

# FACT SHEET: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams

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Since Title IX was signed into law more than 50 years ago, it has enabled tremendous strides in educational opportunity free from sex discrimination, including in athletics, for millions of students across the country.

Today, the U.S. Department of Education is releasing a notice of proposed rulemaking (NPRM) on athletic eligibility under Title IX to advance Title IX's longstanding goal of ensuring equal opportunity in athletics. During the two years of outreach to stakeholders to develop this proposed rule, the Department heard repeatedly that many schools, students, parents, and coaches face uncertainty about when and how transgender students can participate in school sports, particularly because some states have chosen to adopt new laws and policies on athletics participation that target transgender students. The NPRM, if adopted as a final rule, would provide much needed clarity for students, parents, and coaches.

Participation in school athletics is an important component of education and provides valuable physical, social, academic, and mental health benefits to students. The proposed rule affirms that students benefit from the chance to join a school sports team to learn about teamwork, leadership, and physical fitness. The proposed rule would establish that policies violate Title IX when they categorically ban transgender students from participating on sports teams consistent with their gender identity just because of who they are. The proposed rule also recognizes that in some instances, particularly in competitive high school and college athletic environments, some schools may adopt policies that limit transgender students' participation. The proposed rule would provide schools with a framework for developing eligibility criteria that protects students from being denied equal athletic opportunity, while giving schools the flexibility to develop their own participation policies.

"Every student should be able to have the full experience of attending school in America, including participating in athletics, free from discrimination. Being on a sports team is an important part of the school experience for students of all ages," said U.S. Secretary of Education Miguel Cardona. "Beyond all the benefits to physical and mental health, playing on a team teaches students how to work hard, get along with others, believe in themselves, and build healthy habits that last a lifetime. Today's proposed rule is designed to support Title IX's protection for equal athletics opportunity. We welcome and encourage public comment on the proposed regulation and will continue working to ensure Title IX's effective protection for all students."

**The Department invites and encourages public comment. The public comment period will be for 30 days from the date of the NPRM's publication in the *Federal Register*.**

## Summary of the proposed rule:

The proposed rule would apply to public K-12 schools, as well as colleges, universities, and other institutions that receive federal funding (referred to here as "schools").

### **The proposed rule builds upon the longstanding Title IX rules that protect equal athletic opportunities for women and girls.**

Since 1975, federal regulations have required that schools provide equal athletic opportunities for students regardless of sex. In February 2023, the Department released [new resources](https://www2.ed.gov/about/offices/list/ocr/docs/ocr-athletics-resource-202302.pdf) (<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-athletics-resource-202302.pdf>) for students, parents, coaches, and school communities to help them assess whether their athletic programs are fulfilling Title IX's promise to women and girls. Those resources help families assess whether women's and girls' teams receive equivalent levels of coaching, facilities access, fields and equipment, and financial assistance as the men's and boys' teams. For example, if a high school provides the boys' baseball team with a high-quality turf field, but requires the girls' softball team to play on a poorly maintained grass field without fencing or lighting, the school may be violating Title IX. Nothing in today's proposed rule would change these longstanding requirements that women and girls be afforded equal athletic opportunity, and the proposed rule affirms that schools can offer separate men's and boys' and women's and girls' sports teams in certain circumstances.

### **The proposed regulation supports Title IX's nondiscrimination requirement, while providing flexibility for schools to achieve important educational objectives through their athletic program.**

Title IX's nondiscrimination requirement serves to ensure that all students have equal opportunity to enjoy the benefits of team sports participation. Participating in school athletics is an important component of education and provides valuable physical, social, academic, and mental health benefits to students. Younger students, in particular, benefit from the chance to join a team and learn about teamwork, leadership, and physical fitness.

Under the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity.

Instead, the Department's approach would allow schools flexibility to develop team eligibility criteria that serve important educational objectives, such as ensuring fairness in competition or preventing sports-related injury. These criteria would have to account for the sport, level of competition, and grade or education level to which they apply. These criteria could not be premised on disapproval of transgender students or a desire to harm a particular student. The criteria also would have 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 proposed regulation would recognize that differences in grade and education level, level of competition, and sports must be taken into account for any eligibility criteria that would restrict transgender students from participating on teams consistent with their gender identity.**

One-size-fits-all policies that categorically ban transgender students from participating in athletics consistent with their gender identity across all sports, age groups, and levels of competition would not satisfy the proposed regulation. Such bans fail to account for differences among students across grade and education levels. They also fail to account for different levels of competition—including no-cut teams that let all students participate—and different types of sports.

Taking those considerations into account, the Department expects that, under its proposed regulation, elementary school students would generally be able to participate on school sports teams consistent with their gender identity and that it would be particularly difficult for a school to justify excluding students immediately following elementary school from participating consistent with their gender identity. For older students, especially at the high school and college level, the Department expects that sex-related criteria that limit

participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition, and meet the proposed regulation's other requirements.

**Schools would have to take into account the following considerations when developing a policy for participation:**

**The proposed regulation recognizes that there are differences among students and school sports teams depending on grade and education level.**

Students in different grades and education levels have different levels of athletic skill, and schools offer sports teams for different reasons depending on students' grade or education level. For example, teams for younger students often focus on building teamwork, fitness, and basic skills for students who are just learning about the sport, while a collegiate team may be primarily focused on competitive success. That's one reason why the Department expects that, under its proposed regulation, elementary school students would generally be able to participate on school sports teams consistent with their gender identity where considerations may be different for competitive high school and college teams.

Especially for students in earlier grades, including for example those in elementary school, school athletic teams focus on introducing students to new activities and prioritize team sports as an opportunity for students to learn basic skills in physical fitness, leadership, and teamwork.

**The proposed regulation would recognize that school athletic teams vary in the level of competition they offer.**

School teams vary widely across the United States, with some that are very competitive, especially for high school and college students with advanced skills, and others, such as "no cut" teams, that allow all students to join and participate. Some schools also offer teams at lower levels of competition, such as intramural or junior varsity teams, that allow all or most interested students to participate. Sex-related eligibility criteria that restrict students from participating consistent with their gender identity would have to reflect these differences in competition.

**The proposed regulation would recognize that the types of sports offered vary widely and that sport governing bodies vary in their participation criteria.**

Sports vary widely in the skills they require, and students vary widely in their talent for particular sports. Recognizing this, the Department proposes that schools that seek to restrict students from participating consistent with their gender identity must take account of the nature of the sports to which the restriction would apply.

The Department's proposed approach fits with Congress's direction in 1974 that the Title IX regulations include reasonable provisions that "consider[] the nature of particular sports." (Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974)).

Many sport governing bodies have created participation criteria for their sports, and the National Collegiate Athletic Association (NCAA) recently adopted a sport-specific approach for eligibility criteria for male and female teams in its college-level competitive leagues.

**The proposed regulation would recognize the importance of minimizing harms to students whose participation on teams consistent with their gender identity would be limited or denied.**

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 proposed regulation, depending on the specific facts involved.

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The current Title IX athletics regulation can be found at 34 C.F.R. § 106.41. (<https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106>) The proposed regulation would be added as (b)(2), and current (b) would be redesignated as (b)(1).

### **The proposed regulation's text:**

The proposed regulation would be in the Title IX regulations at section 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.

### **Background on Title IX's Guarantee of Equal Opportunity in Athletics:**

The Title IX regulations, since they were first issued, have made clear that different treatment on the basis of sex is generally prohibited, recognizing that such treatment can cause harm by limiting educational opportunities because of sex-based stereotypes about individuals' talents, capacities, and preferences. Congress also indicated, however, that the athletics context presents special considerations and that the Title IX regulations should include "reasonable" provisions governing athletics in light of "the nature of particular sports." Education Amendments of 1974 § 844.

The Department's regulations have thus long permitted schools to offer separate male and female teams in some circumstances while also requiring schools to provide equal opportunity based on sex in their overall athletic program. Courts have affirmed that Title IX allows schools flexibility to organize their athletic program as they wish so long as they provide equal athletic opportunity. For example, a school that offers a golf team for girls but not boys might be permitted under Title IX to exclude a boy from the girls' golf team so long as the school provides boys with equal opportunity based on sex in its athletic program as a whole. Similarly, if a school offers a golf team for boys but not girls, it might be permitted to exclude a girl from the boys' golf team if girls have equal opportunity to participate in the school's overall athletic program.

### **Background on the Department's Process for Developing the Proposed Regulation:**

In 2021, President Biden directed the Department in both Executive Order 13988 on *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* and Executive Order 14021 on *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity* to review its current regulations to ensure they fully implement Title IX's protection against sex discrimination.

In its review process, the Department received extensive public feedback, including in a nationwide public hearing convened by its Office for Civil Rights (<https://www2.ed.gov/about/offices/list/ocr/public-hearing.html>) (OCR), during which OCR received over 280 live comments and over 30,000 written comments, along with listening sessions and meetings. The Department considered comments from stakeholders expressing a variety of views, including student-athletes, parents, athletic associations, professional athletes, teachers, faculty members, school staff and administrators, and other members of the public.

The Department heard that students, parents, schools, athletic associations, and others need clarity about how schools can meet Title IX's nondiscrimination requirement if they limit students' eligibility to participate on male or female athletic teams consistent with their gender identity. In developing the proposed regulation, the Department also reviewed Title IX's text and purpose, courts' interpretations of Title IX and the U.S. Constitution, and the approaches to athletic eligibility criteria currently taken by a wide range of States, school districts, athletic associations, and sport governing bodies.

### Information about the public comment period:

The Department's proposed Title IX regulation will be open for public comment for 30 days from the date of publication in the *Federal Register*.

The unofficial version of the proposed regulation is available [here](https://www.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm.pdf) (<https://www.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm.pdf>).

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