

## II. ABOUT CURRENT LAW ON SEX AND SPORT

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**Q28: What law or laws currently provide for separate-sex sport?**

A28: Separate-sex sport is regulated by a combination of statutes, regulations, and caselaw. This includes the Ted Stevens Olympic and Amateur Sports Act, Title IX and its regulations, the Equity in Athletics Disclosure Act, and court decisions interpreting their terms.

**Q29: Are advocacy groups correct when they say that the law affords females the right to participate, not the right to win and set records, in sport?**

A29: No. They are wrong. The point of the laws that create and regulate separate-sex sport is to ensure that females have the same opportunities as males not only to participate, but also to succeed. In addition to competing, this includes the fair ability to win and set records in regional, national, and international competitions. No male or female has an individual legal right to win or set records in their respective divisions, but as a class, females have the legal right to win and set records in girls' and women's sport, just as males that have that right in boys' and men's sport.

**Q30: How would the redefinition of "sex" in federal law to include gender identity affect the legal status quo? For example, would it allow schools and sports organizations including the NCAA and USOPC to continue to maintain separate-sex sport?**

A30: The re-definition of “sex” to include “gender identity” in a law that prohibits discrimination “on the basis of sex” would mean that programs receiving federal funds and operating in interstate commerce could not lawfully distinguish a biological female from a trans girl/woman. This would make it prima facie unlawful to do what is currently permitted, i.e., to have teams and events that are separated on the basis of biological sex. It would also make it prima facie unlawful to use testosterone — a sex-linked trait — as an eligibility criterion for inclusion in girls' and women's elite sport, e.g., as is currently required by the NCAA, the USOPC, the IOC, and the national and international sports federations. Both separate-sex sport itself and eligibility criteria based on biological sex and sex-linked traits like testosterone, are currently lawful exceptions to general prohibitions on sex discrimination. For this to remain the case, the Equality Act, as currently proposed, would need to be amended to provide for an express exception for competitive sport.

**Q31: Why do proponents of the Equality Act (EA) assert that the redefinition of sex won't affect girls' and women's sport?**

A31. We don't know. Many of the EA's advocates argue that the proposed EA Act won't affect Title IX, without explaining why. Alternatively, others argue that, even if it does, Congress could restore separate-sex sport *after* the EA's enactment, through additional legislation or regulations addressing sport. However, we believe that restoring separate-sex sport after the EA's enactment is highly unlikely as a matter of standard legal analysis, legislative history, and politics.

The EA is designed to amend the Civil Rights Act of 1964. The definitions in that statute have been and will continue to be the basis for interpreting or defining the same words as used in all other civil rights legislation. That is, Congress cannot re-define “sex” in the principal statute and not have that definition apply directly or indirectly to the use of that term in other legislation. In

fact, many of the EA proponents intend precisely this—make the change to the definition in the principal legislation, and this will automatically change the definition in related legislation. Moreover, as a matter of standard legal analysis, absent a legislative carve-out for sport — i.e., an explicit acknowledgement of an exception — any newly enacted, categorical prohibition on discrimination between biological females and trans girls/women would be presumed to supersede any earlier legislation to the contrary, including Title IX.

The legislative history of the EA makes clear that its proponents intend for it to apply to sport with no conditions or exceptions and thus, to prohibit any distinctions between biological females and trans girls/women. At the House Judiciary Committee Hearings, both the witnesses and Democrats on the Committee insisted that trans girls/women be included in girls' and women's sport without any conditions because "transgirls are girls, transwomen are women, period." And on the floor of the House, a bill was rejected by a vote of 181 to 228 that would have retained the longstanding exception in Title IX for separate-sex sport based on biology. (Specifically, Congressman Steube proposed legislation providing that, "Nothing in this Act or any amendment made by this Act may be construed to diminish any protection under Title IX of the Education Amendments of 1972.") The Equality Act then passed the House by a vote of 236 to 173. If not amended, this legislative history would dictate the answer to whether Congress intended to permit or preclude distinctions on the basis of biological sex.

The natural experiment with state versions of the EA also make it clear that an explicit exception is necessary to maintain sex-segregated sports and spaces. In those contexts, trans advocates argue that under the state EAs, it is impermissible to separate or in any way differently to treat transgirls within girls' sport. They make these arguments even though state legislatures did not consider sports as they were enacting their EA legislation.

**Q32. How does the recent Supreme Court decision in *Bostock v. Clayton County* (2020) affect separate-sex sport—does it prohibit all distinctions on the basis of sex, including in sport?**

A32. In *Bostock*, the Supreme Court ruled that "sex" in Title VII means "biological sex." Contrary to what many proponents of the EA argue, *Bostock* did not define (or re-define) "sex" to include "gender identity." Rather, it held that Title VII's general prohibition of discrimination "on the basis of sex" precludes discrimination that takes into account a transgender employee's sex and gender identity. Firing a person because they are transgender — i.e., because their gender identity is nonconforming — requires taking their sex into account, and this is prohibited by Title VII. Because the case involved Title VII's general non-discrimination provision, not an existing exception that allows taking sex into account, the Court wrote that it was leaving the lawfulness of exceptions — including in bathrooms, locker rooms, and sport — for another day. *Bostock* explicitly did not rule on the lawfulness of the current scheme under Title IX and the other sport statutes.

Proponents of the EA nevertheless assert that *Bostock* applies to sport, completely ignoring the Court's express pronouncement to the contrary. Specifically, in cases pending in the lower courts, they argue that *Bostock* supports the redefinition of "sex" to include "gender identity", and that the decision requires the inclusion of trans girls/women in girls' and women's Title IX sport. Notably, however, they are inconsistent in their application of *Bostock* to the question whether administrators can lawfully distinguish biological females from trans women/girls. For example,

in pending federal cases in Connecticut and Idaho, advocates for transgender athletes argue that their inclusion in girls' high school sports must be full and unconditional, without regard to whether they are on gender-affirming hormones. However, in the Idaho matter, in which college sports are also at issue, they don't challenge the NCAA rule, which distinguishes female athletes from transgender athletes by requiring transwomen to undergo a year of gender-affirming hormone treatments before they can compete in women's sport. They support the position that in college, conditions on transgender inclusion are permissible. This distinction between high school and college may make good policy sense; but it is an acknowledgement of the continued lawfulness not only of the NCAA rule, but also more generally of what that rule represents, i.e., the lawfulness of distinctions on the basis of sex in sport. It is also a tacit acknowledgment of the fact that — as the Supreme Court itself announced — *Bostock* is not dispositive in this area.

**Q33. Does the law currently allow schools to distinguish females from trans girls/women? Can accommodations be developed that lawfully provide for their conditional inclusion in girls'/women's sport?**

A33: Formal sex-segregation in sport is the exception to general nondiscrimination law, requiring the exclusion of biological males from most girls' and women's sport. There is no case yet that finally resolves the question whether an exception to this general rule should be made for biological males who identify as women and girls. It is standard practice, however, for the courts to permit (and sometimes even to require) accommodations when there are good reasons for doing so, and when this is possible without imposing an undue burden. Thus, accommodations that would allow trans girls/women to compete in girls'/women's sport should be permissible so long as they meet these standard criteria.