
Department of Education Releases Proposed Title IX Rule for Transgender Athletes

June 8, 2023

Number 21

Written by:

Roxana E. Khan

Partner

Monterey Office

rkhan@lozanosmith.com

Monica D. Batanero

Senior Counsel

Los Angeles Office

mbatanero@lozanosmith.com

Emma Sol

Associate

Walnut Creek Office

esol@lozanosmith.com

On April 6, 2023, the United States Department of Education (Department) published a Notice of Proposed Rulemaking regarding Title IX of the Education Amendments of 1972, specifically focusing on sex-related eligibility for athletic teams. This proposed rule would apply to all public school institutions that receive federal funding, including community colleges and public K-12 schools. Full text of the proposed rule can be found here:

<https://www2.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm.pdf>

No Categorical Bans on Transgender Athletes

The proposed rule prevents “one-size-fits-all” categorical bans on transgender athletes from participating on teams consistent with their gender identity. This is because such bans are said to fail to account for differences among students across grades, education levels, different levels of competition, and different types of sports.

Instead, school districts that choose to establish sex-related eligibility criteria would be required to adopt team eligibility criteria that serve important educational objectives, including fairness in competition and preventing sports-related injury, while minimizing harm to students whose participation on teams consistent with their gender identity would be limited or denied. The intent of the proposed rule is to ensure that all students have equal opportunity to enjoy the benefits of team sports participation, and to ensure recipients cannot impose blanket bans on students from participating on sports teams consistent with their gender identity. If a public school chooses to establish sex-related eligibility criteria for athletic programs, it would have to satisfy the standard in the proposed regulation, as identified below.

The proposed rule builds upon the other proposed Title IX regulations currently under review, which were expected to be published by the end of the month but are now anticipated for publication this fall. Specifically, the proposed rule would add the following to Title IX’s implementing regulations:

34 C.F.R. § 106.41(b)(2): 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 not affect a school district's current discretion under Title IX to offer separate male and female athletic teams when selection is based on competitive skill, or the activity involved is a contact sport. The proposed rule would govern only a narrow category of athletic eligibility criteria: those 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.

In the preamble to the proposed rule, the Department provided examples of when sex-eligibility criteria would and would not be appropriate. In doing so, the Department recognized the increased potential for sex-eligibility criteria at higher levels of competition, such as varsity high school sports or collegiate sports. The Department opined that, in contrast, there would be few, if any, sex-related eligibility criteria applicable to students in elementary school that could comply with the proposed regulation, particularly given the prevalence of "no cut," intramural, or junior varsity teams, which allow all, or most, interested athletes to participate.

California's Protections for Transgender Athletes

California law provides stronger protections for K-12 transgender athletes compared to the proposed Title IX rule. In 2013, California passed Assembly Bill 1266, amending Education Code section 221.5, subsection (f), to provide that "a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."

The California Interscholastic Federation (CIF), the governing body for California high school sports, outlines this right in its bylaws, stating that "all students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records." Additionally, CIF allows schools to determine student eligibility to participate on teams consistent with their gender identity or gender most consistently expressed.

Districts that violate Title IX regulations, once effective, risk losing federal funding. However, California school districts in compliance with the above are already compliant with the proposed Title IX rule.

Takeaways

This proposed rule is in the beginning stages of the rulemaking process and is not yet effective. Once the public comment period closes, the Department will review and finalize the regulation language, which may take anywhere from months to a year before publication. In the meantime, school districts are expected to continue to comply with the current Title IX regulations and California law as it applies to athletics.

If you have any questions about the proposed Title IX regulations, Title IX in general, or if you are interested in training opportunities as related to Title IX, please contact the authors of this Client News Brief or an attorney



Client News Brief

at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

