



# Proposed Title IX Regulations: Athletics and Gender Identity

**Bricker Graydon Education Team**  
**April 12, 2023**



# Disclaimers

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- We are not giving you legal advice. Consult with competent legal counsel regarding how best to address a specific situation.
- Use the Q&A function to ask general questions and hypotheticals.
- Watch for your “Thanks for Attending” email, which will include a link to the slides of this webinar. (Yes you may share them with colleagues and post them if you choose.)

# Reminder

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- This session is regarding proposed regulations. None of this has been finalized, and you are not required to comply until finalization has occurred.
- We cannot possibly cover all 116 pages of the draft document in this webinar, but we're trying to focus on what we believe are the biggest changes in terms of impact.

# More Information

## [Athletic Compliance Resource Center](#)

### Our team is particularly experienced in:

- Title IX compliance and investigations, including the NCAA Policy on Campus Sexual Violence (check out our Title IX and athletics resource page here)
- Operationalizing Name, Image and Likeness
- Student-athlete safety and well-being
- Enforcement investigations
- Eligibility reviews
- Policy and procedure reviews including student-athlete handbooks
- Intellectual property portfolio development and management
- Multimedia streaming rights agreements, product licensing, and sponsorship
- Facilities compliance
- E-sports

## [Title IX Resource Center](#)

### K-12 Title IX Toolkit

The Bricker K-12 Title IX Toolkit is designed to assist school districts with their efforts to comply with the final Title IX Regulations published by the U.S. Department of Education on May 19, 2020, and effective on August 14, 2020.

[MORE](#)

### Upcoming Training Events

- K-12 Training dates through January 22, 2023: [Title IX Regulations Training \(K-12\) >>](#)
- Higher Ed Training dates through May 5, 2023: [Title IX Regulations Training \(Higher Ed\) >>](#)
- For additional Title IX webinars: [Bricker Events Page](#)

### Title IX Training

Our experienced attorneys are available to schools, colleges, universities and adult education programs to provide comprehensive Title IX employee training customized to your institution's policies, procedures and institutional culture.

[MORE](#)



# Your Presenters



- Kasey Nielsen
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- Jacob Sapp
- Melissa Carleton

# Agenda

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

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

## Title IX

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

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

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

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

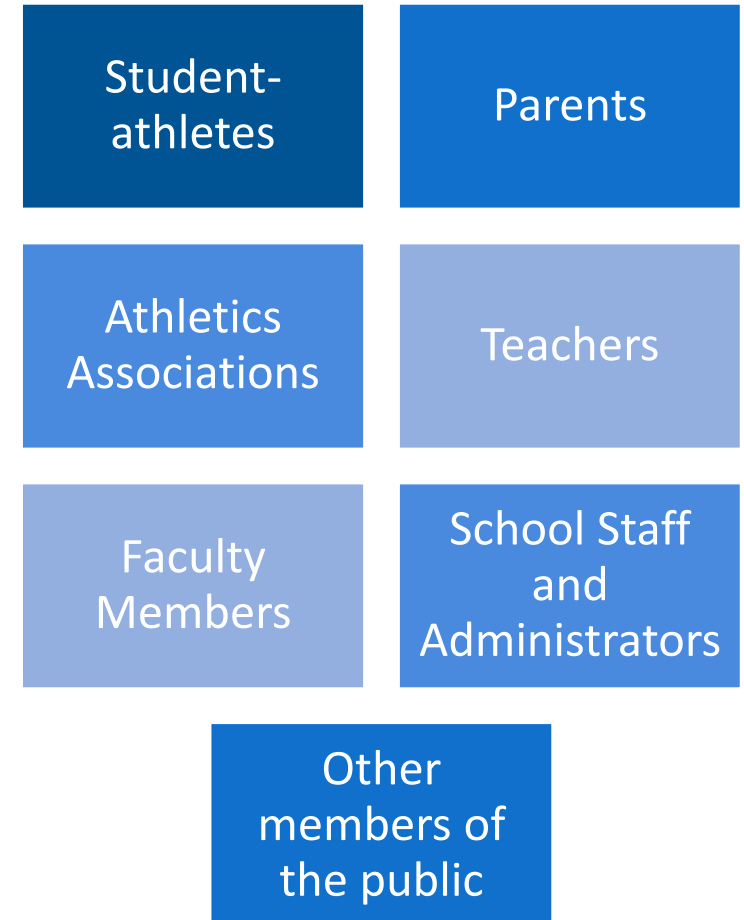
- May 2016 – OCR and DOJ issues a joint Dear Colleague Letter on Title IX and Transgender Students
- February 2017 – DCL is rescinded
- June 2020 – the Supreme Court issued its decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that discrimination based on sexual orientation or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



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

## What was the review process?

- Public feedback, including a [nationwide public hearing](#) from a variety of stakeholders
- Title IX's statutory text, purpose and regulatory framework
- Courts' interpretations of Title IX
- U.S. Constitution
- Existing approaches to sex-related eligibility criteria taken by a wide range of (1) States, (2) school districts and (3) **other organizations, including athletic associations and sport governing bodies**



# What Does the Rule Say? (1 of 10)

- “Old” rule is still intact!
  - Still permits schools to offer separate male and female teams (34 CFR 106.41(b))
  - Must provide equal athletic opportunities to girls/women and boys/men in:
    - Participation (the “three prong test”)
    - Athletic Scholarships
    - Other treatment and benefit areas (the “laundry list” items)
    - 34 CFR 106.41(c)
- When is the last time you did a gender equity/Title IX review?



The image shows three overlapping resource documents from the U.S. Department of Education Office for Civil Rights, dated February 2023. The top document is titled "Supporting Equal Opportunity in School Athletic Programs" and is a resource for students and families. The middle document is titled "Title IX and Athletic Opportunities in K-12 Schools" and is a resource for students and communities. The bottom document is titled "Title IX and Athletic Opportunities in Colleges and Universities" and is a resource for students, coaches, athletic directors, and school communities. Each document includes a table of contents and a list of topics covered. The bottom document also includes a footnote: "1 Title IX says: 'No 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.'" and a page number "1".

## What Does the Rule Say? (2 of 10)

106.41(b)(2)

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such **criteria** must, for each **sport**, **level of competition**, and **grade or education** level: (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.

**No blanket or one-size-fits-all ban on transgender students from participating**

# What Does the Rule Say? (3 of 10)

## Elementary Students

- Generally be able to participate on school sports teams consistent with their gender identity.

Middle School?

## High School and College Students

- The Department expects that sex-related criteria that limit participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition, and meet the proposed regulation's other requirements.

← LESS LIKELY

→ MORE LIKELY

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

# What Does the Rule Say? (4 of 10)

## Four Main Questions:

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

# What Does the Rule Say? (5 of 10)

- What could be **sex-related eligibility criteria**?
  - Sex marker on an identification document, such as a birth certificate, passport, or driver's license
  - Requiring physical examinations
  - Requiring medical testing
  - Requiring treatment
- What is an important **educational objective**?
  - What it is: Ensuring fairness & preventing sports related injury
  - What it is not: Excluding transgender students from sports or to require adherence to sex stereotypes, solely for the purpose of administrative convenience; Communicating or codifying disapproval of a student or a student's gender identity; pretext for an impermissible interest, singling out transgender students for disapproval or harm



# What Does the Rule Say? (6 of 10)

- What is **substantially related**?
  - The connection between the eligibility criteria and the educational objective
  - “direct, substantial relationship between”
  - Cannot rely on overbroad generalizations or false assumptions
  - Can you achieve the same goal using other means?



# What Does the Rule Say? (7 of 10)

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

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

What about **middle school** athletics?

How about **high school** athletics?

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

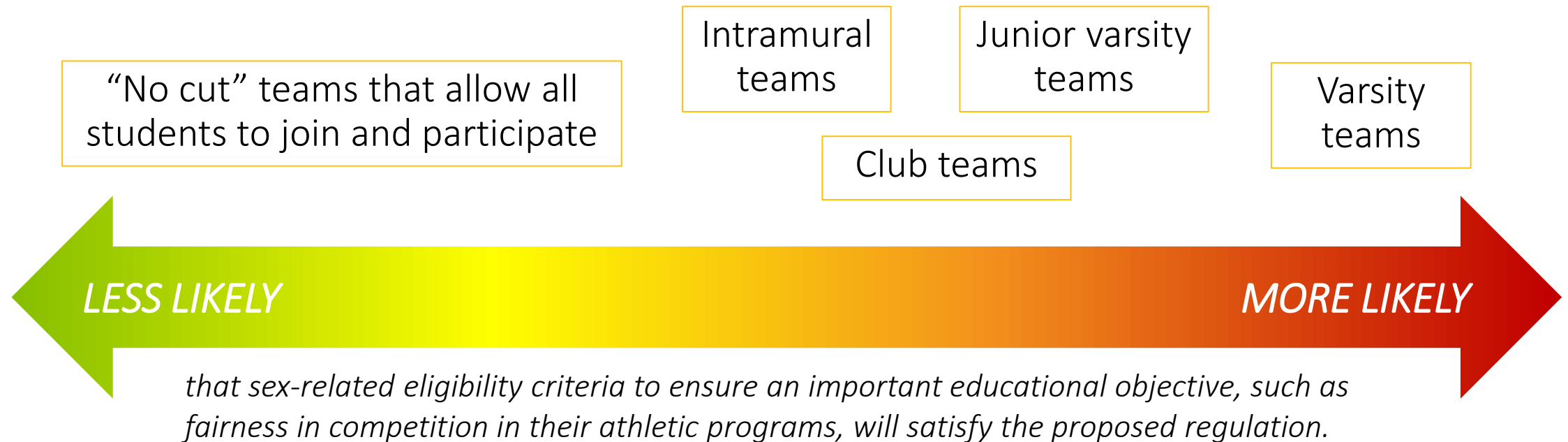
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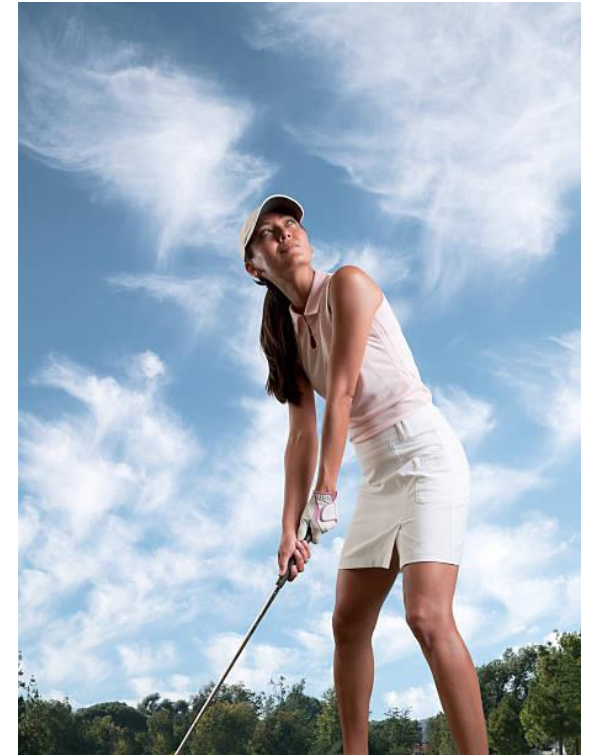
# What Does the Rule Say? (8 of 10)

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



# What Does the Rule Say? (9 of 10)

- What is the **sport**?
- Sports vary widely in the skills they require, and students vary widely in their talent for particular sports
- 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.’”
- Not required to adopt distinct eligibility criteria for each sport



# What Does the Rule Say? (10 of 10)

- Does it **minimize harms** to students?
  - Designing 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)
  - Ask: Is there a less harmful means of achieving the same goal?
- Criteria that limit or deny students' eligibility to participate in sports consistent with their gender identity can (citing case law):
  - Force individual students to disclose that they are transgender, which can be “extremely traumatic” and “undermine [a student’s] social transition”
  - Subject them to “embarrassment, harassment, and invasion of privacy through having to verify [their] sex”
  - Communicate disapproval of transgender students, “which the Constitution prohibits” in the context of public schools





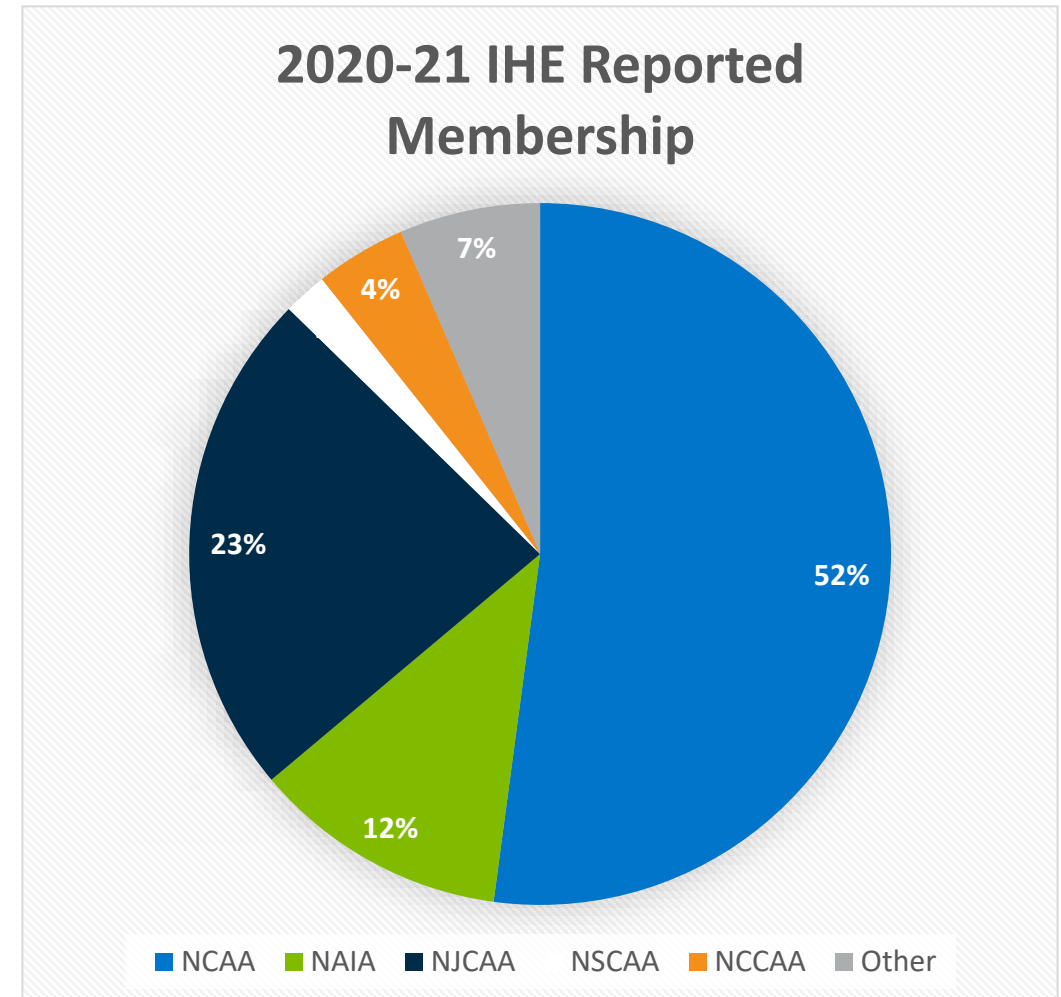
# State Law Conflicts (2 of 2)

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

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

# Higher Ed Impact (1 of 2)

- It depends on a variety of factors! But generally, it will only require updating policies or training materials
- First, are you looking at your intramural or club teams? Or your varsity teams?
- Second, *who* regulates the team's athletic eligibility?
  - For all – your State
  - Intramural/club – likely institution, so review your policy if you have one
  - Varsity – most likely an athletic association, maybe your conference and institution



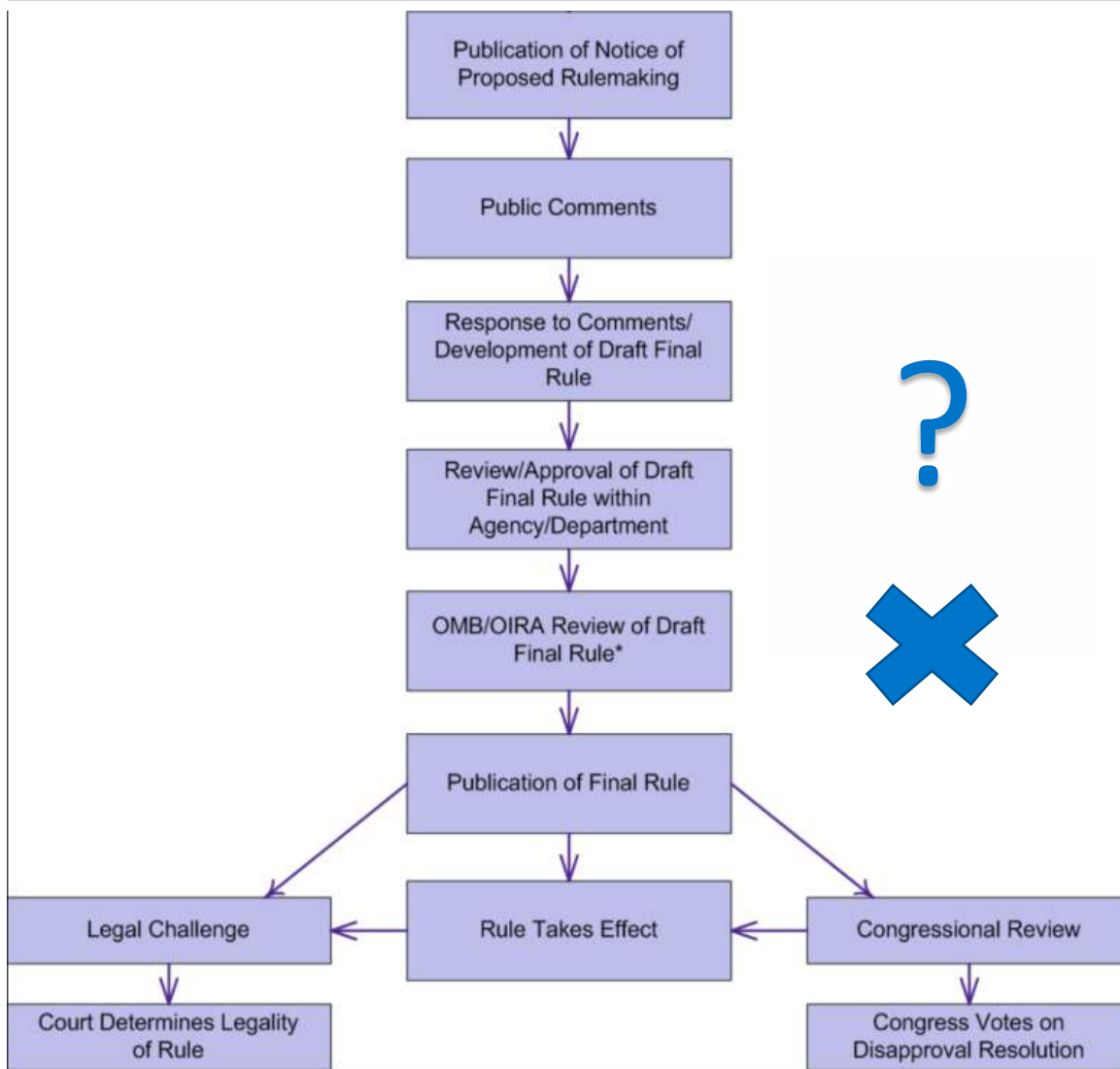
# Higher Ed Impact (1 of 2)

- 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)
  - 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
- What can those on campus do?

## Examples:

- USA Gymnastics
- USRowing
- USA Volleyball

# Next Steps to a Final Rule



## Public Comment Process



## Publication & Review



Upcoming: [www.bricker.com/events](http://www.bricker.com/events)

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



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