# DOE Issues Proposed Rules on Athletics and Gender Identity

BY BOWDITCH & DEWEY • APRIL 7, 2023

On April 6, the Department of Education issued a notice of proposed rulemaking under Title IX, which would regulate how gender identity factors into athletics participation. The proposed rule would apply to students in K-12 public schools, as well as colleges and universities that receive federal funding. It would impact how most NCAA-affiliated institutions regulate sex or gender-based participation in sports.

The proposed rule would mean that schools cannot have an across-the-board ban preventing transgender students from competing on teams that align with their gender identities. However, the rule would allow schools to limit the participation of transgender students in sports associated with their gender identity if they determine that such limitation is: (i) substantially related to the achievement of an important educational objective, and (ii) minimizes harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied. Sex-related criteria for participation in sports must be specific to the sport, the level of competition, and the grade and education level of the participants. In its commentary, the Department of Education included the risk of sports-related injury and fairness of competition as factors that a school could weigh in determining whether limiting participation of transgender students in sports associated with their gender identities were permissible.

The Department of Education characterized the proposed rule as a clarification of Title IX's application to athletics and gender identity. In a fact sheet accompanying the proposed rule, the Department specifically stated that categorical bans on transgender students participating in athletic teams consistent with their gender identity – presumably including those that already have been enacted in Idaho, Florida, Tennessee, West Virginia, and, as of two days ago, Kansas – would violate Title IX.

It remains to be seen whether the proposed rule will be enacted as written. It has not yet been officially published in the Federal Register; once it is, the public will have 30 days to comment. When the final rule is published, it may be different than the proposed rule, and its enactment may be subject to litigation.

The Department of Education's press release, and an unofficial copy of the proposed rule, can be found here. Please

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contact your Bowditch attorney if you have questions about how this impacts your institution.

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