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TITLE IX ATHLETICS PROPOSED RULE SUMMARY SESSION

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April 13, 2023

MEET YOUR FACILITATORS



Andrea Stagg

Director of Consulting Services

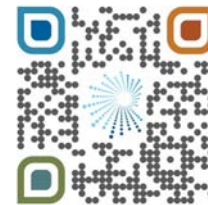
Andrea Stagg has extensive experience consulting, writing and training on Title IX, Equity and safety. Andrea was Deputy General Counsel and Director of Government Relations & Compliance at Barnard College and was counsel to three colleges within the SUNY system. She has worked with federal and state legislators to develop state laws and follow best practices in campus safety and sexual harassment prevention.



Joseph Storch

Senior Director of Compliance & Innovation

Joseph Storch develops guidance and builds systems to simplify compliance, so we can invest in prevention. A nationally recognized expert on Title IX, the Clery Act, and state laws covering violence and harassment, he twice testified before the Senate, drafted legislation and regulations, and regularly provides guidance for national associations and institutions. Nearly 20 years in, he's just getting started.



PRESENTATION AGENDA

- TL;DR
- The Proposed Rule
- Some Analysis
- The Current Landscape

- Commenting on the Regs
- Q&A
- Everybody goes outside

TL;DR

- Published today
- 30 day comment period (ends May 15)
- Date finalized TBD
- We expect a lot of comments
- We expect litigation
- No blanket bans
- Rebuttable Presumption

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams

A Proposed Rule by the Education Department on 04/13/2023

This document has a comment period that ends in 32 days. (05/15/2023)

SUBMIT A FORMAL COMMENT

PUBLISHED DOCUMENT

Start Printed Page 22860

AGENCY:
Office for Civil Rights, Department of Education.

ACTION:
Notice of proposed rulemaking (NPRM).

SUMMARY:
The U.S. Department of Education (Department) proposes to amend its regulations implementing Title IX of the Education Amendments of 1972 (Title IX) to set out a standard that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The proposed regulation would clarify Title IX's application to such sex-related criteria and the obligation of schools and other recipients of Federal financial

DOCUMENT DETAILS

Printed version:
[PDF](#)

Publication Date:
[04/13/2023](#)

Agency:
[Department of Education](#)

Dates:
Comments must be received on or before May 15, 2023.

Comments Close:
05/15/2023

Document Type:
Proposed Rule

Document Citation:
88 FR 22860

Page:
22860-22891 (32 pages)

CFR:

WHAT THE PROPOSED RULE CHANGES (ADDS)

(b) *Separate teams.*

(1) Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(2) 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.

THE CURRENT ATHLETICS REGULATIONS

106.41 is the section of the regulations regarding athletics

- (a) General
- (b) Separate teams
- (c) Equal opportunity
- (d) Adjustment period

[important: these apply to any any interscholastic, intercollegiate, club, or intramural athletics of a recipient, k12 and higher ed]

WHY NOW?

- Different approaches among athletic organizations in the U.S. and internationally
- Varying state laws
- Litigation
- Inconsistency is harmful and unhelpful



IF YOU'RE APPLYING “SEX-RELATED” ELIGIBILITY CRITERIA...

- Do you have an important educational objective in separating athletic teams?
- Are the criteria substantially related to those identified important educational objectives?
- Are you minimizing harm to students whose opportunities will be limited or denied?



WHAT IS AN IMPORTANT EDUCATIONAL OBJECTIVE?

- Preventing injury
- Promoting fairness in competition
- And (the Department would love to know)?
- Still requires an analysis that's specific to the sport and level of competition
- “Communicating or codifying disapproval of a student or student’s gender identity” is not an important educational objective



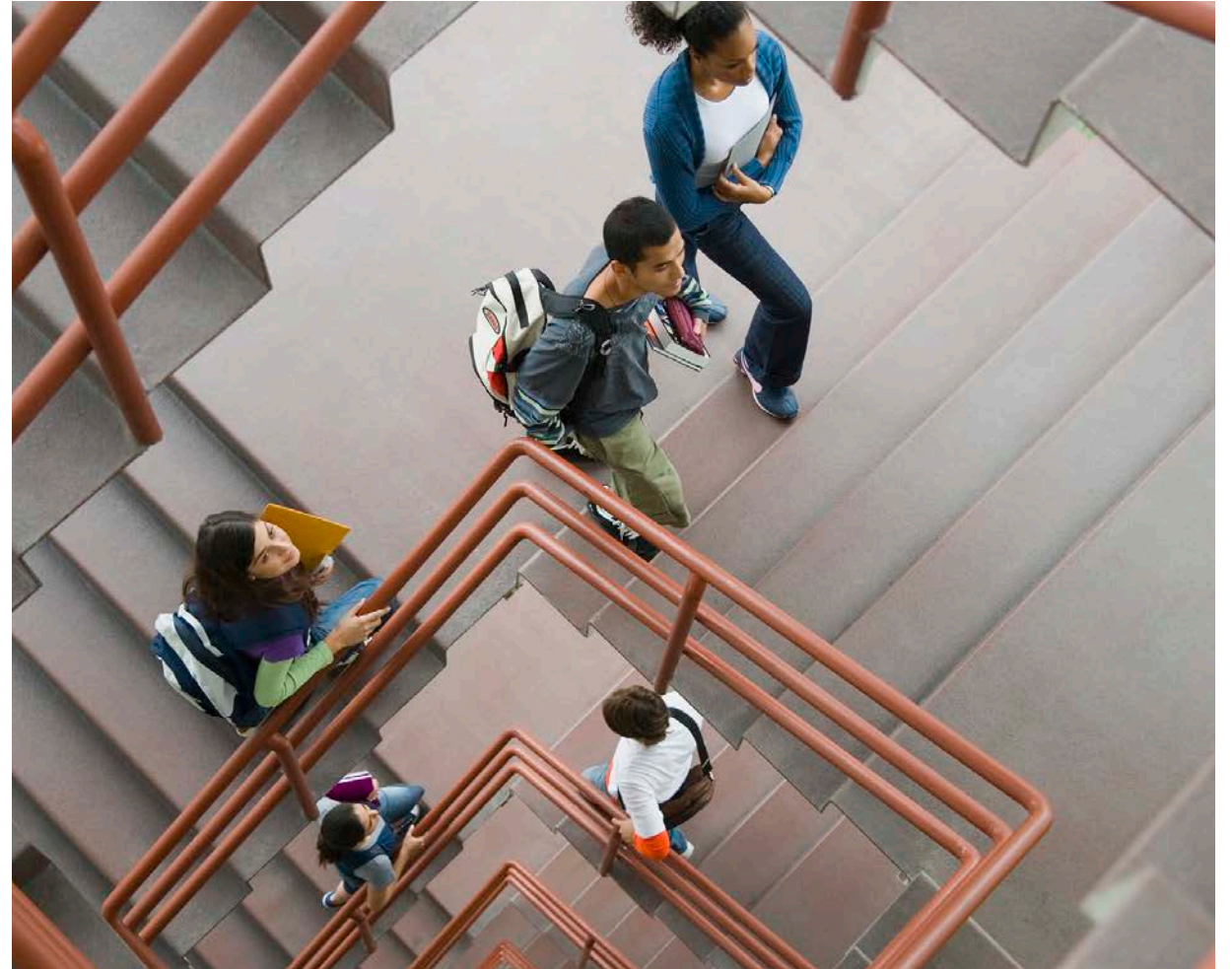
HOW DO YOU MINIMIZE HARM?

- Department has identified some harms.
- The Department is asking us to tell them how a school can minimize harms.



WHAT ELIGIBILITY CRITERIA ARE NOT SEX-RELATED?

- Attendance
- Academic standing
- Conduct/behavior



INTERMEDIATE SCRUTINY OR THE REBUTTABLE PRESUMPTION

- Supreme Court uses intermediate scrutiny in sex discrimination cases
- The Proposed is *not* a bright line rule
- Schools (and associations [and states]) cannot use blanket bans or one-size-fits-all tests



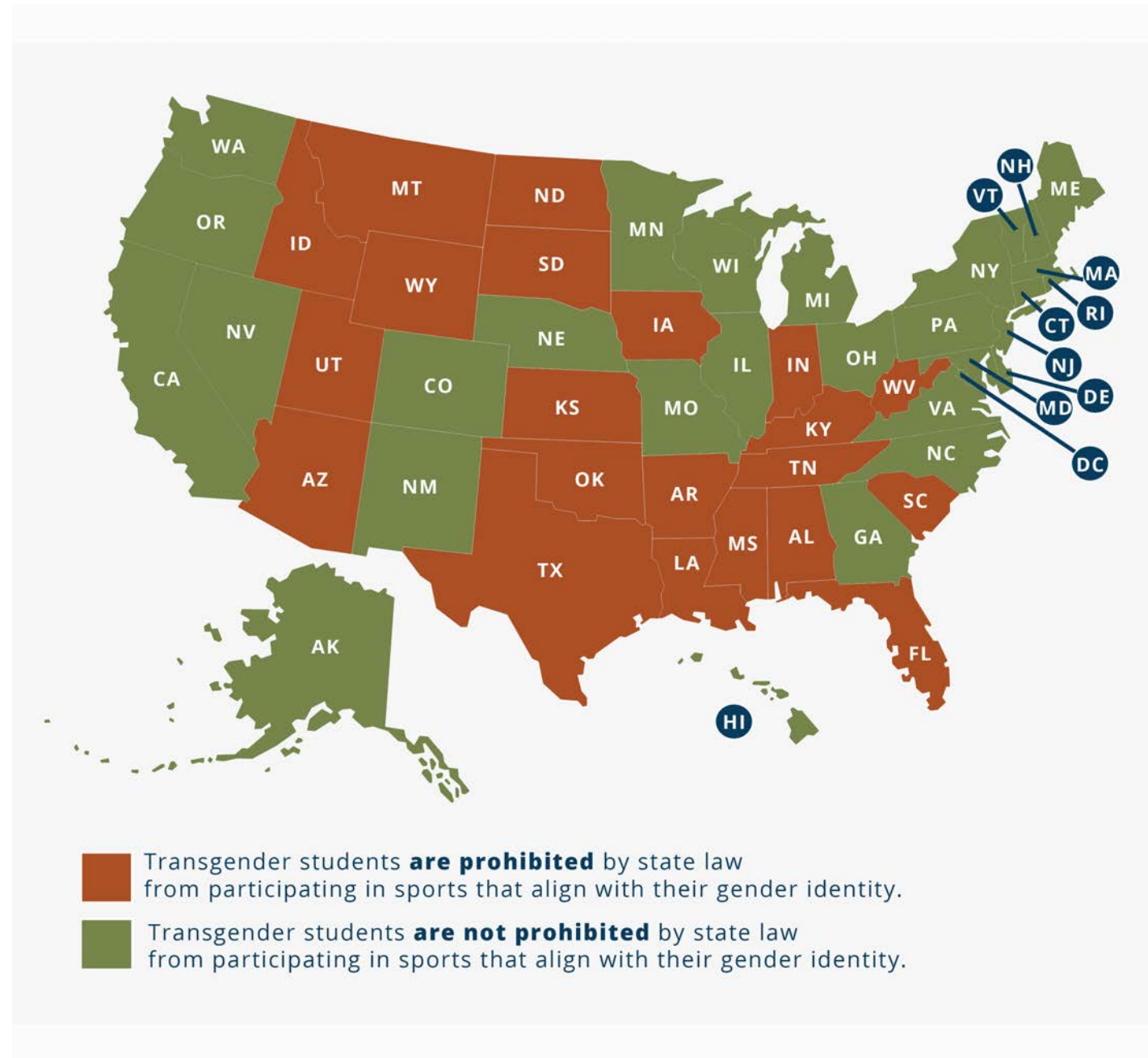
INTERMEDIATE SCRUTINY OR THE REBUTTABLE PRESUMPTION

- Difference between elementary (and immediately following) and secondary/post-secondary
- Intramural and Club Sports
- A presumption of inclusivity, to be (potentially) rebutted if meets both tests



THE CURRENT LANDSCAPE

- Title IX 1972 and 1975
- Non-Athletics Cases Start to Bubble Up
- Dueling DCL's
- *Bostock v. Clayton County* (2020)
- ED Notice of Interpretation, July 2021 (Enjoined)
- 2022 Proposed TIX Regulations
- 2023 Proposed TIX Athletics Regulations



WHAT HAPPENS NEXT

- Publication today
- 30 day comment period, might be extended
- Department must review and address comments, and draft final rule
- Potential for litigation
- How to submit a comment:
 - Federal eRulemaking Portal
 - No other system (exceptions upon request based on disability)
 - As always, your comment will become public; no PII
 - Must be received on or before the deadline
 - Reach out to campus counsel with questions



Portrait circa 1605 by Joos van Craesbeeck

"YOUR FEEDBACK IS IMPORTANT TO US..."

- What educational objectives are important enough to justify using sex-related eligibility criteria that limit participation?
- How can schools minimize the harms to students who are kept from participating or competing based on sex-related eligibility criteria?
- How, if at all, should the permissibility of particular sex-related eligibility criteria differ depending on the sport, level of competition, grade or education level, or other considerations?
- Are sex-related eligibility criteria ever appropriate in the earlier grades?
- The impact of the Proposed Rule on two-year institutions of higher education.
- Whether there are any sex-related eligibility criteria that can comply with the standards established in the Rule in the elementary school context and, if so, what criteria may comply.
- The extent to which state athletic associations are likely to engage in a review of policies and the timeline for such a review.
- The extent to which athletic associations (such as the NCAA, NAIA, NJCAA, NCCAA, etc.) are likely to engage in a review of policies and the timeline for such a review.
- Identifying high-quality data sources on higher education athletic team offerings, intramural and club sports, and time estimates for complying with the Proposed Rule.

<https://bit.ly/3zRTetM>

"YOUR FEEDBACK IS IMPORTANT TO US..."

- Assistance in analyzing how the policy changes made by one athletic association will contribute to policy revisions by other associations.
- Assistance in analyzing whether blanket rules implemented by associations may impact schools that do not accept federal funds.
- Assistance in analyzing time burdens in later years once the Rule is finalized (including policy re-review and training).
- Assistance in understanding the impact of structures and requirements (public comments, shared governance, membership votes) would have on an implementation timetable.
- How to make the Proposed Regulations easier to read and understand (formatting, language, technical jargon).
- The impact of the Regulations on federalism principles and the burden on small entities covered by the Regulatory Flexibility Act.
- Whether the Rule would require transmission of information that other federal agencies or authorities make available.
- Any alternative approaches to the subject other than the one that the Department has selected in the Proposed Rule.

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