

Transgender Athletes: Education Department Proposes Amendment to Title IX Regulations

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Title IX of the Education Amendments of 1972 (Title IX) [bars](#) discrimination “on the basis of sex” in education programs that receive federal financial assistance. Long-standing [regulations](#) implementing Title IX provide that recipients may not discriminate based on sex in athletics programs, although schools may operate sex-segregated teams in certain circumstances. The Department of Education (ED)’s Office for Civil Rights (OCR) recently [issued](#) a Notice of Proposed Rulemaking (NPRM) that seeks to amend its Title IX regulations. If adopted, the [proposal](#) would prohibit categorical bans on transgender students participating in sports consistent with their gender identity but would allow some restrictions that—for each grade level, sport, and level of competition—are substantially related to an important educational objective and are aimed to minimize harm.

The NPRM follows a July 2022 [proposal](#) to amend ED’s Title IX regulations more broadly, including to (1) [alter](#) a school’s responsibilities in cases of sexual harassment and (2) [define](#) the scope of Title IX’s prohibition against sex discrimination to include discrimination based on sexual orientation and gender identity. According to ED, it [expects](#) to finalize both proposed rulemakings by October 2023. These proposals also follow [Bostock v. Clayton County](#), a 2020 Supreme Court case that interpreted a statutory ban on sex discrimination in the employment context under [Title VII of the Civil Rights Act of 1964](#). In *Bostock*, the Court determined that sex discrimination in that context includes discrimination based on sexual orientation and gender identity.

This Sidebar first provides the general context for the recent NPRM, starting with a brief background on Title IX, the Court’s decision in *Bostock*, as well as developing approaches to the participation of transgender athletes in competitions at the state, national, and international level. The Sidebar then examines the NPRM and its potential implications for schools and their athletics programs, concluding with considerations for Congress.

Background: Reach of Title IX and Athletics Regulations

All public school districts [receive](#) some federal financial assistance, as do most institutions of higher education through participation in federal student aid programs. As a result, both must comply with Title IX and its implementing regulations.

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While Title IX prohibits sex discrimination in a school's [athletics](#) programs, this does not mean that every sex-based distinction is banned. The statute does contain exceptions, including when [application](#) of the law would conflict with a religious institution's tenets. According to Title IX [regulations](#), schools may offer separate athletics teams for males and females where selection is based on competitive skill or the activity is a contact sport. Schools that operate athletics programs must [provide](#) "equal athletic opportunity for members of both sexes" overall, although they need not offer the same sports for each sex. Schools operating athletics programs [must](#) also "effectively accommodate the interests and abilities of members of both sexes." The NPRM does not appear to [propose](#) a change to these requirements.

In the 2020 case *Bostock v. Clayton County*, the Supreme Court ruled that Title VII, which prohibits sex discrimination in employment, extends to discrimination based on sexual orientation and gender identity. Courts interpreting Title IX's prohibition against sex discrimination in federally funded education programs often [draw](#) upon cases interpreting Title VII's ban against sex discrimination in employment. Following the *Bostock* decision, some federal appellate [courts](#) have [applied](#) the reasoning of that case to Title IX, concluding that sex discrimination under the statute includes discrimination based on sexual orientation and gender identity. In addition, President Biden has issued an executive order that [asserts](#) the Administration's policy of ensuring that educational environments are free from sex discrimination, including based on sexual orientation and gender identity; it specifically [directs](#) the Secretary of Education to review regulations for consistency with that policy.

Developing Approaches: State, National, and International Policies

Current policies on the participation of transgender athletes in sports consistent with their gender identity can range from state requirements for high school athletes, national policies for intercollegiate athletics, to international policies for Olympic athletes. Because Title IX only applies to federally funded education programs, ED's NPRM may have legal consequences for public school districts and most colleges, but would not apply to an international athletics competition unconnected to federally funded educational programs.

State Laws and Policies

States have taken varying approaches to the participation of transgender students in athletics. Both state laws and the policies of state athletics associations can potentially be relevant. Some state high school athletics associations [permit](#) transgender students to participate in athletics consistent with their gender identity with no restrictions. Others impose certain limitations, such as a [documented](#) period of testosterone suppression [therapy](#) for transgender girls to participate on female athletics teams, or evidence that a transgender girl does not [possess](#) physical advantages compared to other girls of the same age group. By contrast, some states have passed laws [imposing](#) categorical bans on participation. For instance, some laws [prohibit](#) transgender girl students from [participation](#) in athletics consistent with their gender identity in sports sponsored by public high schools and public postsecondary institutions. There are pending legal challenges to both permissive and restrictive laws and policies.

National Collegiate Athletic Association (NCAA) and International Olympic Committee (IOC)

At the national and international levels, the policies of athletics associations regarding the participation of transgender athletes have [informed](#) ED's consideration of the matter. In 2022, the NCAA [updated](#) its policy on participation for transgender athletes to reflect a sport-by-sport approach, meaning that standards are established by each sport's national governing body. Participation in NCAA athletics competitions will require submission of relevant documentation (e.g., testosterone levels) that meets the

sport-specific standard. The NCAA policy was adopted after a similar sport-by-sport approach was adopted by the IOC.

The NCAA is [not](#) a recipient of federal financial assistance and thus is not directly regulated by Title IX. However, because member universities participating in NCAA athletics activities generally are recipients of federal funds and must comply with Title IX and its implementing regulations, the NCAA's policies may be indirectly affected by a change in Title IX's athletics regulations.

ED's NPRM: Proposal to Amend Title IX Athletics Regulations

ED's Title IX athletics NPRM appears to reflect an attempted middle ground position between a restrictive categorical ban and a permissive policy with no limitations. The proposed standard would [amend](#) Title IX regulations to provide that if a recipient does apply sex-based criteria to determine a student's eligibility to participate on a female or male sports team consistent with their gender identity, such criteria must, for each grade and education level, sport, and level of competition (1) be substantially related to achieving an important educational objective; and (2) minimize harms to students whose participation consistent with their gender identity is limited or denied.

On the one hand, this proposal would not require schools to limit the participation of transgender student athletes. Schools with permissive policies would likely not need to alter their practices under the regulation. On the other hand, [according](#) to ED, the proposal would prohibit a categorical ban on transgender student athlete participation, including a ban on transgender girls from participating in female athletics, as such a policy would not account for the considerations the NPRM requires. Instead, under the proposed regulations, limitations on the participation of transgender athletes would only be acceptable when they both are substantially related to achieving an important educational objective and framed to minimize harm for each sport, educational level, and level of competition.

ED explicitly acknowledges that this proposed standard for the Title IX athletics regulations is informed by cases [interpreting](#) the Constitution's Equal Protection Clause, which [requires](#) governmental sex-based classifications to be substantially related to achieving an important government objective. Title IX and the Equal Protection Clause's protections against sex discrimination are not coterminous.

"Important Educational Objective"

The NPRM would require limitations on transgender student athletes' participation in sports to be substantially related to an important educational objective. ED discusses at least two such [objectives](#) that could justify limitations (though it notes that the regulations would not necessarily preclude another objective). First, fairness in competition can be an important educational objective, as competition is key to many sports, particularly at the college and high school levels. Second, preventing injuries in sports is important, and limitations might be acceptable on this basis.

By contrast, ED's proposal points out several [objectives](#) that would not be acceptable under the NPRM's provisions, such as codifying disapproval of a student's gender identity; requiring adherence to sex stereotypes; or solely relying on administrative convenience to support a policy. Recipients also may not establish criteria "solely for the purpose of excluding transgender students from sports," or as a pretext for singling out transgender students for harm.

"Substantially Related" Standard

According to the [NPRM](#), limitations on the participation of transgender athletes consistent with their gender identity must, for each sport, education level, and level of competition, be *substantially related* to achieving an important educational objective. Drawing from judicial application of equal protection principles, ED [asserts](#) that there must be a "direct, [substantial](#) relationship between a recipient's

objective and the means used to achieve that objective,” and criteria may not [rely](#) on “overly broad [generalizations](#)” about the capacities of males and females.

For example, a school district or university [might](#) invoke fairness in competition to support certain sex criteria for transgender athletes, but those criteria must be substantially related to achieving fairness in competition in the specific sport at issue, at the particular level of competition, and at that grade level. ED [argues](#) that it is unreasonable to assume that every transgender girl or woman is similarly situated in physical ability to cisgender boys and men. Criteria that assume all transgender girls and women will have an unfair advantage over cisgender girls and women in all contexts would likely be an overbroad generalization that would not satisfy the proposal. Thus, categorically denying transgender girls the opportunity to participate on any female athletics teams would not be permitted under the proposal because such criteria would rely on an overly broad generalization that fails to account for specific levels of competition, the nature of a particular sport, and the applicable grade level of students.

In addition, if a school can reach its objective without limiting a student’s ability to play sports consistent with gender identity, then the use of sex criteria may be pretextual. Accordingly, the possibility of alternative criteria that would achieve a school’s educational objective without limiting or denying athletes’ eligibility to participate in sports consistent with their gender identity may also be relevant to the analysis.

Accounting for Different Grade Levels, Sports, and Levels of Competition

Grade or Education Level

ED’s [position](#) is that students of different grades may not be similarly situated in terms of athletic skills and the larger purposes of athletics participation. For students in lower grade levels, such as elementary and middle school, participation in team sports may reflect purposes beyond competition such as introducing students to new activities and developing physical fitness and teamwork. By [contrast](#), at the high school and college level, some athletics teams might be more focused on elite competition.

ED thus [asserts](#) that there would be “few, if any” sex eligibility criteria for elementary students that would satisfy the proposed regulation’s demands, and that it would be “particularly difficult” to satisfy the standard with criteria imposed in grades immediately following elementary school. On the other hand, at the high school and college level, sex criteria imposed to ensure fairness in competition may be more likely to comply with the regulation.

Level of Competition

The NPRM also acknowledges that schools’ athletics programs take a wide variety of formats. In lower grades, the [emphasis](#) is often on participation and learning, rather than elite competition as in an intercollegiate setting. Within athletics programs, some levels of competition are lower than others. Those that accommodate broad participation, such as intramural or junior varsity programs, may differ from the competition considerations for a varsity team. ED notes that certain sports’ national governing bodies allow transgender athletes to participate consistent with their gender identity without restriction below the elite level. Therefore, the NPRM [asserts](#) that eligibility criteria for transgender athletes would be more likely to satisfy the proposed regulations at the high school and university level, perhaps reflecting the possibility that considerations for elite competition are more likely at that level than for elementary students and middle school students. For instance, at top levels of varsity high school sports competitions, athletes may be competing against one another for scholarship and recruitment possibilities, whereas an intramural contest might not raise similar stakes for participants.

Sport

As mentioned above, sex eligibility criteria for transgender athletes must also take account of the sport to which they apply. The NPRM asserts [that](#) not all differences between students will confer a competitive advantage or raise safety concerns. ED points to NCAA and IOC policies allowing for a sport-by-sport approach to eligibility criteria, allowing for considerations specific to the nature of different activities and accounting for competitive advantage or risk in a specific activity.

Harm Minimization

Eligibility criteria must also, [according](#) to the proposal, be crafted in a manner that minimizes harms to those students whose opportunity to participate in sports consistent with their gender identity is limited or denied. Even eligibility criteria that are substantially related to an important educational objective would violate the proposal, if a school could reasonably apply less harmful criteria that achieves those objectives. ED [gives](#) this example: if a school requires documentation of a student's gender identity, the school must take steps to minimize the potential harm that this documentation might cause for students, such as privacy invasion or disclosure of confidential information.

Considerations for Congress

The Title IX athletics NPRM proposes one way of approaching how schools should handle the participation of transgender students in athletics consistent with their gender identity. If Congress disagrees with the proposal, it has a variety of possible avenues to alter applicable legal requirements. Congress can amend the text of Title IX to more specifically detail requirements for schools that receive federal funding. Legislation could address the meaning of sex discrimination generally, including whether it includes discrimination based on sexual orientation or gender identity. Congress could also refine the expectations for athletics programs in statute. Such legislation might track the NPRM's provisions, supersede any final rule with different requirements, or even direct a new rulemaking consistent with different standards. Congress may also alter the various exceptions to Title IX's mandate or further define how those exceptions should be applied under the statute.

Alternatively, if the NPRM were adopted and Congress wished to limit its effect, pursuant to the [Congressional Review Act](#), Congress could pass a joint resolution of disapproval within the time limits that statute establishes. Enforcement of certain aspects of a regulation may also be limited through passage of [appropriations](#) riders, although such provisions generally expire at the end of the applicable appropriations cycle.

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