



May 15, 2023

Submitted electronically via the Federal eRulemaking Portal

The Honorable Miguel Cardona
Secretary of Education

The Honorable Catherine Lhamon
Assistant Secretary for Civil Rights

U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Comment in Response to the Athletics NPRM [Docket ID ED-2022-OCR-0143]

Dear Secretary Cardona and Assistant Secretary Lhamon:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) submits these comments in response to the proposed rule published in the Federal Register on April 13, 2023, by the U.S. Department of Education (“Department”) regarding *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* (“Proposed Rule”).¹ Specifically, the Department invites comments regarding its proposal to amend the regulations implementing Title IX of the Education Amendments of 1972 (“Title IX”) in the context of athletics and solicits responses to specific directed questions, including “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[.]”² We appreciate the occasion to offer our informed perspective that all students regardless of sex should access the full benefits of education, and the Proposed Rule must be strengthened to ensure that transgender, nonbinary, and intersex students are afforded equal athletic opportunity to participate in a recipient’s athletic program alongside their peers.

Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving the full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer (“LGBTQ+”) people and everyone living with HIV through impact litigation, education, and policy advocacy. Since its inception, Lambda Legal has direct experience representing, assisting, and providing critical resources and toolkits to LGBTQ+ youth (and their parents or guardians),

¹ See Proposed Rule, 88 Fed. Reg. 22860, available at <https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

² *Id.* at 22861, 22877-78.





including students who face unlawful discrimination, harassment, and bullying at school. We have also partnered with, and worked alongside, school districts and administrators who endeavor to create safe and inclusive environments where LGBTQ+ students can thrive and reach their full potential. As relevant here, our direct experience working with transgender, nonbinary, and gender diverse youth who participate in education programs and activities at schools, colleges, and universities across the country means that we can share our informed views about the myriad of challenges they face in their daily lives, including the obstacles to nondiscriminatory participation in athletic programs.³

We agree with the Department that amending Title IX regulations is necessary to provide much needed clarity on how recipients can meet their obligations to ensure that *all* students have equal opportunity to participate on male and female athletic teams. The final amended athletics regulation implementing Title IX should, at minimum, (1) ensure that general nondiscrimination principles prohibiting sex-related criteria for participation consistent with a student’s gender identity apply uniformly to interscholastic, club, and intramural athletic programs; (2) expressly prohibit categorical exclusions in athletic participation policies and other sex-related eligibility criteria which rely on overly broad generalizations or sex-based stereotypes that deny or limit a student’s participation in an athletic program consistent with their gender identity; and (3) make clear that “sex verification” practices and other barriers to participation that are impossible or impracticable for students to meet violate Title IX. In short, the Department should provide greater clarity of the Proposed Rule to minimize any possible confusion or misapplication and to help recipients and students understand the robust protections provided by Title IX.

I. The Rule Should Ensure General Nondiscrimination Principles Prohibiting Sex-Related Eligibility Criteria Apply to Interscholastic, Club, and Intermural Athletic Programs.

Title IX broadly prohibits discrimination on the basis of sex in education programs that receive federal financial assistance. 20 U.S.C. §1681(a) (stating “[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.”). In its July 2022 NPRM, the Department proposed to amend its regulations to clarify, among other things, that Title IX prohibits discrimination based on gender identity and sex characteristics.⁴ Moreover, the Department made clear that in the limited circumstances in which Title IX permits different treatment on the basis of sex, a recipient may not implement a policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity because it subjects a person to more than de minimus harm. For the same reasons, the Department should expressly state in the text of the athletics rule that

³ See, e.g., Joel Beall, *Why a 14-year-old boy is outlawed from playing on his golf team*, Golf Digest (April 26, 2022), <https://www.golfdigest.com/story/luc-esquivel-transgender-high-school-sports-ban-tennessee>; Katie Barnes, *Young transgender athletes caught in middle of states' debates*, ESPN.com, Sept. 1, 2021, https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates.

⁴ See July 2022 NPRM, 87 Fed. Reg. 41571.



there is always the presumption of inclusion in sports to ensure transgender, nonbinary, and intersex students have an equal athletic opportunity to participate on sex-separated teams consistent with their gender identity.

Providing equal athletic opportunity for students regardless of sex is a cornerstone of Title IX. The Proposed Rule correctly highlighted “the many benefits that students gain from participating on athletics teams, including learning skills that promote personal health, wellness, and leadership; being part of a team; and fostering social relationships.”⁵ No student should be denied the benefits associated with participation on athletics teams, particularly in interscholastic, club, and intermural athletic programs, all of which prioritize the social, mental, and physical health benefits of sports participation. The longstanding baseline athletics rule and overall framework respects Title IX’s nondiscrimination guarantee and aims to achieve maximum inclusion for all students, even where it permits (but does not require) recipients to offer separate male and female teams. The same should be true for transgender, nonbinary, and intersex students. Thus, there should be no ambiguity in the final rule that sex-based eligibility criteria are impermissible to deny or limit participation of students consistent with their gender identity in K-12, college club, and intermural athletic programs.

II. The Rule Should Expressly Prohibit Categorical Exclusions and Other Sex-Related Criteria That Rely on Overly Broad Generalizations or Sex-Based Stereotypes.

As explained in its preamble, the Proposed Rule prohibits athletics eligibility criteria that takes a “one-size-fits-all” approach or otherwise uses sex-based criteria to categorically ban transgender, nonbinary, and intersex youth from participating on male or female teams consistent with their gender identity. In at least 21 states, transgender youth are categorically denied the benefits of playing alongside their peers and legislative efforts in many other states persist. In any context, Title IX abhors sex-based restrictions that rely on overly broad generalizations and sex-based stereotypes that limit or deny students equal educational opportunities. For this reason, the Department should expressly state in the text of the rule that categorical bans and eligibility criteria rooted in overly broad generalizations or sex-based stereotypes violate Title IX.

We are also concerned some recipients may erroneously read the preamble of the Proposed Rule to suggest that “preventing injury” and “ensuring fairness” are presumptive legitimate goals justifying sex-based restrictions. They are not. Of course, some risk of injury is inherent in playing sports, but there is no reliable evidence demonstrating that transgender women and girls specifically pose a risk of injury to other women and girls. Recipients, including those with inclusive policies permitting transgender students to play alongside their peers, have long utilized nondiscriminatory strategies to minimize injury for all students, such as “appropriate

⁵ Proposed Rule, at 22865; *see also Benefits of Youth Sports*, PRESIDENT’S COUNCIL ON SPORTS, FITNESS & NUTRITION SCIENCE BOARD (Sep. 17, 2020), https://health.gov/sites/default/files/2020-09/YSS_Report_OnePager_2020-08-31_web.pdf; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional ‘SCS’ Scale*, 27 J. of Sport Management, (2013) (explaining that sports participation can create social connections and a sense of community in participants, especially for youth populations, whose interest in playing sports is often born out of a desire to connect with their peers).



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 based on gender identity.” With respect to ensuring fairness, “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.”⁶ In any event, Title IX’s existing regulation at 106.41(c) ensures that all students are afforded overall equal athletic opportunity, and the Department can apply longstanding and well understood rules to ensure compliance.

The Department should also add fulsome examples in the preamble that further illustrate various overly broad generalizations and sex-based stereotypes at play in many policies that operate to deny or limit transgender, nonbinary, and intersex youth from equal athletic opportunity. The Proposed Rule offers some examples of illegitimate sex-based criteria, including where the “objective is communicating or codifying disapproval of a student or a student’s gender identity” and for “administrative convenience.” Notably, administrative convenience” rationales have often served as a proxy for exclusion or otherwise operates to deter a student from participating in athletics at all. As the preamble correctly notes, sex based-criteria “force individual students to disclose that they are transgender, which can be ‘extremely traumatic’ and ‘undermine [a student’s] social transition” and often “leave[] 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.”⁷ In some states, identity documents correctly reflecting the student’s identity and the provision of appropriate healthcare for transgender, nonbinary, intersex people are impossible, impractical, and/or cost prohibitive. The Department must account for these oppressive state laws, ostensibly “neutral” criteria, and other barriers to participation that primarily and disproportionately affect transgender, nonbinary, and intersex students.

III. The Rule Should Expressly Forbid “Sex Verification” Practices

The Department must clarify that mandated “sex verification” practices violate Title IX. There is long and sordid history of mandated sex verification procedures designed to root out athletes in women’s sports who are viewed as insufficiently “female.” During the 1950s, women competing on the international level were required to obtain certificates of femininity. That policy was superseded by an even stricter policy in the 60s that imposed mandatory genital inspections on all elite women athletes.⁸ Sex verification procedures are still imposed in elite athletics whenever suspicions are raised about a particular athlete based on how they appear, behave, or perform.

⁶ 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)).

⁷ Proposed Rule, at 22877.

⁸ Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes* (June 28, 2016), NEW YORK TIMES, <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.



Women and girls that are athletes of color have been the most affected by “gender monitoring” because they are disproportionately accused of failing to conform with stereotypes about how men and women should appear—accusations that are deeply rooted in racial bias and historic slavery practices—a view that is premised upon an ideal of femininity centered on whiteness and fragility.⁹ The disproportionate number of accusations targeting female athletes of color is exacerbated by the fact that the organizations that enforce “gender disputes” at the elite level are often private organizations, rather than by more neutral entities such as a multilateral coalition.⁹

Without an express prohibition, the Proposed Rule could lead to a troubling increase in surveillance and scrutiny on K-12 athletes who fail to conform with gender stereotypes. Last year, in response to a covert investigation into whether a cisgender girl was transgender, the Utah High School Activities Association acknowledged that they often receive complaints when an athlete “doesn’t look feminine enough” and that they look into each of the allegations.¹⁰ The impact would be detrimental to transgender students, but transgender students make up only 1.4% of 13–17 year olds, and sadly, few of them participate.¹¹ In other words, as with elite college sports, standards that encourage gender monitoring would fall hardest on K-12 female athletes of color and LGBTQ+ students generally, who would be most likely to experience increased scrutiny, and they would be the most likely population forced to undergo potentially traumatic sex verification procedures.

There is already an attempt to impose drastic measures that would encourage gender policing in K-12 schools. Many of the bills seeking to prohibit transgender people from participating in athletics contain similar provisions. For example, one of the first bills to become law requires that any dispute over a student’s sex must be resolved by forcing the student to undergo a health examination that requires a health care provider to certify the student’s sex.¹² The Proposed Rule should prohibit scrutiny and surveillance of vulnerable students who do not conform with gender stereotypes about how an athlete should look, behave, or perform. We urge the Department to prohibit mandated sex verification that traumatizes and stigmatizes students, in addition to violating students’ bodily autonomy and privacy rights.

CONCLUSION

We appreciate the Department’s commitment to providing strong, clear protections that ensure all students are afforded an equal opportunity to participate in athletic programs consistent with

⁹ *Id.*

¹⁰ Courtney Tanner, *Utah Parents Complained a High School Athlete Might be Transgender After She Beat Their Daughters* (Aug. 18, 2022), THE SALT LAKE TRIBUNE.

¹¹ Jody L. Herman, et al., *How Many Adults and Youth Identify as Transgender in the United States?* (June 2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>.

¹² Idaho Code Ann. § 33-6203(3) “A dispute regarding a student’s sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student’s personal health care provider that shall verify the student’s biological sex. The health care provider may verify the student’s biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.”



their gender identity. Athletics are an integral part of an institution's education program, and all students benefit from a rule that ensures athletics programs are operated in a manner that is free from discrimination on the basis of sex. The Proposed Rule should be strengthened to ensure that recipients provide nondiscriminatory athletic participation opportunities to transgender, nonbinary, and intersex youth and facilitate compliance with Title IX.

In summary, the Proposed Rule and its preamble should:

- Explicitly state there is always the presumption of inclusion in sports to ensure transgender, nonbinary and intersex students have an equal athletic opportunity to participate on sex-separated teams consistent with their gender identity;
- Prohibit sex-based eligibility criteria as a means to deny or limit participation of students consistent with their gender identity in K-12, club, and intermural athletic programs;
- Expressly prohibit categorical bans and eligibility criteria rooted in overly broad generalizations or sex-based stereotypes violate Title IX;
- Include fulsome examples in the preamble to further illustrate various overly broad generalizations and sex-based stereotypes at play in many policies that operate to deny or limit transgender, nonbinary, and intersex youth from equal athletic opportunity; and,
- Bar mandated sex verification practices.

If you have any questions, please feel free to contact Sasha Buchert, Lambda Legal's Director of the Non-Binary and Transgender Rights Project, at sbuchert@lambdalegal.org.

Most respectfully,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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