

Title IX of the Education Amendments of 1972 – 2023 Notice of Proposed Rulemaking
Sex-Related Eligibility Criteria for Male and Female Athletics Teams



Determining Sex for Team-Eligibility Purposes- Part 2

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The proposed regulation provides a standard that schools must use when they want to adopt or use sex-related criteria that limit or deny a student’s eligibility to participate on a female or male team consistent with their gender identity. It sets out two requirements for any such sex related criteria, and states that these criteria must be applied to each sport, each level of competition, and each grade or education level being considered.¹

1. The criteria must be *substantially related* to the achievement of an *important educational objective*, and
2. The criteria must *minimize harms* to students whose opportunity to participate on a female or male team consistent with their gender identity would be limited or denied.

Regarding what type of criteria could fall under the scope of the proposed regulations, the Department includes examples of a requirement that limits or denies a student’s eligibility for a male or female team based on a sex marker on an identification document, such as a birth certificate, passport, or driver’s license. It notes that criteria requiring physical examinations or medical testing or treatment related to a student’s sex characteristics would be within the scope of the proposed regulation, if the results could be used to limit or deny a student’s eligibility to participate consistent with their gender identity.²

In delineating how the proposed regulations would only apply to sex-related criteria that “limit or deny” students’ opportunity to participate consistent with their gender identity, it provides examples of criteria that do not allow transgender athletes to participate in all of the competitions for their sport versus just some competitions, or criteria that force transgender students to participate only on teams consistent with their sex assigned at birth, or that prohibit transgender female students who have undergone endogenous puberty from participating on female teams.³

The caselaw cited in the preamble relates to courts’ treatment of transgender students; the Department notes that the proposed regulation would also provide an appropriate framework for analyzing sex-related criteria that limit or deny an intersex student’s opportunities to participate on female or male teams, and that for nonbinary

¹88 Fed. Reg. 22860, 22871, April 13, 2023

² *Id*

³ *Id* at 22872

students, schools would need to determine whether the criteria actually limit or deny a nonbinary student's eligibility.⁴

It notes that criteria that are unrelated to sex, such as attendance or academic standing requirements, are outside the scope of the proposed regulation.⁵

The Department recognizes that providing separate teams by sex can advance, rather than undermine, equal opportunity in the "unique context of athletics by creating meaningful participation opportunities that were historically lacking for women and girls."⁶ It reminds schools that the Department requires schools to provide equal opportunity as a whole in their athletic programs, and that Title IX does not require identical programs for male and female athletes.⁷

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⁴ Id at 22869

⁵ Id at 22871

⁶ Id at 22877

⁷ Id