

HIGHER EDUCATION INFORMATION MEMO

APRIL 19, 2023

Hot Topics in Title IX Athletics: Transgender Athletes

Although transgender athletes have been competing for many years – recall Renee Richards playing professional women’s tennis in the 1970’s – the participation of trans-female athletes has recently resurfaced as a sensational headline topic. The Trump and Biden administrations took polar opposite positions and federal courts have issued conflicting rulings on this issue, which appears headed to the U.S. Supreme Court.

In 2020, the U.S. Supreme Court ruled that sex discrimination in the workplace includes discrimination on the basis of gender identity (*Bostock v. Clayton County*, 140 S.Ct. 1731 [2020]). Shortly after taking office, President Biden issued an executive order directing federal agencies to interpret all laws barring sex discrimination as also barring discrimination on the basis of gender identity. Accordingly, the Department of Education (DOE) issued guidance documents applying this standard to Title IX. Significantly, however, DOE’s July 12, 2022 proposed revision to Title IX’s regulatory structure to reflect this change did not include the section of those regulations that relates to athletics (34 C.F.R. 106.41), saying that revisions to that section would come later. Subsequently, several courts followed *Bostock* and the DOE’s guidance documents and ruled that Title IX requires schools and colleges to treat transgender students in a manner consistent with their gender identity.

At the same time, a number of states have enacted legislation limiting participation in girls’ and women’s athletics to only cis-females, that is, individuals who were born female. Not surprisingly, litigation has proliferated, and recent decisions offer increasingly contradictory rulings:

B.P.J. et al. v. W. Va. State Bd. of Educ., 2023 WL 1805883 (S.D.W.Va. Feb. 7, 2023). A transgender girl challenged West Virginia’s ban of trans-females from girls’ teams. The trial court ruled against her, stating that “sex and the physical characteristics that flow from it are linked to athletic performance and fairness in sport,” and that Title IX explicitly endorses sports separation by “biological sex.” Plaintiff appealed to the 4th Circuit Court of Appeals which suspended application of this ruling pending the appeal (2023 WL 2803113, 4th Cir. Feb. 22, 2023), and on April 6, 2023, the U.S. Supreme Court declined to vacate that suspension (2023 WL 2801383).

Tennessee v. U.S. Dept. of Educ., 2022 WL 2791450 (E.D.Tenn. July 15, 2022). Twenty states sought to bar enforcement of DOE’s (and the EEOC’s) *Bostock*-based guidance documents. The court ruled that the agency guidance: (a) imposes significant hardship and irreparable harm by interfering with states’ “sovereign” power to make and enforce their own laws; and (b) “create[s] new law, rights or duties” which are unenforceable because they did not undergo the mandatory notice and comment process for “legislative rules.” Defendants appealed this decision to the 6th Circuit, and oral argument is scheduled for April 26, 2023.

Soule v. Connecticut Assoc. of Schools, Inc., 57 F.4th 43 (2d Cir. 2022). Four cis-female runners asserted that the Connecticut athletic conference’s policy allowing trans-females to compete in girls’ events violated Title IX, depriving them of public recognition, the “chance to be champions,” possible college recruiting and future employment. The trial court ruled that their alleged losses were too

speculative and that the DOE guidance documents and *Bostock* “strongly support” a conclusion that this policy does not violate Title IX. A panel of the Second Circuit affirmed that ruling (57 F.4th 43), but on Feb. 13, 2023, the Second Circuit voted to reconsider this ruling *en banc*.

In the midst of this, on April 6, 2023 DOE issued proposed amendments to Title IX’s athletics regulations, which would allow schools to adopt biological sex-based requirements for athletics participation, including some which exclude transgender, intersex and non-binary athletes if such rules: (1) take into account the nature of the specific sport, the level of competition and the educational level of the athletes; (2) are substantially related to the achievement of an important educational objective; and (3) minimize harm to excluded athletes. Accordingly, exclusionary rules at the elementary/middle school level will likely violate Title IX, while high school and collegiate programs – where the stakes are higher – will have more leeway to exclude athletes. Comments on the proposed amendments may be submitted until May 5, 2023 via DOE’s rulemaking portal, and DOE invited commenters to address a number of specific questions about such things as: what “important educational objectives” should be considered in schools’ decisions whether to exclude transgender, intersex or non-binary athletes; how best to minimize harm and take into account the nature of the specific sport, the level of competition and the educational level of the athletes to excluded athletes; and whether additional amendments are needed to provide schools with sufficient guidance in their decision making.

Until the U.S. Supreme Court resolves this issue, as it will surely be asked to do, school districts, colleges and universities are faced with difficult choices in setting policy and may find themselves in a position of having to choose between compliance with contradictory conference/sport governing body rules, state laws and judicial decisions. For assistance with these issues or other questions about Title IX in athletics, please contact Bond attorneys [Kristen Thorsness](#), [E. Katherine Hajjar](#), or the Bond attorney with whom you are regularly in contact.

