

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



Sex-Related Criteria Based on Sport (34 C.F.R. § 106.41 (b)(2))

By: [Kylie Stryffeler](#) & [Kasey Nielsen](#), [Bricker Graydon](#)

The proposed rule states: “If a recipient adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each **sport**, level of competition, and grade or education level:

- (i) be substantially related to the achievement of an important educational objective, and
- (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”

Under the Department’s proposed rule, if an institution aims to implement sex-based criteria, then the sex-based criteria must, for each sport, be substantially related to achieving an important educational objective.¹ The Department proposed this factor because every sport is unique – not all differences among students give a competitive advantage or raise the same sport-related injury concerns.² The Department recognized that schools offer many different sports and each sport has unique rules and prioritizes varied skills and attributes. The Department says one sport team, compared to another sports team, could vary significantly in skills, size, strength, and other attributes relevant to their sport.³ For example, the skill, size, and strength necessary for football likely vary significantly to the skills, size and strength for golf or archery.

The Department said that treating each sport the same would be an “archaic and overbroad generalization” citing *Att’y Gen. v. Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d 284, 293 (Mass. 1979) and *Utah High Sch. Activities Ass’n*, 2022 WL 3907182, at *8-9.⁴ The Department also said this sport-specific inquiry is based on feedback from stakeholders that noted that national and international sport governing bodies set rules for participation and competition that differ by sport.⁵

¹ 88 FR 22876

² *Id*

³ *Id*

⁴ *Id*

⁵ *Id*

The Department acknowledged that the National Collegiate Athletics Association (“NCAA”) and the International Olympic Committee (“IOC”) adopted a sport-specific approach for participation.⁶ The Department also noted that schools would not necessarily need to adopt distinct eligibility criteria for each sport, but the criteria must satisfy the proposed regulation as applied to that sport.⁷ This is consistent with the Javits Amendment that Title IX would “consider[] the nature of particular sports.” Education Amendments of 1974 § 844.⁸

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](https://creativecommons.org/licenses/by-nc-sa/4.0/) (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).

⁶ *Id*

⁷ *Id*

⁸ *Id*