

PETRARCA, GLEASON,
BOYLE & IZZO, LLC
ATTORNEYS AT LAW

US DEPARTMENT OF EDUCATION PROPOSES NEW TITLE IX REGULATION PROHIBITING OUTRIGHT BAN ON PARTICIPATION BY TRANSGENDER STUDENTS IN ATHLETICS

On April 6, 2023, the US Department of Education issued its proposed regulation under Title IX concerning students' eligibility for athletic teams.

The proposed regulation would be added to 34 C.F.R. §106.41 as (b)(2), and provides as follows:

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.

Schools seeking to apply such criteria would be required to take into account differences in grade and education level, level of competition, and sports.

The US Department of Education also released a Fact Sheet to guide institutions on how the proposed regulation would impact their athletic programs. The Department explained that the proposed regulation would prohibit a school from categorically banning transgender students from participating on a sports team that is consistent with their gender identity.

Instead, schools are to develop their own policies that include eligibility criteria designed to protect students from being denied equal opportunity in athletics. Such team eligibility criteria must:

- serve “important educational objectives, such as ensuring fairness in competition or preventing sports-related injury;”
- 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.”

The Department, in its fact sheet, expects that elementary school students should generally be allowed to participate on an athletic team consistent with their gender identity. It also noted that it is “particularly difficult” to exclude students from participation based on gender identity “immediately following elementary school.” At the high school and college level, limiting participation based on gender identity may be permitted if it meets the policy framework outlined above. Of particular note, it is the Department’s position that it is more difficult to justify a school’s need to restrict students from participating in a sport consistent with their gender identity at a lower level of competition such as intramural or JV level



teams.

The Department stated its fact sheet that a clarification on “Title IX’s application to sex-related eligibility criteria 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,”

We will provide further updates on this proposed regulation, including any updates to [IHSA’s current policy](#). If you have any questions, please contact one of our attorneys.

If you have any questions about this or any of our other briefings, please contact one of our attorneys at 708/799-6766 (Flossmoor), 630/928-1200 (Oak Brook), or 630/796-2086 (Downers Grove).