



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2021

The Honorable Charles Perry
Chair, Senate Committee on Water, Agriculture & Rural Affairs
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0396

Re: Whether the NCAA's policies on transgender student-athletes violate Title IX (RQ-0414-KP)

Dear Senator Perry:

You ask whether the National Collegiate Athletic Association ("NCAA"), through enactment of its transgender student-athlete policies, has violated Title IX of the Education Amendments of 1972.¹

The NCAA promulgates and enforces rules for the administration of collegiate athletic programs.

The NCAA is a private organization composed of approximately 1,100 member schools, including virtually all public and private universities and four-year colleges conducting major athletic programs in the United States.² See *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2150 (2021). The organization plays a significant role in the regulation of amateur collegiate sports. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984). The NCAA has adopted and promulgated rules of play, standards for academic eligibility, regulations concerning recruitment of student athletes, and rules governing the size of athletic squads and coaching staffs.³ *Id.* By joining the NCAA, each member school "agree[s] to administer their athletics program in accordance with the constitution, bylaws and other legislation

¹See Letter from Honorable Charles Perry, Chair, Senate Comm. on Water, Agric. & Rural Affairs, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (June 21, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0414KP.pdf>.

²NCAA, *Overview*, <https://www.ncaa.org/overview>.

³In 1987, the Seventieth Texas Legislature enacted chapter 131 of the Civil Practice and Remedies Code, which created an action for damages by a public or private university against an individual who violates a rule of the NCAA if the violation results in disciplinary action taken by the NCAA. See Act of 1987, 70th Leg., R.S., ch. 1065, § 1, 1987 Tex. Gen. Laws 3598, 3598–99. In doing so, the Legislature expressly "adopted" the "rules of each national collegiate athletic association in effect on January, 1, 1987." TEX. CIV. PRAC. & REM. CODE § 131.002.

of the Association.” NCAA Const. art. 3.2.4.1.;⁴ *see Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 183–84 (1988). The NCAA’s bylaws provide that its enforcement program shall be administered by a Committee on Infractions, which supervises an investigative staff, makes factual determinations concerning alleged rule violations, and exercises authority to impose appropriate penalties on a member found to be in violation. NCAA Bylaws, art. 19, §§ 19.01–.13, NCAA Manual at 358–88.

The NCAA has adopted a transgender policy that allows certain transgender athletes who have received medical intervention to participate in sex-separated sports activities other than in accordance with their biological sex.

Your questions ask specifically about the NCAA transgender policy. Request Letter at 1. That policy is detailed in a handbook titled *NCAA Inclusion of Transgender Student-Athletes*.⁵ The NCAA transgender policy provides:

1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men’s team, but is no longer eligible to compete on a women’s team without changing that team status to a mixed team.
2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men’s team but may not compete on a women’s team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

Transgender Handbook at 13. In addition, the policy provides that a “transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.” *Id.* You ask whether this policy violates Title IX. Request Letter at 1.

Title IX prohibits discrimination on the basis of sex in any education program or activity receiving federal funding.

Title IX is a federal law passed as part of the Education Amendments of 1972. *See* Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681–1688). Congress’s purpose in passing Title IX was to address significant concerns

⁴NCAA 2021–2022 *Division I Manual* at 13 (effective Aug. 1, 2021) (“NCAA Manual”), <https://web3.ncaa.org/lstdbi/reports/getReport/90008>.

⁵NCAA OFFICE OF INCLUSION, *NCAA Inclusion of Transgender Student-Athletes* (Aug. 2011) (“Transgender Handbook”), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

about discrimination against women in education. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523–24 (1982). The statute 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). A “program or activity” includes “all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance.” *Id.* § 1687(2)(A).

While the text of the statute itself does not speak to athletic programs, the regulations implementing Title IX have long addressed them:

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 no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a).

The U.S. Department of Education (the “Department”) is charged with promulgating regulations implementing Title IX and ensuring that recipients of federal financial assistance do not discriminate on the basis of sex in any educational program or activity. *See* 20 U.S.C. §§ 1681–1688; 34 C.F.R. §§ 106.1, 106.3(a). In addition to the funding aspect of Title IX enforced by the Department, a plaintiff may enforce Title IX through a private right of action for damages. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).

Relevant to your first question, the United States Supreme Court has concluded that the NCAA itself is not amenable to a private right of action under Title IX. *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 462 (1999) (concluding the NCAA’s receipt of dues from federally funded member institutions does not suffice to bring it within the scope of Title IX). However, to the extent a court determines that an NCAA policy imposed by a college or university violates Title IX, a college or university enforcing that policy could be found in violation of Title IX.

A court would have a basis to conclude that the transgender athlete policy adopted by the NCAA discriminates on the basis of sex.

You ask whether the NCAA discriminates on the basis of sex through its transgender policy. *See* Request Letter at 2. Answering your question requires analysis of both federal and state law, as well as judicial decisions, and legal commentators have recently recognized that those laws often conflict and pose significant risk for athletic departments of colleges and universities faced with this issue. *See* Martin D. Edel & Yara Kass-Gergi, *Making the Roster: Conflicting Title IX Interpretations Present Challenges for Transgendered Athlete Participation*, XI Nat’l L. Rev.

176 (June 25, 2021).⁶ The divergent positions taken by the Department within the past year highlight this conflict.

In early January of 2021, the Department issued guidance regarding its construction of Title IX, advising that “if a recipient chooses to provide ‘separate teams for members of each sex’ . . . , then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status . . . , to comply with Title IX.”⁷ The Department, in that guidance, recognized

one of Title IX’s crucial purposes is protecting women’s and girls’ athletic opportunities. Indeed, Title IX was enacted, and its regulations promulgated, to prohibit discrimination on the basis of sex in education programs and activities and to protect equal athletic opportunities for students who are biological females, including by providing for sex-segregated athletics.

Dep’t Memorandum of Jan. 8, 2021, at 7. Less than six months later, the Department issued a Notice of Interpretation regarding Title IX that reversed course on the position taken earlier in the year, advising that “the Department interprets Title IX’s prohibition on discrimination ‘on the basis of sex’ to encompass discrimination on the basis of sexual orientation and gender identity.” 86 Fed. Reg. 32637-01. It further advised that the Department’s Office of Civil Rights will “fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.” *Id.*⁸

The Department issued its recent Notice “in light of the Supreme Court’s decision . . . in *Bostock v. Clayton County*,” which concluded that discrimination against a person for being transgender is discrimination “on the basis of sex” in the limited context of Title VII employment cases. *Id.*; 140 S. Ct. 1731, 1753–54 (2020) (“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination But none of these laws are before us; we have not had the benefit of adversarial testing about the meaning of

⁶Available at <https://www.natlawreview.com/article/making-roster-conflicting-title-ix-interpretations-present-challenges-transgendered>.

⁷U.S. DEP’T OF EDUC., OFFICE OF THE GEN. COUNSEL, *Memorandum for Kimberly M. Richey, Acting Assistant Sec’y Gen. for the Office of Civil Rights* at 8 (Jan. 8, 2021) (“Dep’t Memorandum of Jan. 8, 2021”), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.

⁸Multiple states, including Texas, have passed legislation generally prohibiting students from competing in athletic competitions designated for the biological sex opposite a student’s biological sex. *See* Act of Oct. 17, 2021, 87th Leg., 3d C.S., H.B. 25, § 3 (to be codified at TEX. EDUC. CODE § 33.0834). The recently-enacted Texas law was adopted for the express purpose of “promoting equality of athletic opportunity between the sexes under Title IX of the Education Amendments of 1972.” *Id.* § 1(2). However, it applies only to teams “sponsored or authorized by a school district or open-enrollment charter school,” and it does not address athletics at the collegiate level. *Id.* § 3. In March 2020, Idaho enacted a similar statute, the Fairness in Women’s Sports Act. IDAHO CODE ANN. §§ 33-6201–33-6206. A federal district court granted a preliminary injunction enjoining the State of Idaho from enforcing the law on the grounds that the plaintiffs are likely to succeed on equal protection claims that the statute is unconstitutional, but that case is pending on appeal to a higher court. *Hecox v. Little*, 479 F. Supp. 3d 930, 987–88 (D. Idaho 2020); *Hecox v. Little*, No. 20-35813 (9th Cir. filed Sept. 17, 2020).

their terms, and we do not prejudge any such question today.”). Despite the U.S. Supreme Court expressly limiting the application of its holding to Title VII, the Department construed it to extend to Title IX, stating that “courts rely on interpretations of Title VII to inform interpretations of Title IX.” 86 Fed. Reg. 32637-01.⁹

Neither the U.S. Supreme Court, the Fifth Circuit Court of Appeals, nor any Texas court has extended the holding in *Bostock* to the Title IX context. And the factual circumstances at issue in that case are largely distinguishable from a Title IX issue involving sex-segregated athletic competitions. One of the purposes of Title IX is to ensure that the segregated allocation of athletic opportunities does not disadvantage women. See *Cohen v. Brown Univ.*, 101 F.3d 155, 176–77 (1st Cir. 1996); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175–76 (3d Cir. 1993). In contrast to the employment and admissions contexts, in the athletics context, biological sex is a highly relevant characteristic. See *Cohen*, 101 F.3d at 178. Courts have long recognized that female competitors are at a physical disadvantage when required to compete against their male counterparts. See *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982). The NCAA transgender policy assumes that a brief period of testosterone suppression will eliminate male physical advantages over women; however, some scientific studies dispute that assumption and recognize the ongoing physical advantage biological males have over biological females following testosterone suppression.¹⁰

To the extent that biological males retain a physical advantage over biological females, permitting them to compete against biological females disadvantages the biological females. Allowing such competitions denies biological females equal athletic opportunities to their biological male counterparts, contrary to the purposes of Title IX. And that disadvantage is based on sex, in particular the physiological differences between sexes, which the NCAA policy ignores for female sex-segregated teams but not for male sex-segregated teams. In such circumstances, a court would have a basis to conclude that requiring a biological female to compete against a transgender female in an athletic competition discriminates against the biological female on the basis of sex. Whether a university discriminates on the basis of sex in violation of Title IX must be analyzed on a case-by-case basis after fact finding, which is beyond the scope of an Attorney General opinion. See Tex. Att’y Gen. Op. No. JC-0027 (1999) at 3 (explaining that whether

⁹Multiple federal courts outside the Fifth Circuit have extended the holding in *Bostock* to the Title IX context. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–17 (4th Cir. 2020) (finding a policy that prohibited a transgender male from using the male restroom discriminated against a student in violation of Title IX); *Adams v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018) (same); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2021 WL 3081883, at *7 (S.D. W. Va. 2021) (concluding that a biologically male student demonstrated a likelihood of success on the merits of Title IX claim when excluded from participation on a female sports team).

¹⁰Joanna Harper et. al, *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin?*, 55 BRITISH JOURNAL OF SPORTS MEDICINE 865, 870 (2021) (“[T]he small decrease in strength in transwomen after 12-36 months of [gender-affirming hormone therapy] suggests that transwomen likely retain a strength advantage over cisgender women.”), <https://bjsm.bmj.com/content/bjsports/55/15/865.full.pdf>; see also David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 71 (2017) (observing that “while testosterone deficiency may lead to loss of bone density, the overall structural framework of the skeleton is likely to change slowly if at all”), https://anzac.edu.au/publications/pubdata/pdf/2017_28397355.pdf.

discrimination in violation of a federal law occurs involves questions of fact, which cannot be addressed in an Attorney General opinion).

The NCAA may penalize universities that do not comply with its constitution, bylaws, and rules.

You also ask whether universities are required to comply with NCAA policies. Request Letter at 2. As discussed above, the NCAA is a private organization, and membership in the NCAA is voluntary. *See Tarkanian*, 488 U.S. at 183, 196. Member universities that do not comply with the NCAA constitution, bylaws, and rules may receive penalties for noncompliance. The NCAA regularly enforces its constitution, bylaws, and rules by imposing sanctions against member schools who do not comply. *See* NCAA Bylaws, art. 19, §§ 19.01–13, NCAA Manual at 358–88 (“Infractions Program”). The NCAA separates schools into divisions based on the size of school and scope of athletic program, and each division has a Committee on Infractions, made up of representatives from member schools and conferences and members of the general public with legal training. *Id.*; *see also Bd. of Regents of Univ. of Okla.*, 468 U.S. at 89. These committees conduct hearings and impose penalties for infractions. Penalties include public reprimand and censure, fines, vacating winning records, reducing scholarship allowances, bans on postseason competition, and bans on televised contests. We are not aware of any NCAA action taken to penalize a college or university related to compliance with the NCAA transgender policy. How a court would determine whether a violation of Title IX occurred if the NCAA imposed penalties against a university must be analyzed on a case-by-case basis after fact finding, which is beyond the scope of an Attorney General opinion. *See* Tex. Att’y Gen. Op. No. JC-0027 (1999) at 3.

S U M M A R Y

The National Collegiate Athletic Association has adopted a policy that allows certain transgender athletes who have received medical intervention to participate in sex-separated sports activities other than in accordance with their biological sex. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal funding. A court would have a basis to conclude that a transgender athlete policy like that adopted by the NCAA discriminates on the basis of sex in violation of Title IX.

Membership in the NCAA is voluntary, but the NCAA may penalize member schools that do not comply with its constitution, bylaws, and rules. How a court would determine whether a violation of Title IX occurred if the NCAA imposed penalties against a university must be analyzed on a case-by-case basis after fact finding, which is beyond the scope of an Attorney General opinion.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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