



# Here's How the Highly Anticipated Changes to Title IX Could Affect Colleges, Universities, and Public K-12 Schools

Insights

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The Department of Education (DOE) is expected to issue two major amendments to Title IX regulations next month that could cause headaches for educational institutions with classes already in full swing. One rule will address gender identity in athletics and the other is expected to substantially alter the investigation and grievance process for complaints of sex-based discrimination and harassment. The Biden administration began proposing rules for public comment in June 2022 with the celebration of Title IX's 50th anniversary — and is now set to finalize them in October. As we count down the days to the release, what do educational institutions need to know about the proposed rules and how can such institutions prepare for compliance?

## **Transgender Students' Athletic Participation**

In April 2023, the DOE and the Biden Administration proposed changes to Title IX aimed at preventing schools from categorically banning transgender students from playing on sports teams aligning with their gender identities.

The proposed rule would apply to colleges, universities, public K-12 schools, and other institutions that receive federal funding. Therefore, K-12 schools that receive federal financial aid should also carefully consider whether to allow students to participate on school sports teams consistent with their gender identity in order to maintain compliance. Notably, there are some exceptions for certain religious schools.

### ***How will the amendments impact existing state laws?***

In the past three years, approximately 23 states have passed laws broadly banning transgender students from sports teams that don't align with their sex as assigned at birth. If enacted, the Biden administration's proposed changes would render many such laws and policies illegal — at least with respect to public schools and those private schools that receive federal financial aid, unless an exception for a religious school is met. These changes would represent the most significant action yet that the Biden administration has taken to combat state bills intended to keep transgender students from playing on sports teams consistent with their gender identity.

### ***How can you prepare for these changes?***

Though the proposed regulations are set to be released while fall sports are in full swing, educational institutions should consider how the proposed regulations could affect the upcoming spring sports season. The proposed regulations specifically prohibit one-size-fits-all policies, so you should consider the following questions when reviewing your policies:

- How might applicable state and local laws be affected by potential changes to Title IX regulations?
- Do your policies account for differences among students based on their grade or education level?
- Do your policies consider differences in the type of sport and levels of competition? For example, have you considered the impact of your policies on “no-cut teams” that let all students participate versus teams that are highly competitive and selective?
- Are your policies applied fairly and consistently?

### **Impact on Investigation and Grievance Process**

The proposed regulations would also make dramatic changes to how institutions investigate and decide complaints of sex-based discrimination and harassment. Key changes include:

- Allowing schools to return to the single-investigator model through the use of live questioning of parties and witnesses at individual meetings with an investigator and allowing the investigators to make decisions regarding responsibility;
- Permitting removal of the cross-examination requirement, unless such a process is required by other law;
- Resuming the use of a preponderance-of-the-evidence standard of proof unless the school uses the clear-and-convincing-evidence standard in all comparable proceedings;
- Providing express protections for LGBTQIA+ students; and
- Ensuring training is provided to students.

### ***How can you prepare for these changes?***

Review your current investigatory and grievance procedures to determine if adjustments are desired:

- Does the school want to revert to a single-investigator model?
- Will you continue to allow for cross-examination?
- Special consideration should be given to whether changes to both processes mentioned above may better serve the institution, faculty, and students alike.
- You should also review your grievance processes for student conduct and discipline and determine the standard of proof used in those proceedings to better guide you in updating your

Title IX processes where appropriate.

If changes are made, you should pay close attention to the impact of those changes in the total Title IX process.

## **Conclusion**

Fisher Phillips will continue to monitor the proposed changes to Title IX and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the author of this Insight, or any member of our [Education Team](#).

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