

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



Substantial Relationship to the Achievement of an Important Educational Objective Requirement

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Under the proposed regulation, a school will have to consider how a sex-related eligibility criteria would be substantially related to the achievement of its important educational objective, by examining how that criteria would affect athletes at each proposed grade or education level that the criteria would apply to. It cites studies to emphasize the point that elementary and middle school are important times for students to try new activities with little or no prior experience, to acquire basic athletic skills, and to work on general physical fitness, leadership, and teamwork. It notes the general absence of state regulation of elementary athletics, and that only about half of state athletics associations regulate middle school athletics. It states that early grade athletic opportunities have many benefits to students regardless of sex, so it believes there would be “few, if any, sex-related eligibility criteria” for elementary students that would comply with the proposed regulation, and that such criteria may be more likely to ensure an important educational objective at the high school and college level.¹

The proposed regulation does not categorize or limit the type of important educational objective that a school may seek to achieve or improve, but the preamble lists two examples of important objectives: ensuring fairness in competition and prevention of sports-related injury.² The Department states that it recognizes that competition is an integral part of many sports, particularly for older students in competitive athletic programs, and that competitors must meet relevant criteria such as age, skill level, following rules, and generally engaging in fair play. It notes that current Title IX regulations at § 106.41(b) allow for teams to be separated by sex where selection is based on competitive skill or if the activity is a contact sport.³

In the preamble, the Department defined that sex-related criteria would be substantially related to achievement of an important educational objective if there is a direct, substantial relationship between the school’s important educational objective, and the means used to achieve that objective.⁴ While the Department does not specify what type of analysis or justification a school will need to provide to prove the substantial relationship

¹ Id at 22874-22875

² Id at 22873

³ Id at 22872

⁴ Id at 22873

requirement, the preamble cites caselaw that the justification must be based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.”⁵

For any sex-related criteria to be used in athletics, the preamble notes that a school’s criteria could not satisfy the requirement of being substantially related to achieving an important educational objective if the objective, whether straightforward or pretextual, is to communicate or codify disapproval of a specific student or that student’s gender identity, to bar or exclude transgender students from sports, or to mandate students’ adherence to sex stereotypes.⁶ It states that criteria that categorically exclude all transgender girls and women from participating on female teams would not satisfy the regulation because that type of criteria relies on overly broad generalizations that don’t take into account the nature of particular sports, level of competition, and the grade/education level of the students at issue.⁷ It also cites caselaw to explain that since it cannot be assumed that all transgender girls and women are similarly situated in their physical abilities in comparison to cisgender boys and men, criteria that assume all transgender girls and women have an unfair physical advantage over cisgender girls and women in every sport, level of competition, and grade or education level are relying on a generalization that would not comply with the regulation.⁸

The Department notes that if a school can achieve its objective through alternative criteria that don’t limit or deny a student’s eligibility to participate on a team consistent with their gender identity, then its use of sex-related criteria may be pretextual, rather than substantially related to achievement of its objective.⁹

Even though the Department does not strictly define “important educational objective,” it notes that its overall approach in this guidance is similar to its existing regulation regarding single sex classes, which permits some schools to offer single-sex classes if the single-sex nature of the class is based on one of two permissible important objectives (the diversity objective and the educational needs objective), and if the single-sex nature of the class is substantially related to achieving that objective.

Although the preamble and proposed regulations do not discuss specific documentary requirements for proving the substantial relationship, it may be instructive to consider that the Department has historically utilized some enforcement mechanisms for Title IX single-sex classes that it may adapt for its current regulations on sex-related athletic eligibility criteria. For example, the Department has at times required schools wishing to have single-sex classes to satisfy the substantial relationship requirement by providing to the Department a research study that demonstrates the effectiveness of the single-sex nature of the class with respect to the specific important objective at issue, or evidence that the exclusion of a certain sex is necessary to achieve its objective (see OCR Letter of Findings for Middleton School District 134, OCR Ref. No. 10131040, November 14, 2016, at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10131040-a.pdf> and OCR Letter of Findings for Lansing School District, OCR Ref. No. 15165001, July 11, 2017, at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15165001-a.pdf>).

Schools will have to analyze their proposed sex-related criteria carefully as there are vast differences between the natures of various sports, the levels of competition at issue, and the grade or education level of the students the criteria are meant to apply to. The Department reiterates that the criteria should not rely on “overly broad generalizations about the talents, capacities, or preferences of male and female students.”

⁵ Id at 22874

⁶ Id at 22872

⁷ Id at 22873

⁸ Id

⁹ Id at 22874

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