



Q&A

8 6 ' H S D U W P H Q W A P R I L 6 2 0 2 3 P O S T E R Q U E S T I O N
Gender Identity in School Athletics

Why did the U.S. Department of Education propose a new r

- o account for the nature of the sport, level of competition, and grade/education level to which they apply;
- o not be premised on disapproval of transgender students or a desire to harm a particular student; and
- o 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 V W X G H I J K L M N O P Q R S T U V W X Y Z. What should my school do?

If the proposed rule is made final, it would override state laws that are in conflict. However, it may be subject to litigation, and 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 of state and federal legal standards in your jurisdiction, which sometimes may conflict on issues concerning the proposed rule, and 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 a school attorney member of the NSBAC 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 on athletic teams. What should my school do?

State laws that provide for student participation based on gender identity on 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 of your state laws and the requirements outlined in the final rule.

States that allow students to participate in sports based on gender identity will have 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 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 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 ~~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.