



Q&A

U.S. Department of Education’s April 6, 2023, Proposed Rule on Gender Identity in School Athletics

Why did the U.S. Department of Education propose a new rule on sex-related eligibility criteria for athletic teams?

In the materials accompanying the [proposed rule](#), the Department explained that the rule would be consistent with its interpretation that Title IX prohibits discrimination based on gender identity and sex characteristics in federally funded education programs. In the athletics context, current regulations allow schools to impose sex-related eligibility criteria for male or female teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport,” [34 CFR §106.41](#), but schools must allow try-outs in certain situations and must provide overall equal athletic opportunity “for members of both sexes.”

The Department explains that the proposed rule is designed to clarify how Title IX applies to sex-related criteria that would limit or deny students’ eligibility to participate on male or female teams consistent with their gender identity. Generally, the rule would require schools to allow athletic participation according to students’ gender identity except in limited circumstances. This clarification, the Department notes, “is particularly important as some States have adopted criteria that categorically limit transgender students’ eligibility to participate on male or female athletic teams consistent with their gender identity.”

What does the proposed rule say?

The [proposed rule](#) would apply to public K-12 schools, as well as colleges, universities, and other institutions that receive federal funding. The Department explained in the [fact sheet](#) that the regulation:

- Would prohibit schools from categorically banning transgender students from participating on sports teams consistent with their gender identity.
- Would allow schools to develop policies that limit transgender students’ participation on teams consistent with their gender identity through eligibility criteria that protect students from being denied equal athletic opportunity. Such eligibility criteria must:
 - serve important educational objectives, such as ensuring fairness in competition or preventing sports-related injury;

Recent Title IX Guidance

In February 2023, the Department released resources for school communities on equal athletic opportunity under Title IX. The resources include background on Title IX requirements and an evaluation tool.

Background link: [Supporting Equal Opportunity in School Athletic Programs A Resource for Students and Families \(PDF\) \(ed.gov\)](#)

Evaluation tool link: [Title IX and Athletic Opportunities in K-12 Schools A Resource for Students, Parents, Coaches, Athletic Directors, and School Communities](#)

- account for the nature of the sport, level of competition, and grade/education level to which they apply;
- not be premised on disapproval of transgender students or a desire to harm a particular student; and
- minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

My state law mandates that schools permit participation on athletic teams consistent only with students' biological sex. What should my school do?

If the proposed rule is made final as-is, it would override state laws that are in conflict. However, it may be subject to litigation, as the Department notes that twenty states currently have laws that require participation consistent with sex assigned at birth. The proposed rule states that school districts will be violating Title IX if they issue a blanket rule or practice of only allowing students to participate on teams consistent with their biological sex. However, schools also should be aware of how states might enforce state laws in the short term, even where federal law may require different actions.

It is important as you navigate this new legal landscape to be aware of state and federal legal standards in your jurisdiction, which sometimes may conflict on issues concerning the proposed rule, and to weigh carefully all interests and exposure to legal liability. There remain several questions for schools on how you should craft policies. It is recommended that schools have your school attorney member of the NSBA Council of School Attorneys (COA) review your policies affecting all students with respect to athletics.

My state allows participation of athletes based on their gender identity for all athletic teams. What should my school do?

State laws that provide for student participation based on gender identity for all athletic teams likely will be consistent with the proposed rule once it is in final form. School districts within those states should develop policies that reflect both the requirements in your state laws and the requirements outlined in the final rule.

States that allow students to participate in sports based on gender identity will differ in language and requirements, so it is important for schools to work with your COA attorney to make certain that the policies you develop are consistent with the final rule and your state laws.

What are the safety considerations schools should maintain for all student athletes?

The Department stated that it recognizes the importance of safe, inclusive, fair, and respectful environments across all sports and that schools should maintain safety of all students including those who identify differently from their biological sex.

If the proposed rule is made final in its current form, schools will need to minimize harms to students whose participation on teams consistent with their gender identity would be limited or denied under any new policy. Preventing students from participating on a sports team consistent with their gender identity can stigmatize and isolate them, and those students may not be able to participate at all if the only other option is to participate on a team that does not align with their gender identity. This

is different from the experience of a student who is not selected for a team based on their skills. If a school could achieve its important educational objective by using sex-related criteria that would cause less harm, but the school chooses not to minimize the harm, the school might not satisfy the requirements of the proposed regulation in its current form, depending on the specific facts involved.

Under the proposed rule as currently written, athletic eligibility criteria that are sex-related and they would limit or deny students' eligibility to participate on a male or female team consistent with their gender identity will be considered contrary to Title IX's antidiscrimination mandate unless they meet the four requirements listed above. This could include criteria requiring physical examinations or medical testing, or other steps related to a student's sex characteristics. Such criteria, like other sex-related eligibility criteria, would have to adhere to the proposed rule's requirements, including the requirement to minimize harms.

Now that the Department has released its proposed rule, what should schools be thinking about?

Keeping in mind the Department's position on sex-related eligibility criteria, and the points it has noted in the supporting material to its proposed rule, schools should start thinking about:

- Scenarios that school policy will need to address – how will schools address tryouts, determine valid safety concerns, identify educational objectives, organize travel rules?
- How your state law interacts with the proposed rule. Has your state education agency offered guidance?
- What your state athletic association says about sex-based eligibility criteria, and any changes it plans to make.
- Whether your school policy will address intramural or non-varsity sports differently from interscholastic varsity sports, which carry unique scholarship, recognition, and monetary opportunities.
- The likelihood that one-size-fits-all categorical exclusions of transgender students from participating in athletics consistent with their gender identity will invite federal scrutiny. The proposed rule, if finalized in its current form, would require a separate analysis by sport, level of competition, and grade/education level.
- Other considerations unique to your state and community.