

Client Alert: Key Takeaways from the New Proposed Rulemaking on Transgender Student Athletic Participation

Publications

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By: Ishan K. Bhabha, Lauren J. Hartz

Earlier this month, the Department of Education released an “Athletics Notice of Proposed Rulemaking,” which would prohibit federal funding recipients from categorically excluding transgender students from the athletics teams that align with their gender identities. The proposed regulation is a response to laws that have been passed in 21 states^[1] banning transgender students, often specifically transgender women and girls, from participating in teams that align with their gender identities. Many of these laws apply not just to secondary schools but also at the collegiate level.

The notice came the same day that the US Supreme Court declined to vacate the Fourth Circuit’s stay of West Virginia’s transgender athletics ban, meaning the state will be unable to enforce the ban until that challenge is resolved.^[2] Though the proposed rule seeks to provide clarity to schools as to their obligations under Title IX, any final rule is likely to be challenged in the courts and could be rescinded and/or replaced by a future administration.

1. The Proposed Regulation

The proposed regulation moves away from a one-size-fits-all transgender student athletics ban. It envisions a more flexible regime under which the permissibility of a ban would depend on the sport, age level, and competitiveness of the particular team. Specifically, it would require sex-related criteria that funding recipients adopt or apply to limit or deny a student’s eligibility to participate on an athletic team consistent with their gender identity to: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a team consistent with their gender identity would be limited or denied. It would not prohibit a recipient’s use of sex-related criteria altogether.

The Department predicated this proposed regulation in part on recognition that participation in team sports has been associated with many valuable physical, emotional, academic, and interpersonal benefits for students. In the Department’s press release, it notes that this proposed standard would

usually mean that elementary school-aged children could participate on teams that align with their gender identity because the teams are generally more about teaching young children valuable skills. By contrast, considerations may be different (and bans more defensible) for competitive collegiate athletics teams, where the teams are seeking competitive success. Yet the proposed regulation would require schools to be sensitive to the differences between even a college intramural team and a Division I sports team because sex-related criteria that would exclude a student from a team consistent with their gender identity must be tailored to the sport, level of competitiveness, and grade-level of each team.

Fairness in competition and “prevention of sports-related injury” are currently the only recognized important educational objectives and any restriction on those bases would still need to minimize harms to transgender students. The NPRM references the current NCAA rules for transgender athlete participation as an example of the sports-specific approach. Under the current NCAA rules, transgender women are required to submit laboratory results demonstrating testosterone levels within the allowable range for the designated sport before any competition in the regular season, the first competition in an NCAA championship event, and any competition in the non-championship segment.^[3]

The many state-wide bans with categorical exclusions that have cropped up over the last few years would be a violation of this Title IX regulation. In the Department’s words: “Criteria that categorically exclude all transgender girls and women from participating on any female athletic teams...would not satisfy the proposed regulation because, in taking a one-size-fits-all approach, they rely on overbroad 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.”

2. Potential Legal Challenges

Agency actions in this area have already met challenges in recent past. States had previously challenged Department of Education guidance interpreting Title IX and Title VII to prohibit discrimination based on sexual orientation and gender identity in light of the Supreme Court’s holding in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). This earlier rulemaking by the Department was preliminarily enjoined as a violation of the Administrative Procedure Act because it did not go through notice and comment.^[4] Regulations by other federal agencies that similarly define sex discrimination to include discrimination on the basis of sexual orientation or gender identity have also been met with legal challenges.^[5]

Though the prior Department of Education regulation was enjoined because it was issued as an interpretive rule, the current proposed rule is now open for notice and comment and thus being pursued through formal rule-making. Moreover, given that it is not yet a final rule, it is not yet ready to be challenged in court (or “ripe” for judicial review). That said, if and when the final rule is published, a legal challenge is all but inevitable.

In the meantime, there have been significant legal challenges to the state athletics bans already in place. At the trial court level, courts in all but one case have found that categorical athletics bans violate Title IX and/or constitutional guarantees against sex discrimination.^[6] In the only case where the ban was originally upheld, the appeals court has stayed its operation and a decision is currently pending on its lawfulness.^[7] In addition to challenges to transgender athletics bans, there is one Title IX challenge to an interscholastic athletic conference *allowing* transgender women to compete in female-designated sports teams.^[8] Though the appeals court dismissed this challenge because the plaintiffs lacked standing for injunctive relief and defendants lacked notice that they could be liable under Title IX for monetary relief, this challenge is currently being heard en banc by the Second Circuit. The Supreme Court has so far declined to intervene in advance of a final decision by the appellate courts.

3. Takeaways

This proposed regulation sheds light on the content of the regulation the Biden Administration is likely to promulgate in the future. If the proposed rule becomes final, many colleges and universities could be subject to both a state law banning transgender participation on teams that align with their gender identity and a federal regulation requiring an important educational objective to justify their exclusion. This situation will likely raise questions about preemption and create uncertainty in the short-term. In the meantime, colleges and universities can:

1. Examine their current institutional rules around transgender athlete participation. Were the proposed rule to become final, any sex-criteria that restricts certain students from participating in the team that aligns with their gender identity must be justified with regard to the team's sport, age-level, and competitiveness.
2. Comment on the proposed rulemaking, available until May 15. The notice specifically requests that commenters let the Department know of (1) additional educational objectives that schools are considering and (2) any further ways the Department may reduce potential costs or increase potential benefits to affected entities.

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Footnotes

[1] See *Bans on Transgender Youth Participation in Sports*, LGBT Movement Advancement Project (Apr. 13, 2023), https://www.lgbtmap.org/equality-maps/sports_participation_bans, for a current

legislation tracker.

[2] *West Virginia, et al. v. B. P. J.*, No. 22A800 (Apr. 6, 2023).

[3] *Transgender Student-Athlete Participation Policy*, Nat'l Collegiate Athletic Assoc. (2023), <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>.

[4] *Tennessee v. U.S. Dept. of Ed.*, No. 21-cv-308, 2023 WL 1097255 (E.D. Tenn. July 15, 2022). The agencies appealed and oral argument is scheduled at the Sixth Circuit for April 26.

[5] *See, e.g., School of the Ozarks, Inc. v. Biden*, 41 F.4th 992 (8th Cir. 2022); *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022).

[6] *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020); *Roe v. Utah High School Activities Ass'n*, 2022 WL 3907182 (D. Ct. Utah Aug. 19, 2022), No. 220903262; *A.M. v. Indianapolis Public Schools and Superintendent*, 617 F. Supp. 950 (S.D. Ind. 2022), *subsequently dismissed as moot*. Montana's athletics ban was also held unconstitutional as a violation of the independence of the state board of higher education, preserved in the Montana Constitution. *See S. Barrett et al. v. State*, No. DV-21-581B (Mont. Dist. Ct. Sept. 14, 2022).

[7] *B.P.J. v. W.V. State Bd. of Educ.*, No. 23-1078 (4th Cir. Feb. 22, 2023), ECF No. 50.

[8] *Soule v. Conn. Ass'n of Schools*, 57 F.4th 43 (2d Cir. 2022).

Related Attorneys



Ishan K. Bhabha

Co-Managing Partner

+1 202 639 6000



Lauren J. Hartz

Partner

lhartz@jenner.com

+1 202 637 6363

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