee* also suggests that requiring compliance with preferred pronouns amounts to compelled speech in a violation of the First Amendment. The Court issued a preliminary injunction to prevent implementation of the federal regulations in the plaintiff states (Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia). The decision is expected to be appealed to the Sixth Circuit by the Biden administration.

On a national level, the National Collegiate Athletic Association (NCAA) updated their [rules](#) for transgender participation in 2022. The policy creates consistency between college sports and the U.S. Olympics, making it easier for athletes to promote into the next stage of competition after college. The NCAA policy requires medical exemptions for transgender males taking otherwise prohibited substances, such as testosterone, for the purpose of gender affirming care. The NCAA further requires documentation of testosterone levels in certain instances. The NCAA is certainly ahead of the federal curve, but the case-by-case determinations included in the U.S. Department of Education’s 2023 proposed rules might adopt a similar approach in their final form – whenever that may be released.

### **Look To These Resources for More Details:**

[Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking \(PDF\)](#)

[U.S. Department of Education Releases Final Title IX Regulations, Providing Vital Protections Against Sex Discrimination | U.S. Department of Education](#)

*Please let me know if you would like further information. Thank you for this opportunity to assist you.*

