

**From:** Ann Wagner  
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At the time Title IX was drafted, dictionaries defined sex as a matter of biology. Because it was not disputed, the Supreme Court used just such a definition to decide *Bostock*, and concluded that in the employment context, discrimination on the basis of gender expression, as with gender nonconforming females/males in *Price Waterhouse* and *Oncale* or with trans people as in *Bostock*, *is* discrimination on the basis of the person's underlying biology. Discrimination on the basis of sex is never allowed in hiring/firing decisions, and so any discrimination because of trans status is impermissible.

Title IX is different. It expressly and implicitly allows different treatment on the basis of sex where justified. Sports is one area in which division into sex-based categories, in recognition of the historical and continuing discrimination against female athletes as well as the categorical performance advantage conferred by male puberty and testosterone, has long been recognized as justifiable. Because discrimination in this context is *permitted* by statute and case law, it is not controlled by the reasoning in *Bostock*.

I urge this body not to abandon the traditional recognition that sex-based categories in sports ensure an even playing ground for comparably situated female athletes. It's not ethical to require high school trans girl athletes to be on blockers or HRT before competing on girls' teams, and recent research has shown that HRT does not sufficiently diminish the advantages of male puberty even after 3 years of HRT. *Bostock* does not require this sex division to be discarded, and logic and experience show that it should not be.

Thank you,  
Ann K. Wagner