



To: University Presidents, General Counsels, Title IX Coordinators, and Boards of Regents at Public Colleges and Universities in the State of Texas

From: Texas Values

Date: August 24, 2023

Re: Notice of Senate Bill 15 Save Women's Sports Law for college athletics effective date of September 1

### **Introduction**

We are writing to you to be a resource regarding a new Texas state law passed this year in the 88<sup>th</sup> Texas Legislative Session, Senate Bill 15 (SB 15), widely known as the "Save Women's Sports Law." The Save Women's Sports Law (SB 15) is a simple law that requires athletes at the collegiate level to compete on the sports team that aligns with their biological sex as listed on their birth certificate. The Save Women's Sports Law requires Texas college athletic programs to protect female athletes' opportunities, scholarships, and safety by ensuring that men do not compete in women's college sports at Texas colleges and universities. We are writing this letter so that universities and colleges can be aware of the law going into effect on September 1, 2023, and how you should respond when faced with the situation of a male athlete seeking to compete in college women sports. We are also aware that the United States Department of Education (ED) under the current presidential administration is discussing rule changes regarding Title IX, which governs how colleges and universities address issues related to "sex" based rights. This letter will also explain and make clear that the ED rule proposals regarding new definitions for "sex" have not been voted on by the U. S. Congress, have not been implemented by the Biden Administration and are inherently flawed in their interpretation of the law. Therefore, colleges and universities in Texas are required to follow state law.

This letter will provide you guidance in the topics listed below in order to prepare your college or university to comply with SB 15, the Save Women's Sports Law:

1. An analysis of SB 15, the Save Women's Sports Law passed in the 88<sup>th</sup> Legislative Session,
2. An Explanation of the Save Women's Sports Law alignment with Title IX passed in 1972, and the current caselaw precedent.
3. An explanation for why the new state law will take precedence over any federal department rule that the Biden Administration tries to implement without Congressional approval.
4. An overview of the current status of the rule proposal to redefine "sex" in Title IX from the U.S. Department of Education.
5. An acknowledgement of the National Collegiate Athletic Association (NCAA).
6. A look at the Southeastern Conference (SEC) stance on men and women spaces.

## **1. Analysis of SB 15, the Save Women's Sports Law passed in the 88<sup>th</sup> Legislative Session**

In the past few years, there has been an increase of men and boys competing in female athletics at the high school and college level across the United States, including in Texas as well. One of the most notable public examples was the complaint and legal action taken in 2019 by two high school Connecticut track runners Selina Soule and Alana Smith who were forced to compete against male track runners who dominated high school women's track meets after they switched from the high school men's team to the women's team. Texas had its own example in 2019 when male track runner CeCe Tefler competed in and won the women's title for the 400-meter hurdles at the NCAA Outdoor Track and Field Championships held at Texas A&M Commerce. The problem did not end there. In 2022, there was an incident in a female locker room at Ranger College in Kilgore, Texas with a male cheerleader who dressed and performed as a female cheerleader. Over time, there were more instances of men competing in college level women's sports where these men were taking records and awards (and public recognition) away females and at times even injuring female athletes. Arguably the most widely reported example came in 2021 when male swimmer "Lia Thomas" swam in the NCAA women's freestyle race and advanced to the championships in 2022, and won first place in the 500-yard freestyle NCAA Championships, stealing that victory from other female college swimmers.

University of Kentucky swimmer Riley Gaines has spoken publicly about having to relinquish a trophy at the event to Thomas after tying in a race after being forced to compete against him at an earlier NCAA 200 freestyle championship race. Riley Gaines has also publicly expressed how traumatic it was to be forced to share a locker room with Thomas who made no anatomy changes to his body. It is notable that Thomas was previously a competitive swimmer in Texas for Westlake High School (Austin, Texas), on the boys' team.

In response to the national stories and local concerns in Texas school districts, the Texas Legislature passed the Save Girls' Sports Act in 2021 that protects girls in K-12 University Interscholastic League (UIL) sports and the 2023 Save Women's Sports Law, which applies to athletics at public colleges and universities, this year in the 88<sup>th</sup> Texas Legislative Session. The Save Women's Sports A passed in the Texas legislature with bipartisan support. Texas is one of 23 states that has a law to protect female athletes by making sure that males do not compete in female sports categories.<sup>1</sup> The UIL continues to follow and enforce the Save Girls' Sports Act passed in 2021.

The Save Women's Sports Law received large support from Texas female athletes who compete in sports at the collegiate level or at some level of athletics. Many of these women took the additional and public step in support, by testifying in favor of the bill, SB 15<sup>2</sup> in a committee hearing at the Texas Capitol. Governor Greg Abbott has shown strong support for a law that protects women from being forced to compete against men in competitive college sports. On

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<sup>1</sup> <https://savewomenssportstexas.com/>

<sup>2</sup> <https://capitol.texas.gov/tlodocs/88R/witlistbill/pdf/SB00015S.pdf#navpanes=0> ,  
<https://capitol.texas.gov/tlodocs/88R/witlistbill/pdf/SB00015H.pdf#navpanes=0>

August 7, 2023 Governor Abbott held a special ceremony for the passage of the Save Women's Sports Law at the Texas Women's Hall of Fame on the campus of Texas Woman's University in Denton, Texas. Governor Greg Abbott invited noted Save Women's Sports advocates Riley Gaines and Paula Scanlan, and Texas athlete Kassidy Comer as well as being surrounded by a number of Texas female athletes of all ages. Unfortunately, it is alleged that some young women from a Texas college women's athletic team were looking forward to attending the governor's ceremony in Denton but were told by their coaches that they could not attend.

The Save Women's Sports Act (SB 15) is a simple law that requires athletes at the collegiate level to compete on the sports team that aligns with their biological sex as listed on their birth certificate. The goal of the law is to protect women athletes from losing sports opportunities and have men compete against them. The law requires that the Texas Higher Education Coordinating Board adopt rules that achieve the goal of protecting women athletics. The bill seeks to protect women's sports by making sure that "an intercollegiate athletic competition sponsored or authorized by the institution of higher education may not allow 1) a student to compete on the team in an intercollegiate athletic competition sponsored or authored by the institution that is designated for the biological sex opposite to the student's biological sex or 2) male student to compete on the team in a mixed-sex intercollegiate athletic competition sponsored or authorized by the institution in a position that is designated by rule or procedure for female students"<sup>3</sup>. Athletic competition is defined in the bill as "any athletic display between teams or individuals, such as a contest, exhibition, performance, or sport". SB 15 applies to "intercollegiate" athletic competitions.

The law is enforced by allowing college women athletes and other individuals to seek legal action if a school or sports team allows a male to compete in women's sports. You should also be aware that the law prohibits a public college, university, or an interscholastic athletic team from retaliating against a person for reporting a violation of the Save Women's Sports Law. Sports teams from schools in other states will have to comply with the Texas law and not have their male athlete compete when they travel to Texas to compete against our Texas women's sports teams.

## **2. Explanation of the Save Women's Sports Law alignment with the original Title IX passed in 1972**

Although the Texas Legislature and advocates for protecting women's sports received a lot of attention and even some criticism for passing the Save Women's Sports Law, the law does not introduce any new concepts. Protecting women and girls' athletic opportunities, especially at the collegiate level, was solidified in law by U.S. Congress with the passage of Title IX in 1972. Title IX of the Education Amendments was passed in 1972 to protect students from discrimination based on "sex". The law was heralded by Congresswoman Patsy Mink who faced discrimination in her education and professional opportunities in the practice of law because she was a woman. Lawmakers added special protections for women in sports in order to ensure that college women athletes could have the same funding, scholarships, and opportunities to compete in sports when

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<sup>3</sup> <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/SB00015F.pdf#navpanes=0>

historically the number of sports for college women to compete in was severely disproportionate to the number of sports college men could choose from.

The law commonly known as Title IX is found in 20 USC Chapter 38 and it states, “[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 Federal Registrar gives further guidance on what this means specifically for sports. 34 CFR 106.41(C) states that “a recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes”.

Allowing a male student to compete on a female designated sports team is excluding a female athlete from participating in a program where the male student typically has more opportunities. Therefore, allowing a male to compete on a woman’s athletic team violates Title IX. The purpose of Title IX was to make sure that women would have fair and equal opportunities in sports and education. Allowing men to compete in women’s sports where they could be injured, have a natural physical disadvantage, or even be displaced by a male athlete clearly denies a woman her equal opportunity to athletic, education, and career opportunities. This is why the federal register also says that “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”. 34 CFR 106.41(b).

Furthermore, women’s private spaces must be protected as well. A natural result of playing in sports is having to use the locker rooms and shower rooms. 34 CFR 106.41 (b) provides that Title IX should be interpreted as such in regards to sex separate facilities:

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

Ultimately, the Save Women’s Sports Law SB 15 is not requiring colleges and universities to follow any new legal concepts as allowing sports to be separate based on “sex” has been the law under Title IX for the past 51 years.

### **3. Argument for why the new state law will take precedence over any federal department rule**

It is important to note that SB 15 will take precedence over any federal rule that may or may not be implemented by the federal government. Additionally, the U.S Supreme Court has made no ruling indicating that a having state law protecting women from being forced to compete against men in women’s sports is unconstitutional. You may have become aware of the United States Department of Education efforts to propose rules that would redefine “sex” in Title IX to include “sexual orientation” and “gender identity”. The rule proposals should be ignored. The new rules to include “sexual orientation” and “gender identity” in the definition of “sex” have yet to be implemented by the Department of Education.

In fact, the proposed rule implementation has been delayed several times, in part because Education Secretary Miguel Cardona has not decided how the proposed rule will affect women's sports <sup>4</sup>.

In summary, there is no clear indication from the federal government that colleges should deviate from their current practice of following Title IX. SB 15 does exactly that, and it gives states a clear, well-established path to follow based on current law and caselaw precedent.

There was a recent U.S. Supreme Court decision in 2020, *Bostock v. Clayton County*, 140 S.Ct. 1731(2020) that addressed issues of sexual orientation and gender identity in relation to employment law and Title VII. However, this case had nothing to do with Title IX and your college should not be convinced otherwise. Supreme Court Justice Gorsuch who wrote the majority opinion even states that "other laws" were not before the Court<sup>5</sup>.

#### **4. Overview of the current status of the rule proposal to redefine "sex" in Title IX from the U.S. Department of Education**

As earlier mentioned, the U.S Department of Education has proposed new rules that would redefine "sex" to include "sexual orientation" and "gender identity" in Title IX. The ED has also proposed a new rule for determining whether men can play in women's sports. Neither rule proposals have been implemented and their implementation date has been pushed to October which is after the academic semester and most sports seasons begin and there is not guarantee or requirement that the ED has to decide by October of this year.

Nonetheless, the proposed rule change to Title IX in regards to women's sports has been met with large opposition and controversy. In fact, the federal registrar received 156,159 comments on the rule change regarding athletics over the time period of only one month<sup>6</sup>. Recent polling suggests that a majority of Americans agree that competitive women sports should be for women only. A Gallup poll conducted in May found that 69 percent of people say that "transgender athletes should only be allowed to compete on sports teams that correspond with the sex they were assigned at birth"<sup>7</sup>.

Accordingly, Texas universities and colleges should follow clearly established law and precedent which is what SB 15 is and is based on. There is no indication of if, when or how the Department of Education will implement a rule.

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<sup>4</sup> <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>

<sup>5</sup> *Bostock v. Clayton County*, 140 S.Ct. 1731, 1753(2020) stating, "[but] none of these laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today... we do not.. address bathrooms, locker rooms, or anything else of the kind".

<sup>6</sup> <https://www.regulations.gov/document/ED-2022-OCR-0143-0001>

<sup>7</sup> <https://www.nbcnews.com/nbc-out/out-news/americans-oppose-inclusion-trans-athletes-sports-poll-finds-rcna88940>

## **5. Acknowledgement of the National Collegiate Athletic Association (NCAA)**

You may be aware that the NCAA previously took the position that they disagreed with states that protected women from keeping men from competing in women's sports. Despite the NCAA making a claim in 2021 that they would not operate in states that pass laws that would protect women from having to compete against men in sports, their stance has changed. Last summer, the NCAA decided to take a sports by sports approach that would relieve the decision to have a policy on "transgender" athlete participation to each of the sports governing boards<sup>8</sup>. The new NCAA policy means that their previous threat is gone.

Earlier this year, over 40 women athletes, along with women advocacy groups, and policy groups, including Texas Values, protested the NCAA at their annual convention held in San Antonio, Texas at the Henry B. Gonzalez Convention. Led by Riley Gaines, the female athletes delivered a petition to a couple of members of the NCAA. One of the groups involved in the demonstration, Independent Council on Women's Sports (ICONS) submitted a legal demand letter to the NCAA that threatened legal action if the NCAA does not "1) repeal all policies and rules that allow male athletes to take roster spots on women's teams and/or compete in women's events, and 2) [e]stablishing and enforcing rules to keep women's sports female, and 3) [r]equiring colleges to provide single-sex locker rooms for female athletes."<sup>9</sup>

In summary, your college/university should not be concerned with anyone suggesting that the NCAA will punish you for adhering to SB 15, the Save Women's Sports Law. Not only has the NCAA retreated and surrendered their political and policy making role on the matter, but they are now at risk of possible litigation from women athletes if the NCAA interferes with their right to protect women collegiate sports.

## **6. A look at the Southeastern Conference SEC stance on men and women spaces**

As a college or university in Texas, your school may be concerned about the rules associated with the different conferences you may be a part of or compete against. It appears that the Southeastern Conference (SEC) which some of your schools may be a member of or may be joining in 2024, has made no rule or policy that would indicate that they are going to deviate from the long held standard in Title IX. In one circumstance it appears the SEC has made it clear that it has a policy on separate dressing rooms that would be aligned with SB 15. On page 40 of the SEC's Commissioner Regulations states that men and women officials should have separate dressing rooms.

*"1. When male and female officials are assigned, two dressing rooms should be provided if possible. 2. When a doubleheader is scheduled, the officials for the men's game must be assigned to a different dressing room from the officials for the women's game"<sup>10</sup>.*

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<sup>8</sup> <https://ncaaorg.sidearmsports.com/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx>

<sup>9</sup> <https://www.iconswomen.com/ncaa-demand-letter/>

<sup>10</sup> <https://a.espncdn.com/sec/media/2023/2023-24%20Commissioner's%20Regulations.pdf>

## **Conclusion**

Our team hopes that this letter provides an explanation of the new Texas Save Women's Sports Law and how this law is to be applied at your college or university in regards to athletic competitions. In summary, your public college or university is required to follow the new law. Your college or university can be assured that protecting women's sports does not conflict with any federal laws or policies considering there has been no attempt by Congress to change the interpretation of Title IX and the recent proposals by the Department of Education are controversial and in conflict with existing U.S. Supreme Court precedent. Additionally, your school should not fear retaliation from the NCAA which has become irrelevant in these circumstances. As a public institution it is always valuable to be in communication with the Texas Attorney's General office should questions arise about state laws, including SB 15. Lastly, if you would like more information from our team at Texas Values on how to address the issue of men competing in women's sports, the Save Women's Sports Law, or issues related to Title IX, please contact us for more information as our team is willing to help you navigate these issues.

Sincerely,

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