

Education Department Proposes New Title IX Regulations for Transgender Student-Athletes

By Susan D. Friedfel, Monica H. Khetarpal, Carol R. Ashley & Mallory H. Gantt

April 10, 2023

Meet the Authors



Susan D. Friedfel

Principal
914-872-8027
Susan.Friedfel@jacksonlewis.com



Monica H. Khetarpal

Principal
(312) 803-2529
Monica.Khetarpal@jacksonlewis.com



Carol R. Ashley

Of Counsel

The U.S. Department of Education Office for Civil Rights (OCR) has proposed a standard that would clarify participation and equal opportunity of transgender students in school athletics.

The proposed regulation published in the [“U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams”](#) fact sheet seeks to build upon existing Title IX rules, the Department said, by upholding the long-standing requirement that women and girls be afforded equal athletic opportunity and affirming that schools can still offer separate men’s and women’s sports teams in certain circumstances while providing equal opportunity to transgender students to participate in athletic programs.

The proposed regulation would apply to K-12 schools, as well as colleges, universities, and other institutions that receive federal funding.

According to U.S. Secretary of Education Miguel Cardona, “Every student should be able to have the full experience of attending school in America, including participating in athletics, free from discrimination.” The proposed regulation seeks to provide schools a framework to develop eligibility criteria that protects students from being denied equal athletic opportunity, while providing schools the flexibility to develop their own policies.

The proposed regulation provides, “if a recipient adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate” on a sports team consistent with their gender identity, “such criteria must, for each sport, level of competition, and grade or education level ... be substantially related to the achievement of an important educational objective” and “minimize harms to students whose opportunity to participate” on a team “consistent with their gender identity would be limited or denied.”

Under the proposed regulation, schools would be prohibited from implementing a one-size-fits-all” categorical ban on transgender students participating in athletics consistent with their gender identity.

Instead, the proposed regulation would allow schools to adopt policies that provide flexible eligibility criteria that serve important educational objectives, such as ensuring fairness and preventing sports-related injury.

When creating a policy, the proposed regulation would allow schools to:

- Recognize differences in grade and education level;
- Recognize that athletic teams vary in competition levels, such as “no cut teams” versus competitive success teams; and



Mallory H. Gantt

Associate

864-672-8087

Mallory.Gantt@jacksonlewis.com

Related Services

Education: K-12

Employment Litigation

Higher Education

- Recognize the types of sports offered by schools vary widely.

For example, under its proposed regulations, OCR expects elementary students would generally be able to participate on school sports teams consistent with their gender identity, where the considerations may be different for high school and college teams with a higher competitive outlook. Likewise, OCR expects that, where schools offer lower levels of competition, such as intramural or junior varsity teams, sex-related eligibility criteria that restricts students from participating would need to reflect such differences in competition.

OCR also recognizes that sports vary widely and schools wishing to restrict students from participating consistent with their gender identity must consider the nature of the sport to which the restrictions would apply. OCR notes that many sports governing bodies have already created participation criteria for their sports. For example, the National Collegiate Athletic Association has adopted a sport-specific approach for eligibility criteria for college-level competitive leagues.

Lastly, OCR iterates that when evaluating the use of sex-related criteria where there are multiple methods of achieving an important educational objective, OCR may determine that the school does not satisfy the requirements of the proposed regulation if the school did not choose the method that minimizes the harm to students whose opportunity to participate on a team based on their gender identity may be limited or denied.

OCR's release of the fact sheet comes as some states seek to or have enacted laws to limit or restrict transgender students from participating on sports teams consistent with their gender identity.

The public may submit comments for 30 days from the date of publication in the *Federal Register*.

The Jackson Lewis Higher Education Team is well-versed in Title IX, including issues on transgender student athletes and continues to analyze ongoing developments in this area. Please contact a Jackson Lewis attorney with any questions regarding the Department of Education update, Title IX policies, and any other Title IX developments.

©2023 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.