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# Department of Education Publishes Proposed Regulation Governing Athletics Eligibility Based on Gender Identity

On April 6, 2023, the U.S. Department of Education issued a proposed rule that would govern a school, college, or university's ability to regulate participation by transgender athletes on teams designated "men's" and "women's." The proposed rule, if ultimately adopted in its current form, would prohibit institutional policies that categorically ban transgender students from participating on sex-designated teams consistent with their gender identity. But it would allow schools to limit participation based on gender identity where such a limitation is "substantially related to the achievement of an important educational objective," such as ensuring "fairness" in competition or preventing "sports-related injury." The regulation would require any such limitations to be based on a sport-by-sport assessment that considers a range of factors, including the age of student athletes involved, the nature of the sport itself, and different levels of athletic skill and competition. If a school maintains such a policy limiting participation, the proposed regulation would also require a school to "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 rule is subject to a 30-day public notice-and-comment period, after which it may be finalized in its current form or may be amended to address feedback received during the notice-and-comment period. There are reports that some states plan to bring legal challenges to the rule if and when it becomes final.

Title IX of the Education Amendments of 1972 broadly prohibits discrimination "on the basis of sex" in the programs and activities of schools, colleges, and universities that receive federal financial assistance. Despite this

broad language, Title IX regulations in place since the 1970s have allowed institutions to “operate or sponsor teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” See 34 C.F.R. § 106.41(b). Through guidance and informal pronouncements over the years, the Department has taken inconsistent positions on whether Title IX’s prohibition of discrimination “on the basis of sex” includes differential treatment based on gender identity and/or whether Title IX’s allowance for sex-separated teams allows separation based solely on sex assigned at birth or “biological sex.”<sup>[1]</sup> Through the proposed regulation, the Department is firmly adopting the position that differential treatment in sports-team selection based on gender identity is a form of differential treatment “on the basis of sex” that Title IX generally prohibits. At the same time, the Department’s proposed regulation acknowledges that considerations for fair competition and sport safety may permit teams to be limited by sex assigned at birth in certain instances. Commentary accompanying the proposed rule generally indicates that such limitations may be appropriate only for sports in high school or college where physical advantage may affect competition and safety in ways significant enough to preclude team selection based on gender identity. Even then, policies limiting participation must be drafted to minimize their adverse effect on transgender students and should account for whether certain mitigating measures, such as hormone suppression, may permit participation by transgender persons while still satisfying competitive and safety concerns.

The proposed regulation does not apply directly to athletics governing bodies such as the NCAA, NAIA, or state high school athletic associations, but it does govern constituent member institutions that receive federal funds. And the proposed regulation assumes that such member institutions would “communicate with” their respective athletic governing bodies about their compliance with the Title IX standard. By the same token, the proposed regulation is clear that an institution is not excused from its own individual Title IX obligations even if it is a member of an association that has a rule at odds with the Title IX standard.

The proposed regulation does not purport to alter Title IX’s self-executing religious exemption; therefore, schools that are controlled by, or are themselves, religious organizations may exempt themselves from the effect of any final regulation to the extent the regulation’s terms conflict with their *bona fide* religious beliefs.

The proposed regulation’s construction of Title IX finds support in some judicial decisions, such as *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), that hold Title IX does not permit schools to limit locker rooms and bathrooms based on “biological sex.” However, the proposed regulation conflicts with the reasoning of other judicial decisions, such as *Adams by and through Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022), which holds that Title IX’s prohibition of discrimination “on the basis of sex” is limited to differential treatment based on “biological sex,” as opposed to gender identity. Thus, if and when the proposed regulation is finalized,

it is likely to be challenged in court, with opponents arguing that the regulation incorrectly interprets Title IX to protect differential treatment based on gender identity. Such challenges may be successful in courts that have already adopted a narrow view of Title IX as limited to prohibiting discrimination based on “biological sex.” But other courts are likely to uphold the regulation as consistent with Title IX, for reasons similar to those articulated in *Grimm*. In the end, Supreme Court intervention will likely be needed to resolve the differing interpretations of Title IX and, thus, the proposed regulation’s ultimate viability.

If a final regulation is ultimately upheld by courts, it would likely preempt various state statutes that currently prohibit transgender women from playing on “women’s” or “girl’s”-designated teams because such statutes impose a categorical limitation on participation, without considering the various factors identified by the regulation. If, on the other hand, the proposed regulation is invalidated or enjoined by courts on the ground that Title IX does not prohibit differential treatment based on gender identity (or, stated differently, permits teams to be limited to persons of a given “biological sex”), then such state laws will remain in force (absent successful challenges to them on other grounds, such as alleged violations of state or federal constitutional rights).

### **What this means to you**

Institutions that wish to comment on the proposed regulation must do so promptly, given the limited 30-day comment period that commences when the proposed regulation is published in the Federal Register.

Schools that currently have policies limiting participation on teams based on gender identity should review such policies to determine whether they comply with the proposed regulation or may need to be modified pending release of the final rule.

Schools in states with statutes that prohibit participation by transgender students on teams based on gender identity should anticipate an uncertain legal environment after the regulation is finalized and are encouraged to consult with legal counsel to determine the best way to manage this legal uncertainty.

### **Contact us**

For more information about the implications of this ruling for your institution, please contact your Husch Blackwell attorney, Derek Teeter, Michael Raupp, Jason Montgomery, or TaRonda Randall. Husch Blackwell regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please fill out this quick form if you would like to receive electronic updates and newsletters.

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[1] This is a term frequently used by courts and state statutes to refer to sex as determined at birth by reproductive organs, chromosomes, and other physical characteristics.