

U.S. Department of Education Proposes New Title IX Rules on Transgender Student-Athletes

April 14, 2023

On April 6, 2023, the Department of Education Office for Civil Rights (“OCR”) issued a Notice of Proposed Rulemaking relating to Title IX, a federal law prohibiting sex discrimination in federally funded programs. 20 U.S.C. §1681(a). The proposal would amend the Title IX athletics regulation, 34 CFR §106.41, and prohibit schools from categorically banning transgender students from sports teams that correspond to their respective gender identity, as opposed to their assigned birth sex (subject to certain exceptions).

For elementary school students, OCR proposed that students should be able to join sports teams consistent with their gender identity, explaining that it would be difficult for a school to justify excluding students immediately in middle or intermediary school from participating consistent with their gender identity. For high school and college students, OCR proposes that sex-related criteria limiting transgender students from participating on teams consistent with their gender identity can be permissible, but only when the school can show the purpose of the limitation is “substantially related” to an “important educational objective” (such as fairness in athletic competition) and that it is designed to “minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”

According to OCR, sex-related criteria would unlawfully “deny” students’ eligibility to participate consistent with gender identity if they flatly bar students’ opportunity to participate on male or female teams consistent with their gender identity (e.g., by requiring transgender students to participate consistent with their sex assigned at birth or by prohibiting transgender girls who have undergone endogenous puberty from participating on girls’ teams). A one-size-fits-all approach, explained OCR, relies on inappropriate generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply.

By way of example, a policy that excludes transgender women and girls from women’s sports entirely, without a valid interest, would be deemed improper. However, a policy based on fairness in competition would constitute an important educational objective justifying sex-related criteria—such as a policy excluding boys from girls’ high school volleyball teams to preserve participation opportunities for girls. To be sure, the proposed regulation would not affect a school’s decision to offer separate male and female athletic teams when selection is based on competitive skill, or the activity involved is a contact sport.

These proposed Title IX changes are anticipated to be made available in the Federal Register in the next few weeks, after which the public comment period will be open for 30 days. Litigation is possible from interested parties and advocacy groups, which could put a hold on any final rule implementation. Accordingly, the time period by which this proposed rule will be finalized is currently unknown.

OCR has also issued a **Fact Sheet** on its proposed rule.

If you have any questions about the proposed rule or about how to submit public comment, please contact your Miller Canfield attorney or any of the authors of this alert.