

Disclaimers



- We are not giving you legal advice. Consult with competent legal counsel regarding how best to address a specific situation.
- Use the Q&A function to ask general questions and hypotheticals.
- ‡ u the slides of this webinar. (Yes you may share them with colleagues and post them if you choose.)

Reminder



- This session is regarding proposed regulations. None of this has been finalized, and you are not required to comply until finalization has occurred.
- We cannot possibly cover all 116 pages of the draft document in this changes in terms of impact.

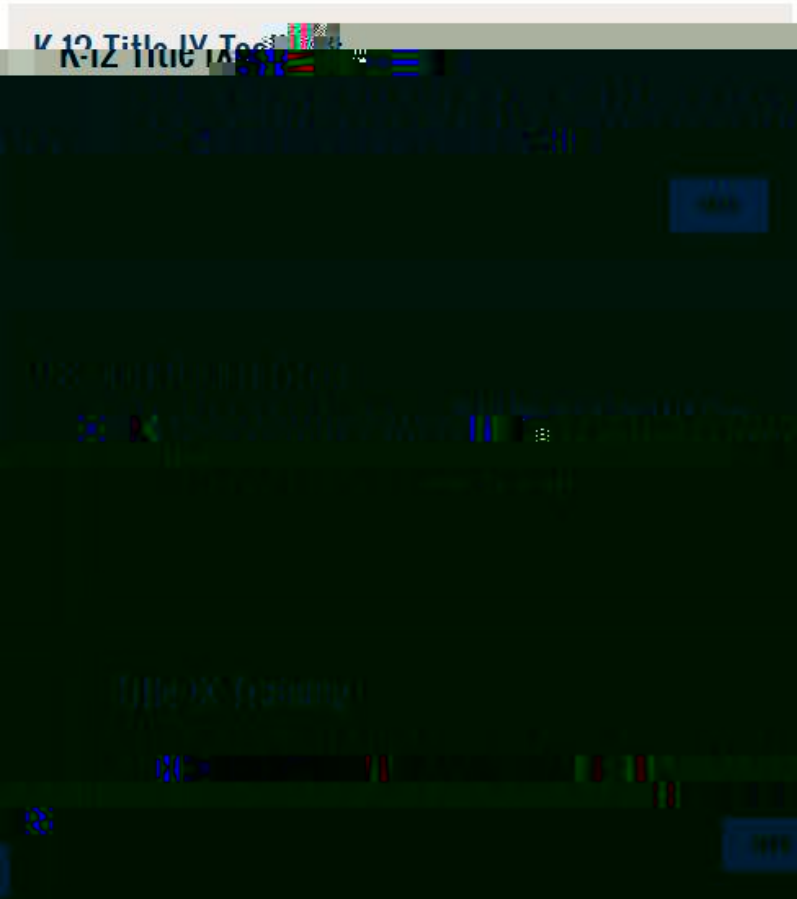
More Information



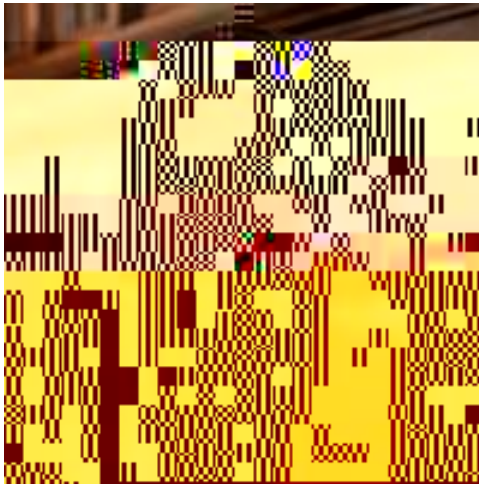
[Athletic Compliance Resource Center](#)



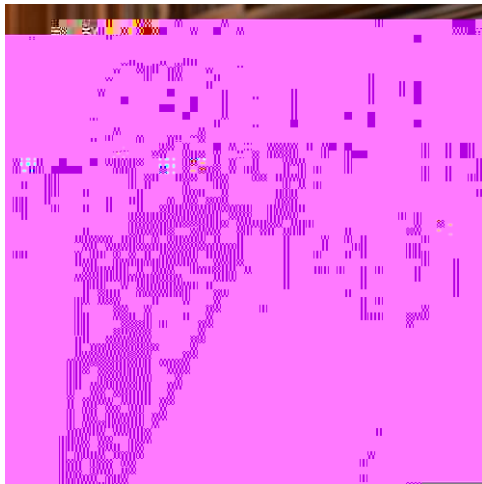
[Title IX Resource Center](#)



Your Presenters



- Kasey Nielsen
- Kylie Stryffeler
- Izaak Orlansky



- Jacob Sapp
- Melissa Carleton

Agenda



- Where did the rule come from?
- What does the rule say?
- Is there potential for this rule to conflict with state laws?
- How does this affect K-12 schools?
- How does this affect higher education clients and in particular NCAA members?
- When might we see a final rule?

Where Did the Rule Come From? (1 of 3)



Title IX

- 1972: Title IX, which requires schools provide equal athletic opportunities for students regardless of sex, is signed into law.
- 1974: Javits Amendment enacted by Congress and allows the Dept. of Ed. discretion to tailor its regulations in the athletics context that it might not nature of particular - Amendments of 1974 § 844.
- 1975: Title IX goes into effect.

The Title IX Athletics regulation (34 CFR 106.41) has not changed since 1975.

Where Did the Rule Come From? (2 of 3)



Where do we start to see transgender students in the Title IX conversation?

- May 2016 OCR and DOJ issues a joint Dear Colleague Letter on Title IX and Transgender Students
- February 2017 DCL is rescinded
- June 2020 the Supreme Court issued its decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that discrimination based on sexual orientation or gender identity is sex discrimination under Title VII of the Civil Rights Act of 1964
- January and March 2021 President Biden directed the Dept. of Ed. in two Executive Orders to review its current regulations
- July 2022

What Does the Rule Say? (1 of 10)

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 - Still permits schools to offer separate male and female teams (34 CFR 106.41(b))
 - Must provide equal athletic opportunities to girls/women and boys/men in:
 - h
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What Does the Rule Say? (3 of 10)



Elementary Students

- Generally be able to participate on school sports teams consistent with TJTm/GS5 gs0 g/GS10 gs0 G

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What Does the Rule Say? (4 of 10)



Four Main Questions:

1. What is the **sex-related eligibility criteria** eligibility to participate on a male or female team consistent with their gender?
The criteria must account for these factors:
 - A. What is the **grade or education level**?
 - B. What is the **competition level**?
 - C. What is the **sport**?
2. What is the important **educational objective**?
3. Is the sex-related eligibility criteria **substantially related** to achieving that educational objective?
4. Does it **minimize harms** to students?

What Does the Rule Say? (5 of 10)



- What could be **sex-related eligibility criteria**?
 - 0 license
 - Requiring physical examinations
 - Requiring medical testing
 - Requiring treatment
- What is an important **educational objective**?
 - What it is: Ensuring fairness & preventing sports related injury
 - What it is not: Excluding transgender students from sports or to require adherence to sex stereotypes, solely for the purpose of administrative convenience; Communicating or ; pretext for an impermissible interest, singling out transgender students for disapproval or harm

What Does the Rule Say? (6 of 10)



- What is **substantially related**?
 - The connection between the eligibility criteria and the educational objective
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What Does the Rule Say? (7 of 10)

- What is the **grade and education level**?
- What is the focus?

In **elementary school**, the focus is building teamwork, fitness, and basic skills for students who are just learning about the sport

What about **middle school** athletics?

How about **high school** athletics?

In **college**, the focus is often competitive success

LESS LIKELY

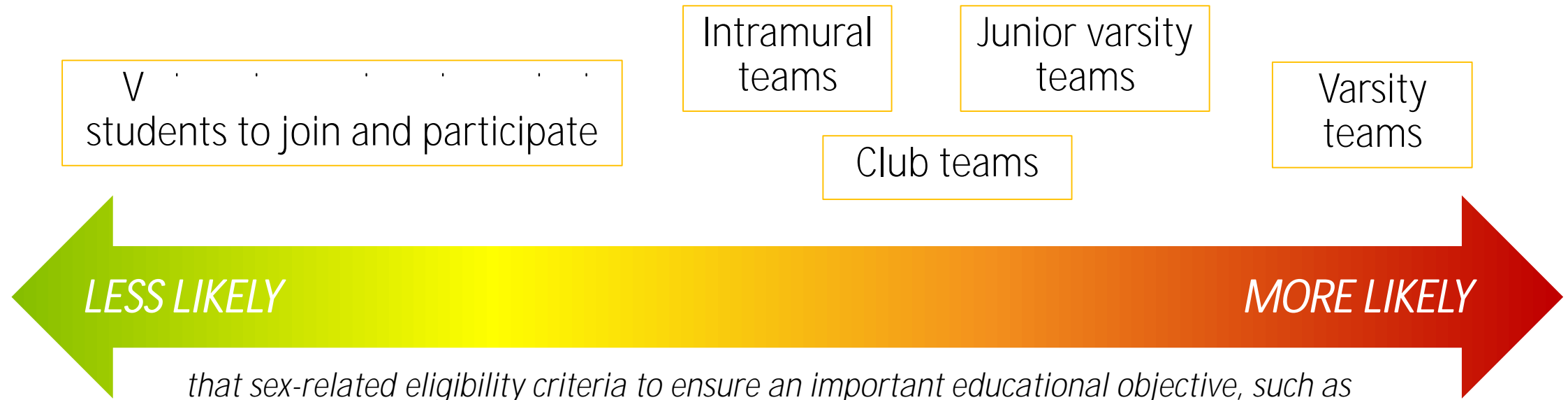
MORE LIKELY

that sex-related eligibility criteria to ensure an important educational objective, such as fairness in competition in their athletic programs, will satisfy the proposed regulation.

What Does the Rule Say? (8 of 10)



- What is the **level of competition**?
- What is the criteria to be able to make the team?



that sex-related eligibility criteria to ensure an important educational objective, such as fairness in competition in their athletic programs, will satisfy the proposed regulation.

What Does the Rule Say? (10 of 10)



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State Law Conflicts (1 of 2)



- ORANGE: State law bans transgender students from participating in sports consistent with their gender identity (*20 states*)
- YELLOW: State law does not ban transgender students from participating

State Law Conflicts (2 of 2)



- **Now what?** This **gender identity**-related eligibility criteria is particularly important as some States have adopted criteria for female athletic teams consistent with their gender identity
- State laws have been challenged in the courts (and some of these cases informed the Athletics NPRM)
 - **Indiana** - *A.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *14 (S.D. Ind. July 26, 2022), vacated as moot, (S.D. Ind. Jan. 19, 2023)
 - **Idaho** - *Hecox v. Little*, 479 F. Supp. 3d 930, 943, 988 (D. Idaho 2020), appeal argued, No. 20-35815 (9th Cir. Nov. 22, 2022)
 - **West Virginia** - *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021) (No. 2:21-cv-00316)
- Will a State challenge the rule if/when it goes into effect?

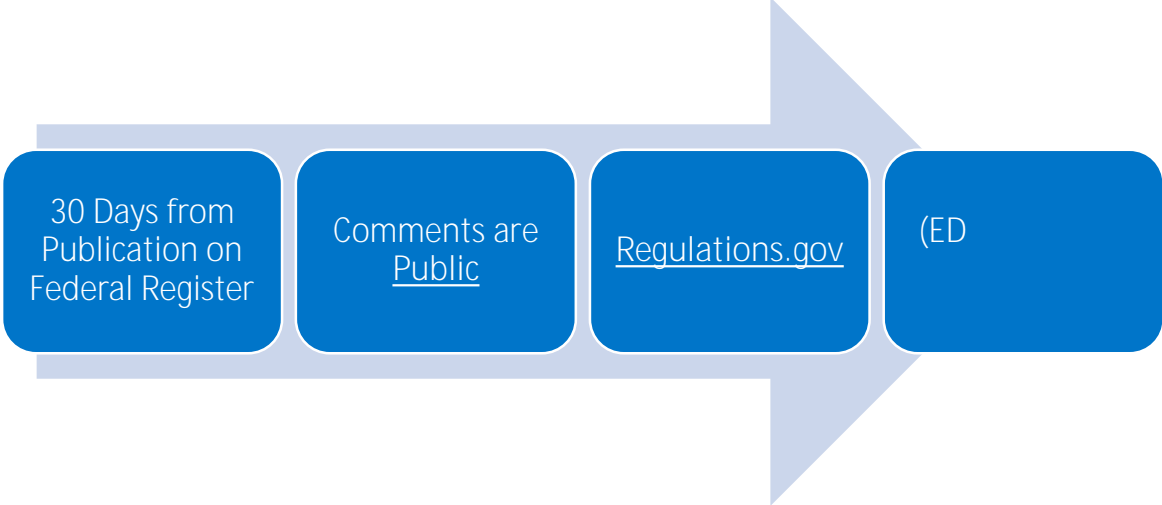
- The proposed regulation adds another layer on federal efforts to push school districts to take a closer look at their athletic programs through Title IX.
- School districts will have to keep track of:
 - State laws (and any litigation related to the proposed regulation)
 - State athletic associations particularly regarding varsity sports
 - Board policies and practices
 - Day-to-day implementation (e.g., intramurals)
- Bottom line: The regulation puts K-12 school districts at the center of this issue.

Higher Ed Impact (1 of 2)



- It depends on a variety of factors! But generally, it will only require updating policies or training materials
- First, are you looking at your intramural or club teams? Or your varsity teams?
- Second, *who* is responsible for athletic eligibility?
 - For all

Next Steps to a Final Rule



Upcoming: www.bricker.com/events



- Higher Education Free Webinar Series:
 - May 17, 12:00 ET Title IX Litigation Update
 - June 6, 12:00 ET Whistleblowers and Retaliation Claims
 - Stay tuned for webinars on the finalized Title IX procedural regulations
- Title IX Training Series:
 - Higher Education Levels 1, 2, & 3 April through June
 - K-12 Next series will be issued after new regulations are released
- Clery Act Bootcamp April 26, 1:00-5:00 ET

