



NATIONAL ASSOCIATION OF
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The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington DC, 20202

The Honorable Catherine Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2022-OCR-0143

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

Submitted Electronically

On behalf of the National Association of School of Psychologists (NASP), I am pleased to submit the following comments in response to the proposed regulations that will govern athletics participation the application of Title IX as it pertains to participation in athletics. It is NASP's position that all students, including transgender and gender diverse (TGD) students should be allowed to participate in school activities, including athletics, consistent with their gender identity. Further, we oppose the use of harmful and invasive medical examinations to confirm or challenge one's gender identity and reject efforts to define "sex" to only mean biological sex for the purpose of limiting TGD student participation in sports. The Department makes clear that law and/or policy that outright bans TGD students from participating in school sports consistent with their gender identity is a clear violation of Title IX. This proposed rule does allow for the adoption and application of exclusionary eligibility criteria *if* "for each sport, level of competition, and grade or education level," the restriction be "substantially related to achievement of an important educational objective" and "minimize harm." The proposed rule explicitly notes that de facto categorical bans would not pass this test. Further, it is expected that any policy based on harmful and inaccurate transphobic myths, which have been disproven by scientific evidence, will likewise fail this test and be considered a violation of Title IX. This proposed rule is a significant and positive step forward to ensuring equal access and opportunity in athletics for TGD youth, if the final rule is properly interpreted, implemented, and consistently enforced.

As outlined in the comments NASP submitted in collaboration with GLSEN, the American School Counselor Association, the National Education Association, and others, the LGBTQ+ community has been the target of coordinated efforts to further stigmatize and erase them from society. These efforts have a profoundly negative impact on the mental health and wellbeing of LGBTQ+ youth¹. It is certain that some decisionmakers or those involved in the administration of athletics programs would attempt to exploit any ambiguous language to justify discrimination and exclusion. Conversely, it is imperative that the Department provide robust guidance and technical assistance to help entities covered by Title IX navigate conflicting state and local policy to support implementation of this rule as intended. As such, these comments focus on revisions we believe will strengthen and support successful implementation of the final rule and support full inclusion of TGD students in school athletics.

¹ Detailed information about current efforts to ban or limit TGD participation in athletics and LGBTQ+ mental health and wellbeing is included in the joint GLSEN/NASP/ASCA/NEA comments

Importance of Inclusive Sports Participation

School sports provide numerous educational and wellbeing benefits² and *all* students should have access to the benefits of participation. The benefits are especially salient in the context of the current youth mental and behavioral health crisis as participation in sports can serve as a protective factor against depression, anxiety, and other mental health challenges, especially for LGBTQ+ youth³. LGBTQI+ youth who experience discrimination, including in the form of being barred from playing school sports consistent with gender identity, have lower levels of self-esteem, higher levels of depression, and a twofold increase in the likelihood of reporting that they seriously considered suicide in the past year compared to LGBTQI+ students who did not report experiencing anti-LGBTQI+ discrimination. Additionally, there was misguided concern that cisgender females would stop participating in sports with the allowance of TGD athletes' participation. However, girls' participation in sports has grown by 13.4% nationwide in the last decade. 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.⁴ In fact, early evidence from California and Connecticut suggests trans-inclusive policies are correlated with increased participation of girls in school sports.⁵ In contrast, where states enacted trans-exclusionary policies, girls' overall participation in high school sports declined.⁶

Analysis and Suggested Revisions

The proposed rule prohibits categorical bans on sports participation consistent with one's gender identity and creates a test for any policy or sex-based eligibility criteria that would limit or restrict sports participation consistent with gender identity. This test requires that "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 educational objective," and must "minimize harm" to the transgender, nonbinary, and intersex students who face additional barriers to participation (and potentially exclusion).

The preamble of the proposed rule provides additional clarification and notes 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." The preamble also expressly states that transphobic or sexist objectives, including "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" do not constitute "important educational objective[s]" as intended by this rule. Furthermore, the proposed rule 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 under that restriction.

Recommendation: We commend the Department for the strong language in the preamble and we urge the Department to strengthen language in the *regulatory text* of §106.41 to:

- Expressly state that the use of categorical bans on participation in sports consistent with gender identity is a violation of Title IX;
- Clearly affirm that where school athletics are lawfully separated by sex, there is a presumption of participation on separate-sex teams consistent with gender identity;

2 Rochelle M. Eime, Janet A. Young, Jack T. Harvey, Melanie J. Charity, and Warren R. Payne, "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," *International journal of behavioral nutrition and physical activity* 10, no. 1 (2013): 1-21, <https://doi.org/10.1186/1479-5868-10-981>

³ 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>.

⁴ 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/>

⁵ Goldberg, "Fair Play," 14-16 (Feb. 8, 2021).

⁶ Id. at 14-15.

- Explicitly state that any policy rooted in sex-based stereotypes and/or transphobic beliefs would violate Title IX;
- Rule out “injury prevention” as a permissible justification for restrictions on participation consistent with gender identity as participation in sports inherently includes risks;
- Rule out “fairness in competition” as a permissible justification for restrictions on participation consistent with gender identity; and
- Eliminate unnecessary and costly requirements for affirming one’s gender when considering sports participation eligibility. The rules must clearly state a student’s consistent assertion of gender identity is sufficient evidence and must expressly prohibit any criteria that:
 - Would force a student to disclose that they are TGD;
 - Requires invasive medical examination or ‘sex testing;’ or
 - Allows for visual inspection of one’s anatomy.

Recommendations or Guidance, Clarification, and Technical Assistance

Robust guidance and clear examples of the types of policies and eligibility criteria that would fail the Department’s proposed tests are necessary to support proper implementation of this rule as intended. Opponents of inclusive sports participation rely on harmful rhetoric, stereotypes, and fear based ‘evidence’ to justify discrimination and exclusion of TGD youth and the Department must, to the maximum extent possible, prevent harmful misinterpretation of the proposed rules. Specifically, we ask that the Department provide clear guidance to school administrators, Title IX Coordinators, and others tasked with implementing the rule as intended. This guidance must provide clarity regarding how the final Title IX rule intersects with and/or supersedes state law or local policy, including how existing state laws not directly related to TGD sports participation could result in a violation of Title IX (e.g., laws prohibiting access to gender affirming medication).

Minimizing Harm or Injury

We urge the Department to reconsider the allowance of sex-based eligibility criteria for the purposes of ‘minimizing harm.’ Participation in sports always includes risks, and schools are right to require the use of proper protective equipment, promote appropriate training and practice activities, implement robust concussion protocols, and other strategies to minimize risk of harm to participants. We question how sex-based eligibility criteria alone minimizes the risk of harm and promotes equitable participation in sports for TGD youth. To be clear, some sports do adopt reasonable eligibility criteria to minimize risk of harm and injury. For example, the governing rules of wrestling limit competition to those who are evenly matched in weight, regardless of age. Other sports limit participation on certain teams on the basis of age or pre-determined skill criteria.

Achievement of Important Educational Objectives

We urge the Department to clarify and provide examples as to what is and what is not considered ‘an important educational objective’ in the context of Title IX. Narrative in the proposed rules includes mention of the ability to attain college athletic scholarships, which could be interpreted as an “important educational objective.” We are concerned that, without further clarification, this language would be inconsistently interpreted to allow participation consistent with gender identity in elementary and middle school and to justify the prohibition of participation consistent with gender identity in high school. Without proper guidance and clarification, this language could also be used to justify exclusionary sex-based eligibility criteria for sports where there is perceived possibility of scholarship attainment yet promote inclusive policies only for those sports for which there is no pathway to scholarship and/or elite competition. This does not promote equity and invites a level of subjectivity that would undermine the intent of the proposed rule.

For example, suppose a transgender female has played soccer on teams consistent with her gender identity her entire life, and has become quite skilled due years of dedicated practice. Upon entering high school, she is told she must play on the boys’ team as to not limit her cisgender female teammates’ likelihood of earning college scholarships. This is

discriminatory and could have the unintended consequence of discouraging TGD students from participating in athletic activities and teams that align with their interests. TGD athletes are entitled to the same levels of athletic excellence, or even mediocrity, that their cisgender peers are. They should not be excluded from participation consistent with their gender identity due to misconceived and often unfounded notions of biological advantages due to their sex assigned at birth. Assumptions of male biological advantages and female biological disadvantages are rooted in sexism and a fixed, binary approach to gender and sex. These assumptions are behind continued underinvestment in women's and girls' athletics and should not be given credence in the very law that is meant to guarantee equal opportunity.

Systemic Fairness of Competition

We acknowledge the difficulty of developing and consistently enforcing a rule that intersects with a myriad of federal and state law and policy, the governing bodies of individual sports, and athletic associations across the K-12 and post-secondary environment. We are concerned that a preference for flexibility in decision making will result in greater inconsistency and a reduction of equitable sports participation consistent with gender identity as individual entities covered by Title IX adopt their own eligibility criteria. In essence, a student could be allowed to participate in athletics consistent with one's gender identity in one locale and be denied the ability in another. The transgender female who is relegated to playing soccer on the men's team and is then outed as transgender can constitute a violation of FERPA and cause possible endangerment to the student. Great variability already exists in state level athletic association policy regarding participation in sports consistent with one's gender identity. This rule seems to allow, and even encourage, this to continue. If institutions have different sex-based eligibility criteria which creates inequitable opportunity for *any* group of participants, then this rule undermines the spirit and intent of Title IX. This would not promote equal opportunity and fairness.

Responses to Directed Questions

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.

NASP defers to organizations who have the proper expertise to determine the most appropriate requirements for participation in school sports and athletic opportunities writ large. However, if the goals of this rule, as stated in the preamble, are to ensure fairness in competition, minimize harm, and advance important educational outcomes, there is precedent for using other benchmarks like skill attainment, in determining who is and is not eligible to participate and/or compete on select sports teams. For example, some sports, including gymnastics, utilize athletic benchmarks when determining eligibility for certain levels of competition⁷.

The National Physical Education Standards, set by SHAPE America⁸, are unrelated to competition. Rather, the emphasis is on health physical development, motor skills, social-emotional skills, and healthy lifestyle, all of which could be considered important educational outcomes. As such, we do not believe there is any reason to prohibit participation in physical education consistent with one's gender identify if sex segregated physical education classes are offered.

We also recommend that the Department should rule out "fairness in competition" as a possible justification for restrictions on participation consistent with gender identity in the K-12 setting. Our organizations reject the premise that "fairness in competition" can ever justify discrimination against transgender, nonbinary, and intersex students. This premise is inconsistent with principles of equal opportunity, the text of Title IX, and existing evidence about sports opportunities. At a bare minimum, the Department should make clear that it does not presume this rationale will ever justify such restrictions.

⁷ USA Gymnastics as Men's Development Program and Woman's Development Program which were created "with the belief that all athletes, regardless of their potential, must have a solid foundation of basic skills in order to advance safely." <https://usagym.org/women/development/>

⁸ <https://www.shapeamerica.org/standards/pe/>

What educational objectives are sufficiently important to justify a recipient imposing sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity and whether those objectives should be specified in the regulatory text.

While collegiate athletic scholarships and opportunities for competition are important, they are not and should not be considered as sufficiently important educational objectives to justify discrimination. School sports build community, promote school spirit and belonging, and convey many health and social benefits. Participation in sports has been shown to broadly benefit children and youth and is reflected in physical development and fitness, social skills, life skills, and mental health and wellbeing, including higher self-esteem and lower levels of depression and suicidality. Playing sports is also associated with benefits by conventional academic metrics. Students who play sports are more likely to graduate from high school, attend college, have higher grade point averages, and score higher on standardized tests. These are the educational objectives that should be prioritized for *all* students, especially in K-12 schools.

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

The intent of Title IX is equal opportunity so that all students—regardless of gender—have the opportunity to participate in sports. It does not guarantee acceptance onto a team so much as ensure that there is a team available to try out for. The proposed rule is specifically addressing concerns of *denying* the opportunity to participate; it does not promise acceptance to an athletic program. Title IX is not intended to ensure student athletes get collegiate scholarships or time off the bench, it intended to guarantee equal opportunity.

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

There are no acceptable sex-related eligibility criteria that can meet the standard set out in the proposed regulations in early grades.

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

Discrimination against a transgender student in any capacity, including sports and athletics, is harmful.

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

As noted above, there are several areas in which we believe clarification and additional text, including plain language examples, are necessary to uphold the intent of Title IX.

We appreciate consideration and attention to these comments.

Sincerely,



Kathleen Minke, PhD, NCSP
Executive Director