

**PRESENTED AT****39<sup>th</sup> Annual School Law Conference**February 15-16, 2024  
Austin, TX**Title IX:  
Here We Go Again  
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**Title IX:  
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(Part Deux)**

Following is an index to resources related to this presentation.

**Proposed Updates to Title IX Final Rule  
(Federal Register Publication Date 7/12/2022)**

Text of proposed updates is available online at:

<https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

**Proposed Updates to Title IX Final Rule:  
Sex-Related Eligibility Criteria for Male and Female Athletic Teams  
(Federal Register Publication Date 4/13/2023)**

Text of proposed updates is available online at:

<https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

**Current Language for 34 C.F.R. § 106.41(b)**

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

**Proposed Updates to 34 C.F.R. § 106.41(b) (changes in red text and highlighted in yellow)**

(b-1) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(b-2) If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

- (i) Be substantially related to the achievement of an important educational objective; and
- (ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

### **Texas Attorney General Lawsuit Challenging Federal Title IX Guidance**

*State of Texas v. Cardona et al*, Case #4:23-cv-00604-O, Northern District of Texas (June 14, 2023).

A courtesy copy of the State's Complaint is included as Tab 1.

### **Fifth Circuit Decisions Involving Title IX Since January 1, 2022**

***Doe v. William Marsh Rice Univ.*, 67 F.4th 702 (5th Cir. 2023).**

Male student filed suit against Rice University ("Rice"), asserting a state-law breach of contract claim and arguing that Rice violated Title IX by investigating and issuing disciplinary sanctions in a way that was biased against the student as a male.

Fifth Circuit identified several deficiencies in the process used by Rice when issuing disciplinary consequences to plaintiff, including:

1. Before plaintiff had a reasonable opportunity to present his side of the story with the advice of counsel, he was prohibited from entering campus with only 24-hours' notice.
2. Plaintiff was banned from athletics, which effectively nullified his full-ride football scholarship.
3. Rice treated plaintiff as guilty, and as a threat to the school community, until he "participated" in Rice's investigation without the advice of counsel.
4. Plaintiff's attorney was not permitted to participate in the investigation process or view any documents in the disciplinary file. Instead, plaintiff was assigned a Title IX "resource navigator" who met with the complainant and the police to take the complainant's statement, indicating a potential conflict of interest.
5. Plaintiff raised credibility concerns about the complainant, but Rice dismissed these concerns as "irrelevant" or otherwise declined to investigate them.
6. Rice failed to clearly notify plaintiff of the conduct he would ultimately be sanctioned for.

Plaintiff raised three doctrinal claims in his lawsuit:

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First appeared as part of the conference materials for the  
39<sup>th</sup> Annual School Law Conference session

"Title IX Update: Here We Go Again"