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*Submitted via [www.regulations.gov](http://www.regulations.gov)*

Dr. Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Ave SW  
Washington, DC 20202

Catherine E. Lhamon  
Asst. Secretary, Office for Civil Rights  
U.S. Department of Education  
400 Maryland Ave SW  
Washington, DC 20202

**Re: Docket ED-2022-OCR-0143, Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance**

Dear Secretary Cardona and Assistant Secretary Lhamon:

The Education Law Center of Pennsylvania (“ELC-PA”) submits this comment in response to the Department of Education’s (the Department) Notice of Proposed Rulemaking (“NPRM” or “proposed rules”) on Title IX of the Education Amendments of 1972 (“Title IX”) and Nondiscrimination on the Basis of Sex in Athletics Education Programs. We echo the concerns raised by our partners at the National Women’s Law Center (NWLC), GLSEN, and The Leadership Conference on Civil and Human Rights. We write separately to share our particular concerns regarding the importance and impact of the proposed amended regulations for students in Pennsylvania’s publicly-funded K-12 schools.

We appreciate the Department’s proposal of a strong rule that makes clear that school policies and state laws cannot categorically ban transgender, nonbinary and intersex students from playing sports. We also urge the Department to take additional steps described in these comments to most effectively protect against sex discrimination and ensure all girls - including transgender and intersex girls - and nonbinary students can play sports alongside their K-12 peers.

***About Education Law Center-PA***

ELC-PA is a statewide non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. We advocate on behalf of the most underserved students, including children living in poverty, children of color, children with disabilities, English learners, those who are in the child welfare and juvenile justice systems, LGBTQI+ youth, and students experiencing homelessness.

We work in three strategic areas: enforcing equal access to a quality education, ensuring adequate and fair funding, and dismantling the school-to-prison pipeline. ELC’s work includes individual and impact litigation, statewide, local, and individual advocacy, and providing

technical assistance to families and students. We participate in partnerships with grassroots community organizations, as well as with local and statewide organizations and agencies. Our advocacy aims to ensure that decisions made by policymakers serve the needs of students who are most marginalized. Over its history, ELC has drafted statewide and federal legislation, regulations, and regulatory guidance. Our recommendations emanate from ELC's nearly fifty years of on-the-ground experience working to ensure fair and equitable access for all students. ELC urges that any amendments promulgated by the Department reflect the varied experiences and intersectionality of students and clarify both the rights of students and the responsibilities of schools and districts to narrow widening educational inequalities.

### **I. Transgender, Nonbinary and Intersex Students Are Under Attack in Pennsylvania**

Our Pennsylvania public school communities are privileged to include transgender, nonbinary and intersex students. It is a joy to know these talented and resilient young people. For students to learn and thrive, schools must be safe places where all students are valued, their individual learning needs are met, and they are given the support to grow into adulthood.

Unfortunately, it is a frightening time for LGBTQI+ students in our schools. Pennsylvania's LGBTQI+ students face high rates of harassment, assault and other discrimination based on their sexual orientation and/or gender identity, through unchecked peer harassment and discriminatory school district policies and statewide proposed legislation.

The 2021 responses to GLSEN's survey of Pennsylvania students reported significant discrimination and harassment in schools:<sup>1</sup>

- The vast majority of LGBTQ students in Pennsylvania regularly (sometimes, often, or frequently) heard anti-LGBTQ remarks in schools, including 95% of students heard negative remarks in school about gender expression and 77% of students heard negative remarks about transgender people.
- 57% of LGBTQ+ students experienced verbal harassment based on their gender expression in Pennsylvania schools, and 30% experienced online harassment during school and 18% experienced physical harassment in school based on their gender expression.
- Transgender and nonbinary students experienced gender-based discrimination in Pennsylvania schools, specifically being prevented from: using their chosen name or pronouns (39%), using the bathroom that aligns with their gender (34%), using the locker room that aligns with their gender (32%), wearing clothing deemed "inappropriate" based on gender (19%), and playing on the school sports team that was consistent with their gender (18%).

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<sup>1</sup> GLSEN, 2021 State Snapshot: School Climate for LGBTQ Students in Pennsylvania (Feb. 2023), [https://maps.glsen.org/wp-content/uploads/2023/02/GLSEN\\_2021\\_NSCS\\_State\\_Snapshots\\_PA.pdf](https://maps.glsen.org/wp-content/uploads/2023/02/GLSEN_2021_NSCS_State_Snapshots_PA.pdf)

The Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health reports alarming rates of self-harm and negative impacts of recent politics for Pennsylvania youth:<sup>2</sup>

- 54% of transgender and nonbinary youth in Pennsylvania seriously considered suicide in the past year.
- 19% of transgender and nonbinary youth in Pennsylvania attempted suicide in the past year.
- 80% of transgender and nonbinary youth in Pennsylvania reported experiencing symptoms of anxiety, and 64% reported experiencing symptoms of depression.
- 71% of LGBTQ youth in Pennsylvania reported they experienced discrimination based on sexual orientation or gender identity.
- 39% of LGBTQ youth in Pennsylvania reported that recent politics negatively impacted their well-being “a lot” and another 48% reported they “sometimes” negatively impacted their well-being.
- Nationally, 83% of transgender and nonbinary youth said they have worried about transgender people being denied the ability to play sports due to state or local laws.

Over the past two years, in Pennsylvania, as across the country, we are facing an unprecedented coordinated political attack against LGBTQI+ students, and in particular transgender and nonbinary students. Educators and parents who stand up for these students have been harassed, instructed to remove gay pride flags and any mention of ‘gender identity’ or gay people in their classrooms, targeted with meritless lawsuits and pushed out of our schools.<sup>3</sup> Parents of LGBTQI+ students have told ELC-PA that they are fearful to enroll their children in these neighborhood public schools due to the likelihood of children being harassed and the failure of schools to provide a supportive, affirming learning environment.

Transgender students in Pennsylvania are being targeted through proposed statewide legislation and multiple school districts considering or implementing policies that prevent students from participating in a school sports team that align with their gender identity, as well as

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<sup>2</sup> The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health by State: Pennsylvania, (Dec. 2022) <https://www.thetrevorproject.org/wp-content/uploads/2022/12/The-Trevor-Project-2022-National-Survey-on-LGBTQ-Youth-Mental-Health-by-State-Pennsylvania.pdf>

<sup>3</sup> Two parents in Mt. Lebanon School District sued their district and an educator who read a storybook to children that included a transgender character, arguing their child must be excused from any mention of gender identity, and only books and lessons describing the lives of straight cisgender people are acceptable in public schools. The school district defended the educator but settled the case in a manner that perpetuates discrimination against transgender students. See <https://www.newsweek.com/outraged-parents-lawsuit-alleges-gender-dysphoria-lesson-given-kids-1714899>. The school board and administration at Central Bucks School District has implemented policies banning books, instructed educators to remove LGBTQ pride flags from classrooms, and reportedly instructed educators they cannot use a transgender student's name and pronoun unless approved by a parent. See <https://www.inquirer.com/news/central-bucks-lenape-middle-school-pride-flag-andrew-burgess-lgtbq-20220511.html>

other discriminatory policies relating to bathroom and locker room access and refusal to use transgender students' name and pronoun.<sup>4</sup>

The Pennsylvania legislature has considered multiple bills including [HB 972](#) and [SB 1191](#) that would single out transgender athletes for discrimination by denying them the ability to play on teams that align with their gender identity. HB 972 was approved by the General Assembly in June 2022 and required a veto by Governor Wolf on July 8, 2022.<sup>5</sup> We expect similar bills to be introduced again this year.

School districts across Pennsylvania are also taking up policies excluding transgender youth from school sports. In July 2022 the Hempfield School District approved a categorical ban on transgender students participating in sports aligned with their gender identity, over vigorous parent and community opposition.<sup>6</sup> Manheim Township School District also proposed a policy prohibiting transgender students from participating in sports aligned with their gender identity, and only tabled the action because of the promise of proposed Title IX regulations on the topic.<sup>7</sup>

In December 2022, Red Lion Area School District approved a “Title IX Emergency Directive” that states students can only participate on sports teams aligned with their “gender assigned at birth” (and discriminates on the basis of bathroom use as well).<sup>8</sup> A Red Lion board member’s discriminatory purpose was clear when commenting that the policy would affect six current students and “If we nip it in the bud now, it doesn’t have to get more than six.”<sup>9</sup> Red Lion school board recently returned to the issue and proposed a policy providing for sex-separated athletic teams “based on reproductive biology and genetic make-up” which will be established by requiring a student present their birth certificate on request.<sup>10</sup>

In January 2023, Penncrest School District approved a policy change that categorically prohibits any person born as a “biological male” from participating in a girls athletic program, but would not prevent any person who is either “biologically born female” or who identifies as

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<sup>4</sup> See e.g., Pennridge School Board has passed a bathroom policy that advocates say discriminates against transgender students, May 11, 2023, <https://www.inquirer.com/news/pennridge-bathroom-policy-transgender-discrimination-20230511.html>; A Beaver County school district is weighing a pronouns policy as LGBTQ student rights are challenged across the nation, Apr. 8, 2023, <https://www.post-gazette.com/news/education/2023/04/07/south-side-area-school-district-beaver-county-pronouns-policy-lgbtq-students/stories/202304060108>;

<sup>5</sup> See Gov. Tom Wolf vetoes transgender legislation, Jul. 8, 2022, <https://www.wgal.com/article/gov-wolf-vetoes-transgender-legislation/40561710>.

<sup>6</sup> See Hempfield school board passes long-debated athletics policy on transgender athletes, Jul. 12, 2022, [https://lancasteronline.com/news/local/hempfield-school-board-passes-long-debated-athletics-policy-on-transgender-athletes/article\\_68857a92-024b-11ed-90d5-8b332381df5e.html](https://lancasteronline.com/news/local/hempfield-school-board-passes-long-debated-athletics-policy-on-transgender-athletes/article_68857a92-024b-11ed-90d5-8b332381df5e.html).

<sup>7</sup> See Manheim Township School District tables discussion, research on transgender athlete participation, Oct. 13, 2022, [https://lancasteronline.com/news/local/manheim-township-school-district-tables-discussion-research-on-transgender-athlete-participation/article\\_185bc520-4b71-11ed-808f-27d27ce6ca8c.html](https://lancasteronline.com/news/local/manheim-township-school-district-tables-discussion-research-on-transgender-athlete-participation/article_185bc520-4b71-11ed-808f-27d27ce6ca8c.html)

<sup>8</sup> See Red Lion Area School District Oks directive that students use facilities that correlate with birth gender, Dec. 8, 2022, [https://lancasteronline.com/news/regional/red-lion-area-school-district-oks-directive-that-students-use-facilities-that-correlate-with-birth/article\\_e6b5d6e6-7726-11ed-b70a-3b58f6a8ae58.html](https://lancasteronline.com/news/regional/red-lion-area-school-district-oks-directive-that-students-use-facilities-that-correlate-with-birth/article_e6b5d6e6-7726-11ed-b70a-3b58f6a8ae58.html)

<sup>9</sup> *Id.*

<sup>10</sup> Red Lion Area School District, Proposed Policy 123.3, Sex Based Distinctions in Athletics (May 9, 2023), <https://4.files.edl.io/4cbf/05/10/23/174044-ce1eda9f-1e0a-46be-842c-97a567b82aae.pdf>

female as their gender identity from playing boys sports.<sup>11</sup> Comments from Penncrest school board president included an intent to discriminate based on the “look” of students and to require a student present their birth certificate,<sup>12</sup> which is not permitted under state school enrollment law.<sup>13</sup>

Many districts, like Conestoga Valley School District,<sup>14</sup> rely on a 2014 policy from the Pennsylvania Interscholastic Athletic Association which states only that “where a student’s gender is questioned or uncertain,” the principal has the deciding vote on whether the student can play sports and with whom.<sup>15</sup> Such an undefined and subjective policy directive leaves students open to a wide variety of discrimination based on the personal viewpoints of their school administrators. The Pennsylvania Department of Education has failed to provide any specific guidance to school districts on the rights of transgender students to participate in school sports or other access issues.

As a student at Manheim Township testified to her school board: “These kids' lives are in your hands, my life is in your hands... You might think that this is just about sports but it's not. ... We're watching and we're listening and we're taking your decision to heart. You are setting a precedent for how you treat your students. And right now, I'm ashamed to be one of your students. Think about us kids and our lives.”<sup>16</sup>

The foundational premise of sports ban policies - that trans girls are not ‘real’ girls and trans boys are not ‘real’ boys - is based on discriminatory stereotypes prohibited by Title IX and antithetical to the mission of public schools to provide safe environments and equitable opportunities to all students. These policies harm transgender students and students who do not conform to sex stereotypes and intersex students as well. Significantly, these policies are likely to disproportionately harm Black girls and other girls of color who are also subjected to racist and sexist stereotypes associating “femininity” with whiteness. School districts in Pennsylvania need to see clear and strong regulations from the Department clarifying that Title IX preempts

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<sup>11</sup> Penncrest School District, Policy 123 Interscholastic Athletics (Jan. 12, 2023), <http://go.boarddocs.com/pa/pncr/Board.nsf/goto?open&id=CLQHA94784F9>.

<sup>12</sup> See Penncrest board enacts book ban with one policy, targets transgender athletes with another, Jan. 14, 2023, <https://www.goerie.com/story/news/education/2023/01/14/penncrest-school-board-pa-book-ban-and-policy-targeting-transgender-student-athletes/69805245007/>

<sup>13</sup> See Pa. Dep’t of Education, Student Enrollment FAQ, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx> (“For example, a school district can never demand only one kind of document, for example a birth certificate, to prove age.”)

<sup>14</sup> Conestoga Valley School District, Policy 123 Interscholastic Athletics (May 20, 2019), <http://go.boarddocs.com/pa/conestoga/Board.nsf/goto?open&id=BAU8DL6E7329>; Conestoga Valley athletics policy will not include specific language regarding transgender athletes, defers to PIAA, Mar. 16, 2023, [https://lancasteronline.com/news/regional/conestoga-valley-athletics-policy-will-not-include-specific-language-regarding-transgender-athletes-defers-to-piaa/article\\_79bd4654-c367-11ed-843f-c39ab0d984bc.html](https://lancasteronline.com/news/regional/conestoga-valley-athletics-policy-will-not-include-specific-language-regarding-transgender-athletes-defers-to-piaa/article_79bd4654-c367-11ed-843f-c39ab0d984bc.html).

<sup>15</sup> Pennsylvania Interscholastic Athletic Assoc., Inc., News Release June 20, 2014: Article XVI Seasons and Out-of-Seasons Rules and Regulations, <http://district5.piaa.org/news/mixed%20gender%20press%20release%20-%20announcement%206-20-14.pdf>

<sup>16</sup> Manheim Township School District tables discussion, research on transgender athlete participation, Oct. 13, 2022, [https://lancasteronline.com/news/local/manheim-township-school-district-tables-discussion-research-on-transgender-athlete-participation/article\\_185bc520-4b71-11ed-808f-27d27ce6ca8c.html](https://lancasteronline.com/news/local/manheim-township-school-district-tables-discussion-research-on-transgender-athlete-participation/article_185bc520-4b71-11ed-808f-27d27ce6ca8c.html)

any state law or policy that categorically bans transgender, nonbinary or intersex students from playing sports or their ability to play sports consistent with their gender identity.

## II. Title IX requires that all students be permitted to enjoy the benefits of school athletics.

Education Law Center of Pennsylvania joins the comments of the National Women's Law Center, GLSEN and others who have described the educational benefits of playing sports which are promised to all students under Title IX. Playing sports is associated with higher grades and standardized test scores, as well as higher rates of school completion.<sup>17</sup> It teaches students about teamwork, helps build their leadership skills, and confers psychological benefits, such as feelings of well-being, a sense of belonging among peers, and connectedness to the school community.<sup>18</sup> All students deserve equal access to these benefits. Preventing transgender, intersex,<sup>19</sup> and nonbinary students from playing school sports based solely on the fact that they are transgender or nonbinary is a form of sex discrimination that exacerbates the poor educational and mental health outcomes for which they are already at risk due to the significant rates of in-school and out-of-school victimization they face.<sup>20</sup> But when transgender and nonbinary students are allowed to play sports, they tend to receive higher grades<sup>21</sup> and experience increased feelings of belonging, higher self-esteem, and lower levels of depression.<sup>22</sup>

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<sup>17</sup> Nat'l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

<sup>18</sup> See, e.g., *id.* at 42; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. OF SPORT MANAGEMENT 349, 349–50 (2013); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 J. OF SCHOOL HEALTH 397–401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 INT'L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 98 (2013).

<sup>19</sup> Because of the absence of inclusive data, less is known about intersex students' experiences with school sports. However, recent reporting from the Washington Post indicates that intersex students often avoid or are discouraged from participating in sports for fear of scrutiny. See Anne Branigin, *Intersex youths are also hurt by anti-trans laws, advocates say*, WASHINGTON POST (July 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>.

<sup>20</sup> In a national survey of LGBTQ+ students, an alarming number of students reported being harassed because of their LGBTQ+ status, with an overwhelming majority of all students (76.1%) reporting experiencing verbal harassment on this basis, and over one-third of students (31.2%) reporting physical harassment on this basis. This hostility in turn impacts students' academic outcomes: many students reported not having plans to finish school, with 51.5% of students reporting hostile school climate (e.g., harassment and transphobic policies) as the reason they did not plan to graduate. See GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* 19, 34 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

<sup>21</sup> GLSEN, *The Experiences of LGBT Students in School Athletics*, (2013) <https://www.glsen.org/sites/default/files/2020-06/The%20Experiences%20of%20LGBT%20Students%20in%20Athletics.pdf>; The Trevor Project, *The Well-Being of LGBTQ Youth Athletes* (Aug. 2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/08/LGBTQ-Youth-Sports-and-Well-Being-Research-Brief.pdf>.

<sup>22</sup> Russell B. Toomey & Stephen T. Russell, *An initial investigation of sexual minority youth involvement in school-based extracurricular activities*, 23 J. OF RESEARCH ON ADOLESCENCE 304, <https://doi.org/10.1111%2Fj.1532-7795.2012.00830.x>; GLSEN, *LGBTQ Students and School Sports Participation* (2021),

These benefits are significant and could even be lifesaving for transgender and nonbinary students.<sup>23</sup>

Within this environment of discrimination, transgender students are significantly less likely to report having played on a school sports team in the past year than their cisgender peers, according to CDC data.<sup>24</sup> Transgender students who are Black, Indigenous, and people of color (BIPOC) experience compounded marginalization in school sports. For example, Black transgender youth were significantly less likely to report having played on a school sports team in the past year than both non-Black transgender students and Black cisgender students.<sup>25</sup> Another recent study of CDC data found that transgender girls of color were significantly less likely to report participating in school sports than other girls.<sup>26</sup>

Nationally, between 2019 and 2021 the percentage of transgender and nonbinary students reporting that they had been barred from school sports more than doubled.<sup>27</sup> In GLSEN's

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<https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf>.

<sup>23</sup> Among LGBTQI+ youth, transgender, nonbinary, and intersex students have elevated suicide risk. More than half (53%) of transgender and nonbinary youth seriously considered attempting suicide in the past year, compared to 45% of LGBTQ youth. The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* (2022), <https://www.thetrevorproject.org/survey-2022/>.

<sup>24</sup> 41% of transgender youth reported participating on at least one school sports team in the past year, compared to 59% of cisgender youth. J. Rhodes Perry and Somjen Frazer, *On All Sides: How Race & Gender Influence Health Risk for Transgender Students of Color* (Washington, DC: Advocates for Youth, 2020), <https://advocatesforyouth.org/wp-content/uploads/2020/09/On-All-Sides-Full-Report.pdf> (Accessed May 14, 2023). Similarly, GLSEN has found that LGBTQ+ students were half as likely as non-LGBTQ students to participate in both interscholastic and intramural sports, and that transgender and nonbinary students were less likely to participate in sports than their cisgender peers. Clark, Kosciw, and Chin, "LGBTQ Students and School Sports Participation." See also Caitlin M. Clark and Joseph G. Kosciw, "Engaged or excluded: LGBTQ youth's participation in school sports and their relationship to psychological well-being," *Psychology in the Schools* 59, no. 1 (2022): 95-114, <https://doi.org/10.1002/pits.22500>.

<sup>25</sup> 36% of Black transgender youth reported that they participated in at least one school sports team, compared to 40% of non-Black transgender youth, 54% of Black cisgender youth, and 59.2% of non-Black cisgender youth. J. Rhodes Perry and Shoshana K. Goldberg, "Sports Participation and Health of Black Transgender Youth," *Advocates for Youth* (2021), <https://www.advocatesforyouth.org/wp-content/uploads/2021/07/Black-Trans-Youth-Sports-Participation-and-Health-Policy-Brief.pdf> (Accessed May 14, 2023).

<sup>26</sup> Raina V. Voss, Lisa M. Kuhns, Gregory Phillips II, Xinzi Wang, Sigrid F. Wolf, Robert Garofalo, Sari Reisner, and Lauren B. Beach, "Physical Inactivity and the Role of Bullying Among Gender Minority Youth Participating in the 2017 and 2019 Youth Risk Behavior Survey," *Journal of Adolescent Health* (2022), <https://doi.org/10.1016/j.jadohealth.2022.08.020> (finding that transgender girls were less likely to participate in school sports and that, after adjusting for demographics, Black, Hispanic, and Asian transgender girls were significantly less likely to indicate that they participated in school sports).

<sup>27</sup> 51.5 % of transgender males reporting being prevented from playing on a sports team consistent with their gender identity in 2021, compared to 15.8% in 2019. 45.9% of transgender females reported being prevented from playing on a sports team consistent with their gender identity in 2021, compared to 21.0% in 2019. 37.1% of trans nonbinary students and 53.2% of students who identified exclusively as transgender only students reporting being prevented from playing on a sports team consistent with their gender identity in 2021, compared to 16.9% of trans students who identified as neither male or female in 2019. 27.7% of nonbinary students who do not identify as transgender reported being prevented from playing on a sports team consistent with their gender identity in 2021, compared to 10.7% in 2019. Kosciw, et al., *The 2021 National School Climate Survey*, p. 92, <https://www.glsen.org/research/2021-national-school-climate-survey>; Clark, et al., "LGBTQ Students and School Sports Participation," p. 3, <https://www.glsen.org/research/lgbtq-students-and-school-sports-participation>.

National School Climate Survey of LGBTQ+ students, nearly half (46%) of transgender secondary students, including those who identify as nonbinary, were prevented from playing on a school sports team consistent with their gender identity.<sup>28</sup> More than one in four (27.7%) of nonbinary students reported the same.<sup>29</sup>

Anti-trans sports bans and restrictions do nothing to “protect girls rights” or address the actual, ongoing gender inequities in athletics<sup>30</sup> - indeed, they only heighten the risk of sex discrimination for all girls who play sports. There is no evidence that permitting transgender and intersex students to play on sports teams aligned with their gender identity harms anyone. A recent analysis of CDC data found that there was no negative impact on the participation of girls and women in school sports in states that had implemented trans-inclusive state athletics policies.<sup>31</sup> In fact, early evidence from California and Connecticut suggests that trans-inclusive policies are correlated with increased participation of girls in school sports.<sup>32</sup> In contrast, where states enacted trans-exclusionary policies, girls’ overall participation in high school sports declined.<sup>33</sup> Anti-trans sports bans and restrictions only codify sexist stereotypes of how girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity.

### **III. The proposed Title IX athletics rule is a strong start but further clarity is needed to prevent any perceived ambiguities being used to harm transgender, nonbinary and intersex students.**

The proposed rule creates a test for any restriction on participation consistent with gender identity: for “each sport, level of competition, and grade or education level,” any restriction must be justified on the grounds that it is “substantially related to achievement of an important

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<sup>28</sup> Joseph G. Kosciw, Caitlin M. Clark, Leesh Menard, *The 2021 National School Climate Survey: The experiences of LGBTQ+ youth in our nation’s schools*, (New York: GLSEN), pp. 91-93 <https://www.glsen.org/research/2021-national-school-climate-survey>.

<sup>29</sup> *Id.* at 92.

<sup>30</sup> Women and girls still lack significant opportunities to play sports as compared to men and boys, with Black and brown women and girls being disproportionately denied opportunities to play; schools still prioritize funding and resourcing men’s and boys’ teams while giving women’s and girls’ teams second-class treatment; and sexual harassment and abuse of student athletes still persists. Women’s Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), [https://www.womenssportsfoundation.org/articles\\_and\\_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women](https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women); Nat’l Women’s Law Center, *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), <https://nwlc.org/resources/finishing-last>; Dean Golembeski, *Gender Equality Remains Elusive in College Sports*, *Best Colleges* (Nov. 10, 2021), <https://www.bestcolleges.com/news/2021/07/01/gender-equality-remains-elusive-in-college-sports/>.

<sup>31</sup> Shoshana K. Goldberg, “Fair Play: The Importance of Sports Participation for Transgender Youth,” *Center for American Progress* (February 8, 2021), 14-16, <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play>. Florida and South Carolina have since passed anti-trans youth athlete laws, however, these were not implemented at the time of this analysis and would not affect the findings of this study. See GLSEN and TransAthlete.com (2022). Navigator: Trans and Nonbinary Athletic Inclusion Policies. <https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>.

<sup>32</sup> Goldberg, “Fair Play,” 14-16 (Feb. 8, 2021).

<sup>33</sup> *Id.* at 14-15.



educational objective,”<sup>34</sup> and must “minimize harm” to the transgender, nonbinary, and intersex students who face additional barriers to participation (and potentially exclusion).<sup>35</sup>

The Department clarifies in the preamble that, to be “substantially related to achievement of an important educational objective,” there must be a “direct, substantial relationship between a recipient’s objective and the means used to achieve that objective,” and precludes reliance “on overly broad generalizations about the talents, capacities, or preferences of male and female students.”<sup>36</sup> The Department clearly states that categorical bans, such as those that “exclude all transgender girls and women from participating on any female athletic teams,” cannot be justified under this rule.<sup>37</sup>

The preamble provides several objectives that would not count as being substantially related to achievement of an important educational objective, including “administrative convenience” and transphobic and sexist objectives such as “communicating or codifying disapproval of a student or a student’s gender identity,” “excluding transgender students from sports,” “requir[ing] adherence to sex stereotypes,” as well as any stated objective that is in reality “a pretext for an impermissible interest in singling out transgender students for disapproval or harm.”<sup>38</sup> The proposed rule also requires that any restriction on participation consistent with gender identity “minimize harm” to the transgender, nonbinary and intersex students who would face exclusion or additional barriers to participation.<sup>39</sup>

Given these elements, if properly interpreted and robustly enforced, the proposed rule could effectively prohibit restrictions on transgender, nonbinary and intersex students’ participation in school sports teams consistent with their gender identity. However, a few revisions and additions are necessary to ensure all students rights under Title IX are protected.

**A. The regulatory text should expressly prohibit categorical bans and affirm a presumption of participation consistent with gender identity in K-12 sports which cannot be overcome.**

The Department must state in the rule text that categorical bans are prohibited. While this is part of the proposed rule’s standard and explained in the preamble discussion, such an important principle must be stated in the rule itself.

The proposed rule states: “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

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<sup>34</sup> U.S. Department of Education, “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,” at 22891.

<sup>35</sup> *Id.* at 22891.

<sup>36</sup> *Id.* at 22873.

<sup>37</sup> *Id.* at 22873.

<sup>38</sup> *Id.* at 22872.

<sup>39</sup> *Id.* at 22891.

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.”<sup>40</sup>

With this proposed rule, the Department makes clear that, for a restriction on participation consistent with gender identity to satisfy the heightened intermediate-scrutiny standard, it must be appropriately tailored with respect to age, sport, and level of competition, and must not rely on overbroad sex-based generalizations or assumptions, including assumptions of categorical or overwhelming advantage. The purpose of Title IX covering K-12 school athletics is to ensure equal opportunity to benefit from sports participation and this principle must not be eclipsed by limited school-based pathways to elite and professional competition.

Therefore, the Department should state in the text of the rule that there is always a presumption of inclusion of transgender, nonbinary and intersex students in all K-12 school sports and because these settings prioritize the social, mental and physical health benefits of sports participation over competition, schools will not be able to meet the demanding standard and overcome the presumption. The Department should expressly prohibit K-12 schools from adopting any sex-based restrictions for student participation in school sports.

Additionally, the Department should clarify that when a school chooses to offer only gender-specific teams in a sport, students thereby excluded must have a reasonable opportunity to participate.<sup>41</sup> The rule should clearly state that where only boys’ and girls’ teams are offered, nonbinary students should have the opportunity to try out for the team on which they are most comfortable.

**B. If the Department declines to expressly prohibit all sex-based restrictions in K-12 schools, additional clarifying protections are required.**

If the Department does not expressly prohibit schools from adopting sex-based restrictions for K-12 participation in sports, the Department should state in the text of the rule itself that any restriction must address a well-founded and substantial concern and cannot be based on overbroad generalizations or sex-based stereotypes.

**1. The Department must clarify that “injury prevention” and “fairness in competition” will rarely, if ever, be permissible bases for restrictions because they are rooted in sex stereotypes.**

The Department names “prevention of sports-related injury” as an example that a recipient “might assert... as an important educational objective in its athletic programs,

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<sup>40</sup> *Id.* at 22875.

<sup>41</sup> 34 C.F.R. § 106.41(b).

particularly for older students in competitive athletic programs,” as a justification for restrictions on transgender, nonbinary, and intersex students’ opportunity to play on a male or female team consistent with gender identity.<sup>42</sup> While preventing injury is an important educational interest, there is no evidence behind the transphobic and sexist myths that transgender, nonbinary or intersex students pose a risk of injury to their cisgender peers. Such harmful, stigmatizing myths assume that transgender and intersex girls are bigger, faster and stronger than cisgender girls and therefore pose a danger to cisgender girls who must be protected.<sup>43</sup>

The Department must not echo discriminatory and dehumanizing rhetoric that relies on overbroad generalizations and stereotypes. This could create a hostile environment for any student who is perceived as not conforming to gender stereotypes<sup>44</sup> by encouraging students and staff to scrutinize and harass peers that some deem too tall, muscular or otherwise “unfeminine.” This practice is likely to disproportionately harm BIPOC girls because of racist and sexist stereotypes that have linked femininity with whiteness.

Participation in sports always includes risks and schools have many nondiscriminatory options to reduce risks including “appropriate coaching and training, requiring use of protective equipment and specifying rules of play.”<sup>45</sup> With effective, nondiscriminatory options available, the Department should rule out “prevention of injury” as a permissible justification for restrictions on participation consistent with gender identity because it does not pass the test in the proposed rule.

The preamble also identifies “fairness in competition” as a potential “important educational objective in its athletic programs, particularly for older students in competitive athletic programs,” that a school entity may identify as a justification for restrictions on transgender, nonbinary and intersex students’ participation.<sup>46</sup> As with the “prevention of injury” discussion, fairness is an important educational interest but there is no evidence behind the transphobic and sexist myths that transgender or intersex girls have an inherent athletic advantage over their cisgender peers.<sup>47</sup>

Fairness in sports has never been about equalizing all physiological differences among athletes. Body diversity is inherent in sports and there are numerous physiological differences

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<sup>42</sup> U.S. Department of Education, “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,” 22872.

<sup>43</sup> Lindsay Pieper, Jaime Schultz, Libby Sharrow, Anna Baeth, and Anne Lieberman, “A statement from Athlete Ally on the future of women’s sport, co-authored by affiliated academics and endorsed by leading scholars in the fields of Kinesiology, Law and Policy, and Gender Studies: The Future of Women’s Sports Includes Transgender Women and Girls,” Athlete Ally, November 15, 2021, [http://www.athleteally.org/wp-content/uploads/2021/11/The-Future-of-Womens-Sport-includes-Transgender-Women-and-Girls-Statement\\_11.15.21.pdf](http://www.athleteally.org/wp-content/uploads/2021/11/The-Future-of-Womens-Sport-includes-Transgender-Women-and-Girls-Statement_11.15.21.pdf).

<sup>44</sup> *Cf. Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018).

<sup>45</sup> U.S. Department of Education, “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,” 22869.

<sup>46</sup> *Id.* at 22872.

<sup>47</sup> See Pieper, *et al.*, “The Future of Women’s Sports Includes Transgender Women and Girls,” [http://www.athleteally.org/wp-content/uploads/2021/11/The-Future-of-Womens-Sport-includes-Transgender-Women-and-Girls-Statement\\_11.15.21.pdf](http://www.athleteally.org/wp-content/uploads/2021/11/The-Future-of-Womens-Sport-includes-Transgender-Women-and-Girls-Statement_11.15.21.pdf).

that impact athletic ability,<sup>48</sup> particularly among K-12 students whose bodies are still developing at widely varying rates. There are multiple sources of competitive advantage that are not policed under a mandate of fairness but would contribute more to inequities in athletic success than transgender or intersex status, including socioeconomic factors like nutrition, coaching, access to quality equipment, and having enough time to train for competitive success.<sup>49</sup> Policies that prevent students from participating in sports because they fall outside the stereotyped ideals of what girls' bodies should look like serve only to contravene Title IX's purpose and constitute sex discrimination.

## **2. The rule must specify that requiring sex verification practices is not permitted.**

The preamble states that any criteria must minimize harm - including physical examinations, medical testing or treatment - but the Department should explain that sex verification or sex testing is not permitted because it inherently would cause significant harm to affected students. Requiring sex verification with demands for medical documentation, hormonal or chromosomal testing, genital exams, or the collection of young students' reproductive health information are unscientific and fundamentally at odds with the proposed rule's harm minimization requirement because they traumatize and stigmatize students.

Due to the serious harm caused by sex verification, the American Medical Association has adopted a policy opposing mandatory testing, medical treatment or surgery for transgender athletes and athletes with intersex traits, affirming these athletes should be permitted to compete in alignment with their gender identity, and opposing the satisfaction of third-party requirements to certify or confirm an athlete's gender through physician participation.<sup>50</sup>

Without this critical clarification in the rule, sex testing and intrusive examinations remain permissible even for K-12 students. Such restrictions invade students' privacy and bodily autonomy and are often arbitrarily applied based on prejudice against girls who are perceived to fall outside sexist, stereotyped ideals of femininity. Sex verification is disproportionately

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<sup>48</sup> Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 91 (2023) (noting that there are over 200 genetic differences other than sex that affect athletic ability, including "height, blood flow, muscle mass, pain threshold, and respiratory and cardiac functions") (citing Joanna L. Grossman & Saraswati Rathod, *Trashing the Playing Field: State Legislators Misguided Move to Ban Transgender Women and Girls from Competing in Women's Sports*, JUSTICIA: VERDICT (Apr. 27, 2021), <https://perma.cc/V6HB-J3LH>).

<sup>49</sup> See, e.g., Andrew B. Bernard and Meghan R. Busse, "Who Wins the Olympic Games: Economic Resources and Medal Totals," *Review of Economic and Statistics* 86, no. 1 (2004): 413-417; Canadian Center for Ethics in Sports, *Transgender Women Athletes and Elite Sports: A Scientific Review*, 6 (2022), [https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-scientificreview-executivesummary-e\\_0.pdf](https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-scientificreview-executivesummary-e_0.pdf).

<sup>50</sup> American Medical Association, "Physicians oppose mandatory gender-based treatments for athletes," November 15, 2022, <https://www.ama-assn.org/delivering-care/population-care/physicians-oppose-mandatory-gender-based-treatments-athletes>.

enforced against Black and brown girls whose bodies have historically been subject to excessive scrutiny for nonconformity with white-centric ideals of femininity.<sup>51</sup>

The Department must explain clearly that sex verification or sex testing violates Title IX and is never necessary to advance an important educational objective because it causes serious harm to students.

**3. The Department must clarify permissive minimally burdensome procedures to establish a student's gender identity and state that requiring burdensome standards that are impossible or impracticable for students to meet would be unlawful.**

The Department should treat any procedures related to establishing a student's gender identity identically across school sports and other activities covered by section 106.31(a)(2) in its 2022 proposed Title IX rule.<sup>52</sup> Procedures must be flexible and minimally burdensome. The Department should apply sincerity standards consistent with Title IX's religious exemption as the sincerity of a student's gender identity, like one's religious belief, is "generally not in dispute"<sup>53</sup> and is "generally presumed or easily established."<sup>54</sup>

While a gender marker on state issued ID or amended birth certificate may be accepted as a means of establishing eligibility, students must not be limited to these means given the cost involved and the potential interaction with discriminatory state legislation making such options impossible or impracticable.<sup>55</sup> The Department must explicitly state that other methods of establishing a student's gender identity will be accepted, including a student's consistent assertion of that gender identity at school, or a statement from a family member, health care provider, friend or other community member.<sup>56</sup>

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<sup>51</sup> See National Women's Law Center, "Fulfilling Title IX's Promise: Let Transgender and Intersex Students Play," June 2022, [https://nwlc.org/wp-content/uploads/2019/09/NWLC\\_Trans50th\\_FactSheet.pdf](https://nwlc.org/wp-content/uploads/2019/09/NWLC_Trans50th_FactSheet.pdf); *Hecox vs. Little*, brief amicus curiae National Women's Law Center, Lawyers' Committee for Civil Rights Under Law and 60 Additional Organizations in Support of Appellees and Affirmance, December 20, 2021, available at <https://nwlc.org/wp-content/uploads/2020/12/ECF-Stamped-Hecox-Amicus-12.21.2020.pdf> ("Black and brown women and girls are routinely targeted, shamed, and dehumanized for not conforming to society's expectations of femininity.") .

<sup>52</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 FR 41390, 41571 (Jul. 12, 2022), 41390, 41571.

<sup>53</sup> *Moussazadeh v. Tx. Dep't of Crim. Just.*, 703 F.3d 781, 790 (5th Cir. 2012) (applying Religious Land Use and Institutionalized Persons Act (RLUIPA)).

<sup>54</sup> Equal Employment Opportunity Comm'n, Compliance Manual Section 12: Religious Discrimination, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

<sup>55</sup> The Department should account for state attacks on gender-affirming care that will impact students' abilities to comply with some sex-related eligibility criteria. Currently 16 states have bans preventing youth from accessing gender-affirming care. See Movement Advancement Project, *Bans on Best Practice Medical Care for Trans Youth*, [https://www.lgbtmap.org/equality-maps/healthcare/youth\\_medical\\_care\\_bans](https://www.lgbtmap.org/equality-maps/healthcare/youth_medical_care_bans) (last updated May 1, 2023).

<sup>56</sup> See, e.g., Mass. G.L. c. 4, § 7 ("Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.");

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The students of Pennsylvania and across the country are entitled to attend schools and participate in athletics free from sex-based discrimination, and we appreciate the Department's consideration of these comments to ensure these rights are safeguarded and fully implemented.

Respectfully submitted,



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EDUCATION LAW CENTER PA

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California Dep't of Educ., School Success and Opportunity Act (AB 1266) FAQ,  
<https://www.cde.ca.gov/re/di/eo/faqs.asp> (“Gender identity is a deeply rooted element of a person’s identity. Therefore, school districts should accept and respect a student’s assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student’s core identity. Some examples of evidence that the student’s asserted gender identity is sincerely held could include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.”).