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DEPARTMENT OF EDUCATION

34 CFR Part 106

[Docket ID ED-2022-OCR-0143]

RIN 1870-AA19

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The U.S. Department of Education (Department) proposes to amend its regulations implementing Title IX of the Education Amendments of 1972 (Title IX) to set out a standard that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The proposed regulation would clarify Title IX's application to such sex-related criteria and the obligation of schools and other recipients of Federal financial assistance from the Department (referred to below as "recipients" or "schools") that adopt or apply such criteria to do so consistent with Title IX's nondiscrimination mandate.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at https://www.regulations.gov. However, if you require an accommodation or cannot otherwise submit your comments via https://www.regulations.gov, please contact the program contact person listed under FOR FURTHER INFORMATION CONTACT. Comments that are not submitted via https://www.regulations.gov will not be accepted absent such a request. The Department will not accept comments submitted after the comment period closes. To ensure that

the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Please go to https://www.regulations.gov to submit your comments electronically. Information on using https://www.regulations.gov, including instructions for finding a rule on the site and submitting comments, is available on the site under "FAQ."

Note: The Department's policy is generally to make comments received from members of the public available for public viewing on the Federal eRulemaking Portal at https://www.regulations.gov. Therefore, commenters should include in their comments only information about themselves that they wish to make publicly available. Commenters should not include in their comments any information that identifies other individuals or that permits readers to identify other individuals. If, for example, your comment describes an experience of someone other than yourself, please do not identify that individual or include information that would allow readers to identify that individual. The Department reserves the right to redact at any time any information in comments that identifies other individuals, includes information that would allow readers to identify other individuals, or includes threats of harm to another person.

FOR FURTHER INFORMATION CONTACT: Alejandro Reyes, U.S. Department of Education, 400 Maryland Ave., SW, PCP-6125, Washington, DC 20202. Telephone: 202-245-7705. You may also email your questions to T9AthleticsNPRM@ed.gov, but as described above, comments must be submitted via the Federal eRulemaking Portal at https://www.regulations.gov.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

SUPPLEMENTARY INFORMATION:

Executive Summary:

The Department's July 2022 Proposed Rulemaking:

On July 12, 2022, the Department published in the *Federal Register* a notice of proposed

rulemaking to amend its regulations implementing Title IX (July 2022 NPRM). 87 FR 41390 (July 12, 2022), https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal. In the July 2022 NPRM, the Department announced plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend its Title IX regulations to clarify what criteria, if any, a recipient of Federal funding[1] should be permitted to use to establish students' eligibility to participate on a particular male or female athletic team. 87 FR 41537. This notice of proposed rulemaking, referred to below as the Athletics NPRM, addresses that issue. The comment period for the July 2022 NPRM closed on September 12, 2022.

Purpose of This Regulatory Action:

The purpose of this regulatory action, the Athletics NPRM, is to propose a regulatory standard under Title IX that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity (referred to below as "sex-related criteria" or "sex-related eligibility criteria"). The proposed regulation also would provide needed clarity, in response to questions from stakeholders, on how recipients can ensure that students have equal opportunity to participate on male and female athletic teams as required by Title IX.

In particular, the Department proposes amending § 106.41(b) of its Title IX regulations to provide that, 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 athletic team consistent with their gender

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[1] The text of Title IX states that the statute applies to "any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). The definition of the term "Federal financial assistance" under the Department's Title IX regulations is not limited to monetary assistance, but encompasses various types of in-kind assistance, such as a grant or loan of real or personal property, or provision of the services of Federal personnel. *See* 34 CFR 106.2(g)(2) and (3). Throughout this preamble, terms such as "Federal funding," "Federal funds," and "federally funded" are used to refer to "Federal financial assistance," and are not meant to limit application of the statute or its implementing regulations to recipients of certain types of Federal financial assistance.

identity, those 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. As discussed below, the proposed regulation would not prohibit a recipient's use of sex-related criteria altogether. Instead, the proposed regulation would require that a recipient meet this standard for any sex-related criteria that would limit or deny students' eligibility to participate on a male or female team consistent with their gender identity. The Department recognizes that prevention of sports-related injury is an important educational objective in recipients' athletic programs and that—as courts have long recognized in cases involving sex-separate athletic teams—fairness in competition may be particularly important for recipients in some sports, grade and education levels, and levels of competition. The Department anticipates that some uses of sex-related eligibility criteria would satisfy the standard in the proposed regulation in some sports, grade and education levels, and levels of competition.

The Department makes this proposal based on an extensive review of its regulations implementing Title IX, as well as the statute's text and legislative history; Federal and State case law; relevant State laws and the policies of schools and athletic associations; live and written comments received during a nationwide virtual public hearing on Title IX held in June 2021; and other information provided by stakeholders. *Executive Order on Regulatory Planning and Review*, Exec. Order No. 12866, 58 FR 51735 (Oct. 4, 1993), https://www.govinfo.gov/content/pkg/FR-1993-10-04/pdf/FR-1993-10-04.pdf.

Costs and Benefits:

As further detailed below in the *Regulatory Impact Analysis*, the Department estimates that the total monetary cost to recipients of the proposed regulation over 10 years would be in the range of $23.4 million to $24.4 million, assuming a seven percent and three percent discount rate, respectively. Because of the lack of available quantitative data, the Department cannot fully

quantify the economic impact of the proposed regulation. The Department believes that the benefits associated with the proposed regulation—providing a standard to clarify Title IX obligations for recipients that adopt or apply sex-related eligibility criteria and protecting students' equal opportunity to participate on male and female teams consistent with Title IX—far outweigh the costs.

In particular, the Department believes the proposed regulation would offer greater clarity regarding how a recipient can comply with its nondiscrimination obligation under Title IX if the recipient offers an athletic program and adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The Department recognizes that there is a valuable, even if not readily quantifiable, benefit of increasing students' equal opportunity to participate consistent with their gender identity under sex-related eligibility criteria that meet the proposed regulation's requirements, which some recipients' current eligibility criteria may not provide. The Department also recognizes that, without the proposed regulation's requirements for a recipient's sex-related eligibility criteria, some students may suffer harm as a result of being unable to gain the benefits associated with equal opportunity to participate on athletic teams at school.

Participation in team sports has been associated with many valuable physical, emotional, academic, and interpersonal benefits for students, and athletic participation has the potential to help students develop skills that benefit them in school and throughout life, including teamwork, discipline, resilience, leadership, confidence, social skills, and physical fitness. *See, e.g.*, Scott L. Zuckerman et al., *The Behavioral, Psychological, and Social Impacts of Team Sports: A Systematic Review and Meta-analysis*, 49 Physician & Sports Med. 246 (2021); Ryan D. Burns et al., *Sports Participation Correlates with Academic Achievement: Results From a Large Adolescent Sample Within the 2017 U.S. National Youth Risk Behavior Survey*, 127 Perceptual & Motor Skills 448 (2020); President's Council on Sports, Fitness & Nutrition Sci. Bd., *Benefits of Youth Sports* (Sept. 17, 2020), https://health.gov/sites/default/files/2020-

09/YSS_Report_OnePager_2020-08-31_web.pdf; *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 916 (7th Cir. 2012) (noting that "[s]tudies have shown that sports participation provides important lifetime benefits to participants" (quoting Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 Conn. L. Rev. 401, 413 (2010))).

The Department also recognizes that a recipient could incur some costs in complying with the proposed regulation if it adopts or applies certain sex-related eligibility criteria for participation on male or female athletic teams. The Department acknowledges that past agency statements on Title IX's coverage of discrimination based on gender identity have varied, and the proposed regulation would shift away from some of those statements. The Department believes that any costs associated with an individual recipient's compliance would be minimal if the proposed regulation is made final. For example, the proposed regulation may require updating of existing policies or training materials, but the Department does not expect that the proposed regulation would require other types of expenditures.

Invitation to Comment: The Department invites you to submit comments regarding the proposed regulation. To ensure that your comments have the maximum effect on developing the final regulation, you should identify clearly the specific part of the proposed regulation or directed question that each of your comments addresses.

The Department also invites you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 (explained further below) and their overall goal of reducing the regulatory burden that might result from the proposed regulation. Please let the Department know of any further ways it may reduce potential costs or increase potential benefits, while preserving the effective and efficient administration of the Department's programs and activities. The Department also welcomes comments on any alternative approaches to the subjects addressed by the proposed regulation.

During and after the comment period, you may inspect public comments about the

proposed regulation by accessing *Regulations.gov*. You may also inspect the comments in person. Please contact the person listed under FOR FURTHER INFORMATION CONTACT to make arrangements to inspect the comments in person.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: Upon request, the Department will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed regulation. To schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Background:

The mission of the Department's Office for Civil Rights (OCR) is to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our Nation's schools. One of the Federal civil rights laws that OCR enforces is Title IX, which prohibits discrimination on the basis of sex under education programs or activities that receive Federal financial assistance. 20 U.S.C. 1681-1688. Athletic programs have long been recognized by Congress, the Department, and Federal courts as an integral part of a recipient's education program or activity subject to Title IX. *See, e.g.*, Education Amendments of 1974, Pub. L. No. 93-380, section 844, 88 Stat. 484, 612 (Javits Amendment); *see also* U.S. Dep't of Health, Educ., and Welfare, *Final Rule: Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 FR 24128, 24134 (June 4, 1975) (citing cases); U.S. Dep't of Health, Educ., and Welfare, Office for Civil Rights, *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 FR 71413 (Dec. 11, 1979) (1979 Policy Interpretation), https://www.govinfo.gov/content/pkg/FR-1979-12-11/pdf/FR-1979-12-11.pdf (also available at https://www.ed.gov/ocr/docs/t9interp.html); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 516, 531-32, 532 n.22 (1982) (noting the broad sweep of Title IX; that the original Title IX regulations, reviewed by Congress, covered athletics; and

that a Senate resolution disapproving the regulations' application to athletics was introduced but not "acted upon").

In 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. In January 2021, President Joseph R. Biden, Jr. issued Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, which set out this Administration's policy "to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII [of the Civil Rights Act of 1964] and other laws that prohibit discrimination on the basis of gender identity or sexual orientation." *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, Exec. Order No. 13988, 86 FR 7023 (Jan. 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf. Executive Order 13988 directed the Secretary of Education, in consultation with the Attorney General, to "review all existing orders, regulations, guidance documents, policies, programs, or other agency actions" promulgated under any statute or regulation that prohibits sex discrimination for their consistency with the stated policy. *Id.*

The President subsequently issued Executive Order 14021 to ensure "that all students [are] guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity." *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, Exec. Order No. 14021, 86 FR 13803 (Mar. 11, 2021), https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf. This Executive Order, like Executive Order 13988, directed the Secretary of Education, in consultation with the Attorney General, to review all existing regulations, orders, guidance

documents, policies and any other similar agency actions for consistency with Title IX, other governing laws, and the stated policy.

As these Executive Orders directed, the Department extensively reviewed its Title IX regulations and policy documents for consistency with Title IX's statutory prohibition on sex discrimination in federally funded education programs or activities. Based on this review and consideration of, among other things, substantial input from stakeholders, the Department published the July 2022 NPRM to amend its regulations implementing Title IX. 87 FR 41390.

In the course of its review, the Department also received feedback that the current regulations do not explicitly address the criteria, if any, a recipient may use to determine a student's eligibility to participate on a male or female athletic team consistent with Title IX and the Department's regulations. Based on this review and consideration of substantial input from stakeholders, the Department proposes amending its current regulations to address the unique circumstances of male and female athletic teams consistent with Title IX's prohibition on discrimination on the basis of sex. In particular, this Athletics NPRM proposes amending the Department's Title IX regulations to set out a standard that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on male or female athletic teams consistent with their gender identity.

History of Title IX's Application to Athletic Programs:

Enacted in 1972, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Title IX includes several statutory exemptions and exceptions from its coverage, including for the membership practices of certain organizations, admissions to private undergraduate colleges, educational institutions that train individuals for the military services or merchant marine, and educational institutions that are controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the

controlling organization. 20 U.S.C. 1681(a)(1)-(9). Title IX authorizes and directs the Department, as well as other agencies, "to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. 1682.

In 1974, Congress enacted the Javits Amendment in response to concerns that Title IX would disrupt existing practices in intercollegiate athletics. It read:

> The [Department of Health, Education, and Welfare (HEW)] Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Education Amendments of 1974 section 844; *see also* S. Rep. No. 93-1026 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 4206, 4271.

In 1975, HEW, the Department's predecessor, first promulgated regulations under Title IX[2] after multiple congressional hearings. 121 Cong. Rec. 20467 (1975) (statement of Sen. Birch Bayh). The regulations were subject to a statutory "laying before" provision, designed to afford Congress an opportunity to examine the proposed regulations and disapprove them by resolution within 45 days if Congress deemed them to be inconsistent with Title IX. *N. Haven Bd. of Educ.*, 456 U.S. at 531-32. The Supreme Court has stated that the fact that no such

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[2] 45 CFR part 86 (1975). In 1980, Congress created the U.S. Department of Education. Pub. L. 96-88, section 201, 93 Stat. 669, 671 (1979); Exec. Order No. 12212, 45 FR 29557 (May 5, 1980). By operation of law, all of HEW's determinations, rules, and regulations continued in effect, and all functions of HEW's Office for Civil Rights with respect to educational programs were transferred to the Secretary of Education. 20 U.S.C. 3441(a)(3). The regulations implementing Title IX were recodified without substantive change in 34 CFR part 106. *See* 45 FR 30802, 30955-65 (May 9, 1980).

disapproval resolution was adopted "strongly implies that the [Title IX] regulations accurately reflect congressional intent." *Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984);[3] *see also N. Haven Bd. of Educ.*, 456 U.S. at 533-35.

Since 1975, the Department's regulations have specified that separate or differential treatment on the basis of sex is presumptively a form of prohibited sex discrimination. *See*, *e.g.*, 34 CFR 106.31(b)(4), (7) ("Except as provided for in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex . . . [s]ubject any person to separate or different rules of behavior, sanctions, or other treatment; . . . [or] [o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity."); *see also id.* at 106.34(a) ("Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex."). These regulations reflect the understanding that subjecting students to differential treatment on the basis of sex in the education context is presumptively harmful and cannot be justified by reliance on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Despite the general principle reflected in the Department's regulations that differential treatment or separation based on sex presumptively results in prohibited sex discrimination, Congress indicated in the Javits Amendment that a different approach to athletics was appropriate and that the Title IX regulations should include "reasonable" provisions governing intercollegiate athletic activities in light of "the nature of particular sports." Education

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[3] The Supreme Court in *NCAA v. Smith* subsequently described *Grove City College* as holding "that Title IX, as originally enacted, covered only the specific program receiving federal funding." 525 U.S. 459, 466 n.4 (1999) (citing *Grove City Coll.*, 465 U.S. at 570-74). That part of the Court's holding was superseded by the Civil Rights Restoration Act (CRRA), in which Congress "correct[ed] what it considered to be an unacceptable" interpretation by the Supreme Court of the scope of Title IX. *Id.* (quoting *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73 (1992)). The CRRA codifies Congress's interpretation of the terms "program or activity" and "program" as encompassing "all of the operations of * * * . . . (2)(A) a college, university, or other postsecondary institution . . . * * * or (B) a local education agency . . . * * * or other school system . . .* * * any part of which is extended Federal financial assistance." 20 U.S.C. 1687.

Amendments of 1974 section 844. HEW responded to this congressional direction by promulgating a regulation permitting sex separation in certain circumstances in "any interscholastic, intercollegiate, club or intramural athletics offered by a recipient." 45 CFR 86.41 (1975) (currently codified at 34 CFR 106.41). As noted above, Congress had the opportunity to examine and disapprove HEW's regulations, including this athletics provision. Congress did not disapprove them, and the Title IX regulations took effect on July 21, 1975.

The now-longstanding athletics regulation states that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." 34 CFR 106.41(a). The regulation then provides that when selection for an athletic team is based upon competitive skill or the activity involved is a contact sport, a recipient may offer sex-separate teams (though it is not required to do so). 34 CFR 106.41(b) ("[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."). The regulation contemplates that in some circumstances, female students may try out for a male team, or vice versa: "[W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport." *Id.* The regulation thus recognizes that in some instances individual students may be denied the opportunity to participate on a particular team on the basis of sex.

Importantly, the regulation goes on to say that a recipient must still provide equal opportunity in its athletic program as a whole. 34 CFR 106.41(c). Thus, a recipient that excludes a boy from the girls' golf team and does not offer a boys' golf team, for example, would have to provide equal opportunity based on sex across the totality of its athletic program,

and disparities in overall participation opportunities in that program, including on male and female teams, could violate § 106.41(c), depending on the facts at issue. As one court explained, "the provisions of title IX grant flexibility to the recipient of federal funds to organize its athletic program as it wishes, so long as the goal of equal athletic opportunity is met." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993) (citation omitted); *see also* U.S. Dep't of Health, Educ., and Welfare, Office for Civil Rights, *Sex Discrimination in Athletic Programs*, 40 FR 52655, 52656 (Nov. 11, 1975) (explaining that "an institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to qualify for the men's team").

Although the Department's Title IX regulations have never explicitly addressed the criteria, if any, a recipient may use to determine a student's eligibility to participate on a male or female athletic team, OCR has previously articulated various interpretations of current § 106.41(b) as applied to transgender students (*i.e.*, students whose gender identity is different from the sex they were assigned at birth). In May 2016, OCR and the Civil Rights Division of the U.S. Department of Justice (DOJ) issued a joint Dear Colleague Letter stating that while a recipient may not "adopt or adhere to requirements that rely on overly broad generalizations or stereotypes . . . or others' discomfort with transgender students[,] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport." U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on Title IX and Transgender Students at 3 (May 13, 2016) (rescinded in 2017) (2016 Dear Colleague Letter on Title IX and Transgender Students) (footnote omitted), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. In cases alleging gender identity discrimination in sex-separate programs and activities outside the context of athletic teams—*e.g.*, denying students access to sex-separate

facilities consistent with their gender identity—several Federal courts have held that the Department's interpretation of 34 CFR 106.33 of its Title IX regulations, as reflected in the 2016 Dear Colleague Letter on Title IX and Transgender Students, was reasonable. *See*, *e.g.*, *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) (according controlling weight to the "Department's interpretation of its own regulation, § 106.33"), *vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016) (same); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *3 (E.D. Wis. Sept. 22, 2016) (same), *aff'd sub nom. Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *abrogated on other grounds as recognized by Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020).

In August 2016, however, a Federal district court issued an opinion finding that the interpretation set out in the 2016 Dear Colleague Letter on Title IX and Transgender Students did not undergo the notice-and-comment process required by the Administrative Procedure Act and was contrary to law. The district court granted a preliminary injunction barring the Departments of Education and Justice from relying on the 2016 Dear Colleague Letter on Title IX and Transgender Students in their enforcement of Title IX with respect to access to certain sex-separate facilities. *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016); *see also Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 7852331, at *4 (N.D. Tex. Oct. 18, 2016) (clarifying that the preliminary injunction is "limited to the issue of access to intimate facilities"). In February 2017, DOJ's Civil Rights Division and OCR issued a letter withdrawing the statements of policy and guidance reflected in the 2016 Dear Colleague Letter on Title IX and Transgender Students, stating that they made this change "in order to further and more completely consider the legal issues involved." U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on Transgender Students at 1 (Feb. 22, 2017) (under review in light of Exec. Order No. 13988),

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. On March 3, 2017, the Federal district court dissolved the preliminary injunction when the plaintiffs voluntarily dismissed the lawsuit. Plaintiff's Notice of Voluntary Dismissal, *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex. Mar. 3, 2017), ECF No. 128.

In the months immediately following the Supreme Court's June 2020 decision in *Bostock*, 140 S. Ct. 1731, OCR made several statements on *Bostock*'s application to Title IX. For instance, on August 31, 2020, OCR issued a revised Letter of Impending Enforcement Action in its investigation of the Connecticut Interscholastic Athletic Conference (CIAC) and six school districts. OCR Case No. 01-19-4025, *Conn. Interscholastic Athletic Conf. et al.* (Aug. 31, 2020) (revised letter of impending enforcement action) (archived and marked not for reliance in February 2021) (Revised CIAC Letter), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf. The letter stated that OCR was providing an update in light of *Bostock* and took the position that when a recipient provides "separate teams for members of each sex" under 34 CFR 106.41(b), "the recipient must separate those teams on the basis of biological sex" and not on the basis of gender identity. Revised CIAC Letter at 36. The letter departed from OCR's typical practice concerning enforcement letters by stating that it "constitutes a formal statement of OCR's interpretation of Title IX and its implementing regulations and should be relied upon, cited, and construed as such." *Id.* at 49.

In January 2021, the Department posted a memorandum from its General Counsel's office commenting on *Bostock*'s application to Title IX. U.S. Dep't of Educ., Memorandum from Principal Deputy General Counsel delegated the authority and duties of the General Counsel Reed D. Rubinstein to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights re *Bostock v. Clayton Cnty*. (Jan. 8, 2021) (archived and marked not for reliance in March 2021) (Rubinstein Memorandum), https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-

01082021.pdf. The Rubinstein Memorandum stated that "if a recipient chooses to provide 'separate teams for members of each sex' under 34 C.F.R. § 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status or sexual orientation, to comply with Title IX."

In February 2021, OCR withdrew the Revised CIAC Letter, citing its inconsistency with Executive Order 13988 (describing *Bostock*) and the fact that it was issued without following the appropriate procedures required for issuing guidance.[4] Similarly, in March 2021, the Department archived the Rubinstein Memorandum and marked it "not for reliance," citing its inconsistency with Executive Order 13988 and the fact that it was issued without the review required under the then-applicable Department's Rulemaking and Guidance Procedures, 85 FR 62597 (Oct. 5, 2020) (rescinded effective September 29, 2021).

In June 2021, the Departments of Justice and Education filed a Statement of Interest in a Title IX and equal protection challenge to a State law limiting students' eligibility to participate on female athletic teams consistent with their gender identity, emphasizing that "[a]t its core, Title IX is about ensuring equal educational opportunities to all students regardless of their sex." Statement of Interest of the United States at 12, *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), https://www.justice.gov/crt/case-document/file/1405541/download (supporting the Title IX and equal protection claims raised by a transgender girl in middle school challenging the application of a State law prohibiting her

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[4] OCR Case No. 01-19-4025, *Conn. Interscholastic Athletic Conf. et al.* (Feb. 23, 2021) (letter withdrawing Revised CIAC Letter), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a5.pdf. In December 2022, in related Federal court litigation over CIAC's athletic eligibility policy, a panel of the U.S. Court of Appeals for the Second Circuit noted that the policy—which permits high school students to participate on male and female athletic teams consistent with their gender identity—could not be said to fall "within the scope of Title IX's proscriptions." *Soule by Stanescu v. Conn. Ass'n of Schs.*, 57 F.4th 43, 55 (2d Cir. 2022). Subsequently, the Second Circuit vacated the panel's opinion pending rehearing en banc. *See Soule by Stanescu v. Conn. Ass'n of Schs*., No. 21-1365 (2d Cir. Feb. 13, 2023).

from participating on her school's girls' athletic teams).[5] In April 2023, the Department of Justice filed a brief as amicus curiae in support of plaintiff-appellant B.P.J.'s appeal to the Fourth Circuit. *See* Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant and Urging Reversal, *B.P.J. v. W. Va. State Bd. of Educ*., No. 23-1078 (4th Cir. Apr. 3, 2023), https://www.justice.gov/crt/case-document/file/1577891/download.

Separately, also in June 2021, in light of the Supreme Court's decision in *Bostock*, the Department issued a Notice of Interpretation to explain the Department's enforcement authority over discrimination based on sexual orientation and gender identity under Title IX. U.S. Dep't of Educ., Office for Civil Rights, Notice of Interpretation: Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 FR 32637 (June 22, 2021) (2021 Bostock Notice of Interpretation), https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf.[6] Against this backdrop and for reasons described in this preamble, the Secretary proposes to amend the Department's Title IX regulation in 34 CFR 106.41.

The Department's Review of its Title IX Regulations

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[5] The Federal district court initially granted a preliminary injunction barring implementation of the West Virginia law to exclude a transgender girl in middle school from participating on her school's girls' track and cross-country teams, *B.P.J.*, 550 F. Supp. 3d at 357. On January 5, 2023, the court granted a motion for summary judgment upholding West Virginia's law, concluding that the law does not violate the Equal Protection Clause or Title IX, and dissolving the preliminary injunction. *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2023 WL 111875, at *8-10 (S.D. W. Va. Jan. 5, 2023), *appeal docketed*, No. 23-1078 (4th Cir. Jan. 24, 2023). On February 22, 2023, a panel of the Fourth Circuit granted B.P.J.'s Motion for Stay of the District Court's January 5, 2023, Order dissolving the preliminary injunction pending appeal. *See B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Feb. 22, 2023). On March 9, 2023, the Defendants-Appellees submitted an application to the U.S. Supreme Court seeking to vacate the Fourth Circuit's injunction pending appeal. *See* Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit, *W. Va. State Bd. of Educ*. *v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023). The discussion below further addresses the district court's now-dissolved January 5, 2023, Order.

[6] A Federal district court preliminarily enjoined and restrained the Department from implementing the 2021 Bostock Notice of Interpretation against 20 States. *See Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at *24 (E.D. Tenn. July 15, 2022), *appeal docketed*, No. 22-5807 (6th Cir. Sept. 13, 2022). This Athletics NPRM is not based on the 2021 Bostock Notice of Interpretation.

On April 6, 2021, OCR issued a letter to students, educators, and other stakeholders that informed them about the steps the Department was taking to review its regulations, orders, guidance, policies, and other similar agency actions under Title IX. U.S. Dep't of Educ., Office for Civil Rights, Letter from Acting Assistant Secretary Suzanne B. Goldberg to Students, Educators, and other Stakeholders re Executive Order 14021 (Apr. 6, 2021), https://www.ed.gov/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf. As directed by Executive Order 14021, this comprehensive review included OCR's review of all agency actions to determine whether changes to the Department's Title IX regulations are necessary to fulfill Title IX's mandate and OCR's commitment to ensuring equal and nondiscriminatory access to education for students at all education levels, regardless of sex. *See id.* at 2.

On May 20, 2021, OCR published a notice in the *Federal Register* announcing a nationwide virtual public hearing (referred to below as the "June 2021 Title IX Public Hearing") to gather information for the purpose of improving enforcement of Title IX. U.S. Dep't of Educ., Office for Civil Rights, Announcement of Public Hearing; Title IX of the Education Amendments of 1972, 86 FR 27429 (May 20, 2021), https://www.govinfo.gov/content/pkg/FR-2021-05-20/pdf/2021-10629.pdf. OCR expressed particular interest in comments about discrimination based on gender identity in educational environments, as well as other topics. *Id.* The virtual hearing was held from June 7, 2021, to June 11, 2021, during which time OCR received live comments through the virtual hearing platform and written comments via email. Over 280 students, parents, teachers, faculty members, school staff, administrators, and other members of the public provided live comments, and OCR received over 30,000 written comments by email. The transcript of live comments is available at https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-publichearing-complete.pdf, and the written comments may be viewed at https://www2.ed.gov/about/offices/list/ocr/public-hearing.html.

In addition to soliciting live and written comments as part of the June 2021 Title IX Public Hearing, OCR also conducted listening sessions with stakeholders expressing a variety of views, including individuals and organizations focused on Title IX and athletics. Among these stakeholders were students, including current and former student-athletes; parents; athletic associations; organizations representing elementary schools, secondary schools, and postsecondary institutions; organizations representing teachers, administrators, parents, and current and former student-athletes; attorneys representing students and schools; State officials; Title IX Coordinators and other school administrators; and individuals who provide Title IX training to schools.

In the June 2021 Title IX Public Hearing, in listening sessions, and in correspondence, stakeholders posed questions and presented concerns regarding Title IX's application to determinations of whether a student is eligible to participate on a recipient's male or female athletic team, particularly in light of the shifting OCR guidance on this issue and the divergent approaches to such eligibility criteria taken by State laws and organizations that set eligibility rules for specific sports. Stakeholders highlighted the many benefits that students gain from participating on athletic teams, including learning skills that promote personal health, wellness, and leadership; being part of a team; and fostering social relationships.

Some stakeholders asserted that allowing students to participate on male or female athletic teams that align with their gender identity is consistent with Title IX's guarantee of nondiscrimination on the basis of sex. In the same vein, some stakeholders stressed that preventing transgender students from participating on their schools' male or female athletic teams consistent with their gender identity deprives those students of the benefits of athletic team participation because it is not tenable to require a transgender girl or woman to participate on a male athletic team or a transgender boy or man to participate on a female athletic team. Some stakeholders expressed concern that some policies and State laws restricting athletic eligibility to a student's sex assigned at birth may also disqualify intersex students (generally, persons with

variations in physical sex characteristics, including variations in anatomy, hormones, chromosomes or other traits that differ from expectations generally associated with male and female bodies) from participating on male or female teams consistent with their gender identity if the sex assigned to those students at birth does not accurately reflect their gender identity. Stakeholders also expressed concern that certain policies and State laws might preclude nonbinary students (generally, persons who do not identify as exclusively male or female) from participating on either male or female teams, including in contexts in which those students' school records or other official documents indicate a nonbinary gender marker and the school's eligibility criteria limit participation to students with a male or female gender marker. By contrast, other stakeholders expressed concerns that participation of some transgender girls and women on female athletic teams could deprive other girls and women of access to the benefits associated with participation on athletic teams. Many stakeholders representing a range of views urged the Department to clarify whether and, if so, how students can participate on male or female athletic teams that align with their gender identity while ensuring fair and safe sports participation for all.

The Department's July 2022 NPRM proposed amendments to the Department's Title IX regulations would clarify, among other things, that Title IX prohibits discrimination based on gender identity and sex characteristics in federally funded education programs and activities. *See* 87 FR 41571. In addition, the proposed amendments would clarify that (a) in the limited circumstances in which Title IX or the Department's Title IX regulations permit different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or the Department's Title IX regulations; and (b) a policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than de minimis harm on the basis of sex. *Id.* at 41534-37. The July 2022 NPRM also recognized that

despite Title IX's general prohibition on sex discrimination against an individual, there are circumscribed situations, including with respect to sex-related eligibility criteria for male or female teams, in which Title IX or its regulations may permit a recipient to separate students on the basis of sex, even when doing so may cause some students more than de minimis harm. *Id*. at 41537. The July 2022 NPRM did not propose any changes to the Department's Title IX regulation governing athletics, however, instead reserving that issue for this Athletics NPRM. *Id*.

The Department now proposes amending its Title IX regulations to help ensure implementation of Title IX in what Congress has recognized as the unique context of athletics. *Cf.* Education Amendments of 1974 section 844 (specifying a requirement for "reasonable provisions considering the nature of particular sports" in the Department's Title IX regulations regarding intercollegiate athletics). The Department acknowledges the interest of some stakeholders in preserving current athletic-team policies and procedures regarding sex-related eligibility criteria and in avoiding potential additional costs to comply with the proposed regulation. However, the Department believes that the current regulations are not sufficiently clear to ensure Title IX's nondiscrimination requirement is fulfilled if a recipient adopts or applies sex-related criteria that would limit or deny students' eligibility to participate on male or female athletic teams consistent with their gender identity. This clarification regarding Title IX's application to sex-related eligibility criteria is particularly important as some States have adopted criteria that categorically limit transgender students' eligibility to participate on male or female athletic teams consistent with their gender identity. *See, e.g.*, Ind. Code section 20-33-13-4 (2022) ("A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology, may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport."); W. Va. Code section 18-2-25d(c)(1) (2021) (designating participation on interscholastic, intercollegiate, intramural, or club athletic teams sponsored by any public secondary school or state institution of

higher education as based on "biological sex"); Idaho Code section 33-6203 (2020) (same). In so doing, these State laws have created additional uncertainty for stakeholders regarding what Title IX permits and requires with respect to male and female teams.

The standard proposed in this Athletics NPRM is consistent with the framework in the current § 106.41 for providing overall equal athletic opportunity regardless of sex for students who seek to participate in a recipient's athletic program. Taking into account extensive stakeholder questions about Title IX's application to sex-related eligibility criteria for male and female athletic teams, the Department's proposed regulation would provide that 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. The proposed regulation would continue to recognize, as has current § 106.41(b) since its promulgation in 1975, that some sex-related distinctions in sports are permissible as long as a recipient ensures overall equal athletic participation opportunity regardless of sex.

Further, it is the Department's intent that the severability clauses set out in the relevant subparts of 34 CFR part 106 would remain applicable to the proposed changes in this Athletics NPRM. It is also the Department's position that the proposed regulation, if adopted as a final rule, would serve an important purpose that is distinct from other provisions in part 106 and would operate independently of other regulatory provisions, such that any potential invalidity of the proposed regulation should not affect any other provisions in part 106.

Significant Proposed Regulation:

Section 106.41 Athletics

Statute: Title IX prohibits discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. 20 U.S.C. 1681(a). The Department has the

authority to regulate with regard to discrimination on the basis of sex in education programs or activities receiving Federal financial assistance, specifically under 20 U.S.C. 1682 and generally under 20 U.S.C. 1221e-3 and 3474. And the Javits Amendment reflects that the Department has discretion to tailor its regulations in the athletics context that it might not have in other contexts and to adopt "reasonable provisions considering the nature of particular sports." Education Amendments of 1974 section 844.

Current regulations: Paragraph (a) of current § 106.41 establishes a baseline rule that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and that no recipient may provide any such athletics separately on the basis of sex. Section 106.41(b) sets forth an exception that permits a recipient to offer separate male and female athletic teams when selection for such teams is based upon competitive skill or the activity involved is a contact sport. Paragraph (b) also states that when a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the excluded sex, and athletic opportunities for members of the excluded sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. The same paragraph lists examples of contact sports. Paragraph (c) states that even when a recipient offers separate male and female athletic teams, a recipient must provide overall equal athletic opportunity for the sexes.

Proposed regulation: The Department proposes adding to § 106.41(b) a standard that would govern a recipient's adoption or application of 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. Specifically, the Department proposes renumbering current § 106.41(b) as proposed § 106.41(b)(1) and adding a new paragraph as proposed § 106.41(b)(2) to state that any such criteria a recipient adopts or applies 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.

Reasons: In light of its review of Title IX and its regulations, stakeholder feedback, and developments in case law and in the sex-related eligibility criteria set by some school districts, States, and other organizations (including athletic associations and sport governing bodies), the Department proposes amending its regulations to provide greater clarity as to the standard that applies 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 athletic team consistent with their gender identity. The proposed regulation is consistent with § 106.41's framework for providing equal opportunity regardless of sex in a recipient's athletic program as a whole and with Congress's direction that the Title IX regulations include "reasonable provisions" regarding athletics that "consider[] the nature of particular sports." Education Amendments of 1974 section 844.

Development of the Proposed Regulation

In listening sessions, correspondence, and through the June 2021 Title IX Public Hearing, OCR received feedback from stakeholders on the educational and other benefits of student participation on athletic teams and the application of Title IX's nondiscrimination mandate to all student-athletes. The feedback also focused on how schools can provide nondiscriminatory athletic opportunities for all students and on factors that influence fairness in competition and prevention of sports-related injury. Amidst this variety of views, OCR heard that students, recipients, athletic associations, and others need clarity from the Department about the legal standards that would apply to ensure Title IX's nondiscrimination requirement is fulfilled if a recipient adopts or applies sex-related criteria that would limit or deny students' eligibility to participate on male or female athletic teams consistent with their gender identity. In developing the proposed regulation, the Department reviewed this stakeholder input as well as Title IX's statutory text and purpose, Title IX's regulatory framework, courts' interpretations of Title IX

and the U.S. Constitution, and the existing approaches to sex-related eligibility criteria taken by a wide range of States, school districts and other organizations, including athletic associations and sport governing bodies.[7]

The Text and Purpose of Title IX

In developing the proposed regulation, the Department considered Title IX's statutory text, purpose, and legislative history, as well as the current regulatory framework and constitutional principles.

As noted above, Congress has been clear that Title IX prohibits sex discrimination in a recipient's athletic program and, recognizing the unique circumstances of athletics, that the Title IX regulations should include "reasonable provisions" governing athletic activities that "consider[] the nature of particular sports." Education Amendments of 1974 section 844. The Department's now-longstanding Title IX regulation on athletics therefore reflects the unique circumstances of athletics, including intercollegiate athletics. The Department's proposed regulation would similarly reflect the unique circumstances of athletics by considering whether sex-related criteria adopted or applied by a recipient to determine eligibility for male and female athletic teams, for each sport, level of competition, and grade or education level, are 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.

The proposed regulation would thus preserve and build on the current regulatory

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[7] The policies of athletic associations, sport governing bodies, State agencies, and other entities, or excerpts thereof referenced throughout this document are examples of various approaches that these entities have taken regarding sex-related eligibility criteria for male and female athletic teams. The Department includes them here to illustrate various points in this preamble; it does not require a recipient to adopt or apply the examples mentioned here, and their inclusion in this preamble is not an endorsement by the Department of any policy or practice, nor does it indicate whether the policy or practice would comply with the standard proposed in this Athletics NPRM. Any links to websites from outside of the Department are provided for the reader's convenience only. The Department does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. Examples and links included in this preamble do not constitute legal advice, create legal obligations, or impose new requirements.

framework the Department has long used to evaluate whether a recipient offers its students an equal opportunity to participate in athletics consistent with Title IX. It is also consistent with current § 106.41, which prohibits sex discrimination in a recipient's athletic program in paragraph (a) and recognizes in paragraph (c) that while a recipient must provide equal opportunity regardless of sex in its athletic program *as a whole*, it may, in limited and defined circumstances set out in paragraph (b), deny individual students the opportunity to participate on a particular male or female team on the basis of their sex. In addition, the proposed regulation is consistent with OCR's longstanding policy of encouraging compliance with the Department's Title IX athletics regulation "in a flexible manner that expands, rather than limits, student athletic opportunities." *See* Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (Sept. 17, 2008) (2008 Dear Colleague Letter on Title IX and Athletic Activities), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.pdf; *see also* 1979 Policy Interpretation, 44 FR 71414 (noting that effectively accommodating the interests and abilities of male and female students in the selection of sports and levels of competition will, in most cases, "entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels").

The proposed regulation is also informed by constitutional principles. In particular, Federal courts' equal protection analysis provides a helpful framework for evaluating when certain sex-based classifications may be justified. *See, e.g.*, 34 CFR 106.34(b) (setting out Title IX regulatory standard for single-sex classes that reflects certain aspects of Federal courts' equal protection framework); U.S. Dep't of Educ., Office for Civil Rights, *Final Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 71 FR 62530, 62533 (Oct. 25, 2006) https://www.govinfo.gov/content/pkg/FR-2006-10-25/pdf/E6-17858.pdf. Notably, however, because the scope of Title IX differs from the scope of the Equal Protection Clause, the Department's current and proposed Title IX regulations, while informed by constitutional

principles, exclusively implement Title IX. *See* 71 FR 62533.

Court Decisions Regarding Sex-Related Eligibility Criteria

In developing the proposed regulation, the Department also reviewed court decisions analyzing allegations that various policies governing transgender students' eligibility to participate on male or female athletic teams discriminate impermissibly based on sex. Several courts have found that excluding transgender students from participating on athletic teams consistent with their gender identity impermissibly discriminates against these students based on sex. In one case, for example, a Federal district court preliminarily enjoined a school district from excluding a fifth-grade transgender girl from the girls' softball team under an Indiana law that categorically precluded transgender girls and women from being treated consistent with their gender identity for purposes of female athletic teams. *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).[8] Adopting the Supreme Court's reasoning in *Bostock* and following controlling Seventh Circuit authority, the court held that the plaintiff had "established a strong likelihood that she will succeed on the merits of her Title IX claim" that the Indiana law discriminated against her on the basis of sex. *Id.* at *11. As the court explained, prohibiting an individual from playing on a team consistent with their gender identity "'punishes that individual for his or her gender non-conformance,' which violates the clear language of Title IX." *Id.* (citations omitted). The court also stated that under current case law, this conclusion was "not even a close call." *Id.*

In another case, a Federal district court preliminarily enjoined the State of Idaho from

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[8] On January 19, 2023, after the parties filed a Joint Stipulation to Dismiss Case Because of Mootness indicating that the plaintiff had enrolled in a charter school not operated by defendant Indianapolis Public Schools, the Federal district court issued an Acknowledgement of Dismissal and vacated the preliminary injunction because of mootness. *A.M.*, No. 1:22-cv-01075-JMS-DLP (S.D. Ind. Jan. 19, 2023). In its Acknowledgement of Dismissal, the court did not repudiate its prior determination that the plaintiff had a strong likelihood of success on the merits of her Title IX claim, as discussed in this preamble.

enforcing a state law that "excludes transgender women from participating on women's sports teams." *Hecox v. Little*, 479 F. Supp. 3d 930, 943, 988 (D. Idaho 2020), *appeal argued*, No. 20-35815 (9th Cir. Nov. 22, 2022). In *Hecox*, the court found that, in light of "the dearth of evidence in the record to show excluding transgender women from women's sports supports sex equality, provides opportunities for women, or increases access to college scholarships," the transgender student plaintiff was likely to succeed in establishing that the Idaho statute violates her right to equal protection. *Id.* at 978-85. The court explained that the Idaho law, which draws a distinction based on the quasi-suspect classifications of sex and transgender status, must, under the Supreme Court's established equal protection doctrine, "serve important governmental objectives and must be substantially related to achievement of those objectives." *Id*. at 973 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Although the court recognized that "'redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes' is 'a legitimate and important governmental interest' justifying rules excluding males from participating on female teams," it concluded that that interest does "not appear to be implicated by allowing transgender women to participate on women's teams." *Id*. at 976 (quoting *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982)). On this point, the court noted both that the small population of transgender athletes would not "substantially displace" cisgender female athletes and that "it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women." *Id.* at 978. As the court explained, "[t]hat the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes." *Id*. at 984.

The court's equal protection analysis in *Hecox* is instructive and relevant to the Department's proposed Title IX regulation in several respects: the court examined interests commonly proffered to defend policies denying transgender students the opportunity to

participate on male or female athletic teams consistent with their gender identity, considered whether such policies actually advance any important objectives, and further considered the effects of those policies on students' equal opportunity to participate in and benefit from their schools' education programs and activities. *See*, *e.g.*, *Hecox*, 479 F. Supp. 3d at 977 ("[T]he Act's categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports . . . .").

Conversely, another Federal district court upheld a West Virginia law against a challenge brought by a transgender girl who, because of the law, was excluded from participating on her middle school's girls athletic teams, concluding that the law satisfied both equal protection and Title IX. *B.P.J.*, 2023 WL 111875, at *8, *10.[9] The court agreed with the plaintiff that the law classified students based on sex. It then observed, in its equal protection analysis, that the State could "allow transgender individuals to play on the team with which they, as an individual, are most similarly situated at a given time," but concluded that the categorical ban on participation by transgender students consistent with their gender identity was substantially related to the State's asserted interest in providing equal athletic opportunity for girls and women. *Id*. at *8. With respect to Title IX, the court observed that: (1) current § 106.41(b) permits sex-separate athletic teams; (2) "'the motivation for the promulgation of the regulation' was to increase opportunities for women and girls in athletics"; and (3) § 106.41(b)'s "endorsement of sex separation in sports refers to biological sex." *Id.* at *9 (citation omitted).

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[9] As explained in Note 5 above, the district court initially issued a preliminary injunction barring enforcement of a State law that would ban the plaintiff from participating on girls' sports teams at school based on the strong likelihood that the West Virginia law violated the Equal Protection Clause and Title IX. *B.P.J.*, 550 F. Supp. 3d 347, 357. On January 5, 2023, the District Court issued an order dissolving the preliminary injunction and finding the West Virginia law did not violate the Equal Protection Clause or Title IX. 2023 WL 111875, at *8, *10. The plaintiff appealed and a panel of the Fourth Circuit enjoined the District Court's January 5, 2023, Order pending the outcome of the appeal, *see B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. Feb. 22, 2023), which the Defendants-Appellees have petitioned the U.S. Supreme Court to vacate. *See* Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit, *W. Va. State Bd. of Educ. v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023).

With regard to the court's third observation, the Department notes that current § 106.41(b) permits a recipient to offer "teams for members of each sex," without defining that term, and also notes the longstanding application of this provision to permit a recipient to offer teams for women and men, and for girls and boys. The Department recognizes that although the court in *B.P.J.* interpreted the Title IX statute and § 106.41(b) in a way that permits categorical exclusion of transgender students from participating consistent with their gender identity, other courts have set out a different interpretation of Title IX and its implementing regulations governing sex-separation in education programs and activities, *see*, *e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd*., 972 F.3d 586, 618-19 (4th Cir.), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *A.M.*, 2022 WL 2951430, at *7-11, underscoring the value of this proposed rulemaking in clarifying the Department's interpretation of its Title IX regulations.[10]

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[10] A decision of the United States Court of Appeals for the Eleventh Circuit likewise highlights the need for the Department to clarify Title IX's application to transgender students in those limited and discrete contexts in which Title IX or its implementing regulations otherwise allow a recipient to separate students on the basis of sex. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc). In *Adams*, the court determined a school policy that excluded a transgender boy from using the male restroom at his school did not violate the Equal Protection Clause, *id.* at 810-11, or Title IX, *id.* at 811-17. The *Adams* court recognized that the school's restroom policy classified students based on sex. *Id*. at 801. The court held, however, that the term "sex" in 34 CFR 106.33, which allows a recipient to "provide separate toilet . . . facilities on the basis of sex," should be understood to mean "biological sex," *see Adams*, 57 F.4th at 814-15. It further concluded that the regulation therefore permitted a recipient to deny transgender students access to restrooms consistent with their gender identity, without considering the distinct sex-based harms that such students suffer from such exclusion. For the Department's views on some of the issues raised in *Adams*, see En Banc Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellee and Urging Affirmance at 22-28, *Adams*, 57 F.4th 791 (No. 18-13592), https://www.justice.gov/crt/case-document/file/1458461/download. *See, e.g.*, *id*. at 22 (recognizing that the Department's Title IX regulation allows for sex-separate restrooms, but noting that the regulation does not speak to how it applies to transgender students).

The claims in *Adams* did not involve athletics or the athletics regulation that is the subject of this Athletics NPRM (34 CFR 106.41). The Department notes the court's statement in dicta, in reference to the Department's current athletics regulation, that "equating 'sex' to 'gender identity' or 'transgender status' would also call into question the validity of sex-separated sports teams," *Adams*, 57 F.4th at 816-17, differs from the approach proposed in this Athletics NPRM. As discussed above, the Department's longstanding view is that sex-separate teams can in some instances advance Title IX's goals, and that as a general matter, a recipient may offer male and

Courts have not addressed Title IX's application to intersex or nonbinary student-athletes. The Department believes the proposed regulation would provide an appropriate Title IX framework for analyzing a recipient's adoption or application of sex-related criteria that limit or deny an intersex student's eligibility to participate on a male or female team consistent with their gender identity. When applying sex-related criteria to nonbinary students, a recipient may need to determine whether the criteria do, in fact, limit or deny a nonbinary student's eligibility to participate on a male or female team consistent with their gender identity to determine whether the proposed regulation would apply.

Existing Approaches to Eligibility Criteria for Male and Female Teams

In addition to the considerations just discussed in developing this proposed regulation, the Department considered a variety of existing approaches to eligibility criteria for male and female teams that affect students' opportunity to participate on such teams consistent with their gender identity. Some States, as well as many school districts and athletic associations, have for many years adopted or applied eligibility criteria that do not restrict students from participating on male or female athletic teams consistent with their gender identity. Other States and organizations have, particularly in recent years, adopted policies that exclude some or all transgender students from participating on male or female athletic teams consistent with their gender identity or have adopted eligibility criteria that relate to birth certificates, physical examinations, or medical treatment.

At the postsecondary level, for example, the National Collegiate Athletic Association (NCAA) in 2022 replaced its longstanding policy describing transgender students' eligibility to participate on a male or female college athletic team in the NCAA with a sport-by-sport approach. *See* NCAA, *Transgender Student-Athlete Participation Policy* (Jan. 2022) (NCAA

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female athletic teams as long as they provide overall equal athletic opportunity consistent with Title IX's nondiscrimination guarantee. The proposed regulation would not alter this position and instead, for reasons discussed throughout this preamble, would provide the necessary clarity to help ensure that recipients continue to provide equal opportunity for students, consistent with Title IX, on their male and female athletic teams.

2022 Policy); https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx; NCAA, *2010 NCAA Policy on Transgender Student-Athlete Participation* (2010), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderStudentAthleteParticipationPolicy.pdf. The NCAA 2022 Policy calls for its member colleges and universities to follow the criteria for transgender students' participation in college sports set by national bodies governing individual sports, which are subject to review by the NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports. In announcing these changes, the NCAA emphasized its support for preserving transgender students' opportunity to participate in team sports and the importance of inclusive, fair, safe, and respectful environments for competition across college sports. *See* NCAA, *Board of Governors Updates Transgender Participation Policy* (Jan. 19, 2022), https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx.

This change in the NCAA's policy follows a similar change by the International Olympic Committee (IOC) regarding athletes' participation in high-level international competition. IOC, *IOC Framework on Fairness, Inclusion, and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (Nov. 2021) (IOC Framework), https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf; IOC, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf. The IOC Framework recognizes "the need to ensure that everyone, irrespective of their gender identity or sex variations, can practise sport in a safe, harassment-free environment that recognises and respects their needs and identities" and that its new "principles . . . aim to ensure that competition [in male and female] categories is fair and safe and that athletes are not excluded solely on the basis of their transgender identity or sex variations." IOC Framework at 1, 2. The IOC

Framework encourages bodies governing individual sports—"particularly those in charge of organising elite-level competition"—to develop eligibility criteria for sex-separate competition that "tak[e] into consideration the nature of each sport," *id.* at 1, to work together to "advance inclusion and prevent discrimination based on gender identity and/or sex variations," *id*. at 2, and to ensure that any eligibility restrictions are "evidence-based" and account for any unique competitive advantage or risk associated with a specific sport, *id.* at 4. The IOC Framework also provides that "until evidence . . . determines otherwise, athletes should not be deemed to have an unfair or disproportionate competitive advantage due to their sex variations, physical appearance and/or transgender status." *Id.* at 4.

In response to the shift by the NCAA and IOC to a sport-specific approach, several sport governing bodies that set criteria for certain non-school-based national and international competition, as well as postsecondary athletic competition, have announced plans to review their policies or have adopted or applied new policies regarding sex-related eligibility criteria. Governing bodies in gymnastics, rowing, and volleyball, for example, have announced policies that allow athletes to participate consistent with their gender identity at lower or non-elite levels of competition, such as in competitions where athletes are not competing for a place on a national team to represent the United States in international competition, or where the rules of international sport governing bodies would not apply. *See*, *e.g*., USA Gymnastics, *Transgender & Non-Binary Athlete Inclusion Policy* at 2 (Apr. 2022), https://usagym.org/PDFs/About USA Gymnastics/transgender_policy.pdf ("Transgender and non-binary athletes in levels other than Elite are permitted to compete without restriction in the gender category with which they identify."); USRowing, *Gender Identity Policy* (Feb. 13, 2023), https://usrowing.org/documents/2022/11/28/Gender_Identity_Policy_021323.pdf ("Athletes at the youth level (youth, junior, high school, scholastic, [and certain other levels, excluding collegiate and international competition]) shall be allowed to participate in a rowing activity in accordance with their expressed gender identity irrespective of the sex listed on the athlete's

birth certificate or student records, and regardless of whether the athlete has undergone any medical treatment . . . ."); USA Volleyball, *Gender Competition Guidelines (2022-23 Season)*, https://usavolleyball.org/about/gender-guidelines (last visited Apr. 1, 2023) ("[n]o restrictions" for transgender girls ages 12 and under seeking to play on girls' teams outside of international competition).

In the international, non-school-based context, some sport governing bodies have adopted policies restricting participation in high-level international women's competition to female athletes who have not experienced male puberty, *see, e.g.*, International Swimming Federation (FINA), *Policy on Eligibility for the Men's and Women's Competition Categories* (June 19, 2022) (FINA Policy on Eligibility), https://resources.fina.org/fina/document/2022/06/19/525de003-51f4-47d3-8d5a-716dac5f77c7/FINA-INCLUSION-POLICY-AND-APPENDICES-FINAL-.pdf; or restricting participation in international events and setting of certain recognized world records to those who satisfy specific testosterone suppression criteria for a set period of time, *see*, *e.g.*, Union Cycliste Internationale, *Eligibility Regulations for Transgender Athletes* (June 22, 2022) (UCI Eligibility Regulations), https://assets.ctfassets.net/761l7gh5x5an/Et9v6Fyux9fWPDpKRGpY9/96949e5f7bbc8e34d536731c504ac96f/Modification_Transgender_Regulation_22_Juin_2022_ENG.pdf. In addition, at least one international governing body has announced plans to revisit its existing criteria with the stated goal of creating inclusive policies that allow for safe participation and fairness in high-level international competition. *See*, *e.g.*, World Lacrosse, *World Lacrosse Forms Partnership with National Center for Transgender Equality to Create Trans-Inclusive Participation Policy* (June 9, 2022), https://worldlacrosse.sport/article/world-lacrosse-forms-partnership-with-national-center-for-transgender-equality.

At the secondary school level, State athletic associations have discussed whether and how to adopt sex-related eligibility criteria against the backdrop of State and Federal law, schools'

experiences with transgender students' participation in athletics, and the context and purpose of interscholastic athletics. *See, e.g.*, Luke Modrovsky, *Transgender Athletes – Participation, Equity and Competition* (May 12, 2022), https://www.nfhs.org/articles/transgender-athletes-participation-equity-and-competition. A report on these discussions includes an observation from a statewide athletic official that although competition is an integral aspect of athletics, the opportunity to participate in athletics at the elementary and secondary levels also serves other educational purposes, including learning to work as a team and building skills. *See id*. (quoting the executive director of a State athletic association explaining that "the purpose of interscholastic activities is meant to be education-based and not for the sole purpose of achieving scholarships, championship titles and wider recognition in the sport" and that "[i]nterscholastic activities remain an opportunity to develop a connection with teammates and the school community, in addition to social, emotional, physical and cognitive development").

A number of State athletic associations that oversee interscholastic athletics at the secondary school level, as well as school districts, have adopted policies permitting transgender students to participate on athletic teams consistent with their gender identity with minimal or no restrictions. *See*, *e.g*., Wash. State Interscholastic Activities Ass'n, *Gender Diverse Youth Sport Inclusivity Toolkit* at 8, 11 (2021), http://wiaa.com/ConDocs/Con1914/Gender Diverse Toolkit.pdf ("All students should have the opportunity to participate in WIAA athletics and/or activities in a manner that is consistent with their gender identity. . . . Athletes will participate in programs [offered separately for boys and girls] consistent with their gender identity . . . ."); R.I. Interscholastic League, *Rules & Regulations* at art. 3, § 3(B) (2022), https://www.riil.org/page/3033 ("The RIIL has concluded that it would be fundamentally unjust and contrary to applicable state and federal laws, to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes."); L.A. Unified Sch. Dist., *Policy Bulletin: Gender Identity and Students – Ensuring Equity and Nondiscrimination* at section II.H.2 (May 17, 2019),

https://achieve.lausd.net/cms/lib/CA01000043/Centricity/Domain/383/BUL-6224.2%20Transgender%20Policy%205%2013%2019.pdf ("Participation in competitive athletics, intramural sports, athletic teams, competitions and contact sports shall be facilitated in a manner consistent with the student's gender identity . . . ."). Other State athletic associations governing interscholastic sports at the middle school and high school level have adopted sex-related criteria that may restrict some students from participating on male or female teams consistent with their gender identity. *See*, *e.g.*, N.M. Activities Ass'n, *Eligibility Bylaws* section 6.1 (July 1, 2022), https://www.nmact.org/file/Section_6.pdf ("Participating students are required to compete in the gender listed on their original or amended birth certificate."); Wis. Interscholastic Athletic Ass'n, *Transgender Participation Policy* (2018), https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf (requiring, among other things, that transgender girls undergo one year of testosterone suppression therapy to be eligible to participate on a female team).

The Department finds the work of these organizations on this issue to be informative to the extent the organizations aim to balance important interests, minimize harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied, and take account of the sport, level of competition, and grade or education level of students.

Opportunity to Participate on Male and Female Teams Consistent with Gender Identity

In light of the many positive benefits of participation in school athletics discussed above, the Department's proposed regulation reflects the understanding that students may be harmed significantly if a school denies them the opportunity to participate in its athletic program consistent with their gender identity. As discussed elsewhere in this preamble, participation on a team that is inconsistent with a student's gender identity is not a viable option for many students. *See*, *e.g.*, *A.M.*, 2022 WL 2951430, at *11 (describing a policy that prohibited students from participating on teams consistent with their gender identity as "punish[ing]" those students);

Hecox, 479 F. Supp. 3d at 977 ("Participating in sports on teams that contradict one's gender identity is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical." (internal quotation marks and citation omitted)).

Federal and State courts also have identified additional, specific harms to transgender students from being excluded from team participation consistent with their gender identity, which the Department recognizes are distinct from the harms to students who are denied the opportunity to participate on a particular team based on sex under the circumstances permitted in the Department's longstanding athletics regulation. *See*, *e.g.*, *A.M.*, 2022 WL 2951430, at *6, *12 (noting that "[p]laying softball helps to lessen the distressing symptoms of gender dysphoria that A.M. suffers from and has allowed her to experience life more fully as a girl" and "[s]oftball participation has resulted in a better self-image and confidence for A.M." whereas "prohibiting A.M. from playing on the girls' softball team will 'out' her to her classmates" and "undermine her social transition"); *Hecox*, 479 F. Supp. 3d at 987 (finding that a State law preventing transgender women from participating on women's athletic teams sponsored by public schools would harm the plaintiff, a transgender woman, by denying her the opportunity to try out for and compete on women's teams, subjecting her to the State's moral disapproval of her identity, and subjecting her to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex); *Roe v. Utah High Sch. Activities Ass'n*, No. 220903262, 2022 WL 3907182, at *9-10 (Utah 3d Jud. Dist. Aug. 19, 2022) (describing irreparable harm to mental and physical health that the plaintiffs, three transgender girls, "have suffered, and will continue to suffer" as a result of a Utah law banning transgender girls from participating on girls' athletic teams and recognizing that "the stigma caused by the Ban has been immediate").

Federal courts have also recognized that, because of these harms, excluding transgender students from participating on male or female athletic teams consistent with their gender identity can violate Title IX's prohibition on sex discrimination. *See, e.g.*, *A.M.*, 2022 WL 2951430, at

*11 (finding strong likelihood of success on the merits of the Title IX claim because prohibiting an individual from playing on a team consistent with their gender identity "'punishes that individual for his or her gender non-conformance,' which violates the clear language of Title IX" (citation omitted)); *see also Hecox*, 479 F. Supp. 3d at 977, 987 (in a case involving an equal protection claim, finding that a transgender college student faced "irreparable harm" from Idaho law categorically barring transgender girls and women from participating on girls' or women's teams and that the law "entirely eliminates their opportunity to participate in school sports"). As noted above, the court in *B.P.J.* reached a different conclusion about the permissibility under Title IX of a ban on transgender students participating in team sports consistent with their gender identity, based on its view that the current regulation would permit such an exclusion and that transgender girls could try out for the boys' teams. 2023 WL 111875, at *9 (citing 34 CFR 106.41(b) and (c)).

Elements of the Proposed Regulation

The proposed regulation would require that 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. The proposed regulation would not affect a recipient's discretion under current § 106.41(b) to offer separate male and female athletic teams when selection is based on competitive skill or the activity involved is a contact sport. The following discussion separately addresses key elements of the proposed regulation.

Eligibility Criteria Covered by the Proposed Regulation

The proposed regulation would govern a narrow category of athletic eligibility criteria: only those 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. Many schools have adopted criteria that govern students' eligibility to participate on athletic teams that are unrelated to sex, such as attendance or academic standing requirements (*e.g.*, minimum grade-point average for all student-athletes). Criteria such as these are outside the scope of the proposed regulation.

By contrast, eligibility criteria would fall within the scope of the proposed regulation if they are sex-related (*e.g.*, they relate to how a student's sex is determined for team-eligibility purposes, including by imposing eligibility requirements related to a student's sex characteristics) and they would limit or deny students' eligibility to participate on a male or female team consistent with their gender identity. These criteria could include, for example, a requirement limiting or denying a student's eligibility for a male or female team based on a sex marker on an identification document, such as a birth certificate, passport, or driver's license. Criteria requiring physical examinations or medical testing or treatment related to a student's sex characteristics would also fall within the proposed regulation's scope if the results of such examinations or testing or requiring such treatment could be used to limit or deny a student's eligibility to participate consistent with their gender identity. Such criteria, like other sex-related eligibility criteria, would have to adhere to the proposed regulation's requirements, including the requirement to minimize harms.

The proposed regulation would not prohibit all uses of sex-related criteria; rather, it would require that if such criteria limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, those criteria, for each sport, level of competition, and grade or education level, would have to 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.

Additionally, the proposed regulation would apply only to those sex-related criteria that would "limit or deny" students' eligibility to participate consistent with their gender identity.

Sex-related criteria would "limit" eligibility if, for example, they do not allow transgender students to participate fully on a male or female team consistent with their gender identity (*e.g.*, by permitting a student to participate in some but not all competitions). Sex-related criteria would "deny" students' eligibility to participate consistent with gender identity if they foreclose students' opportunity to participate on male or female teams consistent with their gender identity (*e.g.*, by requiring transgender students to participate consistent with their sex assigned at birth or by prohibiting transgender girls who have undergone endogenous puberty from participating on girls' teams).

Substantially Related to the Achievement of an Important Educational Objective

The proposed regulation would require that sex-related criteria be "substantially related to the achievement of an important educational objective" if those criteria would limit or deny students' eligibility to participate on male or female athletic teams consistent with their gender identity. Proposed § 106.41(b)(2) does not specify the objectives that a recipient may assert and instead would implement Title IX's guarantee of equal opportunity in education by, in part, specifying that the criteria must serve an important educational objective.

The Department's proposed regulation is similar to the approach in the Department's current Title IX regulation governing single-sex classes, 34 CFR 106.34(b), which permits certain recipients to offer single-sex classes when the single-sex nature of the class is "based on the recipient's important objective" and "substantially related to achieving that objective." That regulation limits a recipient to one of two specific important educational objectives.[11] Although the proposed athletics regulation would not limit the important educational objectives a recipient

[11] Specifically, § 106.34(b)(1)(i) provides that a recipient must choose one of these two important educational objectives: "(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or (B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective."

may seek to achieve, ensuring fairness in competition and prevention of sports-related injury are examples of possible important educational objectives that recipients have asserted and might assert in the future. As with the single-sex classes regulation, this proposed regulation is informed by case law interpreting the Equal Protection Clause, which requires public schools to demonstrate that any sex-based classification they seek to impose is substantially related to the achievement of an important governmental objective. *See Virginia*, 518 U.S. at 532-33; *Hecox*, 479 F. Supp. 3d at 973; *see also* 71 FR 62533.

The Department notes that a recipient could not satisfy the proposed regulation's requirement that criteria be substantially related to achieving an important educational objective if its objective is communicating or codifying disapproval of a student or a student's gender identity. *See*, *e.g.*, *Hecox*, 479 F. Supp. 3d. at 987 (describing Idaho's restriction as impermissibly communicating the State's moral disapproval of the transgender plaintiff's identity); *cf. Romer v. Evans*, 517 U.S. 620, 634-35 (1996) ("'[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" (alterations and emphasis in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))). Nor may a recipient adopt sex-related criteria solely for the purpose of excluding transgender students from sports, *Hecox*, 479 F. Supp. 3d at 984-85 (noting the State of Idaho failed to identify a legitimate interest served by the State law that State and athletic association rules did not already address, "other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics"), or to require adherence to sex stereotypes, *Virginia*, 518 U.S. at 533 (affirming that States "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"), or solely for the purpose of administrative convenience. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980) (rejecting justification for providing death benefit to women only based on assertion that "it is more efficient to presume

[women's] dependency [on men . . .] than to engage in case-to-case determination"); *Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973).

An asserted purpose also would not satisfy the proposed regulation if, rather than being a genuine educational objective of the recipient, it is a pretext for an impermissible interest in singling out transgender students for disapproval or harm. *See*, *e.g.*, *Hecox*, 479 F. Supp. 3d at 984 (noting Idaho "[l]egislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender athletes"); *cf. Virginia*, 518 U.S. at 533 (explaining that a State's justification for sex-related differential treatment "must be genuine, not hypothesized or invented *post hoc* in response to litigation").

Separately, interests in fairness in competition and in preventing sports-related injury to students have been advanced by some stakeholders and discussed by Federal courts in evaluating sex-related eligibility criteria for limiting or denying students' participation on male or female teams consistent with their gender identity. Thus, the Department anticipates that a recipient might assert fairness in competition or prevention of sports-related injury as an important educational objective in its athletic programs, particularly for older students in competitive athletic programs.

The Department recognizes that competition is an integral part of many team sports, particularly at the high school and collegiate level, and that schools have an interest in ensuring competition is fair, including that competitors meet the relevant criteria for competition in their league, such as age and skill level, following applicable rules, and otherwise engaging in fair play. *See, e.g.*, 2008 Dear Colleague Letter on Title IX and Athletic Activities (considering competition, among other factors, when determining whether an activity is a sport that can be counted as part of a recipient's athletic program for the purpose of evaluating Title IX compliance and noting that competitive interscholastic and intercollegiate athletic opportunities are generally "governed by a specific set of rules of play . . . which include objective, standardized criteria by which competition must be judged"). Likewise, the Department

recognizes that schools have an interest in the prevention of sports-related injury. As some stakeholders expressed, ensuring fair competition and prevention of sports-related injury does not necessarily require schools to adopt or apply 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. As discussed above, many schools do not impose such restrictions, and some sport governing bodies impose such restrictions only for older students in highly competitive settings. *See*, *e.g.*, USRowing, *Gender Identity Policy* at 1; FINA Policy on Eligibility.

Some stakeholders expressed their views that fairness in competition depends on having generally applicable competition rules and cannot be determined based on whether a particular student wins or loses, and that schools and athletic associations use various strategies to address injury-related concerns, recognizing that student-athletes vary widely in size and strength on any given team. Strategies noted by stakeholders included appropriate coaching and training, requiring use of protective equipment, and specifying rules of play, all of which can protect against sports-related injury without imposing sex-related eligibility criteria that would limit or deny student participation consistent with their gender identity. Some of these stakeholders thus asserted that the goals of fair competition and prevention of sports-related injury could be achieved while allowing all students the opportunity to participate on athletic teams consistent with their gender identity, particularly at pre-collegiate and college club and intramural levels.

On the other hand, other stakeholders noted that they would view eligibility rules that permit participation by transgender students as unfair or unsafe and asserted that some female students might choose not to participate on female teams under such rules. Many of these stakeholders focused their comments on participation by transgender girls and women who have undergone endogenous puberty, resulting in potentially unfair advantages in size, weight, and strength differences and potentially posing a risk of injury to others. Other stakeholders countered, as noted above, that there are significant differences in size, weight, and strength among girls and women who are not transgender. Some of these stakeholders also indicated that

mitigating measures would be sufficient to address any risk of unfair advantage in competition or risk of sports-related injury on female teams.

Courts have found fairness in competition to be an important educational objective in the context of determining whether schools could provide sex-separate athletic teams. For example, in *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982), the Ninth Circuit recognized the importance of "providing equal opportunities for women" athletes and agreed with the Arizona Interscholastic Association that male students would displace female students in volleyball "to a substantial extent" if not excluded from competition. And, in *Hecox*, the court and all parties recognized Idaho's important governmental interest in promoting sex equality by providing female athletes from elementary school through college a fair opportunity "to demonstrate their skill, strength, and athletic abilities" in school-sponsored athletic competition. 479 F. Supp. 3d at 978.

The Department recognizes fairness in competition and prevention of sports-related injury can be important educational objectives. This recognition is consistent with stakeholder feedback, case law, and current § 106.41(b), which permits teams to be separated by sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. Although many schools presently work to ensure fairness in competition and prevention of sports-related injury while allowing all students to participate on male or female teams consistent with their gender identity, the proposed regulation would permit a recipient to take a different approach as long as the criteria used to determine who can participate on a particular male or female athletic team are substantially related to achieving that important educational objective and comply with the proposed regulation's other requirements.

Substantial Relationship Requirement

Under the Department's proposed regulation, 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 would need to be, for each sport, level of competition, and grade or education level,

"substantially related" to achieving an important educational objective.

As discussed above, the substantial relationship requirement, like the achievement of an important educational objective, is similar to the standard in the Department's Title IX regulation governing access to single-sex classes, 34 CFR 106.34, and informed by case law interpreting the Equal Protection Clause. *See Virginia*, 518 U.S. at 532-33; *Hecox*, 479 F. Supp.3d at 978. Under the proposed regulation, consistent with courts' equal protection analysis, sex-related criteria would be substantially related to achievement of an important educational objective if there is a "direct, substantial relationship between" a recipient's objective and the means used to achieve that objective, *see Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), and if the criteria do not rely on overly broad generalizations about the talents, capacities, or preferences of male and female students, *see*, *e.g.*, *Virginia*, 518 U.S. at 533; *Hecox*, 479 F. Supp. 3d at 982 ("[I]t appears the 'absolute advantage' between transgender and cisgender women athletes [claimed by defendants] is based on overbroad generalizations without factual justification.").

Under proposed § 106.41(b)(2), for example, a recipient would be permitted, consistent with Title IX's requirement to provide overall equal athletic opportunity for students regardless of sex, to rely on fairness in competition as an important educational objective to justify its use of sex-related criteria that would limit or deny students' eligibility to participate consistent with their gender identity—but only if those criteria are substantially related to ensuring fairness in competition in that particular sport at the applicable level of competition and grade or education level. *Cf. Clark*, 695 F.2d at 1127 (upholding policy excluding boys from girls' high school volleyball teams to preserve participation opportunities for girls). As courts have noted, for example, it would not be reasonable to assume that all transgender girls and women are similarly situated in their physical abilities to cisgender boys and men. *See*, *e.g.*, *Hecox*, 479 F. Supp. 3d. at 978. Therefore, criteria that assume all transgender girls and women possess an unfair physical advantage over cisgender girls and women in every sport, level of competition, and grade or education level would rest on a generalization that would not comply with the

Department's proposed regulation. The court in *Hecox* made a similar point when it rejected the premise of an Idaho law that, in every circumstance, "transgender women and girls have 'an absolute advantage' over non-transgender girls" because evidence in the record "undermine[s] this conclusion." 479 F. Supp. 3d at 980-81. The court found that although "[t]he Equal Protection Clause does not require courts to disregard the physiological differences between men and women," the specific principles that support "sex separation in sport" generally "do not appear to hold true for women and girls who are transgender." *Id*. at 976-77 (discussing *Clark*, 695 F.2d at 1129, 1131). Criteria that categorically exclude all transgender girls and women from participating on any female athletic teams, for example, would not satisfy the proposed regulation because, in taking a one-size-fits-all approach, they rely on overbroad generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply.

A State trial court in Utah observed that "the evidence suggest[ed] that being transgender is not 'a legitimate accurate proxy' for athletic performance." *Utah High Sch. Activities Ass'n*, 2022 WL 3907182, at *8 (citations omitted). That court explained that "[m]any transgender girls—including two of the plaintiffs in this case—medically transition at the onset of puberty, thereby never gaining any potential advantages that the increased production of testosterone during male puberty may create." *Id*. The court also noted that other transgender girls "may simply have no discernible advantage in any case, depending on the student's age, level of ability, and the sport in which they wish to participate." *Id*. In short, although fairness in competition may be an important educational objective, the recipient's sex-related eligibility criteria must be substantially related to the actual achievement of that objective. That substantial relationship could not be established by reliance on overbroad generalizations based on sex.

Similarly, although some stakeholders expressed a concern that allowing any transgender girls and women to participate in sports consistent with their gender identity could displace cisgender girls and women from participating in sports, other stakeholders observed that very

few female student-athletes are transgender and, as just discussed, transgender students do not necessarily have greater physical or athletic ability than cisgender students that would affect cisgender students' equal opportunity to participate in a recipient's athletic program. Some courts have also observed that the very small number of transgender girls and women who are student-athletes must be considered when evaluating claims that those athletes pose an outsized risk to participation by and opportunities for cisgender girls and women who are student-athletes. *See*, *e.g.*, *Utah High Sch. Activities Ass'n*, 2022 WL 3907182, at *8 (finding "no support for a claim 'that allowing transgender women to compete on women's teams would substantially displace female athletes'" (quoting *Hecox*, 479 F. Supp. 3d at 977-78)).

The substantial relationship requirement thus would mean that if a recipient adopts or applies sex-related criteria that would limit or deny students' eligibility to participate on a male or female team consistent with their gender identity, the justification for those criteria must be based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Miss. Univ. for Women*, 458 U.S. at 726; *see also*, *e.g.*, *Clark*, 695 F.2d at 1129 (explaining that sex-based criteria would not be substantially related to promoting fairness in competition if based on overbroad generalizations "without factual justification" (citing *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), and *Miss. Univ. for Women*, 458 U.S. 718)).

If a school can achieve its objective using means that would not limit or deny a student's participation consistent with their gender identity, its use of sex-related criteria may be pretextual rather than substantially related to achievement of that important educational objective. Thus, under proposed § 106.41(b)(2), whether the objective could be accomplished through alternative criteria that would not limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity would be relevant to the analysis.

Federal courts have taken a similar approach in evaluating challenges to sex-based classifications under the Equal Protection Clause by considering whether government entities

could achieve the same goal using other means. For example, the Supreme Court noted that it was uncontested that the Virginia Military Institute could achieve its goal of maintaining its adversative training program with some adjustments short of denying admission to all female applicants. *Virginia*, 518 U.S. at 550 n.19; *see also, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017) ("[O]ur decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn."); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (rejecting the use of gender-based classifications where an important governmental interest is "as well served by a gender-neutral classification" because a gender-based classification "carries with it the baggage of sexual stereotypes"); *Caban v. Mohammed*, 441 U.S. 380, 393 & n.13 (1970) (rejecting sex-based distinction while noting that the State could achieve its interests "through numerous other mechanisms more closely attuned to those interests").

The Department notes that to satisfy the substantial relationship requirement, a recipient would not be permitted to rely on false assumptions about transgender students. For example, criteria that exclude transgender students from participation on a male or female team based on a false assumption that transgender students are more likely to engage in inappropriate conduct than other students would not satisfy the proposed regulation because the criteria would not be substantially related to achieving an important educational objective. *See, e.g.*, *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir. 2020) (rejecting Title IX claim because "[t]he use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender"); *Doe v. Boyertown Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018) (rejecting claim that a transgender student's presence in sex-separate facilities violated cisgender students' Title IX rights and distinguishing cases involving voyeurism and sexual harassment as not analogous). Moreover, nothing in Title IX precludes a school from taking nondiscriminatory steps to prevent misconduct and protect privacy for all students.

Grade or Education Level

The Department's proposed regulation would require that sex-related eligibility criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity must, for each grade or education level, be substantially related to the achievement of an important educational objective. This requirement would recognize that students of varying grades or education levels are not necessarily similarly situated with respect to the purposes of team participation, the harms resulting from exclusion from participation, their athletic skills development, other developmental factors, or their legal status as a minor or adult. Thus, any sex-related eligibility criteria must account for those factors that affect students in the particular grade or education level to which the criteria would apply.

Although competition is an aspect of many team sports across grades and education levels, athletic teams offered by schools for students in earlier grades, including those in elementary and middle school, also present an important opportunity to introduce students to new activities for which little or no prior experience is required, acquire basic skills associated with a particular sport, and develop introductory skills related to physical fitness, leadership, and teamwork. *See* Kelsey Logan & Steven Cuff, Am. Acad. Pediatrics Council on Sports Med. & Fitness, *Organized Sports for Children, Preadolescents, and Adolescents*, Pediatrics (June 2019), https://publications.aap.org/pediatrics/article/143/6/e20190997/37135/Organized-Sports-for-Children-Preadolescents-and (associating participation in organized sports in childhood with long-term participation in organized sports, development of life skills, and a high level of physical fitness later in life). Reinforcing this point, the Department's review of the publicly available athletic association policies for all 50 States and the District of Columbia and Puerto Rico indicates that the overwhelming majority of State athletic associations do not regulate athletic competition between elementary school teams.

Similarly, the Department's review found that only about half of State athletic associations regulate athletic activities in middle school, and many of those that regulate make

clear the mission of athletics in those grades is to encourage broad participation, basic skills development, and other aspects of student well-being. *See, e.g.*, Wis. Interscholastic Athletic Ass'n, *Middle Level Handbook* (2022-23) at 2, https://www.wiaawi.org/Portals/0/PDF/Publications/jrhandbook.pdf ("The developmental characteristics of young adolescents should provide the foundation for the middle level athletic programs and philosophy. . . . Programs should promote behaviors that include cooperation, sportsmanship and personal improvement. Winning is not the primary goal of the program. . . . The program should be open to all young adolescents and provide a positive experience. All young adolescents should have the opportunity to participate, play and experience skill improvement."); Iowa High Sch. Athletic Ass'n, *Junior High Sports Manual* (2021-23) at 1, https://www.iahsaa.org/wp-content/uploads/2022/08/2021-23-Junior-High-Manual-8.17.22.pdf ("The primary purpose of the junior high school athletic program is participation, with emphasis on the development of skills, sportsmanship, and citizenship of all students."); S.C. High Sch. League, *2022-23 Middle School Rules & Regulations* at 1, https://schsl.org/archives/7950 ("The program must be justified on a basis of contribution to the desirable development of the participants. The welfare of the youth concerned is of greatest importance. All other needs and problems should be secondary.").

One State athletic association explained, for example, that member schools' goals for offering interscholastic athletic competition and activities for middle school students should encourage broad participation for students in middle school in recognition of the "great range of individual differences among boys and girls of this age (age; body build; interest; ability; experience; health, and the stages of physiological, emotional and social maturity)." S.C. High Sch. League, *2022-23 Middle School Rules & Regulations* at 1, https://schsl.org/archives/7950. To that end, it directs schools to approach competition "from as broad a base as possible to offer experience to many boys and girls." *Id.*

The Department recognizes that recipients that offer male and female teams to students in

early grades have a significant interest in providing all of their students an opportunity to gain foundational physical, emotional, academic, and interpersonal benefits, and other life skills associated with team sports participation regardless of sex. *See* Kelsey Logan & Steven Cuff, Am. Acad. Pediatrics Council on Sports Med. & Fitness, *Organized Sports for Children, Preadolescents, and Adolescents*, Pediatrics (June 2019) (describing the many benefits of youth participation, including children, preadolescents, and adolescents, in organized sports); Anne C. Fletcher et al., *Structured Leisure Activities in Middle Childhood: Links to Well-Being*, J. Community Psychology 31-6, 641-59 (2003) (associating greater psychosocial development with participation in sport activities in elementary school). Barring students from participating on teams consistent with their gender identity may impede them from developing an interest in or aptitude for team sports or for athletic activity altogether, including into adulthood, resulting in negative health and well-being consequences and long-term loss of opportunity. *See, e.g.*, Sandra D. Simpkins et al., *Participating in Sport and Music Activities in Adolescence: The Role of Activity Participation and Motivational Beliefs During Elementary School*, 39 J. Youth Adolescence 1368 (2009), https://link.springer.com/article/10.1007/s10964-009-9448-2 (concluding that elementary school children who did not participate in sports were unlikely to participate when they become adolescents); *cf. A.M.*, 2022 WL 2951430, at *11 (describing distress and other harms associated with prohibiting students from playing on a team consistent with their gender identity).

Accordingly, the Department currently believes that there would be few, if any, sex-related eligibility criteria applicable to students in elementary school that could comply with the proposed regulation, and that it would be particularly difficult for a recipient to comply with the proposed regulation by excluding students immediately following elementary school from participating on male or female teams consistent with their gender identity. The Department welcomes comments on whether any sex-related eligibility criteria can comply with this proposed regulation when applied to students in these earlier grades and, if so, the types of

criteria that may comply with the proposed regulation. The Department anticipates that at the high school and college level, schools' application or adoption of sex-related eligibility criteria to ensure an important educational objective, such as fairness in competition in their athletic programs, may be more likely to satisfy the proposed regulation.

Level of competition

The proposed regulation would specify that any sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team must be substantially related to achieving an important educational objective for each level of competition to which it applies.

This aspect of the proposed regulation would recognize that school-based athletic team offerings vary widely across the United States. To the extent teams are offered for students at earlier grades and levels of education, many schools prioritize broad participation and teaching basic skills. These teams are often not highly selective, including "no-cut" teams that allow all students to join the team and participate, and rarely provide elite competition opportunities, as discussed above in *Existing Approaches to Eligibility Criteria for Male and Female Teams*. Some schools also offer teams at lower levels of competition that are designed to encourage broad participation and help students build basic skills (*e.g.*, intramural, junior varsity, unified) that often permit all or most interested students to participate without an expectation of high-level competition (*e.g.*, varsity). Other teams, more typically for older students who have advanced skills, including at many postsecondary institutions, are more selective and engage in elite competition. *See generally* NCAA, *Overview*, https://www.ncaa.org/sports/2021/2/16/overview.aspx (last visited Mar. 29, 2023) (describing levels of intercollegiate competition for member colleges and universities).

Some stakeholders urged the Department to develop regulations governing the participation of students on male or female teams consistent with their gender identity in a manner that accounts for different levels of competition. In a view expressed by some stakeholders, a one-size-fits-all policy approach would not be appropriate because athletic

participation is organized differently at various levels of competition with some male and female teams open to all students and some that accommodate a larger roster of students with widely varying skill levels. Some stakeholders also noted that at high levels of competition in high school, students may be competing with each other for limited scholarship and recruitment opportunities. Some stakeholders urged that it is appropriate for sex-related criteria that govern the participation of athletes consistent with gender identity to account for differences at these levels of competition.

The Department is also aware of distinctions that national and international sport governing bodies draw among athletes at different levels of competition. In some cases, the criteria that these organizations require transgender athletes to meet to participate on a male or female team consistent with their gender identity differ based on the level of competition. As noted above, for example, USA Gymnastics permits transgender athletes to participate "without restriction" in all competition activities below the elite level. USA Gymnastics, *Transgender & Non-Binary Athlete Inclusion Policy* at 2. Similarly, World Athletics, the international governing body for track and field events, has adopted regulations that apply only at the World Rankings competition level or to athletes who wish to have their performance at a lower competition level recognized as a World Record. World Athletics permits member federations to set their own regulations to determine eligibility to participate in lower level competitions consistent with an athlete's gender identity. *See* World Athletics, *Rule C3.5A-Eligibility Regulations for Transgender Athletes* (Mar. 2023) (Rules 2.1 and 2.5), https://www.worldathletics.org/about-iaaf/documents/book-of-rules.

In light of these examples, the Department proposes a standard that would specifically require a recipient that adopts or applies sex-related eligibility criteria for male and female teams to account for the level of competition at issue. As noted above, the Department expects sex-related eligibility criteria to be more common and more likely to satisfy the proposed regulation at higher grade levels, particularly high school and postsecondary levels.

Sport

The proposed regulation would specify that any sex-related criteria for eligibility to participate on a male or female team must be substantially related to achievement of an important educational objective for each sport to which it applies. This requirement is consistent with the Javits Amendment's direction that the Title IX regulations include reasonable athletics provisions that "consider[] the nature of particular sports." Education Amendments of 1974 section 844.

The Department proposes this requirement because not all differences among students confer a competitive advantage or raise concerns about sports-related injury in every sport, and "[c]lassification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo 'archaic and overbroad generalizations.'" *Att'y Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 293 (Mass. 1979) (citations omitted) (rejecting the athletic association's argument that it was justified in imposing a complete ban on male athletes participating on female athletic teams because of an assertion of the male athletes' competitive advantage in all sports); *see also*, *e.g.*, *Utah High Sch. Activities Ass'n*, 2022 WL 3907182, at *8-9 (finding that challenged Utah law had a substantial likelihood of violating the State constitution because it "prevents *all* transgender girls from competing on *all* girls' teams, regardless of any potentially relevant factors, such as . . . the nature of the particular sport" (emphasis in original)).

School districts and postsecondary institutions offer a wide selection of sports (*e.g.*, badminton, baseball, basketball, bowling, curling, football, golf, gymnastics, riflery, skiing, soccer, softball, swimming and diving, tennis, trap shooting, volleyball, water polo). *See* Nat'l Fed'n of State High Sch. Ass'ns, *High School Athletics Participation Survey (2021-22)*, https://www.nfhs.org/media/5989280/2021-22_participation_survey.pdf. These and other sports that schools offer each have unique rules and prioritize varied skills and attributes. Likewise, students on any given team will typically vary significantly in skills, size, strength, and other

attributes that may be relevant to their chosen sport or position within a sport. Thus, under the proposed regulation, any sex-related eligibility criteria for male or female teams that would limit or deny participation consistent with gender identity would need to be substantially related to achieving an important educational interest in relation to the particular sport to which the criteria apply. Overbroad generalizations that do not account for the nature of particular sports would not be sufficient to comply with the proposed regulation.

The proposed regulation also would address issues raised in feedback the Department received from stakeholders who suggested that any regulations the Department might adopt should account for variations among sports. Stakeholders noted that outside the educational setting, national and international sport governing bodies set rules for participation and competition that differ by sport. As discussed above, the NCAA and the IOC have directed the entities that set rules for participation and competition in intercollegiate and international sporting events recognized by the NCAA and the IOC respectively to adopt a sport-specific approach for any sex-related eligibility criteria to participate on male or female teams consistent with gender identity. As the IOC explained, sport governing bodies must ensure that any sex-related eligibility criteria included in their policies "tak[e] into consideration the nature of each sport," IOC Framework at 1, and account for any sport-specific competitive advantage or risk, *id*. at 4. The Department notes, however, that the proposed regulation would not necessarily require schools to adopt distinct eligibility criteria for each sport; rather, where sex-related criteria would limit or deny students' eligibility to participate consistent with their gender identity, the criteria must satisfy the proposed regulation as applied to that sport.

The proposed regulation would therefore provide that, in light of the variation among sports, a recipient that adopts or applies sex-related eligibility criteria for male or female teams must demonstrate that its criteria are substantially related to achievement of an important educational objective for the particular sport to which they apply.

Harm Minimization Requirement

Proposed 106.41(b)(2) would also require that, if a recipient adopts or applies sex-related criteria that would limit or deny students' eligibility to participate on a male or female team consistent with their gender identity, it must do so in a way that minimizes harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

As explained earlier in this preamble, Title IX generally prohibits a recipient from excluding students from an education program or activity on the basis of sex when the exclusion causes more than de minimis harm. When students are separated or treated differently based on sex, a recipient risks harming those students in a way that would ordinarily violate Title IX. *See* 34 CFR 106.31(b)(4) and (7) (providing that, "[e]xcept as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex . . . [s]ubject any person to separate or different rules of behavior, sanctions, or other treatment . . . [or] [o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity"); *see also*, *e.g.*, *Grimm*, 972 F.3d at 617 (recognizing that school's imposition of different rules on transgender students than other students in their use of school facilities was "sufficient to constitute harm under Title IX"). *But see Adams*, 57 F.4th at 814-15 (holding school district policy that excludes transgender students from restrooms that correspond to their gender identity does not violate Title IX regulations because of the language of 34 CFR 106.33). The July 2022 NPRM proposed amendments to the Department's Title IX regulations that would clarify that a recipient must not separate or treat students differently in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm unless otherwise permitted by Title IX or the Department's Title IX regulations. 87 FR 41534-37. Those proposed amendments would further clarify that a policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than de minimis harm on the basis of sex. *Id*.

Consistent with the Javits Amendment, the Department's Title IX regulations have taken a different approach in the athletics context, permitting a recipient to offer male and female athletic teams to promote equal opportunity for all athletes, even though some harm may be caused when a recipient offers sex-separate athletic teams. In particular, current § 106.41(b), in place since 1975, permits a recipient to offer male and female athletic teams under certain circumstances, and such teams may in those circumstances exclude some students on the basis of sex. This longstanding requirement reflects the Department's recognition that a recipient's provision of male and female teams can advance rather than undermine overall equal opportunity in the unique context of athletics by creating meaningful participation opportunities that were historically lacking for women and girls. *See* 1979 Policy Interpretation, 44 FR 71421 ("If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby.").

The Department also recognizes that overall equal opportunity does not require identical programs for male and female athletes, *id*. at 71421-22, and thus a recipient may, and has always been permitted to, deny students the opportunity to participate on a particular male or female team based on sex under certain circumstances. For example, a recipient may, in some circumstances, offer a volleyball team for girls but not boys, and a boy who would like to play on the school's volleyball team may not be able to do so for reasons discussed above. But the permissibility of sex-separate teams does not exempt a recipient from its responsibility not to otherwise discriminate based on sex when offering opportunities to participate on those teams.

A school policy of separating students on the basis of particular reproductive or other sex-based characteristics, *see, e.g.*, *B.P.J.*, 2023 WL 111875, at *2 (evaluating West Virginia's classification of students based on "reproductive biology and genetics at birth"), will not materially harm the vast majority of students, as those sex-related criteria permit them to participate on athletic teams consistent with their gender identity. But when sex-related criteria do limit or deny a student's eligibility to participate on a male or female athletic team consistent

with their gender identity, the student is subjected to harms based on sex that are distinct from the harms otherwise permitted under the Department's longstanding athletics regulation (*e.g.*, a girl who is not selected for the girls' soccer team based on her athletic skills or a boy who is not eligible to play on the girls' volleyball team when the recipient does not offer a boys' or coeducational volleyball team). Criteria that limit or deny students' eligibility to participate in sports consistent with their gender identity can force individual students to disclose that they are transgender, which can be "extremely traumatic" and "undermine [a student's] social transition," *A.M.*, 2022 WL 2951430, at *11-12; subject them to "embarrassment, harassment, and invasion of privacy through having to verify [their] sex," *Hecox*, 479 F. Supp. 3d at 987; and can communicate disapproval of transgender students, "which the Constitution prohibits" in the context of public schools, *Hecox*, 479 F. Supp. 3d at 987 (citing *Lawrence v. Texas*, 539 U.S. 558, 582-83 (2003)). Further, such sex-related exclusion leaves affected students with no viable opportunity to participate in athletics if the only other option is to participate on a team that does not align with their gender identity. *Hecox*, 479 F. Supp. 3d at 977 (citing evidence that, for transgender students, participating on a team that is inconsistent with their gender identity is equivalent to medically harmful gender identity conversion efforts).

The current regulations, however, do not expressly address these distinct harms caused by sex-related criteria that limit or deny students' eligibility to participate on male or female teams consistent with their gender identity. Proposed § 106.41(b)(2) would account for such harms by requiring that such criteria be adopted and applied in a way that minimizes the harms caused to those students. As a result, even sex-related criteria that are substantially related to the achievement of an important educational objective would violate proposed § 106.41(b)(2) if the recipient can reasonably adopt or apply alternative criteria that would be a less harmful means of achieving the recipient's important educational objective. For example, a recipient might adopt sex-related criteria that require documentation of student-athletes' gender identity based on its interest in providing, consistent with Title IX, equal athletic opportunity on male and female

teams under § 106.41(c). Under proposed § 106.41(b)(2), the recipient would need to design those criteria to minimize the potential harms imposed on affected students (*e.g.*, difficulty of obtaining documentation, risk of invasion of privacy or disclosure of confidential information). If the recipient can reasonably adopt or apply alternative criteria that cause less harm and still achieve its important educational objective, the recipient would not be permitted to adopt the more harmful criteria.

In sum, the proposed regulation would preclude a recipient from implementing sex-based classifications more broadly than is necessary to implement the statute's underlying goals, consistent with Title IX's guarantee that "[*n*]*o person* in the United States" shall be subject to prohibited discrimination on the basis of sex. 20 U.S.C. 1681(a) (emphasis added). Proposed § 106.41(b)(2) would thus provide recipients greater clarity on how to comply with Title IX's nondiscrimination obligation if recipients adopt or apply sex-related criteria that would limit or deny a student's eligibility to participate on male or female athletic teams consistent with their gender identity.

Directed Questions

The Department continues to consider how its Title IX regulations should clarify the permissibility of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The Department therefore specifically invites further public comment on:

a. Whether any alternative approaches to the Department's proposed regulation would better align with Title IX's requirement for a recipient to provide equal athletic opportunity regardless of sex in the recipient's athletic program as a whole;
b. What educational objectives are sufficiently important to justify a recipient imposing sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity and whether those objectives should be specified in the regulatory text;

c. Whether and how the permissibility of particular sex-related eligibility criteria should differ depending on the sport, level of competition, grade or education level, or other considerations;

d. Whether any sex-related eligibility criteria can meet the standard set out in the proposed regulation when applied to students in earlier grades, and, if so, the type of criteria that may meet the proposed standard for those grades;

e. How a recipient can minimize harms to students whose eligibility to participate on a male or female athletic team consistent with their gender identity is limited or denied by the recipient's adoption or application of sex-related criteria; and

f. Whether regulatory text in addition to the text in the proposed regulation is needed to provide recipients with sufficient clarity on how to comply with Title IX's prohibition on sex discrimination, including gender identity discrimination, in the context of male and female athletic teams, consistent with the principles and concerns identified in the discussion of proposed § 106.41(b)(2).

Regulatory Impact Analysis (RIA)

Under Executive Order 12866,[12] the Office of Management and Budget (OMB) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

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[12] *Executive Order on Regulatory Planning and Review*, Exec. Order No. 12866, 58 FR 51735 (Oct. 4, 1993).

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed action is "significant" and, therefore, subject to review by OMB under section 3(f)(4) of Executive Order 12866. The Department has assessed the potential costs and benefits, both quantitative and qualitative, of this proposed regulatory action and has determined that the benefits would justify the costs.

The Department has also reviewed this proposed regulation under Executive Order 13563,[13] which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

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[13] *Executive Order on Improving Regulation and Regulatory Review*, Exec. Order No. 13563, 76 FR 3821 (Jan. 18, 2011), https://www.govinfo.gov/content/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

Pursuant to Executive Order 13563, the Department believes that the benefits of this proposed regulation justify its costs. In choosing among alternative regulatory approaches, the Department selected the approach that maximizes net benefits. Based on the analysis that follows, the Department believes that the proposed regulation is consistent with the principles in Executive Order 13563.

The Department also has preliminarily determined that this regulatory action would not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

This RIA discusses the need for regulatory action, the potential costs and benefits, assumptions, limitations, and data sources, as well as regulatory alternatives considered.

1. NEED FOR REGULATORY ACTION

In 2021, the President directed the Department in both Executive Order 13988[14] and Executive Order 14021[15] to review its current regulations implementing Title IX for consistency with Title IX's statutory prohibition on sex discrimination by a recipient of Federal financial

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[14] *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, Exec. Order No. 13988, 86 FR 7023 (Jan. 25, 2021).

[15] *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity*, Exec. Order No. 14021, 86 FR 13803 (Mar. 11, 2021).

assistance in its education program or activity. Consistent with those Executive orders, the Department reviewed the current regulations based on Federal case law, its experience in enforcement, and feedback received by OCR from stakeholders, including during the June 2021 Title IX Public Hearing and listening sessions. Over 280 students, parents, teachers, faculty members, school staff, administrators, and other members of the public provided live comments during the June 2021 Title IX Public Hearing, and OCR also received over 30,000 written comments in connection with the hearing. In addition, OCR conducted listening sessions with stakeholders expressing a variety of views, including individuals and organizations focused on Title IX and athletics. Among these stakeholders were athletic associations; student-athletes; parents; organizations representing elementary schools, secondary schools, and postsecondary institutions (or institutions of higher education (IHEs)); organizations representing teachers, administrators, parents, and current and former student-athletes; attorneys representing students and schools; State officials; Title IX Coordinators and other school administrators; and individuals who provide Title IX training to schools.

Based on this review, the Department proposes amending its regulations to set out a standard that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The Department received feedback from many stakeholders during the June 2021 Title IX Public Hearing and listening sessions and through correspondence asking the Department to clarify Title IX's application to students' eligibility to participate on male or female athletic teams and urging adoption of a variety of positions.

The Department proposes amending its Title IX regulations to address stakeholder concerns and anticipates that the proposed regulation would result in many benefits to recipients, students, employees, and others, including by providing clarity to help ensure compliance with Title IX's nondiscrimination requirement by recipients that seek to adopt or apply sex-related criteria to determine student eligibility to participate on male or female teams consistent with

their gender identity.

2. DISCUSSION OF COSTS, BENEFITS, AND TRANSFERS

The Department has analyzed the costs and benefits of complying with the proposed regulation. Although many of the associated costs and benefits are not readily quantifiable, the Department believes that the benefits derived from the proposed regulation would outweigh the associated costs. The Department acknowledges the interest of some stakeholders in preserving certain recipients' current athletic-team policies and procedures regarding sex-related eligibility criteria and in avoiding potential additional costs to comply with the proposed regulation. However, the Department believes the current regulations are not sufficiently clear to ensure Title IX's nondiscrimination requirement is fulfilled if a recipient adopts or applies sex-related criteria that would limit or deny students' eligibility to participate on male or female athletic teams consistent with their gender identity. The Department expects that a primary benefit of the proposed regulation would be to provide greater clarity to recipients and other stakeholders about the standard that a recipient must meet under Title IX if it adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity and, as a result, to protect students' equal opportunity to participate on male and female teams consistent with Title IX.

Title IX applies to approximately 18,000 local education agencies (LEAs) and over 6,000 IHEs. Due to the number of affected entities, the variation in likely responses, and the limited information available about current practices, the Department is not able to precisely estimate the likely costs, benefits, and other effects of the proposed regulation. The Department specifically invites public comment on data sources that would provide additional information on the issues that are the subject of this Athletics NPRM, information regarding the number of recipients operating male or female teams in intramural or club sports, and time estimates for the activities described in the Developing the Model (Section 2.B.2) discussion of the RIA, disaggregated by type of recipient. Despite these limitations and based on the best available evidence as discussed

below, the Department estimates that this proposed regulation would result in a net cost to recipients of between $23.4 million to $24.4 million over 10 years.

The assumptions, data, methodology, and other relevant materials, as applicable, on which the Department relied in developing its estimates are described throughout this RIA.

2.A. BENEFITS OF THE PROPOSED REGULATION

The Department believes that the proposed regulation would provide numerous important benefits but also recognizes that it is not able to quantify these benefits at this time. Despite the lack of quantitative data available, however, it is the Department's current view that the benefits are substantial and far outweigh the estimated costs of the proposed regulation.

In particular, the Department's current view is that the proposed regulation would benefit educational institutions and their students and applicants for admission by providing greater clarity about the standard a recipient must meet if it adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The Department expects that the clarity provided by the proposed regulation would reduce the likelihood of sex discrimination in students' opportunities to participate on male or female teams offered by a recipient. By reducing the sex discrimination resulting from confusion surrounding the permissibility of sex-related eligibility criteria, it is the Department's view that the proposed regulation would produce a demonstrable benefit for educational institutions and their students. The Department anticipates these benefits would be realized by helping protect students' equal opportunity to participate on male and female teams consistent with Title IX, along with the associated health and other benefits to students who are able to participate as a result of the proposed regulation's clarity on Title IX's requirements. The Department further anticipates that the proposed regulation would benefit recipients by helping recipients understand their obligations, thereby supporting their efforts to provide equal athletic opportunity regardless of sex in their athletic programs, as Title IX requires.

Youth participation in athletics is associated with many physical, emotional, academic,

and interpersonal benefits for students, including increased cognitive performance and creativity, improved educational and occupational skills, higher academic performance and likelihood of graduation from a 4-year college, improved mental health, and improved cardiovascular and muscle fitness, as well as reduced risk of cancer and diabetes, and has the potential to help students develop traits that benefit them in school and throughout life, including teamwork, discipline, resilience, leadership, confidence, social skills, and physical fitness. *See* President's Council on Sports, Fitness & Nutrition Sci. Bd., *Benefits of Youth Sports* (Sept. 17, 2020), https://health.gov/sites/default/files/2020-09/YSS_Report_OnePager_2020-08-31_web.pdf.

There is also evidence suggesting that allowing transgender children to socially transition (*i.e.*, present themselves in everyday life consistent with their gender identity) is associated with positive mental health outcomes for those children. Kristina Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 Pediatrics 3 (March 2016), https://publications.aap.org/pediatrics/article/137/3/e20153223/81409/Mental-Health-of-Transgender-Children-Who-Are. Ensuring that transgender students have the opportunity to participate on male or female teams consistent with their gender identity can be part of a transgender student's social transition and is thus a crucial benefit to those students' health and well-being.

In addition, though the data quantifying the economic impacts of sex discrimination are limited, the Department recognizes that sex discrimination causes harm to students, including when such discrimination results in students being limited in or excluded from the opportunity to participate in athletics consistent with their gender identity and thereby effectively deprived of the many positive benefits of participation in team sports. *See*, *e.g.*, *Hecox*, 479 F. Supp. 3d at 987 (finding State law caused harm in that it would deny a transgender woman the opportunity to participate on women's team and subject her to the State's moral disapproval of her identity); *Utah High Sch. Activities Ass'n*, 2022 WL 3907182, at *9 (finding immediate harm caused by State law banning transgender girls from participating in sports consistent with their gender

identity).

2.B. COSTS OF THE PROPOSED REGULATION

The analysis below reviews the Department's data sources, describes the model used for estimating the likely costs associated with the proposed regulation, and sets out those estimated costs. The costs described below are not intended to reflect the exact burden on any given recipient, but instead intended to reflect an average burden across all recipients. Specific entities may experience higher or lower costs than those estimated below as a result of this proposed regulation. Due to limited quantitative data, the Department emphasizes that the monetary estimates reflect only the likely costs of this proposed regulatory action and do not seek to quantify, in monetary terms, the costs of sex discrimination. There are limited data quantifying the economic impacts of sex discrimination in athletics, and the Department invites comment on suggestions for any data sources that would provide additional information.

2.B.1. ESTABLISHING A BASELINE

As an initial matter, the analysis that follows separately discusses the effects of the proposed regulation on elementary and secondary education (ESE) entities and postsecondary education or IHE entities. For purposes of this analysis, ESE and IHE entities include educational institutions as well as other entities, such as national athletic associations and sport governing bodies, that are involved in the adoption or application of sex-related eligibility criteria for students participating on a recipient's male or female athletic teams. The Department analyzes the costs associated with the proposed regulation separately for ESE and IHE entities and views this as the best approach for cost analysis because ESE and IHE entities are organized and operate differently, and the costs the proposed regulation would impose on recipients are distinct at these levels, as explained below.

Athletic competition and its governance vary between the ESE and IHE contexts, with most ESE interscholastic competition governed by State-specific athletic associations, while much intercollegiate competition in the United States occurs under the auspices of only a handful

of athletic associations, the largest of which is the NCAA. Under the proposed regulation, a recipient would be permitted to adopt or apply sex-related eligibility criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity if those criteria, for each sport, level of competition, and grade or education level (i) are 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. The Department anticipates that the costs associated with implementing the proposed regulation—such as reviewing, adopting, and implementing policies, and training staff—would best align according to whether an entity is an ESE or IHE entity.

With respect to ESE entities, the Department anticipates that the same entities (*e.g.*, LEAs, State education associations, and State athletic associations) would generally review and respond to the regulation for elementary school, middle school, and high school, and, in doing so, would likely address the full range of affected students in any subsequent review or revision of policies. For this reason, the Department projects costs for ESE entities in one category, even though an entity may opt to adopt or apply different eligibility criteria for sex-separate teams in high school, for example, than for students in elementary school and middle school. To separate these entities into different categories for the purpose of projecting costs would unduly confound estimates. For example, there are not separate burdens associated with the time and effort an LEA athletic director may spend reading and understanding the regulation's application to all students in the LEA. Instead, the athletic director would likely read and understand the regulation in its entirety. That LEA athletic director would then develop policies and practices that comply with the regulation, possibly differentiating sex-related eligibility criteria for male and female teams for different sports, levels of competition, and grades or education levels, while ensuring that the criteria minimize harms to students. Similarly, the Department anticipates that a State athletic association with membership comprised of LEAs that serve

students in grades pre-K through 12 would review the regulation as a whole and set policies for its member entities' participation in interscholastic competition that align with the regulatory requirements.

In light of these factors, the Department believes it is reasonable to project costs by dividing the cost analyses between ESE and IHE entities. The Department notes that, in light of how athletic competition is structured at both the ESE and IHE levels, some entities that would not otherwise be subject to the proposed regulation may nonetheless be affected by its promulgation as a result of actions by third parties. As noted above, most athletic competition is organized by State athletic associations at the ESE level or under the auspices of the NCAA or similar national athletic associations at the IHE level. It is possible that a State athletic association or relevant governing body would require all of its members, including a private high school, to comply with eligibility and participation criteria that the association sets. The Department thus acknowledges that the implementation of the proposed regulation by these athletic associations may indirectly affect entities that are not directly subject to the proposed regulation. The Department does not currently have sufficient data to estimate the likelihood of these effects or their impact and seeks specific public comment on these issues.

Athletic Competition in ESE Entities

In the 2020-2021 school year, according to data from the National Center on Education Statistics, there were 18,259 LEAs in the United States with either a nonzero enrollment or at least one operational school.[16] Of the 18,083 LEAs for which the Department has data on the

[16] In the 2020-2021 school year, 91 ESE entities had nonzero enrollments and zero operational schools. For purposes of this analysis, the Department assumes these entities operate like other LEAs, although several appear to be regional education services agencies or intermediate school districts where the named entity itself, while enrolling students, may not directly provide education to students. In that same year, 531 ESE entities had operational schools either with zero enrollment or no enrollment data available. A number of these entities are charter schools that may have been in the process of opening or closing, and it is unclear whether they will serve students in future years. Inclusion of these two groups of entities will likely result in an over-estimate of the potential costs of the proposed regulation.

relevant variables,[17] 4,383 do not serve students in grades 9 through 12. Many of these are single school LEAs, such as charter schools. The Department assumes that these LEAs will continue to serve only students in elementary or middle school moving forward. Of the remaining LEAs, 1,268 only serve students in grades 9 through 12. Most LEAs (11,661) serve students in pre-kindergarten or kindergarten through 12th grade.

The Department generally assumes that, to the extent LEAs offer separate male and female intramural athletic teams, they generally establish eligibility criteria for participation on those teams at the LEA level even if the policies differ by sport, level of competition, or grade or education level.

For interscholastic athletic competition, eligibility is generally governed by State-specific athletic associations. The Department reviewed existing, publicly available State athletic associations' policies on sex-related eligibility criteria for students' participation on male or female teams for each of the 50 States, Puerto Rico, and the District of Columbia.[18] This review was conducted for the purpose of informing this Athletics NPRM; the Department has not evaluated these policies to determine whether they would comply with the proposed regulation or current statutory or regulatory Title IX requirements. The Department observed that State athletic association policies range from those that allow all students to participate on male or female athletic teams consistent with their gender identity to those that categorically exclude transgender students from participating on male or female athletic teams consistent with their gender identity. The Department further observed additional variation among State athletic association policies that establish some criteria for determining when a student is eligible to participate on a specific male or female athletic team consistent with their gender identity. For example:

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[17] This total excludes one LEA providing only adult education services and 68 LEAs serving only ungraded students.

[18] The Department notes that State athletic association policies on this topic continue to be updated.

- Approximately 20 percent of State athletic association policies currently allow students to participate on male or female athletic teams consistent with their gender identity without establishing additional criteria or eligibility requirements beyond those that apply to all student-athletes, such as attendance or academic achievement.
- Approximately 25 percent of State athletic associations generally permit participation consistent with students' gender identity and have established some criteria or eligibility requirements for participation, such as various types of documentation (examples include a written statement from the student, their parent or guardian, health care or treatment provider, a community member or teacher identifying the student's consistent gender identity).
- Approximately 20 percent of State athletic associations require students who wish to participate consistent with their gender identity to meet additional criteria prior to participation. Of those athletic associations that impose additional requirements, the vast majority (approximately three-quarters of this group) adopted different policies for male and female teams—many of which require transgender girls to satisfy additional criteria prior to participating on a female team consistent with their gender identity.
- The remaining State athletic associations have adopted a range of policies imposing criteria that severely limit most or all transgender students from participating on male or female athletic teams consistent with their gender identity.

In addition to variations among State athletic associations regarding the criteria for participation on male or female athletic teams, the Department observed variations among State athletic associations regarding the eligibility decision process for participation on male or female athletic teams. In nearly half of States, athletic association policies leave decisions regarding eligibility to the school or to the school and the student-athlete. In approximately 30 percent of States, the athletic association is involved in determining eligibility, either alone or in conjunction with the school.

In general, the Department found that State athletic association policies are silent on the issue of students in elementary school. With respect to middle school, the Department found that about half of State athletic associations regulate athletic competition at that level, but only approximately 35 percent of State athletic associations have policies addressing those students' participation in athletic competition consistent with their gender identity. The remaining State athletic associations are either silent on this issue or explicitly defer to the school or LEA for policies affecting students in middle school.

The Department notes that most States do not have laws prescribing sex-related eligibility criteria for recipients' male and female athletic teams. The Department also notes that at least two States have enacted laws or regulations requiring LEAs to allow ESE students to participate in athletics consistent with their gender identity. Twenty States have enacted laws that, to varying degrees, explicitly require that student-athletes participate on male or female athletic teams consistent with their sex assigned at birth. The Department anticipates athletic associations in some States may adopt policies that align with State law before the Department promulgates its final regulation. The Department further notes that some State laws are currently subject to litigation that may affect their continued applicability. *See*, *e.g.*, *B.P.J.*, No. 23-1078 (4th Cir. Feb. 22, 2023) (staying the district court's dissolution of preliminary injunction barring enforcement against plaintiff of West Virginia law requiring students to participate on athletic teams consistent with "biological sex" pending appeal); *Hecox*, 479 F. Supp. 3d at 978-85 (granting preliminary injunction barring implementation of Idaho law that excludes transgender girls and women from participating in athletics consistent with their gender identity based on strong likelihood the law violates the Equal Protection Clause); *Barrett v. State*, Cause No. DV-21-581B (Mont. 18th Jud. Dist. Sept. 14, 2022) (finding Montana law that restricts participation of transgender students in public institutions' athletic programs violates State constitution by infringing on public university's "authority to oversee student groups and activities"), *appeal docketed*, No. DA 22-0586 (Mont. Oct. 13, 2022); *Utah High Sch. Activities Ass'n*, 2022 WL

3907182, at *1, *9 (granting preliminary injunction to enjoin enforcement of Utah law that "effectively bans transgender girls from competing in pre-college school-related girls sports," based on strong likelihood the law violates the State constitution).

In the absence of the clarity that the proposed regulation would provide, the Department assumes that States, LEAs, schools, and State athletic associations would continue to implement varying policies for students in elementary and secondary education, with a small subset adopting criteria that would not limit or deny the participation of transgender students on male or female athletic teams consistent with their gender identity and a small subset adopting criteria that would substantially limit or deny transgender students from participating on male or female athletic teams consistent with their gender identity. The Department also assumes that almost all of the remaining States (approximately half) would have policies that establish minimal criteria for the participation of transgender students in high school athletics consistent with their gender identity (*e.g.*, a written statement from the student or someone on their behalf confirming the student's consistent gender identity). The Department seeks specific public comment on the reasonableness of this assumption.

Athletic Competition in IHE Entities

In the 2020-2021 school year, according to data from the National Center on Education Statistics, there were 6,045 IHEs participating in programs under Title IV of the Higher Education Act of 1965, 20 U.S.C. 1001 *et seq*. (1965), such as Loans, Federal Work Study, and Pell grants. Except as described above, the Department assumes this represents the universe of potentially impacted IHE entities. Of those, 1,689 IHEs offered an educational program that was less than 2 years in duration (*i.e.*, below the associate's level), 1,602 offered a program of at least 2 but less than 4 years, and 2,754 offered a program of 4 or more years. In total, these institutions enrolled approximately 14.8 million full-time equivalent (FTE) students in fall 2020. Approximately 1 percent of students attended less-than-2-year IHEs, approximately 20 percent attended 2- to 4-year institutions, and approximately 79 percent attended at least 4-year

institutions (hereinafter referred to as "4-year institutions").

Table 1. Institutions of Higher Education by Level of Institutions and Enrollment, Fall 2020

Level of Institution	Number of Entities	Total Fall FTE Enrollment	% of Total Fall FTE Enrollment	Average Fall FTE Enrollment
Less-than-2-Year	1,689	228,448	1%	138
2- to 4- Year	1,602	2,905,048	20%	1,843
4 or more Years	2,754	11,617,659	79%	4,317
TOTAL	**6,045**	**14,751,155**	**100%**	**2,490**

In general, the Department assumes that less-than-2-year institutions, which include many trade and technical programs (*e.g.*, cosmetology, HVAC repair, dental assistant) do not engage in interscholastic athletic competition or operate intramural athletic programs. The Department seeks specific public comment on the extent to which less-than-2-year IHEs would be impacted by the proposed regulation.

The Department generally assumes that approximately 50 percent of 2- to 4-year IHEs operate intramural teams, some or all of which are male or female teams, and that the IHEs establish policies governing those programs.

For intercollegiate athletic competition, eligibility is generally governed by national athletic associations, as described above. For purposes of this analysis, the Department assumes that each athletic association independently adopts and applies criteria to determine the eligibility of students to participate on male or female teams consistent with their gender identity. The Department annually collects data on whether IHEs are members of such associations. Of the

3,989 IHEs for which the Department has data,[19] 1,986 were members of a national athletic association in the 2020-2021 school year. Of those IHEs, 1,526 were 4-year institutions and 460 were 2- to 4-year institutions.

Table 2. Selected Characteristics by National Athletic Association Membership and Level of Institution, Fall 2020

	Member of National Athletic Association		Not a Member of National Athletic Association	
Level of Institution	**Number**	**Average Enrollment**	**Number**	**Average Enrollment**
2- to 4-Year IHE	460	3,223	830	1,641
4-Year IHE	1,526	6,440	1,173	1,542
TOTAL	1,986	5,695	2,003	1,583

Table 3. Percentage of IHEs that are Members of National Athletic Associations by Level and Control of Institution, Fall 2020

	2- to 4-Year IHEs	4-Year IHEs	All Levels
Public	55%	77%	65%
Private Non-Profit	7%	57%	54%
Private For Profit	0%	7%	3%
All Sectors	36%	43%	50%

As part of its annual data collection, the Department gathers information on membership in five specific national athletic associations (referred to below as the "five named athletic

[19] Data are not available for 312 2- to 4-year institutions and 55 4-year institutions.

associations"). IHEs reported membership in the five named athletic associations for the 2020-2021 school year as follows:

- The National Collegiate Athletic Association (NCAA) - 1,108 IHEs;
- The National Association of Intercollegiate Athletics (NAIA) - 250 IHEs;
- The National Junior College Athletic Administration (NJCAA) - 498 IHEs;
- The National Small College Athletic Association (NSCAA) - 43 IHEs; and
- The National Christian College Athletic Association (NCCAA) - 89 IHEs.

Also as part of its data collection, the Department permits IHEs to report membership in national athletic associations other than the five named athletic associations. For the 2020-2021 school year, 138 IHEs reported that they were members of an athletic association other than the five named athletic associations. The Department does not have data on the specific athletic associations to which these IHEs belong. For purposes of this analysis, the Department assumes two additional national athletic associations, beyond the five named athletic associations, would be required to review policies pursuant to the proposed regulation if it were to be promulgated. The Department seeks specific public comment on this estimate.

As explained in the discussion of the proposed regulation, in January 2022, the NCAA replaced its longtime rules for transgender student-athlete participation and adopted a sport-by-sport approach that defers to the eligibility criteria set by national governing bodies—*e.g.*, USA Swimming, USA Gymnastics—subject to review by the NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports. Some of these national groups look to international organizations such as FINA and International Gymnastics Federation (FIG), which set criteria for participation in international competitions involving elite athletes. *See*, *e.g.*, USA Swimming, *Athlete Inclusion, Competitive Equity, and Eligibility Policy* at 4-5 (Mar. 10, 2023), https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules_policies/usa-swimming-policy-19.pdf (noting that athletes who wish to compete in a World Aquatics Competition must meet the eligibility criteria in the World Aquatics Policy,

which "are potentially more difficult to satisfy than" the USA Swimming policy); USA Gymnastics, *Transgender & Non-Binary Athlete Inclusion Policy* at 3 (Apr. 2022), https://www.usagym.org/PDFs/About%20USA%20Gymnastics/transgender_policy.pdf (noting that elite athletes who are transgender must satisfy requirements for participation set by the FIG and IOC). Taking these elite international competition criteria into account, 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. In addition, eligibility criteria vary by sport. Some international governing bodies permit transgender women to compete at elite levels if they satisfy specific testosterone suppression criteria. *See*, *e.g.*, Union Cycliste Internationale, UCI Eligibility Regulations. Others exclude from elite competition transgender women who have experienced any aspect of male puberty. *See, e.g.*, FINA Policy on Eligibility. Some sport governing bodies have not yet updated their policies or their criteria for determining transgender students' participation remain under review. For example, World Lacrosse announced it is reviewing and revising its eligibility criteria for everyone involved in the sport, including transgender athletes, to create a policy that ensures that "everyone has a right to safely participate in sport while maintaining fair competition." World Lacrosse, *World Lacrosse Forms Partnership with National Center for Transgender Equality to Create Trans-Inclusive Participation Policy* (June 9, 2022), https://worldlacrosse.sport/article/world-lacrosse-forms-partnership-with-national-center-for-transgender-equality/. The Department generally assumes that national and international governing bodies will continue to revise their policies in the coming years and that most or all will seek to develop policies that, in their view, maximize athletes' participation consistent with gender identity while ensuring fair and safe competition.

2.B.2. DEVELOPING THE MODEL

Athletic Competition in ESE Entities

In general, the Department assumes that only LEAs that offer male and female athletic

teams would be directly affected by the proposed regulation. As part of the 2017-2018 Civil Rights Data Collection, schools in approximately 60 percent of LEAs submitting responses indicated that they operated one or more male or female athletic teams. For purposes of this analysis, the Department assumes approximately 60 percent of all LEAs offer sex-separate athletic teams, for an estimated 10,849 affected LEAs.

As noted above, although recipient LEAs would be subject to the proposed regulation, they generally do not independently establish requirements for participation in interscholastic competition. Instead, LEAs typically participate as members in State athletic associations, which generally establish these requirements. Regardless, the Department notes that recipient LEAs must comply with Title IX and the obligation to do so is not alleviated by any contrary athletic association rule. *See* 34 CFR 106.6(c). Because of this obligation, the Department believes that many LEAs, as members of State athletic associations, would communicate with their State's athletic association about the Department's proposed regulation. As a result, the Department believes it is reasonable to assume that State athletic associations would review and consider revising their policies on this issue.

Also as noted above, the Department has not evaluated existing State athletic association policies governing interscholastic athletics to determine whether they would comply with the proposed regulation. However, the Department assumes that a range of policies would comply with the proposed regulation. On the other hand, a State athletic association policy with restrictive sex-related eligibility criteria that complies with the proposed regulation in the context of a particular sport (*e.g.*, a sport with significant physical contact) may not comply in the context of a different sport (*e.g.*, one with little or no physical contact) if, for example, a recipient cannot demonstrate how its sex-related criteria are substantially related to achievement of an important educational objective in the context of that particular sport 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 by the criteria. As a result, the Department anticipates that

all LEAs and all athletic associations will undertake at least some level of review of their existing policies or the policies of associations to which they belong. The Department does not assume the adoption, elimination, or modification of any specific policy.

The Department believes that the proposed regulation would render State athletic associations that currently prevent transgender students from participating on male or female teams consistent with their gender identity more likely than others to conduct intensive reviews of their existing policies. The Department anticipates this result because athletic association policies that would limit or deny students' eligibility to participate on male or female teams consistent with their gender identity would be more likely to raise questions from member LEAs, student-athletes, and families regarding compliance with Title IX. The Department assumes many of these State athletic associations, or their member LEAs, would engage in some revision to ensure their policies comply with the regulation. By contrast, the Department generally assumes that the 20 percent of State athletic associations that currently allow students to participate on male or female athletic teams consistent with their gender identity would be less likely to engage in intensive review of their policies and implement revisions than other States. For purposes of this analysis, the Department assumes the following:

- All LEAs, including those that do not offer athletic teams, will engage in an initial review of the rule;
- In 20 percent of States, the State athletic association and LEAs offering athletic teams whose policies already permit students to participate on male or female teams consistent with their gender identity will undertake a review but would be unlikely to revise their existing policies;
- In 20 percent of States, the State athletic association and LEAs offering athletic teams whose policies impose requirements that enable most or all transgender students to participate consistent with their gender identity will undertake a more intensive review but would also be unlikely to revise their existing policies; and

- In 60 percent of States, the State athletic association and LEAs offering athletic teams whose policies prohibit or significantly restrict participation by transgender students consistent with their gender identity will undertake a more intensive review and will revise their existing policies.

The Department anticipates that the 60 percent of State athletic associations and LEAs in this final category will experience burdens associated with revising their policies for a variety of reasons. Some of these associations may have more complex policy structures than others (*e.g.*, different policies for different sports as opposed to a single policy affecting all sports). Others may have particular bureaucratic structures (*e.g.*, standing review panels), public participation requirements (*e.g.*, 45 days of public comment), or assent requirements (*e.g.*, a certain percentage of member LEAs must agree to any policy change). The Department seeks specific public comment on the extent to which such structures or requirements may exist and where, how they would impact the estimates included here, and whether, as a result, it would be appropriate for the Department to subdivide this final category to account for variation in the field.

The Department recognizes that LEAs are not evenly distributed across States and, therefore, the policies of a single State athletic association could affect more LEAs than the policies of multiple other State athletic associations that serve a smaller number of schools. However, for purposes of this analysis, the Department assumes that, if 45 percent of State athletic associations implement a particular policy, 45 percent of LEAs offering athletic teams would be affected. More specific estimates would require the Department to develop independent estimates for specific States or groups of States and then correlate those State-specific effects and responses to estimates of the number of LEAs offering athletic teams in each State. There is not enough information available to the Department to develop reliable estimates at this level of granularity, and therefore the Department assumes an equal distribution of LEAs.

The Department also assumes that State athletic associations engage in periodic reviews and updates to their policies. Although the proposed regulation would not require such reviews,

the Department believes the proposed regulation would likely factor into these reviews. The Department assumes any subsequent review of policies in this area would be unlikely to occur for several years after the initial review to determine compliance with the proposed regulation, but also assumes that approximately five State athletic associations would review these policies each year thereafter. Of those, the Department estimates approximately one State athletic association would engage in a policy revision each year. The Department requests specific public comment on the extent to which State athletic associations are likely to engage in a review of these policies and on what timeline such reviews may occur.

Finally, as noted above, in the vast majority of States, determinations regarding eligibility of particular student-athletes are made at the local level (*i.e.*, school or LEA). The Department assumes State athletic associations, once they have revised their policies, will train LEA staff (*e.g.*, athletic directors) to make those determinations. LEA staff in these positions likely already receive regular training from the State athletic association; therefore, the Department assumes that any training regarding eligibility determinations would likely supplant other training, or time devoted to other topics would be adjusted to make time to train LEA staff on this topic.

The Department also notes the relatively low number of transgender student-athletes relative to the overall population of student-athletes. *See*, *e.g.*, *Hecox*, 479 F. Supp. 3d at 982 (noting the "incredibly small percentage of transgender women athletes"). To the extent additional training is required beyond the standard training to all athletic directors and staff, the Department anticipates that it will be conducted on an ad hoc basis as necessary. The Department therefore assumes that there will be no additional time burdens above baseline associated with training in future years.

Athletic Competition in IHE Entities

In general, the Department assumes that only IHEs offering separate male and female athletic teams would be directly affected by the proposed regulation. However, the Department is unaware of any comprehensive data source on the number of IHEs that offer such teams,

including in club and intramural athletics. Based on the information in Establishing a Baseline (Section 2.B.1) above, the Department assumes that participation varies by entity type, including whether an institution is public or private, and size, among other factors. For example, the Department assumes that less-than-2-year private, for-profit IHEs, such as those offering cosmetology or other specific career training programs, are less likely than 4-year IHEs to offer athletic teams. The Department requests specific public comment on the extent to which any high-quality data sources exist regarding IHE offerings of athletic teams, beyond the data from the National Center for Education Statistics cited above, and the extent to which such data can be used for this analysis.

As noted above, although all IHEs that are recipients of Federal financial assistance would be subject to the proposed regulation, they generally do not independently establish requirements for participation in intercollegiate competition. Instead, IHEs typically participate as members of one or more national athletic associations, which generally establish these requirements. However, the Department notes that recipient IHEs, like all recipients of Federal funds, must comply with Title IX and the obligation to do so is not alleviated by any contrary athletic association rule. *See* 34 CFR 106.6(c). Because of this obligation, the Department assumes that many IHEs would advocate, as members of one or more national athletic associations, to ensure that their associations' policies related to students' participation consistent with their gender identity comply with the Department's regulation. As a result, the Department believes it is reasonable to assume that national athletic associations would review and, as necessary, revise their policies to comply with the proposed regulation on this issue.

For purposes of this analysis, the Department has not evaluated existing policies governing intercollegiate athletics such as national athletic association policies to determine whether they would comply with the proposed regulation. However, the Department assumes that due to the nature of the proposed regulation and the potential implications of non-compliance with Title IX for their members, all national athletic associations would engage in

some degree of review of their policies to comply with the proposed regulation. Further, the Department assumes that all IHEs offering athletic teams would spend time reviewing their own policies governing athletic participation not sponsored by a national athletic association (*e.g.*, intramural sports leagues). The Department further assumes that, upon revision of policies by a national athletic association, a subset of affected IHEs would conduct an independent review of the revised policies to independently assess whether the policies are compliant with the proposed regulation. The Department assumes that these reviews would most likely occur at larger, better-resourced IHEs, with the remainder of IHEs assuming that the policies promulgated or approved by their respective athletic associations comply with the proposed regulation without conducting further analysis. The Department does not assume the adoption, elimination, or modification of any specific policy.

For purposes of this analysis, the Department assumes the following:

- All IHEs, including those that do not offer athletic teams, will complete an initial review of the proposed regulation;
- Forty percent of IHEs (those offering athletic teams, including intercollegiate as well as intramural) will undertake a more intensive review of the proposed regulation and their existing policies;
- Twenty percent of IHEs will revise their institution-specific policies (*e.g.*, those governing intramural sports) after conducting the more intensive review just described;
- All five named athletic associations and two additional athletic associations will extensively review their policies, and of those seven athletic associations, four will revise their policies to comply with the proposed regulation; and
- As a result of athletic association policy changes, 10 percent of IHEs will conduct a secondary review of those new athletic association policies to assess compliance with the proposed regulation.

Estimating specific effects the proposed regulation would have on IHEs is difficult for a

variety of reasons. First, because national athletic associations range in size and number of member IHEs, policy revisions undertaken by one national athletic association may have more far-reaching effects than those of another. Second, of the IHEs reporting membership in an athletic association, 132 IHEs reported membership in more than one association. Each national athletic association would likely have one or more member IHE that is also a member of another athletic association. As a result, it is likely that associations would establish policies that account for other associations' policies and that all associations would have an incentive to promote alignment, which would reduce compliance burdens on dual-member IHEs. Depending on which associations revise their policies, the extent to which they do so, the timing of their revisions, and the degree of motivation on the part of other associations to align their policies, there could be widely varying effects. For example, if the NCAA adopts a significant policy revision based on the proposed regulation, that revision would directly affect more than half of all IHEs offering athletic teams. This revision may also prompt smaller associations to adopt similar policies to align with the NCAA, and as a result, nearly all IHEs offering athletic teams would be impacted. By contrast, if a small association adopts a policy change affecting only a small number of IHEs that are not members of additional associations, effects may be limited because other associations may choose not to align their policies. The Department seeks specific public comment on its analysis and information on how to better evaluate the factors that would contribute to the effects of policy revisions by one athletic association on the policies of other associations.

The Department assumes that national athletic associations periodically review and update their policies. Although the proposed regulation would not require periodic reviews, the Department believes national athletic associations will consider the proposed regulation in their review process. The Department assumes national athletic associations are unlikely to review their policies in this area for several years after completing their initial review, but thereafter assumes that every year there would be approximately two national athletic associations that

would review these policies. The Department assumes that most associations review their policies on a 3-year cycle. The Department seeks specific public comment on whether such a timeline is reasonable.

Of those associations that conduct a review, the Department estimates that approximately one athletic association will revise its policies each year. The Department requests specific public comment on the extent to which athletic associations are likely to review their policies and on what timeline these reviews may occur.

The Department anticipates that IHE entities will incur minimal additional training costs, similar to its projections for ESE entities, as a result of the proposed regulation. The Department assumes national athletic associations provide annual training to IHE staff (*e.g.*, athletic directors) on a range of policy issues, and as a result of the proposed regulation, this annual training would cover any new policies. The Department assumes that there will be no additional time burdens above baseline associated with training in future years. The Department seeks specific public comment on the extent to which these estimates and assumptions are reasonable.

Finally, the Department recognizes that this Athletics NPRM comes at a time when IHEs that offer intercollegiate athletic teams may be affected by changes to national and international sex-related criteria for determining students' eligibility to participate on male or female teams. It is the Department's current view that by regulating during a time when changes are ongoing, the proposed regulation may reduce costs by providing some certainty about what regulatory requirements must be met on this issue to fulfill a recipient's obligations under Title IX; at the same time, because these changes are ongoing, the Department cannot predict the nature of future eligibility criteria that may be adopted by the NCAA or other national athletic associations with any degree of certainty.

2.B.3. COST ESTIMATES

Athletic Competition in ESE Entities

The Department estimates that, to comply with the proposed regulation, all regulated

entities, including those that do not offer an athletic program, would take time to review the regulation to determine whether it applies to their entity, as the Department generally assumes that all regulated entities will have some level of interest in the proposed regulation. At the LEA level, the Department assumes this initial review, which is limited to determining whether the regulation applies, would take an education administrator approximately half an hour to complete (at $100.36/hour)[20] at 18,083 LEAs, for a total Year 1 cost of $907,400.

For State athletic associations and LEAs offering athletic teams, the Department assumes those entities in 20 percent of States will engage in a less intensive review of their existing policies. The Department estimates that all LEAs would also spend time reviewing their own policies for intramural and other athletic activities not otherwise governed by a State athletic association for compliance with the Department's regulation. The Department does not anticipate that this review would be burdensome because the Department assumes that there are fewer activities of this type. The Department assumes that this review would be more burdensome for State athletic associations given the number of LEAs and athletic programs implicated. The Department welcomes comments on the accuracy of these assumptions. At the LEA level, the Department estimates this review would require 2 hours each from an education administrator[21] and management analyst[22] ($81.56/hour) at 2,169 LEAs. For State athletic associations, the Department estimates that this activity would take 4 hours for an education administrator, 4 hours for a management analyst, and 2 hours for an attorney ($148.76/hour) at each of 10 associations. In total, we estimate that these activities would cost approximately

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[20] For purposes of this regulatory impact analysis, the Department uses wage rates from the U.S. Bureau of Labor Statistics' May 2021 National Industry-Specific Occupational Employment and Wage Estimates (NAICS 611000 - Educational Services), available at https://www.bls.gov/oes/current/naics3_611000.htm. The Department uses a loading factor of 2.0 to account for the costs of overhead, benefits, and other non-wage expenses.

[21] As used in this regulatory impact analysis, the term "education administrator" is intended to encompass staff in leadership and senior leadership roles in an organization, such as a superintendent, assistant superintendent, or athletic director.

[22] As used in this regulatory impact analysis, the term "management analyst" is intended to encompass non-legal program and agency staff including, but not limited to, athletic coaches, project officers, or athletic department staff.

$799,420 in Year 1.

In the remaining 80 percent of States, the Department estimates that LEAs and State athletic associations would engage in a more intensive review of their policies on athletic participation because their existing policies restrict, to some degree, the participation of students on male or female teams consistent with their gender identity. This intensive review would be used by LEAs and State athletic associations to determine whether existing policies are compliant as written or whether the policies would need to be revised to comply with the proposed regulation. At the LEA level, the Department estimates that this work will take 4 hours each for an education administrator and a management analyst in 8,679 LEAs to complete. For State athletic associations, the Department estimates that this work would take 6 hours from an education administrator, 6 hours from a management analyst, and 2 hours for one attorney working on behalf of each of 41 associations. In total, the Department estimates this activity would cost approximately $6,372,490 in Year 1.

The Department estimates that State athletic associations in approximately 60 percent of States would opt to revise their existing policies upon completing their review. The Department estimates that some LEA staff would be involved in this process by, for example, commenting on draft proposals or participating in roundtable discussions. At State athletic associations, the Department assumes it would take less time to revise existing policies than to complete the review of the proposed regulation; the Department bases its estimate on the assumption that many issues to be addressed would have already been identified during the initial review. At the LEA level, the Department assumes one education administrator would spend 4 hours at each of 6,509 LEAs on this task. At the State athletic association level, the Department estimates this task would require 4 hours from an education administrator, 20 hours from a management analyst, and 12 hours from an attorney. In total, the Department estimates it would cost approximately $2,731,320 in Year 1 for 31 State athletic associations to revise their policies governing students' eligibility to participate on male or female teams consistent with their gender

identity.

After policies have been revised, the Department assumes that State athletic associations would develop and deliver updated training about their new policies to staff in affected LEAs. The Department further assumes that developing the training would require 10 hours from a management analyst, 10 hours from a lawyer, and 1 hour from an education administrator to review and approve the training in each of 31 associations. The Department anticipates that this training would take an additional 30 minutes above existing training obligations for an education administrator in each of 6,509 LEAs. In total, the Department estimates that updated training would cost approximately $401,130 in Year 1.

In future years, the Department assumes that approximately five State athletic associations per year would undertake a review of their policies on students' participation consistent with their gender identity. The Department assumes this task would require 1 hour from an education administrator, 4 hours from a management analyst, and 2 hours from a lawyer for a total cost of approximately $3,620 per year beginning in Year 3.

Each year, the Department assumes that one of those five associations will opt to revise their policies. We estimate that this revision would require 4 hours from an education administrator, 16 hours from a management analyst, and 10 hours from a lawyer for a total cost of approximately $3,190 per year beginning in Year 3.

At the ESE level, the Department estimates that the proposed regulation would generate a present value monetized cost of $10.5 to $10.9 million over 10 years, assuming a seven percent and three percent discount rate, respectively.

Athletic Competition in IHE Entities

The Department estimates that to comply with the proposed regulation, all regulated entities, including those that do not offer an athletic program, would take time to review the proposed regulation to determine whether it applies to their entity, because the Department generally assumes that all regulated entities will have some level of interest in the proposed

regulation. At the IHE level, the Department assumes this initial review, which is limited to determining whether the regulation applies, would take an education administrator approximately 1 hour to complete at each of 6,045 IHEs for a total Year 1 cost of $607,580.

For IHEs offering athletic teams, the Department estimates that these entities would spend time reviewing their own policies regarding participation in athletics for compliance with the proposed regulation. At the IHE level, the Department estimates this internal policy review would require 8 hours from an education administrator, 8 hours from a management analyst, and 6 hours for an attorney working on behalf of each of 2,148 IHEs. In total, the Department estimates that these activities would cost approximately $5,043,330 in Year 1.

The Department further estimates that approximately 20 percent of IHEs would, as a result of their internal policy review, opt to make revisions to their policies. The Department estimates that such revisions would require 4 hours from one education administrator, 30 hours from a management analyst, and 16 hours from an attorney at each of 1,210 IHEs. In total, the Department estimates that these activities would have a total cost of $6,326,360 in Year 1.

The Department estimates that the five named athletic associations and two additional national athletic associations would conduct a review of their policies as a result of the proposed regulation. The Department estimates that these internal policy reviews would require 8 hours each from four education administrators, 8 hours each from four management analysts, and 6 hours each from two attorneys. In total, we estimate that this review would cost approximately $53,250 in Year 1.

The Department further estimates that, as a result of their internal policy reviews, four national athletic associations would choose to revise their policies. The Department estimates that this revision would require 15 hours each from four education administrators, 20 hours each from four management analysts, and 12 hours each from two attorneys. Further, after those revisions are finalized, the Department assumes that approximately 10 percent of IHEs would conduct their own review of the policies prior to implementing them. The Department estimates

that this secondary review would require 8 hours each from an education administrator and management analyst and 6 hours from an attorney. In total, the Department estimates these revisions would cost approximately $1,484,960.

The Department further assumes that each of those four athletic associations would update training materials consistent with their revised policies. The Department assumes that these revisions would require 8 hours from an education administrator, 32 hours from a management analyst, and 10 hours from an attorney. The Department further estimates that the updated training would require an additional hour for an education administrator at each of 1,289 IHEs. In total, the Department estimates that updated training would cost approximately $148,970 in Year 1.

The Department assumes that in future years approximately two national athletic associations per year would undertake a review of their policies on students' participation consistent with their gender identity. The Department assumes this task would require 4 hours each from four education administrators, 8 hours each from four management analysts, and 6 hours each from two attorneys for a total cost of approximately $12,000 per year beginning in Year 3.

The Department assumes that each year, one of those associations would opt to revise its policies. The Department estimates that this revision would require 8 hours each from four education administrators, 16 hours each from four management analysts, and 10 hours each from two attorneys, for a total cost of approximately $11,410 per year beginning in Year 3.

At the IHE level, the Department estimates the proposed regulation would generate total present value monetized costs of $12.9 to $13.4 million over 10 years, assuming a seven percent and three percent discount rate, respectively.

3. REGULATORY ALTERNATIVES CONSIDERED

The Department reviewed and assessed various alternatives prior to issuing the proposed regulation, drawing from internal sources as well as stakeholder feedback OCR received.

Specifically, the Department considered the following actions: (1) leaving the current regulations without amendment; (2) addressing the issue through guidance; (3) proposing amendments to the regulations to specify permissible eligibility requirements; or (4) proposing a regulatory standard that can be effectively implemented, consistent with Title IX, by recipients serving students at varying grade and education levels in a variety of male and female team sports at varying levels of competition.

For the reasons described above, Department currently believes alternative (4) is the best option. In light of its review of Title IX and its regulations, stakeholder feedback, and developments in case law and in the sex-related eligibility criteria set by some school districts, States and other organizations (including athletic associations and sport governing bodies), it is the Department's current view that the proposed regulation would better ensure fulfillment of Title IX's nondiscrimination guarantee and would provide more clarity as to how Title IX applies to sex-related criteria that would limit or deny students' eligibility to participate on male or female teams consistent with their gender identity.

For these reasons and those explained throughout the preamble, and in light of stakeholder feedback received in 2021 and 2022, the Department does not believe alternative (1), which would leave the current regulations without amendment, is a reasonable option. The Department rejected alternative (2), which would address the issue through guidance, because the Department continues to believe it is necessary to establish, through regulations, the legal obligations of a recipient to ensure that its education program or activity is free from all forms of sex discrimination. Guidance documents, which are not legally binding on a recipient, would not serve that function. The Department rejected alternative (3), which would propose amendments to the regulations to specify permissible eligibility requirements, because it would not allow for the Department to appropriately assess whether a recipient's criteria are responsive to the grade or education level of students, the nature of a particular sport, the level of competition, or other factors.

After careful consideration of these alternatives, the Department proposes that adopting option (4), which is to propose the regulatory standard put forward here, would best clarify recipients' legal obligations and most appropriately implement Title IX's guarantee of nondiscrimination on the basis of sex by recipients of Federal funds in the unique context of athletic teams offered by schools. Specifically, the Department's preliminary conclusion is that alternative (4) would help ensure that recipients understand the standard that would govern if they adopt or apply sex-related eligibility criteria for determining student participation on male or female athletic teams, in a manner that ensures overall equality of athletic opportunity based on sex. The Department's current view is that alternative (4) also strikes the appropriate balance between Title IX's guarantee that a recipient's education program or activity be free from sex discrimination and the unique considerations in the context of athletics.

4. ACCOUNTING STATEMENT

As required by OMB Circular A-4, the following table is the Department's accounting statement showing the classification of the expenditures associated with the provisions of the proposed regulation. This table provides the Department's best estimate of the changes in annualized monetized costs, benefits, and transfers because of the proposed regulation.

Category	Benefits
Clarity for recipients and students concerning the standard for adopting and applying sex-related eligibility criteria to participate on a particular male or female athletic team.	Not quantified
Protecting students' equal opportunity to participate on male and female teams and the physical and mental health and other benefits associated with that team	Not quantified

participation.		
	Costs (calculated on an annual basis)	
	3% Discount Rate	7% Discount Rate
Preliminary Review of the Regulation	$172,000	$202,000
Review of Policies	$1,396,000	$1,632,000
Revision of Policies	$1,200,000	$1,403,000
Updated Training	$63,000	$73,000
Periodic Review of Policies	$12,000	$12,000
Periodic Updating of Policies	$11,000	$11,000
TOTAL	$2,855,000	$3,333,000

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand. The Secretary invites comments on how to make the proposed regulation easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulation clearly stated?
- Does the proposed regulation contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulation (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulation be easier to understand if the Department divided it into more (but shorter) sections? (A "section" is preceded by the symbol "section" and a numbered heading; for example, § 106.41 Athletics.)
- Could the description of the proposed regulation in the **SUPPLEMENTARY**

INFORMATION section of this preamble be more helpful in making the proposed regulation easier to understand? If so, how?

- What else might the Department do to make the proposed regulation easier to understand?

To send comments that concern how the Department could make the proposed regulation easier to understand, see the instructions in the **ADDRESSES** section of the preamble.

Regulatory Flexibility Act (Small Business Impacts)

1. INTRODUCTION

This analysis, required by the Regulatory Flexibility Act (RFA), presents an estimate of the effect of the proposed regulation on small entities. The U.S. Small Business Administration (SBA) Size Standards define "proprietary IHEs" as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below $7,000,000. "Nonprofit institutions" are defined as small entities if they are independently owned and operated and not dominant in their field of operation. "Public institutions and LEAs" are defined as small organizations if they are operated by a government overseeing a population below 50,000.

2. INITIAL REGULATORY FLEXIBILITY ANALYSIS

As explained in the Establishing a Baseline (Section 2.B.1) section of the RIA, there is a lack of high quality, comprehensive data about whether particular recipients offer athletic teams, whether intramural or interscholastic, whether recipients are likely to revise athletic eligibility policies as a result of the proposed regulation, and the likely impact of any such changes. As a result, the Department could not definitively conclude that burdens on small entities would be sufficiently low to justify certification under the RFA. If an agency is unable to make such a certification, it must prepare an Initial Regulatory Flexibility Analysis (IRFA) as described in the RFA. Based on the data available, the Department has completed an IRFA and requests comments from affected small entities.

The purpose of this analysis is to identify the number of small entities affected, assess the economic impact of the proposed regulation on those small entities, and consider alternatives that may be less burdensome to small entities that meet the Department's regulatory objectives. Specifically, the Department estimates the number of small entities potentially impacted by the proposed regulation in the discussion of Estimated Number of Small Entities (Section 2.B), assesses the potential economic impact of the proposed regulation on those small entities in the discussion of Estimate of the Projected Burden of the Proposed Regulation on Small Entities (Section 2.C), and examines and considers less burdensome alternatives to the proposed regulation for small entities in the Discussion of Significant Alternatives (Section 2.D). The Department requests comment on the extent to which the burden assumptions described in the RIA are reasonable for small entities (*i.e.*, whether particular activities are likely to take more or less time or cost more or less than otherwise estimated).

2.A. Reasons for Regulating

The Department proposes this regulation to provide greater clarity to recipients and other stakeholders about the standard that a recipient must meet under Title IX if it adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a particular male or female athletic team consistent with their gender identity. The proposed regulation is consistent with the current regulations' framework for providing equal opportunity regardless of sex in a recipient's athletic program as a whole and with Congress's direction that the Title IX regulations include "reasonable provisions" that "consider[] the nature of particular sports." Education Amendments of 1974 section 844.

2.B. Estimated Number of Small Entities

Consistent with the 2020 amendments to the Department's Title IX regulations (see 85 FR 30026), for purposes of assessing the impacts on small entities, the Department proposes defining a "small IHE" as a 2-year institution of higher education with an enrollment of fewer than 500 full time equivalent (FTE) or a 4-year IHE with an enrollment of fewer than 1,000 FTE

based on official 2020 FTE enrollment. The Department also proposes defining a "small LEA" as a local education agency with annual revenues of less than $7,000,000.

During the 2020-2021 school year, according to the National Center for Education Statistics, of the 6,165 Title IV participating IHEs for which sufficient data are available, 2,803 were 4-year institutions, 1,644 were 2-year institutions, and 1,718 were less-than-2-year institutions. Of those, 1,226 4-year institutions, 690 2-year institutions, and 1,650 less-than-2-year institutions met the Department's proposed definition of a "small IHE."

Table 1—Number of Small IHES, Fall 2020				
	4-year	2-year	Less than 2-year	Total
Not Small	1,577	954	68	2,599
Small	1,226	690	1,650	3,566
Total	2,803	1,644	1,718	6,165

During the 2018-2019 school year, 6,518 of the 17,798 LEAs with available revenue data met the Department's proposed definition of a "small LEA."

Table 2—Number of Small LEAs, Fall 2018	
	LEAs
Not Small	11,280
Small	6,518
Total	17,798

2.C. Estimate of the Projected Burden of the Proposed Regulation on Small Entities

Based on the assumptions described in the RIA, an IHE that reviews and revises its policies as a result of the proposed regulation would see a net increase in costs of approximately $560 per year (assuming a discount rate of 3 percent). The Department notes that this estimate assumes an IHE that offers single-sex athletic teams. The Department believes that smaller

IHEs, such as many offering less-than-2-year programs, are less likely than other IHEs to offer athletic teams and therefore would experience no additional costs.

According to data from the Integrated Postsecondary Education Data System (IPEDS), in FY 2019, small IHEs had, on average, total revenues of approximately $10,349,540. Therefore, the Department estimates that the proposed regulation could generate a net cost for small IHEs equal to approximately 0.005 percent of annual revenue when they choose to review their policies. According to data from IPEDS, approximately 30 IHEs had total reported nonzero annual revenues of less than $56,000, for which the costs estimated above would potentially exceed 1 percent of total revenues. Three of these IHEs reported no enrollment data for the Fall 2020. The remaining IHEs enrolled, on average, 65 students in Fall 2020. None of these IHEs reported membership in a national athletic association. Twenty-three of the IHEs were vocational or technical schools and four were administrative units associated with larger college systems. The Department believes it is highly unlikely that these small IHEs offer athletic teams and, if they do, that they would regularly offer single-sex athletic teams.

Based on the assumptions described in the Cost Estimates (Section 2.B.3) discussion of the RIA, an LEA that engages in an intensive review and revision of its policies would see a net increase in costs of approximately $140 per year (assuming a discount rate of 3 percent). The Department notes that these estimates assume a small LEA that offers athletic teams. Many small LEAs may not be impacted by the proposed regulation, given that they may not offer athletic teams. The Department estimates that small LEAs that do not offer athletic teams would experience no additional costs.

In 2018-2019, small LEAs had an average total revenue of approximately $3,450,911. Therefore, the Department estimates that the proposed regulation could generate a net cost for small LEAs of approximately 0.004 percent of total revenues. According to data from the National Center for Education Statistics, in 2018-2019, six small LEAs reported nonzero total revenues of less than $14,000, for which the estimated costs would potentially exceed 1 percent

of total revenues. Among those, four small LEAs had zero students enrolled during the 2018-2019 academic year and the reported revenues for the remaining two would result in calculated total revenues of less than $10 per student. Based on this analysis, the Department believes that these are likely reporting errors and, therefore, the Department does not believe the estimated costs would exceed 1 percent of total revenues for any affected small LEA.

As part of the 2017-2018 CRDC, respondents were asked about the number of male and female athletic teams offered at the high school level. In analyzing the data in conjunction with information from the National Center on Education Statistics, small LEAs that served students in high school were less likely than larger LEAs to report at least one male or female team (30 percent of small LEAs indicated that the item was not applicable, compared with only 12 percent among non-small LEAs). Further, among those that reported at least one male or female athletic team, small LEAs operated, on average, approximately one-fifth as many teams as non-small LEAs (8.7 teams on average compared to 39.4).

The Department requests comment on any additional burdens for small entities.

2.D. Discussion of Significant Alternatives

As discussed in section 3 above (Regulatory Alternatives Considered), the Department reviewed and assessed various alternatives prior to issuing the proposed regulation, drawing on stakeholder feedback OCR received. Specifically, the Department considered: (1) leaving the current regulations without amendment; (2) addressing the issue through guidance; (3) proposing amendments to the regulations to specify permissible eligibility requirements; or (4) proposing a regulatory standard that can be effectively implemented, consistent with Title IX, by recipients serving students at varying grade and education levels in a variety of team sports at varying levels of competition.

As the Department described in the Regulatory Alternatives Considered (section 3) discussion of the RIA, it currently believes that alternative (4) is the best option, including that it is the Department's current view that the proposed regulation would better ensure fulfillment of

Title IX's nondiscrimination guarantee and would provide more clarity as to how Title IX applies to sex-related criteria that would limit or deny students' eligibility to participate on male or female teams consistent with their gender identity.

After careful consideration of the four alternatives discussed above, the Department proposes that adopting option (4) would best clarify recipients' legal obligations and most appropriately implement Title IX's guarantee of nondiscrimination on the basis of sex by recipients of Federal funds in the unique context of athletic teams offered by schools. Specifically, the Department's preliminary conclusion is that alternative (4) would help ensure recipients understand the standard that would govern if they adopt or apply sex-related eligibility criteria for determining student participation on male or female athletic teams and thereby protect students' equal opportunity to participate on male and female teams consistent with Title IX. The Department's current view is that alternative (4) also strikes the appropriate balance between Title IX's guarantee that a recipient's education program or activity be free from sex discrimination and the unique considerations in the context of athletics.

The Department also considered whether proposing different requirements for smaller-sized recipients than for mid-sized or larger ones would reduce any potential burden on smaller entities. The Department rejects this alternative at this time because Title IX rights do not depend on the size of a recipient, and the proposed regulation is sufficiently adaptable so that small entities, along with other entities, can adopt the approach that works best for their particular educational environment.

Executive Order 12250 On Leadership and Coordination of Nondiscrimination Laws

Under Executive Order 12250, the Attorney General has the responsibility to "review . . . proposed rules . . . of the Executive agencies" implementing nondiscrimination statutes such as Title IX "in order to identify those which are inadequate, unclear or unnecessarily

inconsistent."[23] The Attorney General has delegated that function to the Assistant Attorney General for the Civil Rights Division for purposes of reviewing and approving proposed rules, 28 CFR 0.51, and the Assistant Attorney General has reviewed and approved this proposed rule.

Paperwork Reduction Act of 1995

This proposed regulation does not contain any information collection requirements.

Intergovernmental Review: This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79 because it is not a program or activity of the Department that provides Federal financial assistance.

Assessment of Educational Impact: In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether the proposed regulation would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism: Executive Order 13132 requires the Department to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulation—§ 106.41(b)(2)—may have federalism implications. We encourage State and local elected officials to review and provide comments on this proposed regulation.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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[23] *Executive Order on Leadership and Coordination of Nondiscrimination Laws*, Exec. Order No. 12250, 45 FR 72995 (Nov. 4, 1980), https://tile.loc.gov/storage-services/service/ll/fedreg/fr045/fr045215/fr045215.pdf

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List of Subjects in 34 CFR Part 106

Civil rights, Education, Sex discrimination, Youth organizations.

Miguel A. Cardona,

Secretary of Education.

For the reasons discussed in the preamble, the Department of Education proposes to amend 34 CFR part 106 to read as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq*., unless otherwise noted.

2. Section 106.41 is amended by:

a. Designating the text following the heading in paragraph (b) as paragraph (b)(1); and

b. Adding paragraph (b)(2).

The addition reads as follows:

§ 106.41 Athletics.

* * * * *

(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.

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