



## 2024 Joint Guidance on Federal Title IX Regulations Analysis on Section 106.10: Scope

July 3, 2024

**Note:** This document focuses on a summary analysis of Section 106.10, specifically Scope.<sup>1</sup> For a full overview of the changes from the 2020 Regulations and the 2024 Final Regulations, see *Title IX Text for Text 2020 and 2024 Regulation Final Comparison*, available at <https://system.suny.edu/sci/titleix/>.

### **§ 106.10: Scope**

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.<sup>2</sup>

### **Summary and Analysis of the 2024 Title IX Regulations**

Section 106.10, entitled “Scope,” is brief. However, despite the brief number of words, this Section marks the first time that the U.S. Department of Education (“the Department”) has undertaken what amounts to *almost*<sup>3</sup> an explicit definition of “sex,” which is at the core of its enforcement obligations under Title IX.

In its commentary to the 2024 Title IX Regulations, the Department opined that while it was unnecessary to define “sex,” it was helpful to list out each of the bases in Section 106.10 because “each of those bases ... necessarily involves consideration of a person’s sex, even if that term is understood to mean only physiological or ‘biological distinctions between male and female,’ as the Supreme Court assumed in *Bostock*.”<sup>4</sup> The Department further declined to define each of the bases, stating that they are “well understood, informed by case law, and [are] used widely in other laws and policies.”<sup>5</sup> The Department took care to clarify that the bases listed in Section

<sup>1</sup> The effective date of these Regulations will be August 1, 2024 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

<sup>2</sup> 34 C.F.R. § 106.10.

<sup>3</sup> The Department declined to define “sex” in the regulations. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33,802 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2024 Title IX Final Rule”) citing the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,531-34 (Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106) (hereinafter “2022 Title IX NPRM”).

<sup>4</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33802.

<sup>5</sup> *Id.*

106.10 are just that – *bases* of discrimination that involve sex; contrast this with other *forms* that discrimination might take, such as “sex-based harassment.”<sup>6</sup>

While case law, guidance, and other regulations have supported the inclusion of such characteristics in the interpretation of prior regulations, their inclusion in the 2024 Title IX Regulations is at the center of the litigation challenging implementation of the regulations in states across the country.

### **Sex Stereotypes**

In *Price Waterhouse v. Hopkins*,<sup>7</sup> the U.S. Supreme Court held that where an employer denied partnership to a female employee on the belief that a woman cannot be aggressive, that employer has acted on the basis of gender in a manner prohibited by Title VII. This was referred to by the Court as “sex stereotyping.” Courts have considered whether Title IX also prohibits sex stereotyping, particularly more recently as cases involving transgender students have been litigated. The Department, in proposing these regulations, defined sex stereotypes as “fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex.”<sup>8</sup>

### **Sex Characteristics**

While not explicitly mentioned in previous iterations of the Title IX regulations, this has been referred to by various courts in manners suggestive of genetic and anatomical characteristics relating to the sex of an individual. Indeed, the Department appears to adopt a similar definition, noting that it interprets “sex characteristics” to include “intersex traits,”<sup>9</sup> as well as “physiological sex characteristics.”<sup>10</sup> The Department declined to give further examples, but noted that no specific medical diagnosis is required.<sup>11</sup>

### **Pregnancy or Related Conditions**

The prohibition against discrimination on the basis of pregnancy or related conditions was included in the original Title IX regulations and remained unchanged until the 2024 Title IX Regulations, which integrate and expand the protections.<sup>12</sup>

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<sup>6</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33802-03.

<sup>7</sup> 490 U.S. 228 (May 1, 1989).

<sup>8</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33811, citing 2022 Title IX NPRM, 87 Fed. Reg. 41533.

<sup>9</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33803.

<sup>10</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33811.

<sup>11</sup> *Id.*

<sup>12</sup> See Sections 106.2, 106.21(c), 106.40, 106.51(b)(6), 106.57, and 106.60 for additional information.

The Department noted in the Preamble that it declined to add “current, potential or past” to modify “pregnancy or related conditions,” because these matters are already dealt with in other sections of the Title IX regulations.<sup>13</sup>

## Sexual Orientation and Gender Identity

In 2016, the U.S. Department of Education issued two guidance documents regarding transgender students. One was a [Dear Colleague Letter](#) regarding transgender students, which answered practical questions on documents, pronoun usage, restroom and locker room usage, athletic participation, and other such topics. The other was a [document](#) that offered examples of policies and emerging practices for supporting transgender students. Both documents were [withdrawn by the Department in February 2017](#) when the presidential administration changed, accompanied by a statement that this was “an issue best solved at the state and local level.”

On June 15, 2020, the U.S. Supreme Court issued its decision in [Bostock v. Clayton County](#), which held that “an employer who fires an individual merely for being gay or transgender violates Title VII.” Title VII of the Civil Rights Act of 1964<sup>14</sup> generally prohibits employers from, among other things, discriminating “because of” sex. The applicability of the Court’s decision to Title IX was immediately raised by Justice Alito in a dissenting opinion, when he noted:

What the Court has done today—interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. [citing 20 U.S.C. 1681(a) (Title IX)]

In the aftermath of *Bostock*, the Department issued guidance that indicated it would not be applying the case to Title IX, and the Department continued to threaten enforcement action to prohibit transgender women athletes in Connecticut from participating in women’s sports at the high school level.<sup>15</sup>

This guidance was [quickly withdrawn and reversed](#) upon the changing of the presidential administrations by letter dated February 23, 2021; a [Notice of Interpretation](#) was published in the Federal Register a few months later.<sup>16</sup>

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<sup>13</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33812, citing Sections 106.21(c), 106.40(b)(1), and 106.57(b).

<sup>14</sup> 42 U.S.C. 2000e *et seq.*

<sup>15</sup> See U.S. Department of Education, Office for Civil Rights Revised Letter of Impending Enforcement Action, Case Nos. 01-19-4025, 01-19-1252, 01-20-1003, 01-20-1004, 01-20-1005, 01-20-1006, and 01-20-1007 (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>

<sup>16</sup> This notice has been enjoined by two court orders affecting twenty-one states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. See *State of Texas v. Cardona*, No. 4:23-cv-604 (N.D. Tex. June 11, 2024) and *State of Tenn., et al. v. U.S. Dep’t of Educ.*, No. 3:21-cv-308 (E.D. Tenn. July 15, 2022).

On June 23, 2022, the 50<sup>th</sup> Anniversary of Title IX, the 2024 Title IX Regulations were issued in proposed form. The following year, a [set of regulations specifically addressing gender identity in athletics](#) were proposed. The athletic regulations have yet to be issued in final form, and news reports suggest that they will not be finalized until after the 2024 presidential election.

The Department spent several pages of the Preamble defending its authority to issue regulations prohibiting discrimination on the basis of sexual orientation and gender identity.<sup>17</sup> Those arguments are not detailed here due to the proliferation of lawsuits across the country seeking to invalidate the 2024 Title IX regulations for this reason; the courts will ultimately be the arbiters of this debate.<sup>18</sup> The Department did take care to note that it disagreed with any assertion that these protections lessen Title IX protections of girls and women.<sup>19</sup> Instead, the Department stated that it was intending to “increase the inclusion and the safety of LGBTQI+ students and employees in schools; provide them with access to a process to address sex-based harassment; and be consistent with the text and intent of Title IX.”<sup>20</sup> The Department noted that religious exemptions were available to institutions whose religious tenets conflicted with the requirements of the Title IX regulations.<sup>21</sup>

While the regulations themselves do not define “gender identity,” the Preamble states, “[t]he Department understands gender identity to describe an individual’s sense of their gender, which may or may not be different from their sex assigned at birth.”<sup>22</sup> The Department found it unnecessary to include “transgender status” within the bases described in Section 106.10 because it believes that the section is broad enough to cover it as written. As to “sexual orientation,” the Department declined to define it but included something of a definition in the Preamble, stating it describes “the sex of a person to whom another person is attracted.”<sup>23</sup>

## **Other Bases**

The Department considered, but declined, adding other terms to Section 106.10. For example, the Department declined to add “marital status” to the list of bases, noting that it is permissible to discriminate on the basis of marital status, but not to discriminate differently on the basis of sex in a way that is related to marital status (for example, by favoring married mothers over unmarried mothers).<sup>24</sup> The Department also declined to add “intersex traits,” finding the term to be subsumed under “sex characteristics,” and declined to add “gender norms” or “gender

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<sup>17</sup> See 2024 Title IX Final Rule, 89 Fed. Reg. 33803-08.

<sup>18</sup> See the Joint Guidance Pending Litigation Tracker for more information on the seven lawsuits filed across the country, which provides a summary of the major arguments in all complaints. Many include the “expansion” of scope issue.

<sup>19</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33808.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also 20 U.S.C. § 1681(a)(3).

<sup>22</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33809, citing cases.

<sup>23</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33810.

<sup>24</sup> 2024 Title IX Final Rule, 89 Fed. Reg. 33803.

expression,” finding those to also be subsumed into other bases listed in Section 106.10.<sup>25</sup> Finally, the Department noted it declined to include “perceived” status among the bases in Section 106.10, relying on Title VII case law to find that discrimination based on perceived characteristics would also be on the basis of sex.<sup>26</sup>

Some commenters suggested that “menstruation and related conditions” be added to Section 106.10. In response, the Department noted that discrimination based on menstruation, perimenopause, menopause, or their related conditions already constituted sex discrimination based on pregnancy or related conditions, sex stereotypes, or sex characteristics.<sup>27</sup> The Department further noted,

To the extent that discrimination based on menstruation or related conditions becomes a barrier to an individual’s participation in a recipient’s education program or activity, schools have an obligation to address such barriers, prevent their recurrence, and remedy their effects. ... These barriers could include, for example, menstruation-related harassment by students or employees, unreasonable limits on students’ or employees’ bathroom access to address menstrual needs, conduct by school officials that publicly exposes that a student is menstruating (e.g., requiring a student to remove a garment around their waist, or prohibiting a student from changing clothes at school when the student needs to address a menstruation-related issue), or similar menstruation-related restrictions or discipline. *See generally* [T4PA Center, Considerations for Menstrual Equity and Student Success](#), at 4 (2023).<sup>28</sup>

The Department noted that Section 106.44(j) protects menstruation-related privacy concerns.

In conclusion, the Department also stated that the bases listed in Section 106.10 are not exhaustive.<sup>29</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 2024 Title IX Final Rule, 89 FR 33812.

<sup>28</sup> 2024 Title IX Final Rule, 89 FR 33813.

<sup>29</sup> 2024 Title IX Final Rule, 89 FR 33803.