

Insights

DEPARTMENT OF EDUCATION'S NEW PROPOSED RULE FOR TRANSGENDER PARTICIPATION IN ATHLETICS

WHAT DOES IT MEAN AND WHAT CAN YOU DO TO PREPARE FOR THE FINAL REGULATION?

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SUMMARY

The participation of transgender athletes in youth, interscholastic, and elite sport has long been a highly charged political issue domestically and internationally, with a vast range of different approaches to regulating participation. Last week's combination of Supreme Court orders, state legislation, and a proposed rulemaking from the Department of Education's Office of Civil Rights ("OCR") confirm that this must remain a focal point for educational institutions intending to continue offering athletics participation opportunities.

This insight looks closely at the impact of the April 6, 2023 Notice of Proposed Rulemaking on "Sex-Related Eligibility Criteria for Male and Female Athletic Teams" (the "Athletics NPRM"), which sets forth the rubric by which the Biden administration's commitment to preventing discrimination in athletics based on gender identity will be implemented. The Athletics NPRM suggests a framework that likely makes limiting or denying participation in sports before high school insupportable, while permitting constraints on participation at the high school and collegiate levels in certain circumstances.

The Athletics NPRM suggests a two-factor test for whether a restriction on athletics eligibility based on gender identity will pass muster:

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.

Presuming the final regulation adopts a largely identical approach, this succinct regulatory language will have significant impacts on interscholastic and intercollegiate policies towards transgender athlete participation rights. The four key takeaways from the Athletics NPRM are:

1. Any blanket ban on transgender athlete participation in sports consistent with their gender identity will be considered a violation of Title IX.
2. Any criteria adopted to limit or deny a student's eligibility to participate based on their gender identity will have to be substantially related to the achievement of an important educational objective, such as preventing sports-related injuries or fairness in athletic competition.
3. Few, if any, sex-related eligibility criteria for elementary or middle school athletics participation will comply with Title IX.
4. Any exclusionary policies will have to be carefully crafted to address the particular concerns of the sport, grade and education level, and level of competition at issue. No one-size-fits-all policies will be permissible.

OCR is not taking a position on whether any existing policies would comply with these standards, so it will be essential to determine what policy approaches are permissible under the framework set forth in the Athletics NPRM. To do so, it is essential that state and collegiate athletics associations (whose policies govern most competitive scholastic and collegiate sports) and institutions proactively engage in a thorough review of all athletics opportunities and the policies applicable to each grade/age level, sport, and level of competition. Policies that may be permissible at the high school or collegiate level for the most high level competition may not be viable for recreational, intramural, or club sports, let alone at the elementary and middle school levels.

With OCR's expressed position that Title IX prohibits discrimination based on gender identity, your institution will likely be faced with compliance challenges and exposure risk if your athletics governing body does not develop policies that comply with the final regulation. What can you do now to minimize the risk that you are asked to implement policies that may violate the Title IX framework in the final regulation? First, it goes without saying that you should participate in the 30-day comment period for the Athletics NPRM. Beyond that, we recommend you start engaging as follows:

K-12 INSTITUTIONS

Prepare for change if your state is one of the approximately 20 states that has adopted legislation banning transgender athlete participation in youth sport. Such bans will conflict with the new Title IX regulation. While this may lead to extensive litigation about the enforceability of the state laws, we anticipate federalism principles will prevail and that such bans will be found to violate Title IX. Your state may then opt for adopting criteria for transgender athlete participation, such as documentation requirements, hormone suppression treatment, or surgery. If your state's athletics

association currently has such policies or you believe a policy imposing restrictions or exclusions on transgender participation will be adopted after the new regulation is finalized, engage now in the sport-by-sport and level-by-level inquiry such that the approach adopted in your state will be one you are comfortable implementing without risking a Title IX violation. The Olympic movement publications and policies to which the NCAA looks in determining eligibility may be good resources. If your athletics association imposes restrictions on transgender participation in elementary and middle school sports, be ready to advocate that such policies be eliminated as they are unlikely to comport with the final regulation, and you are likely to be in violation of Title IX if you implement them at your institutions.

INTERCOLLEGIATE ATHLETICS

The NCAA's 2022 transgender policy adopted sport-by-sport the policies of the relevant national governing body or international federation. Over the past 18 months, a number of international federations and national governing bodies have announced policies with respect to the conditions upon which transgender athletes can participate in elite athletics. OCR is unlikely to excuse policies that fail to bear a substantial relationship to important educational objectives based on the NCAA's reliance upon third party policies, therefore it may be necessary for institutions to petition the NCAA to engage in supplemental analysis to establish sport-specific rules that are defensible under the Athletics NPRM framework. While injury-prevention or fairness may be important educational objectives, institutions facing compliance investigations or complaints will be required to show that any criteria limiting participation are substantially related to those educational objectives. Either the collegiate athletic associations or you as institutions may want to proactively prepare reasoned and scientifically/medically supported explanation for how the adopted criteria further important educational objectives. If you feel that sport-specific regulations will be important, look to the international federation and national governing body publications to determine if sufficient evidence exists to justify imposition of criteria to limit participation in the specific circumstances contemplated.

COLLEGIATE CLUB, INTRAMURAL OR RECREATIONAL OPPORTUNITIES

For athletic opportunities that are not governed by rules external to those prepared by your institution, be prepared to think critically about the objectives served by your various sports programs or offerings (e.g., club, intramural, or recreational sports) and determine whether there are any legitimate educational objectives that could be served by limiting participation based on gender identity. It seems highly unlikely that defensible justifications will be available for exclusionary policies outside the context of intercollegiate competition, so any limitations should be narrowly crafted and directly related to an important educational objective.

We will be monitoring the outcome of the Athletics NPRM, and will provide further updates when the final regulation is published, while also tracking the domestic and international policies impacting transgender athlete participation in sport. If you would like assistance preparing and submitting

comments, evaluating your existing policies, or working proactively to develop policies that will satisfy the standards set forth in the Athletics NPRM, you can contact sarah.hartley@bclplaw.com or the BCLP Higher Education Team for guidance.

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