



Briefing

The U.S. Department of Education's Notice of Proposed Rulemaking on Title IX Regulations on Students' Eligibility for Athletic Teams

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The Legal Landscape:

- ***Hecox v. Little***, 479 F. Supp. 3d 930 (D. Idaho 2020) (initial PI ruling).
- ***Utah High Sch. Activities Ass'n***, 2022 WL 3907182 (Utah Dist. Ct. Aug. 19, 2022).
- ***Barrett v. State of Mont.***, No. DV-21-581B, at 5-7 (Mont. Dist. Ct. Sept. 14, 2022).
- ***A.M. by E.M. v. Indianapolis Pub. Sch.***, No. 1:22-cv-01075-JMSDLP, 2022 WL 2951430 (S.D. Ind. July 26, 2022), *appeal dismissed*, No. 22-2332 (7th Cir. Jan. 19, 2023).
- ***B.P.J. v. W. Va. State Bd. of Educ.***, No. 2:21-CV-00316, 2023 WL 111875 (S.D.W. Va. Jan. 5, 2023) (initial PI ruling).
- ***Soule v. Conn. Ass'n of Sch.***, 57 F.4th 43 (2d Cir. 2022) (*en banc* review pending).

The Unofficial Proposed Regulation Language:

The proposed regulation would be in the Title IX regulations at section 106.41(b)(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.

NCAA Policy:

- NCAA Policy referenced but not officially endorsed in the unofficial proposed regulations.
- Jan 2022: the NCAA Board of Governors updated the transgender student-athlete participation policy to incorporate sport-by-sport eligibility requirements that align with the Olympic movement in three phases.
- The NCAA Committee on Competitive Safeguards and Medical Aspects of Sports(CSMAS) developed corresponding sport-specific NCAA transgender student-athlete eligibility criteria: [fall sports](#), [winter sports](#) and [spring sports](#).
- Jan 2023: the BOG extended Phase Two of the [NCAA transgender student-athlete participation policy](#) through the 2023-24 academic year.
- Schools are required to submit sensitive medical documentation during the year to the NCAA’s CSMAS Medical Review Panel. Schools may designate a contact person for all related communication.
- The NCAA “encourage[s] schools to consult with legal, risk management and other applicable campus personnel as necessary before submitting eligibility information to evaluate and confirm, as necessary, the applicability of any [...] laws and related requirements.”

Phase 2: Effective 2022-23 and 2023-24

- **Transgender Men:**

- The policy updates do not change eligibility requirements for a transgender man to compete during the 2022-23 and 2023-24 academic years.
- If gender affirming medical care for any student-athlete involves the use of NCAA banned substances (e.g., testosterone), a school would be required to submit a medical exception request on behalf of the student-athlete. More information may be found at [NCAA medical exception procedures](#) .

- **Transgender Women:**

1. [NCAA Transgender Student-Athlete Eligibility Review Form](#); and
2. **Evidence of Serum Testosterone Level.** Laboratory results demonstrating a one-time total serum testosterone level that is within the allowable levels for the sport in which the student-athlete plans to compete. Additionally, submitted laboratory results must be within four weeks (28 days) prior to the applicable competition date (e.g., student-athlete's first contest of each playing season segment or championship selection date).

Open Questions and Takeaways:

- State laws.
- Preemption questions.
- School policies and procedures.
- Comment.
- Education.
- Next steps.



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