



# Title IX: Who Determines the Legal Meaning of “Sex”?

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[Title IX](#) of the Education Amendments of 1972 (Title IX) generally prohibits discrimination “on the basis of sex” in educational programs or activities that receive federal funding. Whether the statute’s protection extends to bar discrimination based on a person’s [gender identity](#) (i.e., according to a person’s internal sense of gender), however, is unsettled. Federal agencies have taken shifting positions on the question in recent administrations, and federal courts have [reached divergent](#) decisions on the matter. In addition, recent [news reports](#) have claimed that an internal Department of Health and Human Services (HHS) memorandum, not publicly available, advocates for interpreting the term “sex” in Title IX to refer to a person’s biological status at birth, but not a person’s gender identity. Though not the primary agency responsible for enforcing Title IX, HHS administers the Patient Protection and Affordable Care Act (ACA), which [bars](#) discrimination in health programs that receive federal funding on the grounds prohibited by Title IX. Reports about a potential HHS memo invited some [speculation](#) that other agencies could “[follow suit](#)” and “effectively end federal recognition” of transgender status.

More broadly, another federal civil rights statute, [Title VII](#) of the Civil Rights Act of 1964 (Title VII), bars discrimination on the basis of sex in the employment context; interpretation of its provision relating to sex discrimination often [informs](#) the [interpretation](#) of Title IX’s prohibitions. The Supreme Court [has been asked](#) to resolve and address competing interpretations of Title VII’s prohibition of discrimination because of “sex.” Accordingly, a definitive ruling on that statute’s scope would likely inform judicial interpretation of the similarly worded prohibition against “sex” discrimination in Title IX.

Against this backdrop, this Sidebar provides an overview of the principal federal agencies involved in interpreting and enforcing Title IX, the various interpretations of the term “sex” in Title IX reached by

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those agencies and federal courts, and the potential interplay among conflicting interpretations of a statutory term between courts and federal agencies.

### **Federal Agencies' Role Enforcing and Implementing Title IX**

**Title IX** generally prohibits discrimination “on the basis of sex” against any “person in the United States” in “any education program or activity receiving Federal financial assistance.” Thus, educational institutions that receive federal funding, as well as non-educational institutions that conduct educational programs, are prohibited from discriminating based on sex in their academic offerings, scholarships, athletic opportunities, and other matters. Title IX protections are generally enforced in two ways. First, individuals **may directly sue** an educational institution that receives federal funding for violating Title IX. Second, federal agencies that provide funding to educational programs—by grant or loan, for example—can issue **Title IX rules** and regulations, monitor recipients’ compliance with Title IX, and, **under certain circumstances**, cut funding if a recipient violates Title IX.

The Department of Justice (DOJ) and the Department of Education (ED) play primary roles overseeing implementation and enforcement of Title IX. The Attorney General, under **Executive Order 12250**, coordinates implementation and enforcement of Title IX across executive agencies. Indeed, all executive agency guidance and regulations on Title IX are subject to the Attorney General’s approval. The **Education Amendments of 1974** direct the Secretary of Education to promulgate regulations restricting sex discrimination at federally assisted education programs. The Attorney General and Secretary of Education delegated many of their Title IX responsibilities to **DOJ’s Civil Rights Division (CRD)** and **ED’s Office of Civil Rights (OCR)**, respectively. Given their overlapping duties, the two agency components collaborate in enforcing Title IX per a **memorandum of understanding**.

ED’s Title IX **regulations** served as the model for a common Title IX **rule** issued in 2000 by 20 executive agencies, including DOJ. The common rule largely mirrored ED regulations and acknowledged ED’s unique role interpreting and enforcing Title IX. Notably, however, neither ED’s regulations nor the common **rule** specify whether Title IX’s use of the term “sex” should be strictly understood to refer to a biological characteristic or also encapsulates a person’s identified gender.

Though ED and DOJ play leading roles interpreting and enforcing Title IX, other agencies administer statutes that may reference Title IX. As noted above, the HHS-administered ACA, for example, **prohibits** discrimination in any health program receiving federal funds on grounds listed in several civil rights statutes, including Title IX. When HHS issued **regulations in 2016** to implement this requirement, the agency construed ACA’s anti-discrimination prohibitions relating to “sex” as covering discrimination based on a person’s self-defined gender identity. However, these regulations (along with those forbidding discrimination based on “termination of a pregnancy”) were **enjoined** pending a final judicial ruling by a federal district court on a number of grounds, including that the HHS likely exceeded its authority under ACA. On the other hand, several other **federal district courts** have taken a different view of ACA’s protections, interpreting the statute’s Title IX-incorporating language as covering gender identity discrimination.

In sum, ED and DOJ play the leading administrative roles in overseeing implementation and enforcement of Title IX across federal agencies, and agencies have generally adopted **uniform** interpretations of Title IX that adhere to ED and DOJ guidance. However, individual agencies may need to assess how these rules apply to matters falling under their specific jurisdiction, including when an agency administers a statute that specifically incorporates Title IX’s anti-discrimination prohibition outside of the education context.

### **Agency Interpretations of Whether Title IX Compels Treatment Consistent with Gender Identity**

Executive agencies in the two most recent administrations seem to have reached different conclusions on whether Title IX addresses the treatment of persons in conformity with their gender identity. In the latter

years of the Obama Administration, ED and DOJ issued guidance construing Title IX-implementing regulations as restricting educational institutions or programs receiving federal funding from treating persons inconsistently with their gender identity. In 2015, for example, ED's OCR issued a [letter](#) regarding transgender students' access to school restrooms. The letter noted that schools may, consistent with ED's Title IX regulations, provide sex-segregated facilities, such as restrooms, locker rooms, and showers. But when schools opt to make sex-based distinctions in such circumstances (e.g., providing different facilities for male and female students), the letter explained, schools "generally must treat transgender students consistent with their gender identity." The letter also pointed to two investigations by ED's OCR and DOJ's CRD of gender identity discrimination complaints against local school districts. Both led to [resolution agreements](#) in which the districts agreed to ensure that transgender students would be treated consistent with their gender identity for restroom access purposes. Similarly, in 2016, OCR and CRD jointly issued a "[Dear Colleague](#)" Letter (DCL) which instructed schools to "treat a student's gender identity as the student's sex for purposes of Title IX." According to the DCL, this "means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity." The DCL advised that requiring transgender students to produce documentation proving their asserted gender identity itself "may violate Title IX."

Litigation followed these agency actions. The U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) in *G.G. ex rel. Grimm v. Gloucester County School Board* deferred to the 2015 ED guidance as an authoritative interpretation of ED's Title IX regulations when considering a transgender student's challenge to the lawfulness of a school district policy that prevented the student from using the boys' bathroom. The Supreme Court [granted](#) certiorari to review the case in late 2016. Just before the High Court granted review in that case, a federal district court in *Texas v. United States* preliminarily enjoined enforcement of the 2016 DCL, concluding that it was a "legislative rule" that should have undergone the [notice and comment procedures](#) of agency rulemaking required by the Administrative Procedure Act. The court further concluded that the DCL conflicted with the text of Title IX and ED's [regulation](#) authorizing schools to provide separate restrooms for students based on sex.

But the possibility of a definitive judicial ruling on the propriety of the 2015 ED letter and the 2016 DCL seemed foreclosed when, in early 2017, the Trump Administration [rescinded](#) those documents. In so doing, ED and DOJ emphasized legal challenges to those earlier actions, and opined that the earlier, Obama Administration-era letters did not "contain extensive legal analysis or explain how the[ir] position is consistent with the express language of Title IX, nor did they undergo any formal public process." The rescission also stated that the withdrawal of these documents did not leave transgender students "without protections from discrimination, bullying, or harassment," and that "schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." Following the rescissions, the Supreme Court [vacated](#) the *Gloucester County* decision and remanded the case for further proceedings (litigation in that case [continues](#)). The federal district court in *Texas* [dissolved](#) the preliminary injunction against the 2016 DCL after plaintiffs voluntarily dismissed their action.

Since the rescission of the Obama Administration-era documents, ED and DOJ have not issued a new guidance document or regulation addressing whether Title IX bars discrimination on the basis of gender identity. However, in October 2017, then-Attorney General Jeff Sessions [issued](#) a memorandum conveying DOJ's position that Title VII's prohibition on discrimination in the workplace based on sex does not address discrimination on the basis of "gender identity *per se*, including transgender status."

### **Recent Appellate Court Decisions Interpreting "Sex" in Title IX**

Some federal courts have also reached the issue of whether Title IX prohibits discrimination based on gender identity or transgender status without relying on guidance from federal agencies. Instead, these courts turned to judicial precedent from the Supreme Court, their own circuit, and other circuits. Though this case law continues to [develop](#), several federal appellate courts have recently held or suggested that Title IX protects against discrimination based on gender identity, including transgender status, in light of

the Supreme Court's 1989 *Price-Waterhouse v. Hopkins* decision which recognized "sex-stereotyping" as a method of proving sex discrimination under Title VII. As a general matter, a claim brought under a "sex-stereotyping" theory asserts that when an entity discriminates against an individual based on a failure to conform to stereotypes associated with the individual's biological sex, such conduct is unlawful sex discrimination.

In its 2017 decision in *Whitaker by Whitaker v. Kenosha Unified School District No. 1 Board of Education*, for example, the Seventh Circuit recognized the viability of a Title IX claim raised by a transgender high school student who challenged the school district's policy on bathroom access. The plaintiff, who was born biologically female and was diagnosed with gender dysphoria, publicly presented as male, and had begun hormone replacement therapy before seeking permission to use the boys' restroom, which the school denied. The parties in the case disputed whether, under Title IX, the plaintiff's claim constituted a claim of sex discrimination. The circuit panel, observing that neither Title IX nor implementing regulations define the term "sex," looked to *Price-Waterhouse*, as well as the circuit court's own en banc decision holding that Title VII's bar against sex-based discrimination includes discrimination based on sexual orientation. The *Whitaker* panel held that because a transgender student does not conform to stereotypes of the sex that he or she was at birth, the student asserts a cognizable Title IX claim when alleging that the discrimination was based on a failure to conform to sex stereotypes. The panel concluded the plaintiff was likely to succeed on his Title IX claim, and upheld the preliminary injunction enjoining the school district from denying him access to the boys' restroom. A petition for certiorari in the case was denied by the Supreme Court in 2018.

The Sixth Circuit expressed a similar interpretation of Title IX in its 2016 decision in *Dodds v. United States Department of Education*, though the issue arose in a different posture. There, a school district appealed a district court's preliminary injunction ordering the school district to permit a transgender girl to use the girls' restroom. In denying the school district's motion for a stay of that injunction, the court of appeals pointed to "settled law" in the Sixth Circuit that sex-stereotyping based on a person's gender non-conforming behavior is unlawful sex discrimination. Relatedly, and more recently, the Sixth Circuit has held that Title VII prohibits discrimination based on transgender or transitioning status, not only based on a theory of sex-stereotyping, but also because such discrimination in the court's view necessarily considers the individual's biological sex. A petition for certiorari in that case—*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*—is pending before the Supreme Court.

Meanwhile, the Third Circuit, in a 2018 decision *Doe by and through Doe v. Boyertown Area School District*, addressed a challenge raised by non-transgender students asserting, among other claims, that a school district infringed on their Title IX rights by permitting transgender students to use bathrooms and locker rooms according to those students' gender identity. There, the school district had adopted a policy of individualized review of such requests and granted them on a case-by-case basis. The Third Circuit affirmed a district court's denial of a preliminary injunction sought by plaintiffs to prevent the school district from continuing this policy. The circuit court held that the plaintiffs' Title IX claim—whether construed to assert disparate treatment based on sex or "hostile environment harassment"—failed for lack of evidence that the policy discriminated based on sex or that any transgender students had harassed non-transgender students. The Third Circuit additionally suggested, however, that barring transgender students from restrooms that align with their gender identity "would itself pose a potential Title IX violation." That and similar observations in the decision elicited a dissenting opinion by several judges to the Third Circuit's denial of rehearing en banc of the case. The dissenting judges, who would have granted rehearing en banc, contended that such dicta in the panel's decision went beyond what was necessary to decide the case, was open to debate, and that the panel's revised decision (reissued after granting panel, not en banc, rehearing) "still wrongly suggests that our Court has reached decisions that it has not."

As noted above, [several petitions are](#) pending before the Supreme Court concerning cases addressing the meaning of “sex” under Title VII. A Supreme Court decision addressing the meaning of “sex” in Title VII potentially could affect future interpretation of Title IX given the similarities between the statutes.

### **Ambiguity and Agency Discretion**

Courts have not definitely resolved whether Title IX bars discrimination based on a person’s gender identity, with some [noting](#) that the statute is ambiguous on the matter. As of the date of this Sidebar, the OCR and CRD have not issued new guidance or regulations resolving the question for administrative purposes. To the extent that a reviewing court finds a statutory term ambiguous, administrative agencies may have some discretion in deciding whether the term covers discrimination based on gender identity. [Traditional administrative law principles](#) would suggest that, if a reviewing court found the scope of Title IX to be ambiguous, an agency regulation interpreting the statute might receive deference if Congress gave that agency the [authority](#) to speak with the force of law. Further, an agency may be afforded deference in its reasonable [interpretation of regulations](#) giving effect to ambiguous statutory language. Indeed, courts repeatedly have [deferred](#) to ED’s interpretation of numerous provisions of Title IX, along with the agency’s interpretation of [Title IX-implementing regulations](#).

If a reviewing court considers it unclear whether Title IX’s prohibition of discrimination “on the basis of sex” extends to gender identity, an administering agency potentially could change its view of whether the statute covers such activity, so long as the [alternative interpretation](#) is also a reasonable construction of the statutory mandate. Further, according to Supreme Court [precedent](#), when a court is asked to interpret an ambiguous statute and faces a conflict between an interpretation taken in prior cases and that forwarded by an agency in a subsequent regulation, the court might defer to the agency’s interpretation, if it concludes Congress delegated the agency with authority to speak with the force of law on the statute’s meaning. As a result, if the statutory scope of Title IX’s prohibition on sex discrimination is ambiguous, agencies may have some degree of discretion to decide whether or not this prohibition requires persons to be treated consistently with their gender identity.

### **Congress’s Role**

As in all matters of federal statutory interpretation, Congress ultimately can resolve any ambiguities by amending the statute or providing for additional legal protections. For example, at least [one bill](#) introduced in the 115<sup>th</sup> Congress would bar gender identity-based discrimination against students in any program or activity receiving federal financial assistance. Likewise, Congress could also amend Title IX to either expressly include or exclude gender identity or otherwise define “sex” with greater specificity. In addition, Congress could, among other legislative options, alter the administration of Title IX by a particular agency or agencies.

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