

PRESENTATION AGENDA

- TL;DR
- The Proposed Rule
- Some Analysis
- The Current Landscape
- Commenting on the Regs
- Q&A
- Everybody goes outside

TL;DR

- Published today
- 30 day comment period (ends May 15)
- Date finalized TBD
- We expect a lot of comments
- We expect litigation
- No blanket bans
- Rebuttable Presumption

Proposed Rule

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams

A Proposed Rule by the Education Department on 04/13/2023

This document has a comment period that ends in 32 days. (05/15/2023)

SUBMIT A FORMAL COMMENT

PUBLISHED DOCUMENT		DOCUMENT DETAILS
	Start Printed Page 22860	Printed version: PDF
	AGENCY: Office for Civil Rights, Department of Education.	Publication Date: 04/13/2023
	ACTION: Notice of proposed rulemaking (NPRM).	Agency: Department of Education
	SUMMARY: The U.S. Department of Education (Department) proposes to amend its regulations implementing Title IX of the Education Amendments of 1972 (Title IX) to set out a standard that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The proposed regulation would clarify Title IX's application to such sex-related criteria and the obligation of schools and other recipients of Federal financial	Dates: Comments must be received on or before May 15, 2023.
		Comments Close: 05/15/2023
		Document Type: Proposed Rule
		Document Citation: 88 FR 22860
		Page: 22860-22891 (32 pages)
		CFR:

THE CURRENT ATHLETICS REGULATIONS

106.41 is the section of the regulations regarding athletics

- (a) General
- (b) Separate teams
- (c) Equal opportunity
- (d) Adjustment period

[important: these apply to any any interscholastic, intercollegiate, club, or intramural athletics of a recipient, k12 and higher ed]



<https://grandriversolutions.com/department-of-education-proposed-changes-title-ix-athletics-transgender-athletes-first-look/>

WHY NOW?

- Different approaches among athletic organizations in the U.S. and internationally
- Varying state laws
- Litigation
- Inconsistency is harmful and unhelpful



IF YOU'RE APPLYING "SEX-RELATED" ELIGIBILITY CRITERIA...

- Do you have an important educational objective in separating athletic teams?
- Are the criteria substantially related to those identified important educational objectives?
- Are you minimizing harm to students whose opportunities will be limited or denied?



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WHAT IS AN IMPORTANT EDUCATIONAL OBJECTIVE?

- Preventing injury
- Promoting fairness in competition
- And (the Department would love to know)?
- Still requires an analysis that's specific to the sport and level of competition
- "Communicating or codifying disapproval of a student or student's gender identity" is not an important educational objective



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HOW DO YOU MINIMIZE HARM?

- Department has identified some harms.
- The Department is asking us to tell them how a school can minimize harms.



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INTERMEDIATE SCRUTINY OR THE REBUTTABLE PRESUMPTION

- Supreme Court uses intermediate scrutiny in sex discrimination cases
- The Proposed is *not* a bright line rule
- Schools (and associations [and states]) cannot use blanket bans or one-size-fits-all tests



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INTERMEDIATE SCRUTINY OR THE REBUTTABLE PRESUMPTION

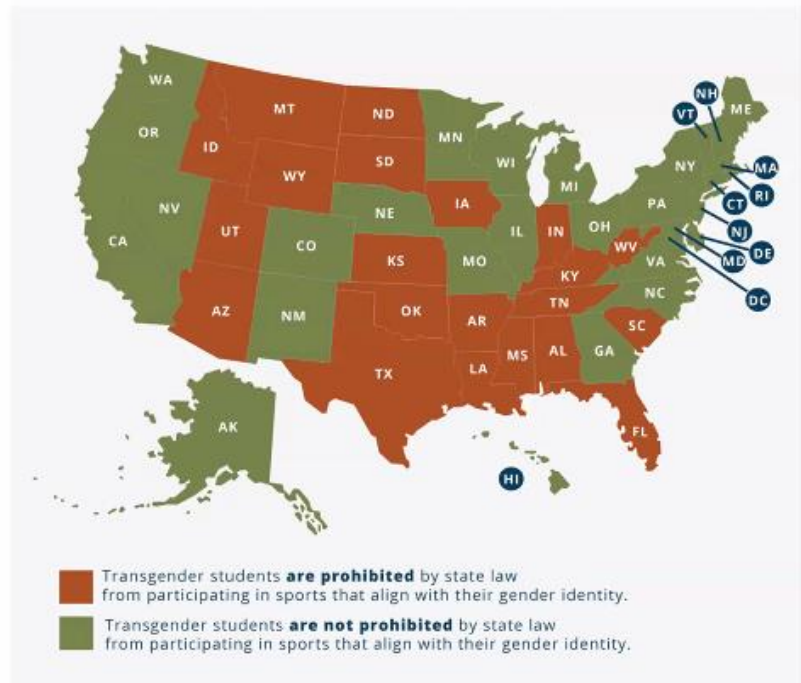
- Difference between elementary (and immediately following) and secondary/post-secondary
- Intramural and Club Sports
- A presumption of inclusivity, to be (potentially) rebutted if meets both tests



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THE CURRENT LANDSCAPE

- Title IX 1972 and 1975
- Non-Athletics Cases Start to Bubble Up
- Dueling DCL's
- *Bostock v. Clayton County* (2020)
- ED Notice of Interpretation, July 2021 (Enjoined)
- 2022 Proposed TIX Regulations
- 2023 Proposed TIX Athletics Regulations



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WHAT HAPPENS NEXT

- Publication today
- 30 day comment period, might be extended
- Department must review and address comments, and draft final rule
- Potential for litigation
- How to submit a comment:
 - Federal eRulemaking Portal
 - No other system (exceptions upon request based on disability)
 - As always, your comment will become public; no PII
 - Must be received on or before the deadline
 - Reach out to campus counsel with questions



Portrait circa 1605 by Joos van Craesbeeck

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"YOUR FEEDBACK IS IMPORTANT TO US..."

- What educational objectives are important enough to justify using sex-related eligibility criteria that limit participation?
- How can schools minimize the harms to students who are kept from participating or competing based on sex-related eligibility criteria?
- How, if at all, should the permissibility of particular sex-related eligibility criteria differ depending on the sport, level of competition, grade or education level, or other considerations?
- Are sex-related eligibility criteria ever appropriate in the earlier grades?
- The impact of the Proposed Rule on two-year institutions of higher education.
- Whether there are any sex-related eligibility criteria that can comply with the standards established in the Rule in the elementary school context and, if so, what criteria may comply.
- The extent to which state athletic associations are likely to engage in a review of policies and the timeline for such a review.
- The extent to which athletic associations (such as the NCAA, NAIA, NJCAA, NCCAA, etc.) are likely to engage in a review of policies and the timeline for such a review.
- Identifying high-quality data sources on higher education athletic team offerings, intramural and club sports, and time estimates for complying with the Proposed Rule.

<https://bit.ly/3zRTEtM>

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"YOUR FEEDBACK IS IMPORTANT TO US..."

- Assistance in analyzing how the policy changes made by one athletic association will contribute to policy revisions by other associations.
- Assistance in analyzing whether blanket rules implemented by associations may impact schools that do not accept federal funds.
- Assistance in analyzing time burdens in later years once the Rule is finalized (including policy re-review and training).
- Assistance in understanding the impact of structures and requirements (public comments, shared governance, membership votes) would have on an implementation timetable.
- How to make the Proposed Regulations easier to read and understand (formatting, language, technical jargon).
- The impact of the Regulations on federalism principles and the burden on small entities covered by the Regulatory Flexibility Act.
- Whether the Rule would require transmission of information that other federal agencies or authorities make available.
- Any alternative approaches to the subject other than the one that the Department has selected in the Proposed Rule.

<https://bit.ly/3zRTetM>