



NSBA shares the Department's concern for protecting the information in

AL ST §161-52.

These state statutes all require that students' participation on teams designated male or female be based on "biological sex or sex identified close to birth." For example, Alabama's statute says:

In Indiana, for example, the statute allows a student “deprived of an athletic opportunity” or “otherwise directly or indirectly injured” by a school district’s, school’s, or association’s violation of the law to bring a civil action against the school district, school, or association. *Ind. Code* § 20-33-136. Iowa’s statute specifies the type of relief students may seek if they are directly or indirectly harmed by an alleged violation of the statute: injunctive, mandamus, damages, and declaratory relief against the entity. *IA ST* § 26112. *See also* *MT ST* 207-1307 (specifying that a student who suffers direct or indirect harm, or is retaliated against, may sue for “injunctive relief, damages, and any other relief available under law against the school”).

Despite the limited protections for schools in the statutes, school districts have been sued in federal courts by individual students challenging such statutes’ application to them.¹⁰

Because the proposed rule would conflict directly with these state laws, school districts in such states will have to analyze and possibly redevelop their policies in consultation with their attorneys, keeping in mind the potential liability they face for violations of their state law. The Department estimates that an initial review to determine whether the regulation applies will take an education administrator approximately half an hour to complete. The Department also estimates that about 60 percent of states, one education administrator from the National Education Agency (NEA) would spend four hours on policy revisions, while a management analyst would spend twenty hours and an attorney twelve hours. 88 Fed. Reg. 22886. The Department speculates that to develop training on the new policies would be spent by state athletic associations.

NSBA urges the Department to estimate and account for more time to be spent by administrative staff and attorneys in developing and conducting training for staff in states that now ban student participation in extracurricular athletics based on gender identity. School personnel will need more time to consult with their school attorneys, engage their communities through meetings and input periods, draft proposed policies with comment periods, finalize policies, and train staff. In some states, this process will happen. (228)Tj (86)Tj -0.003 Tc 0.003 Tw 4 ()-9.9

teams and whether particular recipients will be revising their policies. During the delayed implementation period, we ask that the Department gather data that will inform its enforcement and assist school districts considering policy changes based on the findings NSBA is concerned that without a period of considered policy development, schools will be forced to adopt policies without sufficient time to consult with their communities and state agencies, creating even more vulnerability to litigation. School districts in states with conflicting statutes are subject to the very real risk of drawing claims including litigation if they implement the federal rule without sufficient time to inform and consult with these stakeholders.

II. Alternative Approaches to Achieve Equal Athletic Opportunity Regardless of Sex in the Recipient's Athletic Program as a Whole

Because the proposed rule retains the longstanding language regarding “boys” and “girls” teams, it appears to limit the scope of its coverage. It is not clear whether the text of the proposed rule applies only when a school designates teams as “boys” and “girls.” Some schools operate, and some are considering, co teams.¹¹ Many state statutes refer to “co teams” as well. NSBA asks that the Department clarify how the rule will apply if a school offers coed teams or designates slots for boys and girls on such teams.

NSBA also asks that the Department clarify the rule’s application in situations where nonbinary students wish to participate in athletics. At most sports at most levels, there will not be a team that corresponds to a nonbinary student’s gender identity. The Department notes that schools may need to determine whether stated criteria, when applied to nonbinary students, limit or deny the student’s eligibility to participate on a male or female team consistent with their gender identity. If a school answers that question in the negative, does that mean that the student may be required to join a team based on biological sex in that case? We ask that the Department clarify how schools can address participation in such situations through policy.

III. Safety and Fairness as Important Educational Interests

The proposed rule would require any criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity to be substantially related to the achievement of an important educational objective for “each sport, level of competition, and grade or education level.” This language is the rule to the intermediate scrutiny standard applied by courts to sex-based classifications challenged under constitutional theories of equal protection. Although this language is familiar to attorneys and courts, its use in a regulation creates implementation challenges for school districts.

First, the legal meaning of substantially related/important educational interest may be difficult to discern and challenging to apply. The intermediate scrutiny standard is less defined through case law than the higher “strict scrutiny” or lower “rational basis” standards applicable in other contexts. Courts have not interpreted “substantially related” consistently or clearly. In the

¹¹ See *Brooks v. State College Area Schools District*, __ F.Supp.3d __, 2022 WL 17366397 (M.D. Penn. 2022) (in a case where female players alleged a school district committed a Title IX violation when it failed to provide effective accommodation to female athletes by rostering a second middle school ice hockey team, the court found, “Merely allowing female athletes to show up for coed tryouts is not enough to satisfy Title IX” and granted a preliminary injunction).

states "Having separate specific teams further efforts to promote sex equality. Specific teams accomplish this by providing opportunities for

V. ~~Associations~~

Many school districts do not set their own rules on athletic eligibility regarding

secondary educational avenues for students participating in latter' developed policies and procedures related to determining eligibility for transgender students.

¹² At the same time, not all athletic associations will be considered recipients of federal funds.

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¹² See, e.g., Michigan High School Athletic Association, *Eligibility of Transgender Student-Athletes*, <https://cdn.factcheck.org/UploadedFiles/TransgenderPolicy.pdf>

Given the Department's explanation, the "harm" component of the proposed rule appears to be all-inclusive and requires a degree of forecasting. If any application of school-based eligibility criteria that limits or denies participation will be deemed to be harmful, how will a school be able to show it chose a less harmful alternative? Will the Department consider emotional harm? If so, how does the Department suggest that schools anticipate and weigh emotional harm?