



U.S. Department of Education Releases Notice of Proposed Rulemaking on Athletic Eligibility Under Title IX

April 12, 2023

On April 6, 2023, the U.S. Department of Education published an unofficial version of its Notice of Proposed Rulemaking which would amend the current Title IX regulations to prohibit public K-12 schools, as well as colleges, universities, and other institutions that receive Federal funding from “adopt[ing] or apply[ing] a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity.” The Department’s proposed Title IX regulation will be open for public comment for 30 days from the date of publication in the *Federal Register*.

Specifically, the Department proposes amending § 106.41(b)(2) of its Title IX regulations to state, “If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.” The proposed regulation would allow institutions flexibility to develop team eligibility criteria that serve important educational objectives, such as ensuring fairness in competition or preventing sports-related injury, but also require institutions consider and minimize harms to excluded students.

This announcement follows the Department’s July 2022 notice of proposed rulemaking to amend its regulations implementing Title IX. The Department had announced plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend its Title IX regulations to clarify what criteria, if any, a recipient of Federal funding should be permitted to use to establish student’s eligibility to participate on a particular male or female athletic team.

According to the Department, the proposed regulation would “recognize that differences in grade and education level, level of competition, and sports must be taken into account for any eligibility criteria that would restrict transgender students from participating on teams consistent with their gender identity.” Further, the Department stated it expects “[U]nder the proposed regulation, elementary school students would generally be able to participate on school sports teams consistent with their gender identity and that it would be particularly difficult for a school to justify excluding students immediately following elementary school from participating consistent

with their gender identity. For older students, especially at the high school and college level, the Department expects that sex-related criteria that limit participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition, and meet the proposed regulation's other requirements.”

The Department also recognized that “many sport governing bodies have created participation criteria for their sports, and the National Collegiate Athletic Association (NCAA) recently adopted a sport-specific approach for eligibility criteria for male and female teams in its college-level competitive leagues.”

Twenty states have imposed restrictions on transgender student-athletes from participating in sports consistent with their gender identity. Should the proposed regulation become final, it will preempt state law. Legal challenges to the proposed regulation, however, are likely.^[i]

The Department’s fact sheet can be found here: <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>

Cullen and Dykman is here to assist you in reviewing your policies and procedures for Title IX compliance. We will continue to monitor the status of the proposed regulation and provide updates when available. If you have questions about the proposed regulation and/or any impact it may have on your institution, please contact Dina Vespia (dvespia@cullenllp.com) at (516) 357-3726.

Please note this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Thank you to Ciara Villalona, a Law Clerk pending New York bar admission, who assisted in the preparation of this alert.

Footnotes

^[i] Paula Lavigne, *No Wholesale Ban of Transgender Athletes, U.S. Department of Education Proposes*, ABC News, Apr. 6, 2023, <https://abcnews.go.com/Sports/wholesale-ban-transgender-athletes-us-department-education-proposes/story?id=98417532>

Practices

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