FAQ on the proposed regulations on Title IX in Athletics by the U.S. Department of Education

April 13, 2023

The U.S. Department of Education, under the Biden Administration, published proposed regulations that will negatively impact women and girls in athletics. Title IX of the Civil Rights Act of 1972 (Title IX) prohibits discrimination on the basis of sex. It applies when a recipient participates in a program or activity that receives federal financial assistance. To date, the proposed rule has **not** taken effect.

Q: What does the proposed rule say?
The Department's proposed regulation would bar schools from adopting or enforcing policies that categorically ban transgender students from participating on teams consistent with their gender identity. In competitive high school and college athletic environments, schools may adopt policies that limit transgender students' participation. Schools would be required to adopt criteria that would limit or deny transgender athletes from competing in school athletics that align with their gender identities. Sex-based restrictions for athletes must be "substantially related to the achievement of an important educational objective." Under the proposed rule, elementary school students would generally be able to participate on school athletics teams consistent with their gender identity.

Q: Who will have to comply with this rule?
Any school that participates in a program or activity that receives federal financial assistance will have to comply with a final rule. This likely applies to all public schools, most higher education institutions and may apply to private secular institutions.

Q: What happens next?
The Department formally published these rules in the Federal Register on April 13, 2023. Public comments may be submitted to the Department on or before May 15, 2023. Comments may be submitted here.

Q: When could this rule go into effect?
After the comment period, the Department must review all public comments and then finalize the regulations. If and when the Department issues final regulations, an effective date will be included. It will likely be several months before a Title IX in athletics final rule is released.

Q: Do I have to change any policies during this period?
No, this is a proposed rule and will not have the force of law until a final rule is released and formally published. WILL recommends that policies are not changed to "comply" with the proposed rules because the Department has the opportunity to amend the proposed rules after reviewing the public comments.

Q: What does WILL think about this rule?

WILL believes the proposed regulation puts fair play and equal opportunities in athletics at risk for women and girls. It also threatens the safety of women and girls, who should be allowed to compete fairly on a level playing field that gives them opportunities for success.

As school districts consider their potential and future liability, they should consider more than just the pending proposed rules. For instance, several states have passed laws seeking to ban transgender athletes from competing in school athletics that align with their gender identities. Lawsuits across the country are expected which challenge the proposed regulation.

WILL has a Title IX FAQ memo available to school districts and parents. It is specific to the current law in Wisconsin and the Seventh Circuit Court of Appeals and includes a response to the question of whether a public school in Wisconsin may limit sport participation by biological sex. The issue of transgender students participating on athletics teams is likely to eventually be heard by the U.S. Supreme Court.

Q: Is this the same as the other Title IX rule release a few months ago?
These proposed rules on athletics are different than the pending rules on Title IX released in 2022 regarding the reinterpretation of Title IX and its definition of sex discrimination.

Q: What can I do if I have opinions about this rule?
We encourage everyone to submit comments on or by May 15, 2023. WILL is currently exploring all legal options regarding this rule. If you are interested in learning more, please contact us at 414-727-6372 or libby@will-law.org.