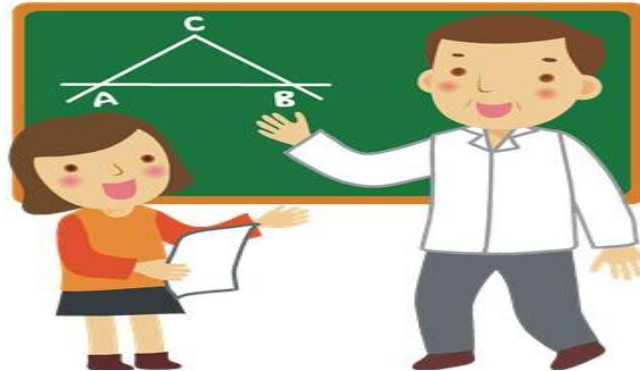


Title IX Regulations and Title IX Injunctions *Where Do We Stand in Maryland?*



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Title IX of the Education Amendments of 1972

Title IX was enacted by Congress and signed into law in 1972 and provides as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C § 1681.

Title IX Regulations

In addition to the statutory text, Congress authorized the U.S. Department of Education to issue “rules, regulations, or orders of general applicability” that are “consistent with achievement of the objectives” of Title IX. 20 U.S.C. § 1682.

- Those objectives are avoiding the use of federal resources to support discriminatory practices and providing individual citizens with effective protection against those practices. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

New Amended Title IX Regulations

- **On April 29, 2024, the U.S. Department of Education issued a final rule amending the Title IX regulations on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.**
- **The amended regulations went into effect on August 1, 2024.**

What Changes Are In the Amended Title IX Regulations?

- **According to the U.S. DOE, the amended Title IX regulations add the following:**
- **Provide full protection from sex-based harassment.**
- **Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities—and to prevent its recurrence and remedy its effects.**
- **Require schools to provide supportive measures to complainants and respondents affected by conduct that may constitute sex discrimination, including sexual violence and other forms of sex-based harassment.**
- **Require schools to respond promptly and effectively to all complaints of sex discrimination with a fair, transparent, and reliable process that includes trained, unbiased decisionmakers to evaluate all relevant and not otherwise impermissible evidence.**
- **Provide schools with flexibility to adapt the regulations' grievance procedure requirements to their educational communities so that all schools can implement Title IX's promise of nondiscrimination fully and fairly in their educational environments.**
- **Protect students, employees, and applicants from discrimination based on pregnancy or related conditions.**
- **Prohibit discrimination against LGBTQI+ students, employees, and others.**
- **Protect people from harm when they are separated or treated differently based on sex in school.**
- **Protects students, employees, and others from retaliation.**
- **Support the right of parents and guardians to act on behalf of their elementary and secondary school children.**
- **Ensure that schools communicate their nondiscrimination policies and procedures.**
- **Prohibit schools from sharing personal information.**
- ***The final regulations do not include new rules governing eligibility criteria for athletic teams.***

Do the Amended Title IX Regulations Have Significant Changes for Maryland School Systems?

- *Not really.*
- Beyond some procedural changes, the amended regulations do not present significant changes with respect to how Maryland school systems have been addressing gender identity issues and sexual discrimination/harassment because we have been following the judicial precedent from *Grimm v. Gloucester, M.A.B v. Talbot*, and *B.P.J. v. West Virginia* as well as MSDE guidance.
- The new regulations nonetheless have resulted in litigation in other regions of the country where the precedent is not as clear as it is in the Fourth Circuit and particularly in Maryland.
- This may be confusing because three states within the Fourth Circuit (Virginia, West Virginia, and South Carolina) are parties to injunctions issued by courts outside of the Fourth Circuit.

New 2024 Title IX Regulations

Changes to Definition of “sex”

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

- The 2024 regulations make clear that the definition of ‘sex’ includes gender identity and sexual orientation.

Key Procedural Changes

- **Training Requirements:** the new regulations require the Coordinator(s), Investigator(s), decision-maker(s), mediator(s) and all staff to receive annual training on Title IX.
- **Streamlined Roles:** The Title IX Coordinator may now serve as the investigator or decision-maker, making the process more streamlined for smaller school districts.

New 2024 Title IX Regulations

Key Procedural Changes

- **Expanded Protections for Pregnant and Parenting Students:** Following the same protections afforded to employees under the PUMP Act and the Pregnancy Discrimination Act, students now have access to accommodations and protections from discrimination based on pregnancy or “related conditions.”
- **Expanded Jurisdiction:** If events which happened during a school-sponsored activity outside the United States contribute to a hostile environment based on sex under Title IX, the school district now has jurisdiction of those events which take place out of country.
- **Introduction of the *De Minimis* Harm Standard:** The new regulations clarify that a school must not separate or treat any person differently based on sex in a manner that subjects them to more than *de minimis* harm, except in the limited specified circumstances permitted by Title IX. The commentary states that preventing a person from participating in a recipient’s education program or activity consistent with their gender identity subjects that person to more than *de minimis* harm.

New 2024 Title IX Regulations

Key Procedural Changes

- **Expanded Definition of Complainant:** Under the new regulations, any person (not just an employee or a student) who experiences sex discrimination while trying to access an educational program or activity may bring a Title IX complaint.
- **Inclusion of the IEP / Section 504 Team:** The new regulations require the Title IX Coordinator to include a member of student's IEP or Section 504 team into the procedure process at the beginning to ensure compliance with the IDEA and ADA.

Fourth Circuit and Maryland Precedent

- ***Grimm v. Gloucester Co. Sch. Bd.* (4th Cir. 2020)** – holding that students (and others) have the right under Title IX and the 14th Amend. Equal Protection Clause to access restrooms based upon their gender identity.
- ***M.A.B. v. Bd. of Ed. of Talbot Co.* (D. Md. 2018)** – similar reasoning with respect to locker room access.
- ***B.P.J. v. West Virginia* (4th Cir. 2024)** -- holding that West Virginia law excluding transgender students from girls' sports violates Title IX and that district court should not have dismissed equal protection claim.

Judicial Challenges to Title IX Regulations

- ***State of Tennessee v. Cardona*, (E.D. Ky., June 17, 2024).** In this case, Tennessee, Kentucky and Ohio (Sixth Circuit States), joined by Indiana (a Seventh Circuit State), and Virginia and West Virginia (Fourth Circuit States) filed a Complaint in the United States District Court for the Eastern District of Kentucky seeking to enjoin and invalidate the Final Rule and its accompanying regulations. On June 17, 2024, the Court granted a preliminary injunction on the grounds that the U.S. DOE exceeded its statutory authority under Title IX by enacting regulations that exceed the scope of the statute itself. In particular, the Court reasoned that the regulations were arbitrary by redefining “sex” to include “gender identity.”
- ***State of Louisiana v. U.S. Department of Education*, (W.D. La., June 13, 2024).** In this case, Louisiana and Mississippi (Fifth Circuit States), joined by Montana and Idaho (Ninth Circuit States) obtained a similar preliminary injunction.
- ***State of Kansas v. United States Department of Education*, (D. Kan., July 2, 2024).** In this case, Kansas, Utah, and Wyoming (Tenth Circuit States), joined by Alaska (a Ninth Circuit State) and the Moms for Liberty, Young America’s Foundation, and Female Athletes United obtained a similar preliminary injunction.
- ***State of Alabama v. Cardona*, (11th Cir., Aug. 1, 2024).** In this case, Alabama, Florida, and Georgia (Eleventh Circuit States), joined by South Carolina (a Fourth Circuit State) obtained a preliminary injunction from the U.S. Court of Appeals for the Eleventh Circuit.

Maryland Schools Identified in Kansas Preliminary Injunction

- As a result, the various preliminary injunctions currently prohibit the U.S. DOE from enforcement of the Title IX regulations in 26 states.
- *Maryland is not a party to any of the pending suits;* however, the Kansas injunction extends to a number of Maryland schools identified by the Moms for Liberty Plaintiffs as schools where members have children in attendance.
- The Kansas preliminary injunction restricts the U.S. DOE from enforcing the new Title IX regulations in these identified schools but not elsewhere in Maryland. The injunction does not prevent school districts from following the new regulations.
- *No Garrett schools are on the list.*

What's Next?

- On June 28, 2024, the U.S. Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce*, overruling the Chevron doctrine. This holding overturns the decades-long practice of federal courts deferring to federal agencies' interpretations of ambiguous statutes.
- The viability of the Chevron doctrine was raised in several of the rulings issuing preliminary injunctions and may signal that the Supreme Court will be receptive to arguments that U.S. DOE exceeded its authority.
- Of course, there is an election in November. That may moot everything.
- **For now, Maryland educators should stay tuned and follow the new regulations, MSDE Guidance, and Fourth Circuit precedent.**