



ANOTHER BLOW TO WOMEN'S SPORTS:

A Q&A ON THE BIDEN ADMINISTRATION'S PROPOSED TITLE IX ATHLETICS REGULATION

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TOPLINE POINTS

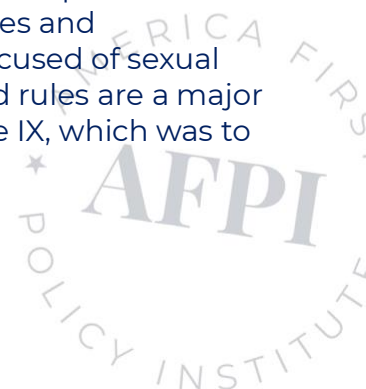
- ★ The Biden Administration has [proposed changes](#) to Title IX regulations governing athletics eligibility criteria that will open female sports to transgender athletes. If finalized in its current form, the rule will invalidate state laws passed by at least 20 elected legislatures to protect women's sports.
- ★ Biological men will be allowed to compete in women's sports at every level, in virtually all settings at lower grade levels, depriving female athletes of the athletic opportunities Title IX was originally designed to advance. Biological male athletes will gain access to intimate facilities meant for girls and women, including hotel rooms on overnight trips and locker rooms.
- ★ Concerned parents, athletes, and citizens have until May 15 to submit a public comment to protect the integrity of women's sports and to prevent colleges from the heavy compliance burdens associated with the proposal.

BACKGROUND

On April 6, the Biden Administration released a draft of its proposed revisions to the Department of Education's Title IX regulations governing sex-based eligibility criteria in athletics at schools that receive federal aid. The proposal will make it difficult for states, K-12 schools, and colleges to protect the integrity of women's sports by requiring most to open competition to any athlete who identifies as female. Schools and colleges that wish to maintain separate men's and women's sports teams basing eligibility criteria on biology will face new compliance burdens, intrusive federal oversight, and new legal and public relations risk. State laws that prohibit biological male athletes from competing in women's sports will also be invalidated by the proposed regulation if it is finalized in its current form.

Concerned athletes, parents, and citizens have until May 15, 2023, to [submit a public comment to the Department of Education registering opposition to the proposed rule.](#)

The proposed rule is the second major change to Title IX regulations proposed by the Biden Administration. The first, released in the summer of 2022, extends the scope of sex-based discrimination under Title IX to include gender identity. As AFPI has carefully documented, the Department of Education's radical rewrite of Title IX regulations will have far-reaching deleterious consequences. At the K-12 level, it will undermine parental rights, encourage schools to affirm gender transition by young children and encourage the compelled use of preferred pronouns in violation of the First Amendment and religious liberty protections. At U.S. colleges and universities, the regulation undermines due process protections for students accused of sexual assault, and it will deepen the campus free speech crisis. Together, the proposed rules are a major setback for female students and athletes and betray the original purpose of Title IX, which was to ensure equal educational and athletic opportunities for women.



Q&A:

Q: Why is the Biden Administration proposing a second revision to the Department of Education's Title IX regulations, this time focused on athletics?

A: The Biden Administration has proposed this revision after promising a separate rulemaking on athletics eligibility following several anti-discrimination actions. [Executive Order 13988](#), issued by President Biden on his first day in office, directed each agency head to review all departmental programs and policies, revising all anti-discrimination efforts to “combat discrimination on the basis of gender identity or sexual orientation.” A later action, [Executive Order 14021](#), specifically directed the Secretary of Education to revise agency actions and policies, including Title IX regulations, to expand the scope of sex-based harassment that is prohibited at recipient schools to include “discrimination on the basis of sexual orientation or gender identity.” When the Department issued its first draft regulation on Title IX in July 2022, it did not address the athletics eligibility criteria. It promised a separate rulemaking to deal with the issue, which was released this week.

Q: Who would be affected by the proposed regulation?

A: Any school or college that receives federal funding is considered a “recipient” school and is required to comply with Title IX regulations. Schools that do not risk losing federal funding.

Q: How will this impact sports at the elementary and middle school level?

A: The rule will force elementary schools to allow children to participate in sports based on their subjective gender identity in virtually all cases. The Department of Education has already said that it “believes there would be few if any, sex-related criteria applicable to students in elementary school that could comply with the proposed regulation.” This increases the likelihood that biological male students will share intimate facilities (including change rooms and overnight lodging facilities) with female students at programs and events sponsored by K–12 schools. Parents will not always be informed about when these situations will occur. Several school districts have already told concerned parents that privacy rules prevent them from disclosing whether students of the opposite biological sex are sharing intimate facilities with their son or daughter.

Q: When would schools and colleges be allowed to adopt athletic eligibility requirement criteria based on biological sex?

A: In order to limit participation on a team to athletes based on biological sex, school administrators will be required to establish a “substantial” relationship to an educational objective and take steps to minimize harm to students wanting to participate based on their subjective gender identity.



Q: What does it mean to establish a “substantial” relationship to an educational objective and take steps to minimize harm to students wanting to participate based on their subjective gender identity?

A: Schools are allowed to take fairness and athlete safety into account as “important educational outcomes.” This means separate sex teams (based on participants’ biological sex) will generally only be permitted at higher grade levels and in college, in contact sports, and where the level of competition for roster positions or scholarships is generally very high. The rule recognizes that the size and strength advantages associated with male puberty can increase the risk of a sports-related injury to women in contact sports and can tip the scale toward biological male athletes at high levels of competition. As such, the proposed regulation implicitly recognizes that allowing biological male athletes to compete in women’s sports can place biological female athletes at a disadvantage when competing for scholarships and limited spots on highly competitive teams.

Q: Who determines whether schools have taken sufficient steps to “minimize harms” to trans-identifying students when setting athletic eligibility criteria?

A: Students and activists will be able to file complaints with the Office of Civil Rights at the Department of Education alleging sex discrimination under Title IX when they believe schools have established overly restrictive policies or made insufficient efforts to minimize harm to transgender students. This means that the Biden Administration will have the authority to micromanage schools’ policies regarding sex-related eligibility criteria in athletics.

Q: This seems like a recipe for confusion. What happens when different schools make different decisions about, say, biological male participation in girls’ soccer at the high school level?

A: In all likelihood, district and university policies will differ considerably. This will lead to complaints to the Office of Civil Rights (OCR), which will be required to assess the policies—and the reasons schools give to justify them—on a case-by-case basis. If OCR judgments are not consistent—or if they accept some schools’ rationale but not others for policies that do the same thing—transgender athletes will ask why federal civil rights protections allow them to play on women’s soccer teams in some states and colleges but not in others.

Q: Will the proposed regulation change how schools design their overall athletics programs?

A. Probably. Schools that establish criteria that take biological sex into account could be required to make changes to their athletics programs “as a whole” to ensure transgender students still have overall equal athletic participation opportunities. This could lead schools to prioritize sports where biological males can more easily and safely compete with and against biological females. One of the ways schools originally complied with Title IX of the Education Amendments of 1972, which required ensuring equal opportunity for female athletes, was to close some men’s programs, like wrestling, while they increased the number of women’s teams. To ensure natal males who identify as females have equal athletic opportunities under the proposed rule, schools could feel pressured to sunset teams where biological males pose an elevated injury threat to women (soccer, basketball, and rugby) in favor of sports where they do not (badminton, bowling, and rowing).



Q: Does the Biden Administration’s proposal consider the mental and emotional impacts on biological females who will be required to share locker rooms, hotel rooms on overnight trips, and other intimate spaces with biological males?

A: No. The Department of Education does not acknowledge that female athletes of all ages often feel uncomfortable sharing locker rooms with, and competing against, athletes with male genitalia who may be sexually attracted to women. Creating a welcoming and inclusive environment for female athletes does not appear to constitute a valid educational objective—justifying the use of biological categories in eligibility criteria—under the proposed rule.

Q: How hard will it be for administrators to develop policies that base eligibility requirements on biological sex that do so to advance important educational objectives?

A: The rule is designed to make it difficult to keep biological male athletes out of female sports. It specifically forbids “overbroad generalizations that do not account for the nature of particular sports.” School administrators will have strong incentives to cave in the face of transgender activist demands to avoid Office of Civil Rights investigations and associated negative media coverage. They will also be incentivized to minimize legal risk and to reduce the burdens of documenting compliance with the new rule.

Q: How aggressively will the government regulate local schools under the Biden Administration’s proposal?

A: The Biden Administration has made advancing the transgender agenda a priority. The proposed rule likens “participating in sports on teams that contradict one’s gender identity... to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.” Essentially, the administration is stating that it views opening female athletics to biological male athletes as a civil rights enforcement priority. This suggests that the Office of Civil Rights (OCR) plans to aggressively investigate schools and colleges that do not establish very permissive policies. In other contexts, when the Department of Education publicizes details of its investigations into school practices, it generates intense negative publicity. This provides strong encouragement to schools around the country to change their policies in advance to ensure they do not become a target of OCR or activist complainants.

Q: How will this impact Division I collegiate athletics specifically?

A: Colleges and universities will be allowed to operate single-sex intercollegiate athletics teams, basing eligibility criteria on biological sex, in compliance with NCAA policy, which requires schools to conform their policies to national athletics federations on a sport-by-sport basis. In other cases, from intramurals to intercollegiate athletics where national federation standards allow participation based on gender identity, the regulation empowers activists to bring complaints to the campus Title IX office and the Department of Education’s Office of Civil Rights if schools exclude transgender athletes from women’s sports. It will be up to the Department of Education’s civil rights enforcement arm to determine whether the school’s rules have a substantial relationship to an educational objective. This will create strong pressures to open many women’s teams to biologically male athletes wherever governing federation rules allow it. Colleges will also be required to review their athletics program as a totality to ensure transgender students have equal access to athletics opportunities on the whole, which could lead them to prioritize



female sports where the advantages transgender athletes have derived from the size and strength advantages associated with male puberty are less obviously manifest.

Q: How will the proposed changes affect efforts by school boards and state lawmakers to protect women's sports?

A: Because the rule would consider it a civil rights violation to deprive an individual opportunity to participate in an athletics program based on their gender identity if it does not advance an important educational outcome (under the rule's strict definition), school districts and states will be prohibited from developing general policies that restrict participation in female sports to biologically female athletes. The proposal is designed to invalidate laws passed by elected state legislatures. Several cases already pending in federal courts suggest that the Title IX athletics rule itself, if finalized in its current form, would also be subject to constitutional challenge. Supreme Court Justices Clarence Thomas and Samuel Alito noted in a recent dissent—opposing the Court's [decision](#) not to take up one such case on an emergency basis—that West Virginia's "application concerns an important issue that this Court is likely to be required to address in the near future, namely, whether either Title IX of the Education Amendments of 1972 or the Fourteenth Amendment's Equal Protection Clause prohibits a State from restricting participation in women's or girls' sports based on genes or physiological or anatomical characteristics."

Q: How do American voters feel about men competing in women's sports?

A: According to Scott Rasmussen's National Surveys of registered voters published by the America First Policy Institute:

- [80% of registered voters](#) agreed with the statement, "Every American should be treated equally, but it's important to acknowledge that there are significant biological differences between men and women."
- [67% of registered voters](#) "believe biological males have an unfair advantage competing against biological females in women's sports."
- 56% of registered voters do not think public schools in their area should allow biological male athletes to compete in women's sports (compared to 25% who said they should be permitted to).

CALL TO ACTION

Make your voice heard and help protect female athletics. Concerned citizens have until May 15, 2023, to file a [public comment](#) opposing the rule change. Public comments are important for several reasons:

- A high number of comments is a strong signal to the media, federal administrators who write regulations, and stakeholders that the issue is very important to the public.
- The Department of Education is legally required to take every comment into account. Thoughtful criticism can lead to important changes that improve the final rule.
- When agencies neglect to respond to comments or fail to address serious deficiencies highlighted during the comment period, courts can strike them down under the Administrative Procedures Act.



Visit the Federal Register [comment portal](#) for the proposed Title IX regulation to submit your public comment.

TIPS:

1. Your public written comments can be any length, from a few sentences to several pages.
2. Personal insights and pointed questions make for effective submissions.
3. Public comments can be made anonymously for those who would like to share personal experiences without public attribution.
4. Be sure to include the Docket ID at the top of your comment: ED-2022-OCR-0143.
5. Remember, all comments must be received by May 15, 2023.

Visit AmericaFirstPolicy.com to learn more about how proposed changes to [Title IX](#) will affect K-12 schools, the debate about [transgender participation in female sports](#), and how [radical gender ideology](#) is transforming American society.

