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Higher Education Alert

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Navigating federal and state law landscapes impacting sex-segregated facilities

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Universities must balance state gender-identity discrimination bans with federal directives related to sex-segregated facilities.



What's the impact?

- Aligning with state law may increase the risk of federal scrutiny; aligning with federal expectations could impact state law compliance and litigation exposure.
- A holistic risk review should include legal, operational, and reputational impacts.

Colleges and universities in a growing number of states—including Massachusetts, New York, New Hampshire, Maine, Rhode Island, Connecticut, New Jersey, Delaware, Pennsylvania, Illinois, Michigan, California, Oregon, and Washington, among others—are confronting direct tension between state anti-discrimination laws and evolving federal enforcement positions regarding access to sex-segregated facilities by transgender and gender non-conforming individuals.

Many state laws expressly prohibit discrimination based on gender identity and have been interpreted to permit individuals to access facilities consistent with their gender identity. At the

same time, the current federal administration has taken the position, through Executive Orders, agency guidance, investigations, and resolution agreements, that Title IX permits—and in some cases may require—sex-segregated facilities based on sex assigned at birth rather than gender identity.

Institutions must increasingly assess competing litigation and enforcement risks. Compliance with state anti-discrimination requirements may increase the likelihood of federal scrutiny, while alignment with federal enforcement expectations may expose institutions to state investigations, attorney general enforcement actions, and private litigation. Although state laws carry the force of enacted legislation, the federal administration has signaled a willingness to pursue aggressive enforcement measures against institutions it views as noncompliant, including investigations, negotiated resolution agreements, and potential threats to federal funding streams.

What do Title IX and its implementing regulations actually say?

The 2020 Title IX regulations did not define the terms “sex,” “male,” “female,” “gender,” or “gender identity,” either in the regulations themselves or in the extensive accompanying preamble. The longstanding facilities regulation, codified at 34 C.F.R. § 106.33, likewise remained unchanged during the 2020 rulemaking process. That provision states only:

“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex...”

Notably, despite the opportunity to do so during the 2020 rulemaking process, the Department of Education did not adopt an express definition of “sex” tied to biological sex or sex assigned at birth.

State enforcement procedures and the risks of noncompliance with state law

While enforcement mechanisms vary somewhat by jurisdiction, most states employ a combination of administrative enforcement, attorney general authority, and private rights of action. Failure to comply with gender identity protections may therefore expose institutions to parallel enforcement proceedings and litigation across multiple forums. Several examples are below.

CALIFORNIA

The California Civil Rights Department possesses broad investigative and enforcement authority under state anti-discrimination law, including the ability to pursue civil actions directly. Potential

exposure includes compensatory damages, attorneys' fees, injunctive relief, and civil penalties in certain circumstances.

The California Attorney General may separately pursue systemic discrimination claims, and private plaintiffs may also bring direct actions under fee-shifting statutory frameworks that incentivize litigation. California courts and regulators have historically interpreted gender identity protections broadly, increasing both the likelihood of enforcement activity and the potential scope of institutional exposure.

MASSACHUSETTS

In Massachusetts, complaints may be filed with the Massachusetts Commission Against Discrimination, which may award damages, require policy modifications, and mandate training or other remedial measures.

The Massachusetts Attorney General also retains authority to pursue pattern-or-practice civil rights violations, while private litigants may seek compensatory damages and attorneys' fees through civil litigation. Massachusetts law does not generally impose statutory caps on emotional distress damages in discrimination matters, which may increase exposure depending on the facts presented.

RHODE ISLAND

Complaints may be filed before the Rhode Island Commission for Human Rights, which may investigate claims, conduct hearings, award compensatory damages, and order injunctive or other remedial relief.

The Rhode Island Attorney General may also pursue broader civil rights enforcement actions, and private rights of action remain available to impacted individuals.

NEW YORK

Institutions in New York may face investigations by the New York State Division of Human Rights, which possesses authority to award damages, attorneys' fees, and civil fines, including enhanced penalties where conduct is found to be "willful, wanton, or malicious."

The New York Attorney General may separately investigate alleged systemic discrimination and seek injunctive relief, restitution, and civil penalties. Private civil litigation also remains available, creating potentially significant defense costs, discovery burdens, and reputational exposure.

The importance of a holistic assessment

Institutions must also account for operational and reputational considerations, including campus disruption, employee and student relations concerns, donor and alumni reaction, and heightened media scrutiny. In some instances, these disputes may themselves trigger additional regulatory attention.

As the key takeaway, a failure to comply with state law creates more than theoretical risk. Institutions may face simultaneous administrative enforcement proceedings, attorney general investigations, private litigation, financial exposure, and mandated operational changes. In states with particularly robust civil rights enforcement regimes—including California and Massachusetts—fee-shifting provisions and strong enforcement cultures may significantly increase both the likelihood and cost of litigation.

Risks associated with compliance with state law and noncompliance with federal directives

Institutions that continue to follow state law requirements may face increased federal scrutiny. The Departments of Education, Justice, and Health and Human Services have all signaled a willingness to investigate institutions whose policies they believe are inconsistent with the administration's interpretation of Title IX and related federal statutes.

Recent federal resolution agreements have included provisions relating to women's athletics and sex-segregated facilities, including housing, locker rooms, and shower facilities designated for women. These agreements provide additional insight into the federal government's current enforcement priorities and expectations.

Although federal law may preempt conflicting state law under certain circumstances, the federal position in this area presently rests largely on executive action, agency interpretation, and enforcement priorities rather than explicit statutory amendments or revised Title IX regulations. That distinction complicates traditional preemption analysis and contributes to the current legal uncertainty.

Importantly, the Supreme Court's decision in *Bostock v. Clayton County* remains good law and continues to hold that discrimination "because of sex" under Title VII includes discrimination based on gender identity. While *Bostock* arose in the Title VII employment context rather than under Title IX, courts and agencies continue to grapple with the extent to which its reasoning applies in educational settings and specifically to sex-segregated facilities.

Related litigation is already underway. In Virginia, the Fairfax County School Board has challenged federal efforts to impose conditions relating to transgender student policies, arguing in part that the federal government is exceeding its authority under Title IX and the Administrative Procedure Act. Conversely, the federal government has challenged certain state

policies permitting access to facilities consistent with gender identity, asserting that such policies conflict with federal law and Title IX obligations, including in Minnesota, Maine, and Massachusetts.

Managing compliance and litigation risk

For now, colleges and universities operating in states with gender identity protections remain in a legally difficult position. Until courts provide clearer guidance, potentially including Supreme Court review, institutions must evaluate these issues through a multidimensional risk framework that includes federal funding exposure, state enforcement risk, litigation posture, institutional mission, operational realities, and campus climate considerations.

Nixon Peabody's [Higher Education lawyers](#) can help institutions understand these evolving requirements with practical guidance on compliance, governance, investigations, and litigation strategy. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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