

May 15, 2023

We the undersigned 212 LGBTQI+ justice, civil rights, and education organizations are pleased to submit this comment in response to the proposed rulemaking by the U.S. Department of Education (“the Department”) for Title IX §106.41, addressing nondiscrimination in school sports where separate-sex teams are lawfully permitted.

gender identity the only approach to sex-separated school sports teams that does not risk a covered entity violating Title IX. For a covered entity who nonetheless seeks to adopt or apply exclusionary eligibility criteria, the proposed rule requires that “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.”

² Through guidance accompanying the regulatory text (“the preamble”), the Department makes clear that policies that categorically ban transgender

However, in the context of an ongoing and highly coordinated effort to denigrate, erase, and further stigmatize transgender youth and the broader LGBTQI+ community, we cannot assume good actors, nor should we undervalue revisions that would best support implementation of a strong Title IX rule. We must also name that the discussion in the preamble of “prevention of sports-related injury” and “fairness in competition” can be construed as giving credence to transphobic myths even as it makes clear that the Department intends to closely scrutinize efforts to use overbroad generalizations and sex-based stereotypes to justify restrictions on students’ equal participation consistent with their gender identity. For these reasons, we urge revisions to support strong implementation and advance full inclusion of transgender, nonbinary, and intersex students in school sports.

Current Landscape: Transgender, Nonbinary, and Intersex Students’ Opportunities to Participate

Transgender, nonbinary, and intersex young people face substantial barriers to equal opportunity in school sports, including being prevented or discouraged from playing sports by school staff or coaches⁶ and being forced to use locker rooms that do not correspond with their gender identity (which has been found to be associated with a decreased likelihood of participation in school sports).⁷ Recently, these barriers have taken the form of outright bans on transgender students playing school sports on separate-sex teams consistent with gender identity, denying them the opportunity to play alongside their cisgender peers. This type of categorical ban has been enacted in 21 states to date.⁸

In addition to what the Department describes as “categorical” bans, other discriminatory restrictions similarly harm students by effectively preventing them from participating in sports on equal terms, or often from participating at all. These include requirements that target transgender and intersex students by barring their participation absent proof of medical interventions such as hormone therapy or surgery;⁹ or proof of specific hormone levels, anatomical development, or

amended identification documents that amount to requirements for such interventions. For many students, across all ages and levels of school and competition, such requirements call for medical interventions that may not be medically indicated and may even be contraindicated or otherwise unwanted by the individual. At all levels of school, such requirements may place real, unjustifiable pressure on students to undergo medical interventions based on the requirements and timetables of school sports eligibility, rather than basing such decisions on their own medical needs. Even students for whom such interventions represent medically necessary gender-affirming care often cannot access this care due to cost, insurance coverage, limited availability of providers, and an

increasing number of students who are

In addition to unfairly depriving transgender, nonbinary, and

or otherwise “unfeminine.” Because of racist and sexist stereotypes that have tended to link “femininity” with whiteness, any restrictions on students’ ability to participate in school sports consistent with their gender identity are likely to particularly harm BIPOC women and girls.²²

All students should have access to the benefits of school sports participation. For transgender, nonbinary, intersex, and other LGBTQI+ students, these benefits are particularly impactful and may serve as a protective factor against higher rates of depression and suicidality.²³ Among transgender and nonbinary students, participation in sports is associated with higher GPAs,²⁴ increased feelings of school belonging,²⁵ higher self-esteem,²⁶ and lower levels of depression.²⁷

Many states have already acted to support transgender, nonbinary, and intersex students’ equal opportunities to participate in school sports. As early as 2007, states adopted policies or guidance expressly supporting and facilitating the equitable participation of transgender students in school sports consistent with their gender identities.²⁸ Sixteen states and the District of Columbia have implemented such policies.²⁹ In at (25)Tjt,260.1 601P (hi)-Tw 7.98 x[19.24 -5pl601P8771 601P (M2 (m) (

correlated with increased participation of girls in school sports.³² In contrast, where states enacted trans-exclusionary policies, girls' overall participation in high school sports .³³

Analysis and Recommendations

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

based stereotypes, or otherwise fails to establish a well-founded and substantial concern affecting equal opportunities in school athletics.

The Department makes clear that categorical bans on participation consistent with gender identity are impermissible; the regulatory text should expressly include this prohibition.

The preamble makes clear that “categorical” bans, such as those that “exclude all transgender girls and women from participating on any female athletic teams... would not satisfy the proposed regulation because, in taking a one-size-fits-all approach, they rely on overbroad generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply.”⁴⁵ We commend the Department for making clear that the bans proposed in the submission violate Title IX.

identity.”⁵⁶ Again, our organizations understand and agree that fairness is an important educational interest, but this discussion could be misconstrued as suggesting that there is any evidence behind

athlete of all time. Phelps possesses “a disproportionately vast wingspan... Double-jointed ankles give his kick unusual range. In a quirk that borders on supernatural, Phelps apparently produces just half the lactic acid of a typical athlete — and since lactic acid causes fatigue, he’s simply better equipped at a biological level to excel in his sport.”⁶³ Likewise, consider cross-country skier and seven-

The application of evidence from one sports context to another (e.g., from Olympic volleyball to intramural volleyball). Scientific studies on athletic performance typically measure extremely specific variables such as “muscle surface area” or “lower handgrip strength.”⁶⁸ Recipients who rely on such evidence should not be permitted to generalize results to different sports (e.g., from NCAA track to NCAA soccer).

Evidence that equates or assumes that cisgender men’s performance is the same as transgender men’s performance is not supported by the scientific literature. (E)2 (ea3y0c]g.185 TD[lw 0 -1 (d)5.)2 (e)-1 (aer)-0.9 (f)3.9 (o)1.1 (r)-1 (m)9 (an)1 (ceID 6 BD

The Department should clarify that restrictions cannot be justified in the context of K-12 and college intramural and club sports.

The proposed rule states: “the Department currently believes that there would be few, if any, sex-

professional competition. Nearly all of the best high-school-aged basketball players, for example, compete for teams in the American Athletic Union (AAU) or other travel leagues.⁷⁵ In track and field, the best young athletes attend invitation-only events hosted by non-school entities like the National Scholastic Athletics Foundation (NSAF). To be clear, organizations governing elite, non-school youth sports should allow for the participation of transgender, nonbinary, and intersex youth; some have already adopted trans-inclusive policies.⁷⁶ However, the content of such policies—or their absence—does not set the bar for rules governing the participation of transgender, nonbinary, and intersex students in the Title IX-covered setting of school sports.

Where elite and professional competition currently imposes restrictions on participation consistent with gender identity, transgender, nonbinary, and intersex athletes who aspire to compete at these levels will take steps to meet eligibility rules if that is feasible and the right decision for them given their individual needs and the various barriers they face. The Department must not add to these barriers given that the purpose of Title IX covering school athletics is to ensure equal opportunity to benefit from sports participation. School sports build community,⁷⁷ promote school spirit and belonging,⁷⁸ 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,⁷⁹ social skills,⁸⁰ and mental health and wellbeing,⁸¹ including higher self esteem⁸² and lower levels of depression and suicidality.⁸³ Playing sports is also associated with benefits by conventional

We look forward to continuing to dialogue and work with the Department to fully enforce Title IX and make equal educational opportunity a reality. If you would like to discuss these recommendations, please contact Aaron Ridings of GLSEN at aaron.ridings@glsen.org. Thank you for your consideration.

Sincerely,
GLSEN

American School Counselor Association
interACT: Advocates for Intersex Youth
National Association of School Psychologists
National Center for Transgender Equality
National Education Association

National Organizations

A Better Balance
AACTE
Advocates for Youth
All4Ed
American Atheists
American Humanist Association
Athlete Ally
Autistic Self Advocacy Network
Autistic Women & Nonbinary Network
Bayard Rustin Center for Social Justice
Campaign for Our Shared Future
Campus Pride
CenterLink: The Community of LGBTQ Centers
EDGE Consulting Partners
EDIT Lab at Northwestern University
EducateUS: SIECUS In Action
Equal Rights Advocates
FORGE, Inc.
Gender Spectrum
Girls Inc.
GLMA: Health Professionals Advancing LGBTQ+ Equality
Healthy Teen Network
Human Rights First
If/When/How: Lawyering for Reproductive Justice
Interfaith Alliance
Know Your IX
Movement Advancement Project
National Association of Social Workers
National Black Justice Coalition

National Center for Youth Law
National LGBTQ Task Force
National Organization for Women Foundation
National PTA
National Women's Law Center
Parents Across America
ParentsTogether
Positive Women's Network-USA
Princess Janae Place Inc
Public Justice
Rainbow Health Consulting
Sam & Devorah Foundation for Trans Youth
SIECUS: Sex Ed for Social Change
Southeast Asia Resource Action Center
Stand with Trans
Stop Sexual Assault in Schools
The Consortium of Higher Education LGBT Resource Professionals
The Education Trust
The Every Voice Coalition
The GenderCool Project
The Inclusion Playbook
Transathlete
Transgender Law Center
Transgender Legal Defense & Education Fund
Union for Reform Judaism
Unitarian Universalist Association
Whitman-Walker Institute
Withycombe Consulting

State & Local Organizations

Ace and Aro Alliance of Central Ohio
Affirmations Community Center
AIDS Foundation Chicago
Akron AIDS Collaborative
Alaska School Psychology Association
All Under One Roof LGBT Advocates of Southeastern Idaho
Association of School Psychologists of Pennsylvania
Binghamton University Q Center
Bradbury Sullivan LGBT Center
Brave Space Alliance
California Association of School Counselors
Caribbean Equality Project
Central Valley Coalition for Trans and Gender Diverse Equality
Central Valley Pride
Central Valley Pride Center

Centre LGBT+
City University of New York LGBTQI+ Council
College of Staten Island - LGBTQ Resource Center
College of Staten Island, City University of New York
Colorado Children's Campaign
Colors+
Compass LGBTQ Community Center

MaineTransNet
Maryland School Counselor Association
Massachusetts School Counselors Association
Massachusetts Transgender Political Coalition
Mazzoni Center
Metropolitan Community Church of Baton Rouge
Metropolitan Community Church of Knoxville
Michigan Organization on Adolescent Sexual Health (MOASH)
MO School Counselor Association
Naper Pride
Naples Pride
NASW - ME Chapter
New Jersey Abortion Access Fund
New Jersey Association of School Psychologists
New York Association of School Psychologists
New York State School Counselor Association
North Carolina School Counselor Association (NCSCA)
North Dakota Human Rights Coalition
Northwest Arkansas Equality, Inc.
Ohio Psychological Association
Ohio School Counselor Association
Oklahomans for Equality (OKEQ)
Olympic Pride
One Colorado
one-n-ten
Our Spot KC
Out Alliance
OutFront Kalamazoo
OUTMemphis
OutNebraska
Outright Vermont
Pacific Pride Foundation
Parents Organized for Public Education
Pennsylvania School Counselors Association
Phoenix Pride
Pride Action Tank
Pride at Work - Rochester Finger Lakes Chapter
Pride Center of Terre Haute Inc.
Pride On Foot
PRISM
Prism Counseling & Community Services
Prism United
PROMO
Queermunity Collaborative
QUEERSPACE collective

Rainbow Rose Center
Resource Center
Rhode Island School Psychologists Association
RISE: Healthy for Life
Sacramento LGBT Community Center
San Diego Black LGBTQ Coalition
San Diego Pride
Serotiny Counseling
Shenandoah LGBTQ Center
Shoals Diversity Center
Sioux Falls Pride
SMYAL
SOJOURN: Southern Jewish Resource Network for Gender and Sexual Diversity
Somos Familia
Spencer Pride, Inc.
St. Louis Queer+ Support Helpline
Sussex Pride
Tennessee Equality Project
Tennessee School Counselor Association (TSCA)
Texas Association of School Psychologists
The Atlanta Pride Committee
The Center for Sexuality & Gender Diversity
The Frederick Center
The Human Rights Alliance
The LIAM Foundation
The LOFT LGBTQ+ Community Center
The Mahogany Project
The Pride Center at Equality Park
The Spectrum Center
The Welcome Project PA
TRACTION Tsts

GLSEN State & Local Chapters

GLSEN Arizona

GLSEN Arkansas

GLSEN Austin

GLSEN Bluegrass

GLSEN Bucks County

GLSEN Central New Jersey

GLSEN Central Ohio

GLSEN Collier County

GLSEN Connecticut

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