

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



Harm Minimization Considerations

By: [Courtney Bullard, Institutional Compliance Solutions](#)

Under proposed rule §106.41 (b)(2), if a school adopts sex-related criteria that would limit or deny a student’s eligibility to participate on an athletic team consistent with their gender identity, the criteria must “minimize harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.” 88 Fed. Reg. 22860, 22861 (April 13, 2022)

Throughout the preamble, the Department repeatedly emphasizes that the proposed rule is meant to increase students’ access to athletics and limit the potential dangers of restricting students’ athletic opportunities. Historically, when a student is excluded from an activity based on their sex, the student experiences harm that is “more than de minimis” such that “it would ordinarily violate Title IX.” *Id.* at 22877. In the Athletics NPRM, the Department echoes this analysis and outlines special considerations regarding athletic participation. For example, under the current Title IX regulations, specifically §106.41(b), recipients are not required to have “identical” programs for male and female athletes. *Id.* But, recipients may offer separate male and female athletic teams and can restrict students from participating on an athletic team based on their sex in “some circumstances.” *Id.* For instance, an institution may offer women’s volleyball but declines to offer men’s volleyball; and that institution may restrict a male student from participating on the women’s team. *Id.*

But the Department makes a unique argument with respect to restricting participation based on gender identity. While “*separating* students on the basis of sex on the basis of particular reproductive or other sex-based characteristics” would not harm the majority of students, the preamble states, “criteria that *limit[s]* or *deni[es]* a student’s eligibility to participate on a team that is “consistent with their gender identity” produces a “distinct” type of harm. *Id.* Such criteria, the Department argues, can force students to disclose that they are transgender, nonbinary, or gender nonconforming, an experience that can be “extremely traumatic.” *Id.* Students may also be subjected to “embarrassment, harassment” if they have to “verify” their sex. *Id.* This distinction is emphasized repeatedly throughout the rule’s analysis.

Finally, if finalized, the Department will enforce the rule by evaluating the institution’s eligibility criteria and assess the potential harm to student athletes. To determine whether an institution’s policy is compliant, the Department will pay particular attention to the nexus between the eligibility criteria and the educational objective. Under the proposed rule, such criteria must be the “least harmful means” of achieving the institution’s “important educational objective.” *Id.* Thus, if a recipient can “reasonably adopt” criteria that is less harmful, adopting “more harmful” criteria would violate the proposed §106.41 (b)(2). *Id.* Assistant Secretary Catherine Lhamon also emphasized this point during a webinar on May 2, 2023. Based on the

preamble and Mrs. Lhamon's comments, an institution's policies and rationale will be evaluated carefully and on an individual basis.

The 2022 Title IX NPRM Joint Resources Portfolio is prepared as a service by in house and firm attorneys but does not represent legal advice. The Resources Portfolio is for educational purposes only and no attorney/client relationship is formed with any contributor or their organization. Legal advice for specific situations may depend upon state law and federal and state case law and readers are advised to seek the advice of their own appropriate counsel. The Joint Resources Portfolio is available absolutely free pursuant to a Creative Commons [Attribution-NonCommercial-ShareAlike 4.0 International license](#) (meaning that all educational institutions are free to use, customize, adapt, and re-share the content, with proper attribution, for non-commercial purposes, but the content may not be sold).