

An Attempted Compromise?

Breaking Down the Proposed Title IX Rule For Transgender Athletes

Webinar: April 14, 2023



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Today's Presenters



Katie Long



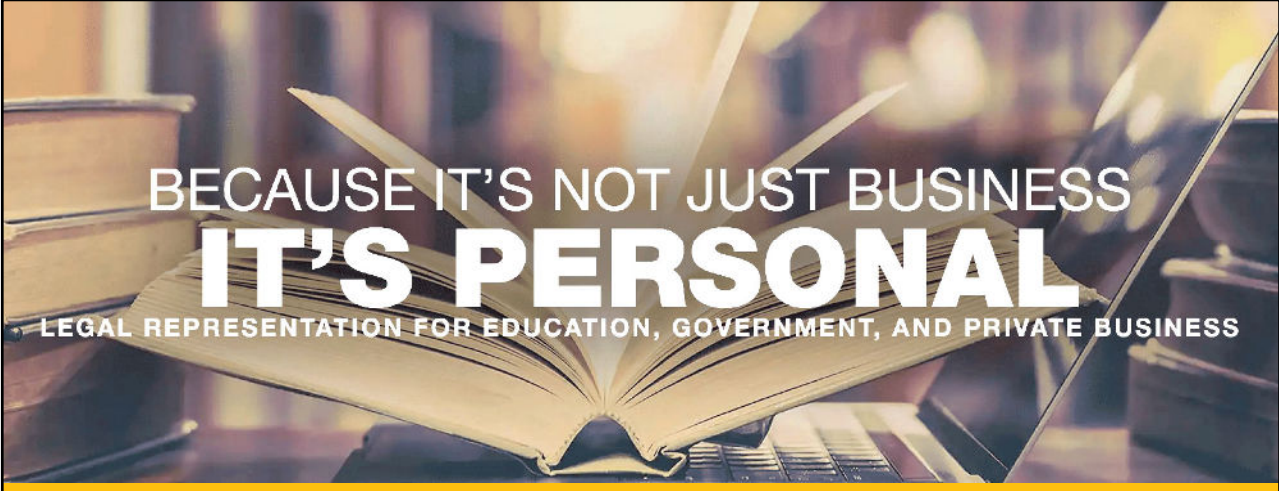
Jackie Wernz



Kendra Yoch



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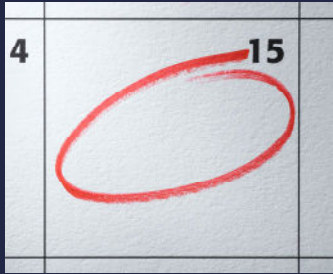


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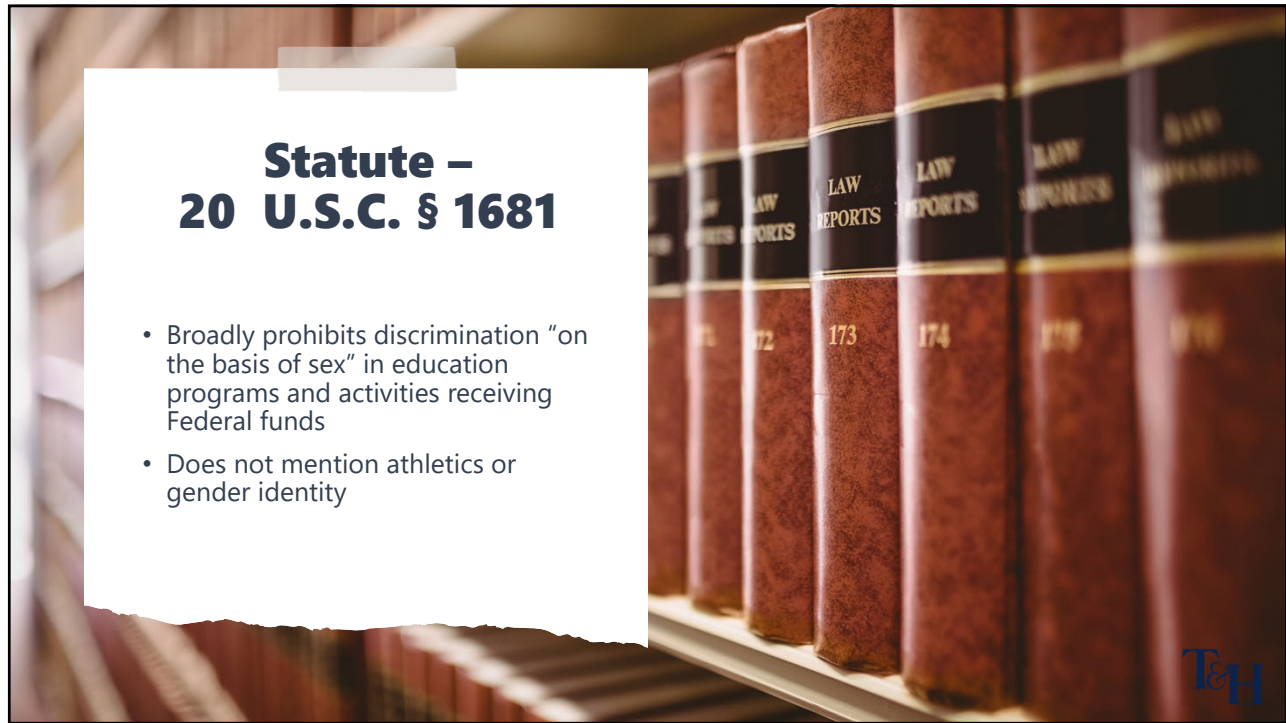
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**CURRENT LAWS
& GUIDELINES**



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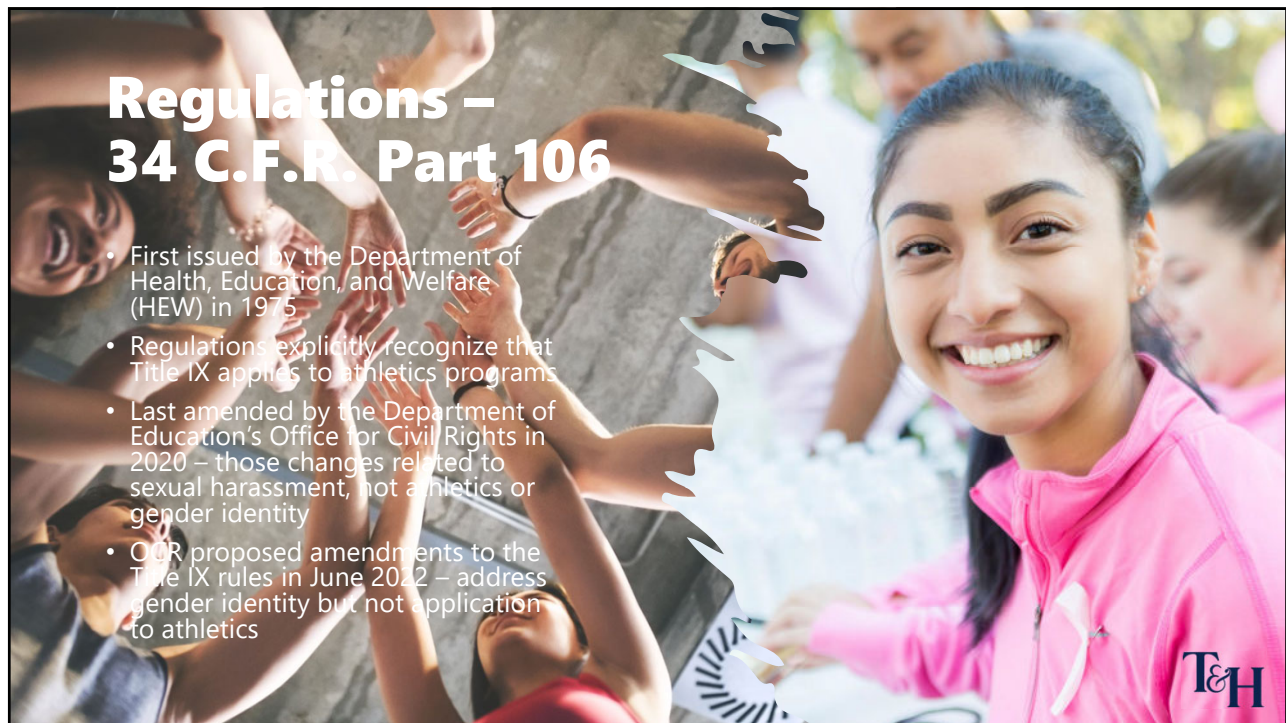


Statute – 20 U.S.C. § 1681

- Broadly prohibits discrimination “on the basis of sex” in education programs and activities receiving Federal funds
- Does not mention athletics or gender identity



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Regulations – 34 C.F.R. Part 106

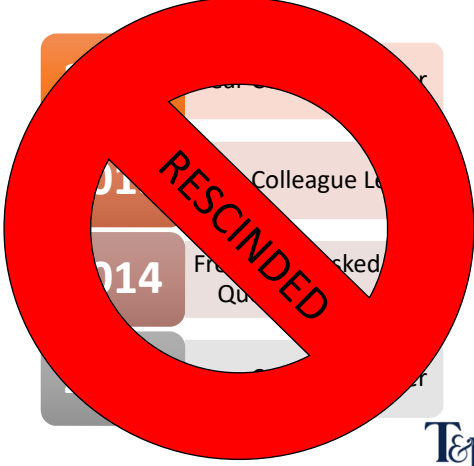
- First issued by the Department of Health, Education, and Welfare (HEW) in 1975
- Regulations explicitly recognize that Title IX applies to athletics programs
- Last amended by the Department of Education’s Office for Civil Rights in 2020 – those changes related to sexual harassment, not athletics or gender identity
- OCR proposed amendments to the Title IX rules in June 2022 – address gender identity but not application to athletics



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Guidance Documents



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The *Bostock* Battle

- The Supreme Court held in 2020 that Title VII's prohibition against employment discrimination "because of sex" prohibits firing an employee based on their LGBTQIA status
- Title IX uses similar language – prohibits discrimination "on the basis of sex"
- Title IX has long allowed for different-sex sports teams and focused on opportunity for female athletes

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The Trump OCR's Last Words

- After *Bostock*, the Trump OCR begrudgingly agreed in August 2020 that Title IX covers discrimination against individuals based on LGBTQIA status
- But it stated that some types of different treatment based on LGBTQ+ status would not be illegal discrimination, such as:
 1. preventing unfettered access to facilities such as restrooms and locker rooms and
 2. participation on athletic teams that correspond with a person's gender identity but not their sex assigned at birth



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The Biden OCR's Opening Shots

- July 7, 2021 Notice of Interpretation (NOI)
- Said OCR would investigate allegations of individuals being excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities, or otherwise treated differently because of their sexual orientation or gender identity
- Although the words "bathroom," "restroom," "locker room," and "athletics" did not appear in the NOI, it seemed likely based on the Obama administration's enforcement of Title IX that OCR would expect schools to offer equal access to facilities and athletics teams



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U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

Confronting Anti-LGBTQI+ Harassment in Schools

A Resource for Students and Families

June 2021

**Examples of the kinds of incidents
CRT and OCR can investigate:**

On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as "male." Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her "those are the district's policies."

Pursuant to a Federal court order, the Departments have been preliminarily "enjoined and restrained from implementing" this document against the states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia. See *State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).

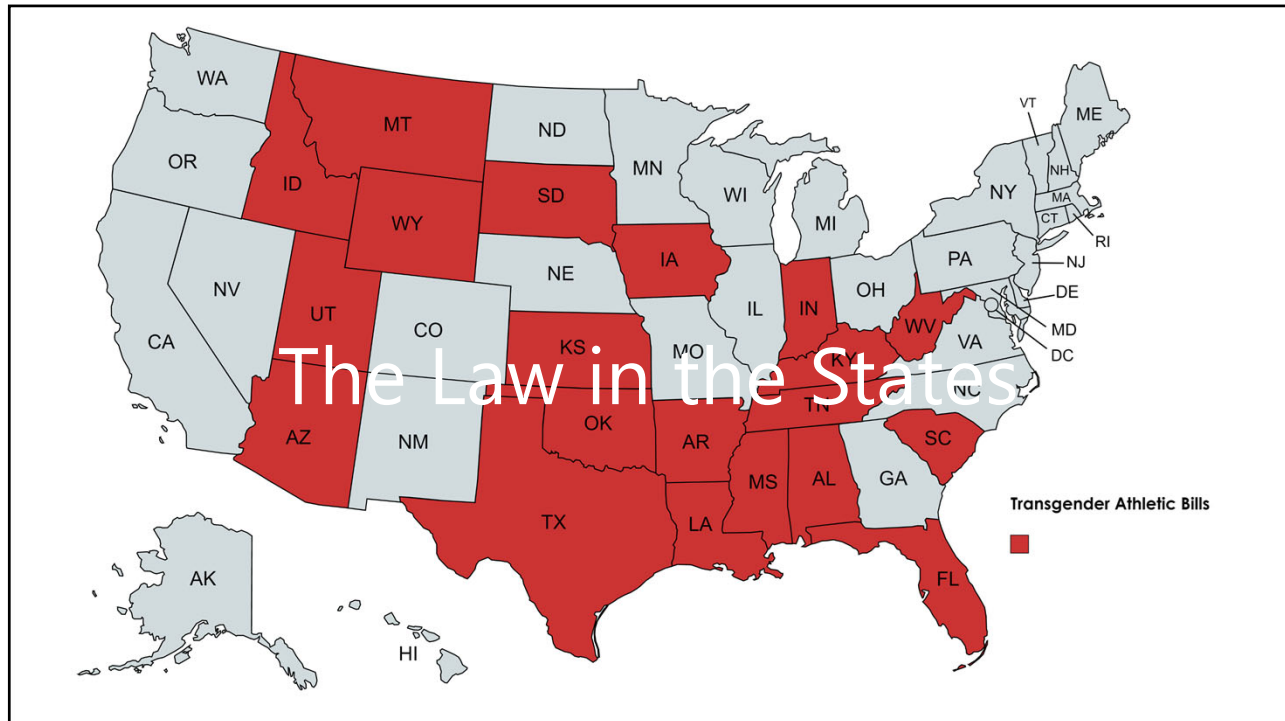
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The State of the Law

- OCR enforcement didn't happen
- In contrast, many states have passed laws prohibiting transgender students from participating on teams matching their gender identity



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The State of the Law

Important Unanswered Questions:

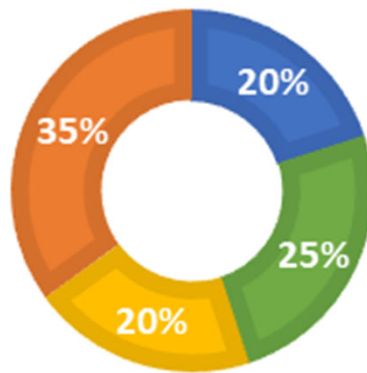
- What is OCR's current stance with respect to participation of transgender athletes on teams?
- What if there is a conflict between that stance and state law?

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The State of Play – State Athletic Associations

Severely limit or prohibit participation consistent with gender identity

Permit participation consistent with gender identity with additional documentation



Permit participation consistent with gender identity

Permit participation consistent with gender identity with written statement



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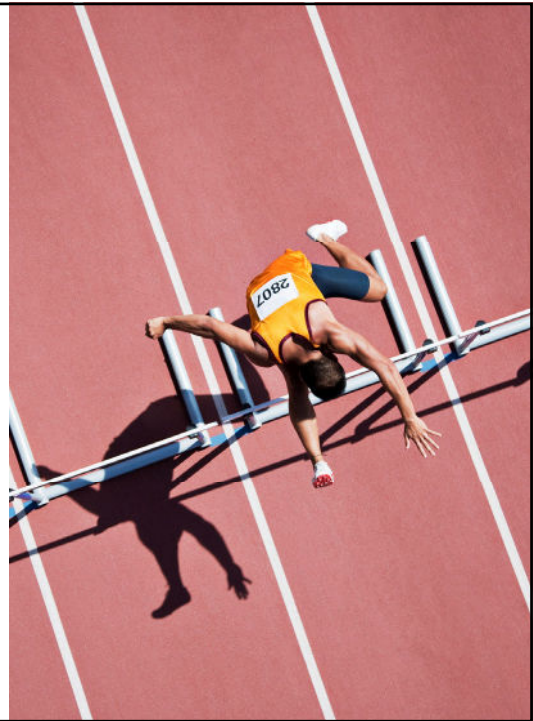
State of Play – Higher Education

- 36% of 2-4 year IHEs and 43% of 4 year IHEs are part of a national athletic association
- 52% of those institutions are members of the NCAA
- 23% are members of the NJCAA
- 12% are members of the NAIA

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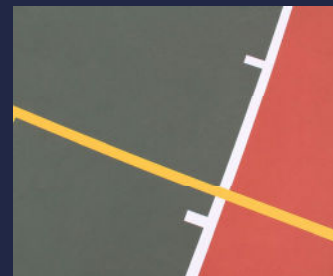
State of Play - NCAA

- Sport-by-sport approach following the criteria set by national bodies governing individual sports, subject to review by the NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports
- Some national governing bodies have developed eligibility criteria that differ based on levels of competition, with certain criteria applying only to athletes who seek to compete internationally or in nationally recognized record-setting events
- Some international governing bodies permit transgender women to compete at elite levels if they satisfy specific testosterone suppression criteria
- Others exclude from elite competition transgender women who have experienced any aspect of male puberty



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PROPOSED RULE



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Proposed Athletic Rule

- April 6, 2023 notice of proposed rulemaking (NPRM) would amend the existing Title IX regulations
- Applicable to schools, colleges, and universities that receive Federal funds
- Based on two years of outreach to stakeholders
- Goal to address uncertainty about when and how transgender students can participate in school sports, particularly because of state laws



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Proposed 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:

- Be substantially related to the achievement of an important educational objective, and
- Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.



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Proposed Rule Does Not Chart a Novel Course

- Language is similar to Title IX regulations allowing for single-sex classrooms – 34 C.F.R. 106.34(b)
- The test borrows heavily from Supreme Court's analysis and test in *United States v. Virginia* regarding military college exclusively for males
- Language of the proposed rule is consistent with several courts' analysis regarding transgender athletic participation in Equal Protection and Title IX context, such as *Hecox v. Little*



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The Rules Still Allow....

CONTINUE



CONTINUE



T&H Athletics Equity Webinar
April 27, 2023
[Bit.ly/2023AthleticsEquityGuidance](https://bit.ly/2023AthleticsEquityGuidance)

- **Male and female teams (34 CFR 106.41(b))**
 - Still must provide equal opportunities
- **Eligibility criteria**
 - Attendance requirements
 - Academic standing Requirements
- **Criteria addressing other LGBTQIA issues (not sports)**



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Bans on (Total) Bans

Under the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity

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What Is Allowed?

A school could adopt or apply sex-related criteria limiting or denying a student's eligibility to participate on a male or female team consistent with their gender identity only in limited circumstances. Specifically, any such criteria:

1. Must be substantially related to the achievement of an important educational objective
2. Must minimize harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied

Analysis must be specific to each sport, level of competition, and grade or education level

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Examples of Criteria

01

Requiring transgender students to participate on teams consistent with their sex assigned at birth

02

Limiting or denying a student's eligibility for a team based on a sex marker on an identifying document

03

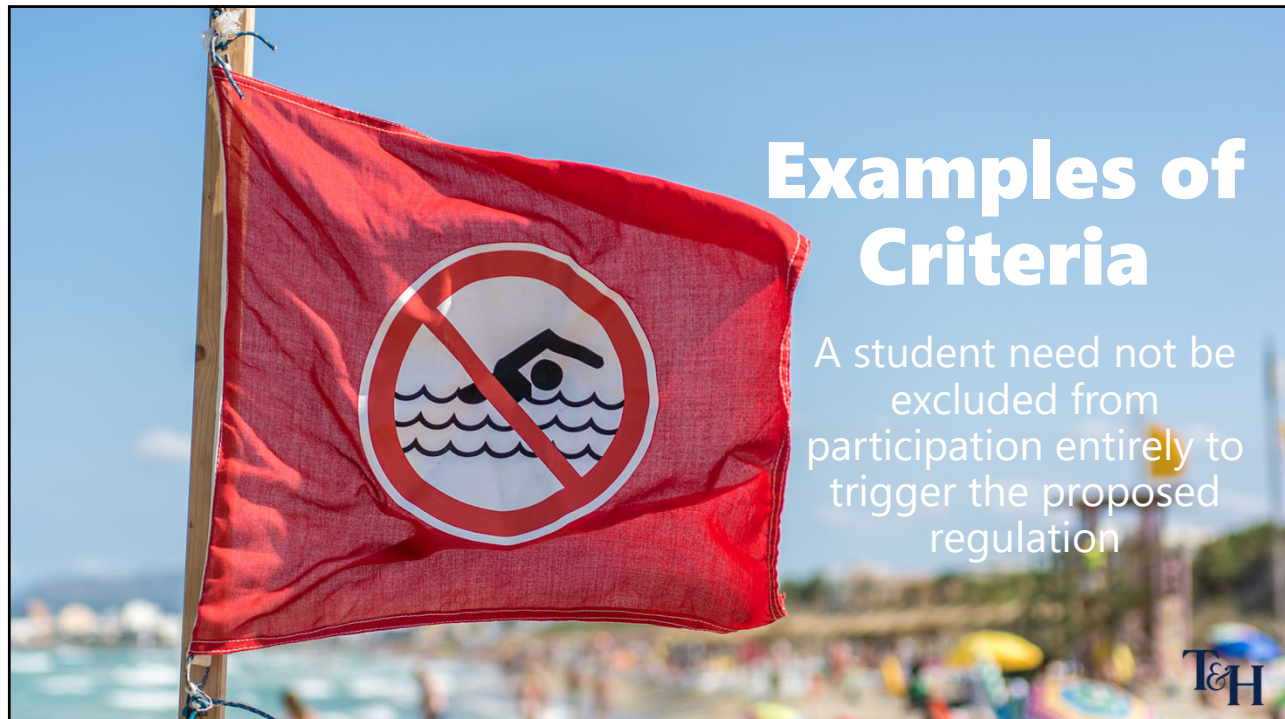
Requiring physical examinations or medical testing or treatment related to sex characteristics to limit or deny a student's eligibility to participate consistent with gender identity

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Prohibiting transgender girls who have gone through puberty from participating on girls' teams

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Examples of Criteria

A student need not be excluded from participation entirely to trigger the proposed regulation

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Two Part Test

1

Substantially related to the achievement of an important educational objective

2

Minimize harm to those students whose opportunities would be limited or denied

Analysis must be specific to each sport, level of competition, and grade or education level

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Substantially Related + Important Objective

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Important Educational Objective

- Proposed 106.41(b)(2) does not limit the objectives a recipient may assert
 - Examples in NPRM
 - Prevention of sports-related injury
 - Fairness in competition - "may be particularly important for recipients in some sports, grade and education levels, and levels of competition"
- (Particularly for older students in competitive athletic programs)



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What Is NOT an Important Educational Objective

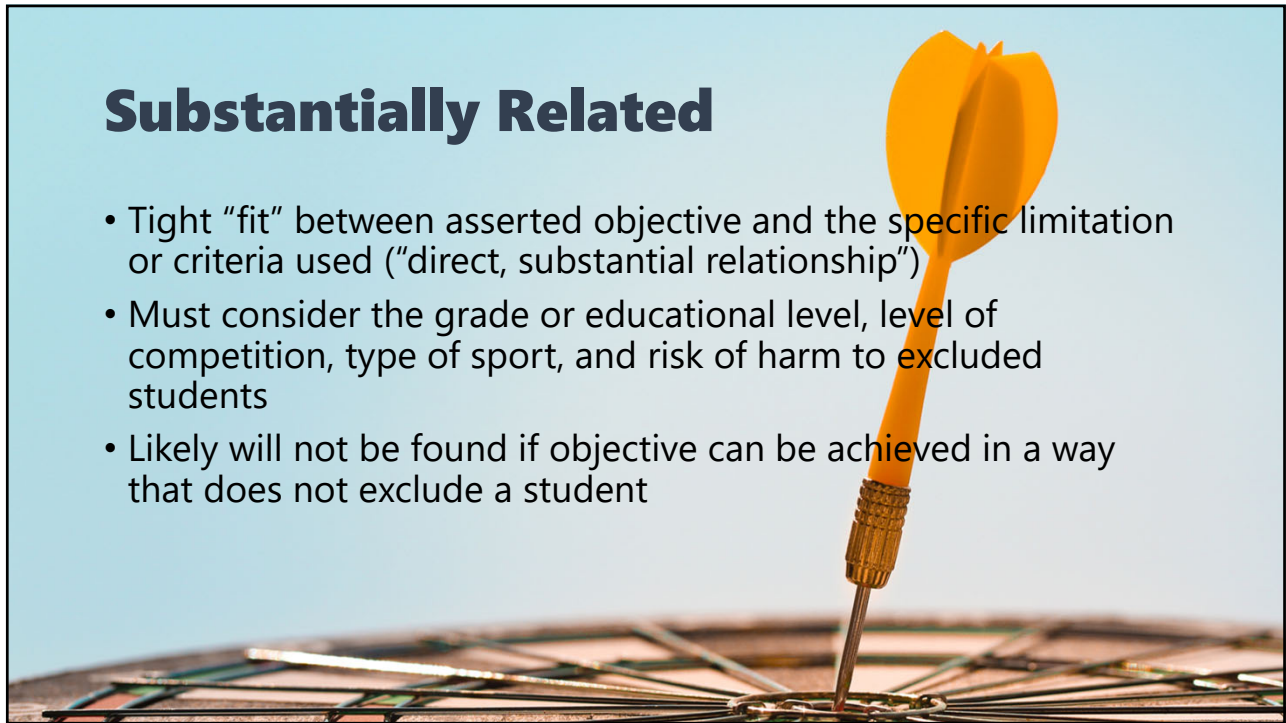
- Excluding transgender students from sports
- Communicating or codifying disapproval of a student or a student's gender identity
- Requiring adherence to sex stereotypes
- Administrative convenience
- Pretext for singling out transgender students for disapproval or harm



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Substantially Related

- Tight "fit" between asserted objective and the specific limitation or criteria used ("direct, substantial relationship")
- Must consider the grade or educational level, level of competition, type of sport, and risk of harm to excluded students
- Likely will not be found if objective can be achieved in a way that does not exclude a student



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Stereotypes ≠ Substantially Related



- Criteria that assume transgender females possess an unfair physical advantage over cisgender females in every sport, level of competition, and grade or education level would rest on a generalization that would not comply with the proposed rule
- Based on "reasoned analysis rather than . . . the mechanical application of traditional, often inaccurate, assumptions"
- Need "factual justification," not overly broad generalizations about talents, capacities, or preferences of male and female students

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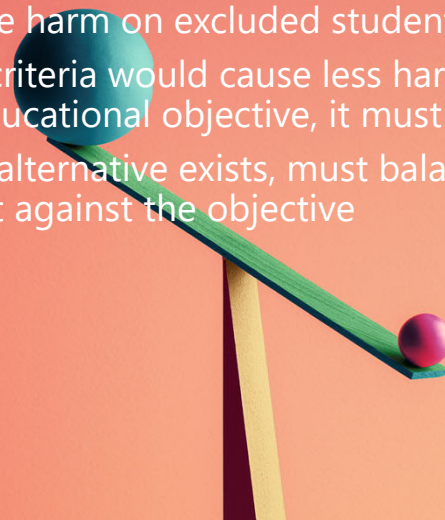
Minimize Harm



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Harm Minimization

- Must evaluate the harm on excluded students
- If an alternative criteria would cause less harm and still achieve the important educational objective, it must be used
- If no reasonable alternative exists, must balance the harm to the excluded student against the objective



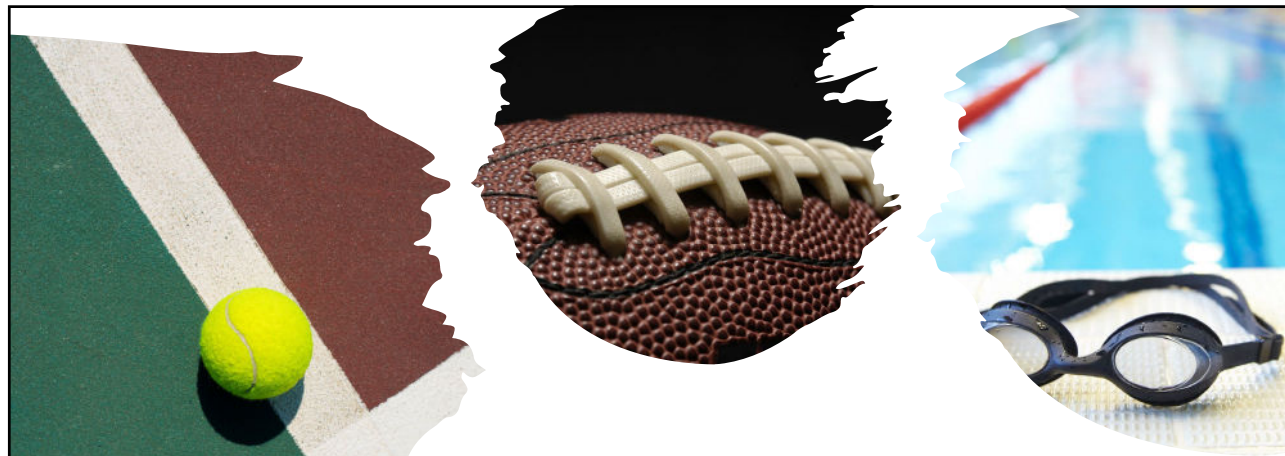
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GAME PLANNING



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Each Sport

- Cannot have a blanket rule for all sports, even if you comply with other parts of the test
- Not all differences among students confer a competitive advantage or raise concerns about sports-related injury in every sport

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Each Level of Play

- Cut vs. No Cut
- Intramural vs. Extramural
- Junior Varsity vs. Varsity



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Each Grade or Education Level

- May be impossible to exclude students based on gender identity in elementary school
- Will be "particularly difficult" to exclude students from participation "immediately following elementary school"
 - May be permissible in high school and college



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The State of Play – Elementary and Middle School

- The overwhelming majority of State athletic associations do not regulate athletic competition between elementary school teams.
- About half of State athletic associations regulate athletic activities in middle school; many of those make clear that the mission of athletics in those grades is to encourage broad participation, basic skills development, and other aspects of student well-being.



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SHE/HER
What About Intersex &
Nonbinary/At Metes?

THEY/THEM

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State Law Conflicts

- Federal law is the supreme law of the land
- If there is a conflict between a federal and state law, the federal law prevails
- States and state athletic associations could challenge the law in court, but until a court enjoins enforcement the rule would supersede state laws

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THE ROAD AHEAD



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The Road Ahead

- The NPRM was published in the Federal register yesterday (April 13, 2023)
- The comment period is open for 30 days (until May 15, 2023)
- The Department must review and respond to all comments to the rule before it can go into effect
- Some sources suggest that the Department intends to finalize the rule over the summer to become effective next academic year



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Litigation Considerations

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Questions?
Thank You!

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