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:

- **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.
Questions?
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