

# CLIENT NEWS BRIEF

## Status of Federal and State Laws on Student Gender Identify Rights: Federal Lawsuit Seeks to Block Participation of Transgender Athletes and the Office for Civil Rights Weighs In

In February of this year, the families of three cisgender female high school athletes (Plaintiffs) filed a federal lawsuit against the Connecticut Interscholastic Athletic Conference (CIAC) and multiple Connecticut school boards over a CIAC policy (Policy) that allows transgender athletes to participate in sports based on their gender identity. The complaint focuses on the biological differences between males and females, stating that the Policy permits athletes “who are male in every biological respect to compete in girls’ athletic competitions if they claim a female gender,” resulting in fewer opportunities for victory and advancement for cisgender female athletes. The complaint claims that the Policy has denied, and continues to deny, equal athletic opportunities for cisgender female athletes, in violation of Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex-based discrimination in federally funded programs and aims to ensure equal opportunities for female athletes.

Plaintiffs initially sought an expedited preliminary injunction to prevent the CIAC and named school boards from enforcing the Policy, pending the entry of a final order in the case. On April 8, 2020, the court denied Plaintiffs’ motion to expedite the preliminary injunction, reasoning that it is likely that no track events will be held this spring due to the coronavirus pandemic. Any claims for other injunctive relief or damages will be addressed in accordance with a schedule that gives all concerned adequate time to address the various issues of law and fact.

The federal Department of Justice (DOJ) has filed a Statement of Interest (Statement) to aid in the proper application of Title IX in the underlying case. In the Statement, the DOJ took the position that because the Policy fails to account for the physiological difference between men and women, it “deprives those women of the single-sex athletic competitions that are one of the marquee accomplishments of Title IX.” The DOJ also concluded that Title IX and its implementing regulations do not require or authorize the Policy, because Title IX prohibits discrimination solely “on the basis of sex,” which does not include transgender status or gender identity. The DOJ’s now-stated position is that under Title IX, “sex” refers to a binary concept (male and female), and that if the legislature intended for it to go beyond that, it would have specified that Title IX applies to “transgender status” and/or “gender identity,” as it had done in subsequent legislation.

The DOJ’s reasoning here is potentially weakened by a recent Supreme Court ruling. On June 15, 2020, the United States Supreme Court issued its opinion in *Bostock v. Clayton County, Georgia* (2020) \_\_\_ U.S. \_\_ [(U.S., June 15, 2020) 139 S.Ct. 1599], holding that because sexual orientation and transgender status “are

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inextricably bound up with sex” as the term “sex” is used under Title VII of the Civil Rights Act of 1964, discrimination because of sexual orientation or transgender status is discrimination “because of sex.” Because there might be a nuanced distinction between Title IX’s use of the words “on the basis of sex,” and Title VII of the Civil Rights Act of 1964’s “because of sex,” it remains to be seen how the *Bostock* opinion might affect the DOJ’s reasoning in the Statement.

There has yet to be any determinative rulings on the merits of the case and the court issued a scheduling order indicating that the trial would be set in the spring of 2021.

## **Status of California Laws Relating to Transgender Students**

At the K-12 level, in January 2012, California’s Assembly Bill (AB) 887 amended Education Code section 220 to specifically prohibit discrimination in any school program or activity based upon gender identity or gender expression. AB 887 also added Education Code section 210.7, which defines “gender” as “sex, and includes a person’s gender identity and gender expression” and defines “gender expression” to mean “a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” (See July 25, 2016 article, [Keeping Pace with Development in Student Gender Identity Rights](#).) Thereafter, effective January 2014, AB 1266 amended Education Code Section 221.5 to include Section 221.5(f), which provides that a student must be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender, regardless of the gender listed on the student’s records. (See [2016 Client News Brief Number 53](#).)

At the community college level, Title 5 of the California Code of Regulations prohibits discrimination on the basis of sex, which is defined as “sexual harassment or discrimination on the basis of gender.” Under Title 5, “gender” means sex, and includes a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” Moreover, “sex” is defined to include “a person’s gender.” As of the date of this article, in addressing the treatment of transgender athletes, the California Community College Athletic Association’s website references OCR’s 2016 guidance, which appears to be consistent with Title 5, and which provides that transgender students should be allowed to participate in activities in a manner that is consistent with their gender identity. However, it is important to note that in 2017 this guidance was rescinded, but never amended or otherwise addressed, by the United States Department of Education until the filing of the Statement.

Given the similarities between California’s laws and the CIAC Policy in Connecticut, it is important that school districts and community college districts closely follow this case and others that address the applicability of Title IX to transgender-related matters. For example, on April 15, 2020, a federal lawsuit was filed challenging Idaho’s recently passed law that bans transgender women from participating in women’s sports sponsored by public schools, colleges, and universities, contending that the law violates the 14th Amendment’s Equal Protection Clause and Title IX because it is discriminatory, and the 4th Amendment’s protections of privacy because the requires testing should an athletes’ gender be in question. Should Plaintiffs prevail and the court adopt the reasoning in the DOJ’s Statement, this would result in a conflict between state and federal law in California. Such a ruling could also raise a question about student confidentiality and privacy rights. Further, as indicated by the OCR’s May 15 letter, there could also be funding implications for school districts and community college districts who enforce similar policies.

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School districts, local education agencies, and community colleges should continue to observe the laws currently in place in California, and they should also ensure they have board policies and regulations which are designed to address the needs and legal rights of both transgender and non-transgender athletes. For further guidance on best practices with regard to transgender student issues, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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