

Alejandro Reyes
U.S. Department of Education
400 Maryland Ave. SW, PCP-6125
Washington, DC 20202
Submitted via regulations.gov

May 15, 2023

Re: 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 (RIN 1870-AA19, Docket No. ED-022-OCR-0143)

We are grateful for the opportunity to provide comments on the Sex-Related Eligibility Criteria for Male and Female Athletic Teams proposed by the Department of Education (“the Department”) as part of its rulemaking activities under Title IX of the Education Amendments of 1972 (“Title IX”).¹ *See* 88 Fed. Reg. 22,860 (Apr. 13, 2023).

The undersigned are scholars affiliated with the Williams Institute at the UCLA School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity (“SOGI”), including on the demographics and experiences of lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people. The Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, and has long worked with federal agencies to improve data collection on the U.S. population.² Scholars at the Williams Institute have also conducted research on many aspects of transgender experience, including population size, discrimination, health and economic disparities, and experiences in higher education.³

I. The Regulation Will Impact a Significant Number of Transgender People

The Williams Institute estimates that there are 1.6 million transgender people ages 13 and older in the United States, including 300,100 transgender youth ages 13-17 and 398,900 transgender

¹ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

² *See, e.g.*, GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf>.

³ To access Williams Institute research on transgender people, visit WILLIAMS INST., *Subpopulations: Transgender People*, <https://williamsinstitute.law.ucla.edu/publications/?subpop=transgender-people>.

young adults ages 18-24.⁴ We do not yet have a reliable way to estimate the number of youth under the age of 13 who identify as transgender. This proposed rule may also affect gender non-conforming, nonbinary,⁵ and intersex⁶ youth, which we will recognize throughout this comment, but we limit our discussion primarily to the impact on transgender youth based on the evidence presented here.

Although it is impossible to estimate the exact number of transgender people who are participating in sports at every level, existing data suggest that this rule would have a significant impact on transgender youth. At the high school level, one study using data from the Youth Risk Behavior Surveillance System (“YRBSS”) found that 40.7% of transgender youth grades 9-12 played on at least one sports team.⁷ Based on that estimate, approximately 122,000 transgender youth may participate in high school-level team athletics. For youth under age 12, data from the 2020 National Health Interview Survey (“NHIS”) showed that approximately 52.5% of all youth participated in a sport in the previous 12 months.⁸ Unfortunately, we don’t know how many of those youth are transgender.

At the college level, students may compete in varsity, club, and intramural sports.⁹ At the varsity or most competitive level, there are several different athletics associations which govern the sport leagues within which students may compete. For example, the National Collegiate Athletic Association (“NCAA”) has three divisions, representing different levels of competition.¹⁰ The National Association of Intercollegiate Athletics (“NAIA”) is focused on smaller colleges.¹¹ Additionally, students may participate in sports at community colleges or in other sports not regulated by the NCAA or NAIA, such as those participating in the National Junior College Athletics Association (“NJCAA”).¹² The number of students competing in these associations is

⁴ JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O’NEILL, WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 5 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

⁵ See e.g. Logan L. Barsigian et al., *Narratives of Gender, Sexuality, and Community in Three Generations of Genderqueer Sexual Minorities*, 7 *PSYCHOL. SEX ORIENTAT. GEND. DIVERS.* 276-292 (2021). See also BIANCA D.M. WILSON & ILAN H. MEYER, WILLIAMS INST., NONBINARY LGBTQ ADULTS IN THE UNITED STATES (2021), <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>.

⁶ Intersex is an umbrella term for differences in sex traits or reproductive anatomy. Intersex people are born with these differences or develop them in childhood. There are many possible differences in genitalia, hormones, internal anatomy, or chromosomes, compared to the usual two ways that human bodies develop. *What is the definition of intersex?* INTERACT YOUTH ADVOCATES, *FAQ*, <https://interactadvocates.org/faq/> (last visited May 8, 2023).

⁷ J. RHODES PERRY & SOMJEN FRAZER, ADVOCATES FOR YOUTH, ON ALL SIDES: HOW RACE & GENDER INFLUENCE HEALTH RISK FOR TRANSGENDER STUDENTS OF COLOR 66 (2020), <https://actionnetwork.org/forms/on-all-sides>.

⁸ LINDSEY I. BLACK, EMILY P. TERLIZZI & ANGEL VAHRATIAN, ORGANIZED SPORTS PARTICIPATION AMONG CHILDREN AGED 6-17 YEARS: UNITED STATES, 2020 1 (2022), <https://www.cdc.gov/nchs/data/databriefs/db441.pdf>.

⁹ See e.g. CAPPEX, *Differences Between College, Club, and Intramural Sports*, <https://www.cappex.com/articles/college-life/college-club-vs-intramural-sports> (last visited May 11, 2023).

¹⁰ NCSA, *The Differences Between NCAA Divisions*, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions> (last visited May 3, 2023).

¹¹ NCSA, *NAIA vs. NCAA: What’s the Difference?*, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions/naia-vs-ncaa> (last visited May 3, 2023).

¹² NJCAA, *Mission Statement*, https://www.njcaa.org/about/mission/Mission_statement (last visited May 3, 2023).

much smaller than the number at primary and secondary schools – for example, the NCAA estimates that it had approximately 552,000 student athletes in 2022,¹³ the NAIA estimates that it serves 65,000 students annually,¹⁴ and the NCJAA estimates that it served approximately 59,000 students in 2017.¹⁵ Within these three associations (assuming these numbers are consistent over multiple years), there are roughly 676,000 student athletes at the higher education level. Comparatively, the National Center for Education Statistics estimates that approximately 19.4 million students attended colleges and universities in 2020.¹⁶ Data from the National College Health Assessment (“NCHA”) collected in Fall 2022 showed that overall, 5.1% of students participated in varsity sports, 8.9% participated in club sports, and 11.1% participated in intramural sports.¹⁷

It is likely that transgender college students participate in team sports at lower rates than cisgender students. Using data from an earlier version of the NCHA, the Center for American Progress estimated that in fall 2019 through spring 2020, 15% of transgender students participated in either varsity, club, and/or intramural sports compared to 22% of cisgender students.¹⁸ Anecdotal accounts of the number of openly transgender athletes in the competitive collegiate-level associations in recent years are as low as 36 individuals.¹⁹ While better data are needed to understand the number of transgender student athletes participating in the different levels of collegiate sports, it is unlikely that they make up more than 1.3% of the overall college athlete population.²⁰

As of the date of this comment, 21 states have enacted legislative bans on participation of transgender athletes by gender identity in school sports.²¹ All states with bans specifically exclude transgender women and girls from participating in sports consistent with their gender identity, and five states extend bans to transgender boys and young men as well.²² Eighteen

¹³ NCAA, *NCAA Demographics Database*, <https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx> (last visited May 3, 2023).

¹⁴ NAIA, *About the NAIA* (Apr. 11, 2021), <https://www.naia.org/membership/2015-16/releases/20160411bcnqp>.

¹⁵ NAT’L JUNIOR COLL. ATHLETICS ASS’N, *NJCAA Participation Figures – Men’s Division*, https://d2o2figo6ddd0g.cloudfront.net/1/f/foxubphijs5cjm/NJCAA_SA_Participation_Stats_8.1.17.pdf (last visited May 3, 2023).

¹⁶ U.S. DEP’T OF ED., NAT’L CTR. FOR ED. STAT., *IPEDS, Spring 2021, Fall Enrollment Component*, <https://nces.ed.gov/ipeds/search/ViewTable?tableId=29448> (last visited May 3, 2023).

¹⁷ AM. COLLEGE HEALTH ASS’N, *AMERICAN COLLEGE HEALTH ASSOCIATION-NATIONAL COLLEGE HEALTH ASSESSMENT III: REFERENCE GROUP EXECUTIVE SUMMARY FALL 2022 19* (2023), https://www.acha.org/documents/ncha/NCHA-III_FALL_2022_REFERENCE_GROUP_EXECUTIVE_SUMMARY.pdf.

¹⁸ Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROG. (2021), <https://www.americanprogress.org/article/fair-play/>.

¹⁹ Cyd Zeigler & Karleigh Webb, *These 36 Trans Athletes Have Competed Openly in College*, OUTSPORTS (Apr. 17, 2023), <https://www.outsports.com/trans/2022/1/7/22850789/trans-athletes-college-ncaa-lia-thomas>.

²⁰ We estimate that 1.3% of young adults ages 18-24 in the U.S. are transgender. See HERMAN, FLORES & O’NEILL, *supra* note 4, at 5.

²¹ MOVEMENT ADVANCEMENT PROJECT, *Bans on Transgender Youth Participation in Sports: Map*, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last visited May 4, 2023).

²² Those states are Alabama, Florida, South Carolina, Texas, and Utah. *Id.*

states ban participation in K-12, two states ban participation in high school and some middle school grade levels,²³ and seventeen states ban transgender participation at the collegiate level.²⁴ West Virginia is the only state that bans participation in college, but not in primary grades.²⁵ All state legislative bans apply at the high school level, and we estimate that approximately 90,100 transgender youth ages 13-17 live in these states.²⁶ By defining eligibility for sports based on assigned sex at birth, these bills could also impact non-binary and intersex people, but those groups are not explicitly targeted in the bills, and we do not have sufficient data to show how they are impacted.

II. Transgender Students Benefit from Access to Sports in a Gender-affirming and Non-Discriminatory Manner

Like all students, research indicates that transgender students will benefit in terms of health, academic achievement, and social relationships from participation in sports. Conversely, being unable to participate in sports in a gender-affirming manner will add to the already challenging environments that transgender students face at school, which include high levels of harassment, discrimination, and exclusion. These experiences lead to negative health and other outcomes for transgender students which will be exacerbated by exclusion from sports.

A. All Students Benefit from Participating in School Sports

As discussed in the preamble of the Proposed Rule, research has shown that participating in school sports provides many benefits for students. School sports participation—particularly participation in team sports—has been linked to positive physical and mental health outcomes, higher levels of academic achievement, and social benefits. Though limited, research specifically focused on LGBTQ students has found that, like youth in general, LGBTQ youth experience benefits related to sports participation.

i. Physical and Psychological Health Benefits

Many studies have documented the immediate and long-term physical health benefits of school sports participation. Student athletes report better overall health and less bodily pain compared to non-athletes.²⁷ Physical activity in youth has also been linked to lower rates of adverse health

²³ Kentucky bans participation in grades 6-12. KY. REV. STAT. ANN. §§ 156.070, 164.2813 (West 2022). Wyoming bans participation in grades 7-12. S.F. 0133, 69th Leg., Reg. Sess. (Wyo. 2023).

²⁴ States with bans that do not apply at the collegiate level are Alabama, Kentucky, Texas, and Utah. MOVEMENT ADVANCEMENT PROJECT, *supra* note 21.

²⁵ W. VA. CODE § 18-2-25 (2023).

²⁶ See HERMAN, FLORES & O'NEILL, *supra* note 4, at 5.

²⁷ E.g., Yagang Song & Chongyan Shi, *Association Between Sports Participation and Overall Health in Children and Adolescents*, 51 COMPLIMENTARY THERAPIES CLIN. PRAC. 101718 (2023); Marketa Lachytova et al., *Associations Between Self-Rated Health, Mental Health Problems and Physical Inactivity Among Urban Adolescents*, 27 EURO. J. PUBLIC HEALTH 984 (2017); Keith J. Zullig & Rebecca J. White, *Physical Activity, Life Satisfaction, and Self-Rated Health of Middle School Students*, 6 APPLIED RES. QUAL. LIFE 277 (2011); Alison R.

outcomes later in life, including lower incidence of diabetes, hypertension and other cardiovascular diseases, and bone disease.²⁸ Moreover, studies show that youth who participate in school sports, compared to those who do not, are more likely to maintain a physically active lifestyle through adulthood, suggesting that the physical benefits of early engagement in sports continue to accrue over the life course.²⁹

Research has also shown that sports participation—particularly in team sports—improves mental health outcomes for students. A 2013 systematic review of published literature identified numerous studies linking adolescent sports participation to a range of psychological benefits.³⁰ The research cited found that sports participation was related to improved self-esteem, improved emotional well-being, psychological resilience, greater life satisfaction, lower rates of depression and feelings of hopelessness, reduced suicidality, reduced anxiety and nervousness, and other benefits.³¹ The authors noted that these benefits, along with the social benefits discussed below, were most pronounced for students who participated in team sports, as opposed to informal or individual-level sports.³² More recent research has similarly found that participation in school sports is associated with a range of psychological benefits for youth.³³

ii. Academic And Social Benefits

School sports participation has also been linked to positive educational and social outcomes for youth. Adolescent student athletes report higher grades, more attentiveness, and are more likely to go to college compared to non-athletes.³⁴ Research has also documented a link between school sports participation—particularly team sports—and improved social outcomes. Studies

Snyder et al., *Health Related Quality of Life Differs Between Adolescent Athletes & Adolescent Nonathletes*, 19 J. SPORT REHAB. 237 (2010).

²⁸ Kelsey Logan et al., *Youth Sports Participation and Health Status in Early Adulthood: A 12-Year Follow-up*, 19 PREVENTIVE MED. REPORTS (2020); Snyder et al., *supra* note 27; Francisco B. Ortega et al., *Physical Fitness in Childhood and Adolescence: A Powerful Marker of Health*, 32 INT. J. OBESITY 1 (2008).

²⁹ Snyder et al., *supra* note 27; Tuija Tammelin, *Adolescent Participation in Sports and Adult Physical Activity*, 24 AM. J. PREV. MED. 22 (2003).

³⁰ Rochelle M. 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. J. BEHAV. NUTRITION & PHYS. ACTIVITY 1 (2013). *See also* Matt D. Hoffman et al., *Associations Between Organized Sport Participation and Mental Health Difficulties: Data from Over 11,000 US Children and Adolescents*, 17 PLOS ONE 1 (2022).

³¹ Eime et al., *supra* note 30, at 5-11.

³² *Id.* at 19.

³³ *E.g.*, Hoffman et al., *supra* note 30; Timothy A. McGuine et al., *High School Sports During the COVID-19 Pandemic: The Effect of Sport Participation on the Health of Adolescents*, 57 J. ATHL. TRAIN. 51 (2022).

³⁴ Ryan D. Burns et al., *Sports Participation Correlates with Academic Achievement: Results from a Large Adolescent Sample Within the 2017 U.S. National Youth Risk Behavior Survey*, 127 PERCEPTUAL & MOTOR SKILLS 448 (2020); Christopher J. Wretman, *School Sports Participation and Academic Achievement in Middle and High School*, 8 J. SOCIETY SOCIAL WORK & RESEARCH 399 (2017); Martin Van Boekel et al., *Effects of Participating in School Sports on Academic Performance and Social Functioning*, 46 J. APPLIED DEV. PSYCH. 31 (2016); Dara Shifrer et al., *College-Going Benefits of High School Sports Participation: Race and Gender Differences over Three Decades*, 47 YOUTH SOC. 295 (2015).

evaluating students who play sports, compared to those who do not, have found that sports participation is associated with improved social interactions, improved relationships, more friendships, higher self-confidence, more school connectedness, and better social skills.³⁵

iii. Benefits to Transgender Students

Research on the impact of sports participation on LGBTQ youth is limited. However, existing research focused on LGBTQ youth, and transgender youth specifically, has found that they experience the same benefits from sports participation as youth in general, despite often experiencing homophobia and transphobia in athletic environments. For example, a 2022 study based on a large sample of LGBTQ youth found that “sports participation was related to higher levels of self-esteem, lower levels of depression, and greater school belonging.”³⁶ Another study comparing experiences of LGBTQ and non-LGBTQ youth found that sports participation was related to increases in school belonging for both groups of youth.³⁷

Studies focused specifically on transgender students have found similar impacts of sports participation. For example, a survey conducted by The Trevor Project found that transgender and nonbinary students who participated in sports reported higher grades compared to those who did not participate.³⁸ In addition, an analysis of data collected through the National College Health Assessment survey, a national survey of college students conducted by the American College Health Association, found that transgender students who participated in collegiate sports were less likely to report psychological distress, self-harm, suicidal thoughts, and suicidal behavior compared to transgender students who did not participate in sports.³⁹

B. Experiences of Transgender Students in Schools

Transgender students face unique barriers to equal participation in school programs and activities, including sports. Transgender students experience high rates of bullying, discrimination, and harassment. These experiences have been extensively documented in both K-12 and in higher education. Research focused specifically on the experiences of transgender students within athletic environments has found that transgender student athletes often encounter transphobia and other barriers to fully participating in school sports. These findings are reflected in studies that have evaluated the experiences of LGBTQ students more broadly.

³⁵ Eime et al., *supra* note 30.

³⁶ Caitlin M. Clark & Joseph G. Kosciw, *Engaged or Excluded: LGBTQ Youth's Participation in School Sports and Their Relationship to Psychological Well-being*, 59 PSYCHOL. SCHS. 95 (2022).

³⁷ Russell B. Toomey & Stephen T. Russell, *An Initial Investigation of Sexual Minority Youth Involvement in School-Based Extracurricular Activities*, 23 J. RES. ADOLESC. 304 (2012).

³⁸ THE TREVOR PROJECT, THE TREVOR PROJECT RESEARCH BRIEF: THE WELL-BEING OF LGBTQ YOUTH ATHLETES (2020).

³⁹ Shoshana K. Goldberg, *supra* note 18.

i. K-12

Research on the experiences of transgender students in K-12 schools has documented high rates of school-based bullying, harassment, and discrimination. For example, analysis conducted by the U.S. Centers for Disease Control and Prevention of data collected through the 2017 Youth Risk Behavior Survey (“YRBS”) from ten states and nine large, urban districts found high rates of bullying against transgender students. Over one third of transgender students (35%) reported being bullied at school, 30% reported electronic bullying, 27% felt unsafe at or traveling to school, and 24% reported being threatened or injured with a weapon at school in the last year.⁴⁰ An earlier CDC study analyzing 2013 YRBS data found a “significant linear relationship” between gender non-conformity and bullying.⁴¹ Other analyses of YRBS data have found that LGB students also report higher rates of bullying and feeling unsafe compared to their non-LGB peers.⁴²

Community-based surveys of transgender people have found similarly high rates of bullying, discrimination, and harassment in schools. For example, in response to the 2021 GLSEN National School Climate Survey, about three-quarters (74%) of transgender students said they had experienced victimization at school because of their gender and 44% said they had experienced victimization online.⁴³ About three-quarters (74%) of transgender students also reported that they felt unsafe at school because of their gender, and 38% reported that they had missed school in the prior month because of safety concerns.⁴⁴ Similarly, the 2015 U.S. Transgender Survey (“USTS”), a large, national survey of transgender and gender non-conforming people, found that over half of respondents (54%) reported verbal harassment, one-quarter (24%) reported physical assault, and over one in ten (13%) reported sexual assault while in kindergarten through 12th grade because of openly identifying or being perceived as transgender.⁴⁵ Additionally, a mixed-method study on school climate for transgender youth found that the vast majority of transgender students (82%) reported hearing negative comments

⁴⁰ Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Abuse, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 69 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

⁴¹ Allegra R. Gordon et al., *Gender Expression, Violence, and Bullying Victimization: Findings from Probability Samples of High School Students in 4 US School Districts*, 8 J. SCH. HEALTH 306 (2018). Investigators used a scale of self-reported gender expression, where 1 was “most gender conforming” and 7 was “most gender nonconforming.”

⁴² E.g., Ctrs. for Disease Control & Prevention, *Youth Risk Behavior Surveillance – United States 2021*, 72 MORBIDITY & MORTALITY WKLY. REP. 71, 17, 42 (2023).

⁴³ JOSEPH G. KOSCIW, CAITLIN M. CLARK & LEESH MENARD, THE 2021 NATIONAL SCHOOL CLIMATE SURVEY 86-87 (2021), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

⁴⁴ *Id.* at 85, 90.

⁴⁵ SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 132 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

based on their gender identity or expression from other students “sometimes or often[,]” and nearly one-third (31%) heard such comments from school personnel.⁴⁶

Studies also highlight various forms of discrimination experienced by transgender students, including denials of access to appropriate facilities, dress codes prohibiting them from wearing clothing matching their gender identities, and inappropriate and ineffective teacher and administrator responses to mistreatment.⁴⁷

ii. Higher Education

Survey data also indicate that discrimination and harassment impact LGBTQ students in higher education. Survey data on students’ experiences come from a wide range of sources, including academic research, campus climate surveys, and surveys by non-governmental organizations. Williams Institute analysis of data collected through the Access to Higher Education Survey sheds light on the experiences of LGBTQ people in community colleges, four-year colleges, and graduate schools. Overall, our analysis found that one-quarter of transgender people (26%) and nearly one in ten LGBTQ cisgender people (9%) reported barriers hindering their academic success in a higher education program, which included experiencing unfair treatment, harassment, or bullying for being LGBTQ.⁴⁸ These findings are consistent with earlier research showing that transgender students in higher education are at increased risk of discrimination and harassment. For example, a 2018 Williams Institute report on transgender students in higher education concluded that transgender students nationwide “report[ed] greater levels of harassment and discrimination, have a more negative perception of campus and classroom climates, and feel less accepted as part of the campus community, as compared to cisgender students.”⁴⁹ Similar experiences in higher education were documented in the 2015 USTS, with one-quarter of respondents (24%) who were out as transgender in college or vocational school reporting verbal, physical, or sexual harassment at school.⁵⁰

iii. Athletic Environments

Research further shows that mistreatment of LGBTQ students, and transgender students in particular, occurs within athletic environments specifically. For example, the 2021 GLSEN National School Climate Survey found that half (51%) of transgender students said they had avoided gym or PE class because they felt unsafe, and an even higher percentage of students

⁴⁶ Jennifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH ADOLESCENCE 1175, 1179–90 (2010).

⁴⁷ E.g., Aaron Curtis, *Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination*, 53 HARVARD J. ON LEGIS. 459 (2016); KOSCIW, CLARK & MENARD, *supra* note 43, at 92.

⁴⁸ KERITH J. CONRON ET AL., WILLIAMS INST., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE 17 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf>.

⁴⁹ ABBIE E. GOLDBERG, WILLIAMS INST., TRANSGENDER STUDENTS IN HIGHER EDUCATION 6 (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Aug-2018.pdf>.

⁵⁰ JAMES ET AL., *supra* note 45, at 136.

(64%) said they had avoided locker rooms.⁵¹ Among all LGBTQ students, about one-quarter (24%) said they had avoided athletic fields or facilities due to safety concerns and 11% had been discouraged from playing sports by school staff or a coach because of their sexual orientation or gender identity.⁵² Other quantitative and qualitative studies have found that LGBTQ students experience transphobia and homophobia when playing sports from their teammates, other schools, and coaches.⁵³ Non-LGBTQ students also often report that they witness transphobia and homophobia in athletic environments.⁵⁴ Several of these studies evaluated rates of intervention by school staff and found that homophobic and transphobic behavior on the field or in the gym often goes unaddressed.⁵⁵

C. Negative Experiences Impact Transgender Students' Health and Wellbeing and Can Lead to Lower Levels of Sports Participation

Transgender students face disparities in health and wellbeing compared to their cisgender peers. The CDC's analysis of 2017 YRBS data found that transgender students were significantly more likely than cisgender students to report negative mental health outcomes and substance use. For example, over half (53%) of transgender students reported feeling sad or hopeless compared to 21% of cisgender boys and 39% of cisgender girls; 39% of transgender students reported having made a suicide plan compared to 10% of cisgender boys and 16% of cisgender girls; and 17% of transgender students reported being injured in a suicide attempt compared to 2% of cisgender boys and 3% of cisgender girls.⁵⁶ Further, transgender students were significantly more likely to report substance use, including cigarettes, alcohol, cocaine, and other substances.⁵⁷ Analyses of YRBS data focused on LGBQ students similarly found that they are at higher risk for poor mental health, suicidality, and substance use compared to their non-LGBQ peers.⁵⁸

Research indicates that health disparities and risk behaviors, like substance use, among LGBTQ youth are related to negative experiences, such as bullying and unsupportive school environments. For example, a 2011 study of youth in Oregon found that, in general, LGB youth were more likely to have attempted suicide than heterosexual youth, and that LGB youth in

⁵¹ KOSCIW, CLARK & MENARD, *supra* note 43, at 89.

⁵² *Id.* at 11, 33.

⁵³ Scott B. Greenspan et al., *LGBTQ+ and Ally Youths' School Athletics Perspectives: A Mixed-Methods Analysis*, 16 J. LGBT YOUTH 403 (2019); Diane L. Gill et al., *Perceived Climate in Physical Activity Settings*, 57 J. HOMOSEXUALITY 895 (2010); Owen D.W. Hargie, *'People Have a Knack of Making You Feel Excluded If They Catch on to Your Difference': Transgender Experiences of Exclusion in Sport*, 52 INT. REV. SOC. SPORT 223 (2015); Ronald G. Morrow & Diane L. Gill, *Perceptions of Homophobia and Heterosexism in Physical Education*, 74 RES. QUARTERLY EXERCISE & SPORT 205 (2003).

⁵⁴ Morrow & Gill, *supra* note 53.

⁵⁵ Gill et al., *supra* note 53; Morrow & Gill, *supra* note 53; Greenspan et al., *supra* note 53.

⁵⁶ Johns et al., *supra* note 40.

⁵⁷ *Id.*

⁵⁸ CTRS. FOR DISEASE CONTROL & PREVENTION, YOUTH RISK BEHAVIOR SURVEY: DATA SUMMARY & TRENDS REPORT 2009-2019 81-101 (2019), <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/YRBSDataSummaryTrendsReport2019-508.pdf>.

unsupportive school environments were at a 20% greater risk of attempting suicide than were LGB youth in supportive school environments.⁵⁹ High levels of school-based victimization have also been associated with higher levels of illicit drug use and risky sexual behavior.⁶⁰ In addition, studies focused on transgender youth have found evidence of associations between discrimination, abuse, and poorer health. For example, a 2010 study found that transgender respondents who had experienced gender-related abuse in their youth reported significantly higher rates of major depression and suicidality during that period of their lives than those who had not had such experiences.⁶¹ These findings support that, like LGBTQ adults, LGBTQ youth experience minority stress related to their LGBTQ+ status which contributes to negative health outcomes.⁶²

Exclusion and other negative experiences may prevent many transgender students, particularly transgender girls, from reaping benefits related to sports participation. Research indicates that transgender girls may be less likely to participate in high school sports than their cisgender peers. For example, an analysis of 2017-2019 YRBS data found that transgender girls were less likely to participate in high school sports than cisgender girls (33% vs. 48%), while transgender boys were more likely to participate in sports than cisgender boys (54% vs. 50%).⁶³ Similarly, as noted above, an analysis of NCHA survey data suggested that transgender college students participate in varsity, club, and/or intramural sports at lower rates than cisgender students (15% vs. 22%).⁶⁴ These statistics are reflected in qualitative studies in which transgender and LGBQ participants have reported that fears of discrimination and harassment, unwelcoming environments, feeling unsafe, lack of support from coaches and staff, and lack of inclusive spaces (locker rooms, restrooms, etc.) kept them from participating in sports, or have pushed them into individual sports or activities outside of school as opposed to school-based team sports.⁶⁵

⁵⁹ Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youth*, 127 PEDIATRICS 896 (2011).

⁶⁰ Daniel E. Bontempo & Anthony D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior*, 30 J. ADOL. HEALTH 362 (2002).

⁶¹ Larry Nuttbrock et al., *Psychiatric Impact of Gender-Related Abuse Across the Life Course of Male-to-Female Transgender Persons*, 47 J. SEX. RES. 12 (2010).

⁶² See, e.g., Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 38 (1995); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations*, 129 PSYCH. BULL. 674, 674 (2003); cf. Ilan H. Meyer et al., *Social Patterning of Stress and Coping: Does Disadvantaged Social Statuses Confer More Stress And Fewer Coping Resources?*, 67 SOC. SCI. & MED. 368, 371 (2008) (examining "social stress theory"); Walter Bockting et al., *Adult Development and Quality of Life of Transgender and Gender Nonconforming People*, 23 CURRENT OP. ENDOCRINOLOGY, DIABETES & OBESITY 188, 188 (2016).

⁶³ Raina V. Voss et al., *Physical Inactivity and the Role of Bullying Among Gender Minority Youth Participating in the 2017 and 2019 Youth Risk Behavior Survey*, 72 J. ADOLES. HEALTH 197 (2023).

⁶⁴ Shoshana K. Goldberg, *supra* note 18.

⁶⁵ Jay Holder, Jacqueline Morris & Mark Spreckley, *Barriers and Facilitators for Participation in Physical Activity in the Transgender Population: A Systematic Review*, 6 PHYS. ACTIVITY & HEALTH 136 (2022); Greenspan et al., *supra* note 53; Clark & Kosciw, *supra* note 36; Emily Elizabeth Munson & Kristine A. Ensign, *Transgender*

III. Title IX Provides Broad Protections Against Transgender Discrimination in Sports

The Supreme Court and the federal government have confirmed that federal statutes which prohibit sex discrimination inherently protect transgender people from discrimination based on gender identity. In terms of access to sex-separated facilities and programs, including sports, this precedent requires that transgender people be allowed to participate in a manner consistent with their gender identity. Courts that have reached a different result have inappropriately focused on sex separation as opposed to gender identity discrimination, narrowed their interpretations of sex discrimination in Title IX and other statutes to “biological sex,” and/or applied inaccurate definitions of sex that only focused on a single aspect of biological sex, such as reproductive capacity, as opposed to the multiple and nuanced components that make up “sex.”

For over two decades, courts have interpreted federal statutes that prohibit sex discrimination to protect transgender people from discrimination based on their gender identity.⁶⁶ The Supreme Court affirmed this approach in *Bostock v. Clayton County* when it held that the prohibition on sex discrimination contained within Title VII of the Civil Rights Act of 1964 encompasses acts of sexual orientation and gender identity discrimination.⁶⁷ Following *Bostock*, President Biden issued Executive Order 13988, requiring federal agencies to implement and enforce all applicable sex nondiscrimination statutes consistent with *Bostock*.⁶⁸

President Biden’s Executive Order 14021⁶⁹ emphasizes that protection against transgender discrimination “is codified, in part, in Title IX.”⁷⁰ This understanding was reinforced in a

Athletes’ Experiences With Health Care in the Athletic Training Setting, 56 J. ATHL. TRAINING 101 (2021); THE TREVOR PROJECT, THE TREVOR PROJECT BRIEF: LGBTQ YOUTH SPORTS PARTICIPATION (2020); Bethany Alice Jones et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies* 47 J. SPORTS MED. 701-716 (2017).

⁶⁶ See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) (holding that Title IX prohibits gender identity discrimination as an aspect of sex discrimination), *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (holding that Title VII’s sex discrimination prohibition applies to claims based on sexual orientation and gender identity discrimination); *Smith v. City of Salem* 378 F. 3d 566 (6th Cir. 2004) (holding that the a transgender employee’s termination because she transitioned violated Title VII’s sex discrimination provision); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that the plaintiff had a viable theory of discrimination under the Equal Credit Opportunity Act after the plaintiff was refused service for wearing clothing not associated with the gender marker on their identification). See also G.G. ex rel. *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

⁶⁷ *Bostock*, 140 S. Ct. at 1737 (2020).

⁶⁸ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

⁶⁹ Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

⁷⁰ *Id.*

Department of Justice memorandum directing agencies to interpret Title IX in light of *Bostock*.⁷¹ The Department subsequently published a Notice of Interpretation stating that “OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.”⁷² The Department’s 2022 proposed rule would also incorporate this clarification into the implementing regulations of Title IX, although the proposal did not amend the relevant subsections of 106.41(b).⁷³

The Department should read Title IX broadly and inclusively in the context of athletics and other environments where the statute permits sex-separation. Caselaw and longstanding legal principles support the Department taking a gender identity-based approach to transgender participation in sports, rather than one that allows distinctions based on assumptions about “biological sex”⁷⁴ defined by sex assignment at birth.

A. Courts Have Agreed That Title IX Prohibits Gender Identity Discrimination Even Where the Statute Permits Sex Separation, Including Sports

As discussed in the preamble to the proposed rule, multiple circuit courts have held that Title IX’s sex discrimination provisions prohibit discrimination on the basis of gender identity in the

⁷¹ “After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation.” Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen., C.R. Div., U.S. Dep’t of Justice, to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

⁷² Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, at 32,639 (June 22, 2021). This Guidance is enjoined from being implemented in Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia. *See Tennessee v. Department of Ed.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022). The Eastern District of Tennessee found that the Department’s interpretation of Title IX to protect transgender students was plausibly an improper extension of rights and a legislative act rather than merely an interpretation of existing law. *Id.* at 838-39. However, the injunction is specific to the interpretation documents previously issued by the Department. The Sixth Circuit asked parties to submit supplemental briefings on the impact of the Department’s proposed Title IX rule on the litigation. Letter from Deborah S. Hunt, Clerk, 6th Cir., to Counsel, Re: State of Tenn., et al., v. Dept. of Educ., et al., No. 22-5807 (Apr. 10, 2023), <https://storage.courtlistener.com/recap/gov.uscourts.ca6.145366/gov.uscourts.ca6.145366.77.0.pdf>. As indicated in the Notice of Proposed Rulemaking and mentioned in the U.S.’s letter in response to the courts request, the Notice of Proposed Rulemaking is “not based on” the enjoined documents. Letter from David S. Peters, Counsel of Record, U.S. Dep’t of Just., to Deborah S. Hunt, Clerk, 6th Cir., Re: State of Tennessee, et al. v. Department of Education et al., No. 22-5807 (argument scheduled for April 26, 2023), No. 22-5807 (Apr. 19, 2023), https://storage.courtlistener.com/recap/gov.uscourts.ca6.145366/gov.uscourts.ca6.145366.82.0_1.pdf; 88 Fed. Reg. 22,865 n.6.

⁷³ 87 Fed. Reg. 41390.

⁷⁴ Notably, in *Bostock*, the parties “conceded” that sex referred to “biological sex” under Title VII of the Civil Rights Act. The court thus grounded its approach in a “biological sex” framework, but still found that gender identity discrimination in employment was impermissible sex discrimination under Title VII. *Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1739 (2020).

context of sex-separated facilities. For example, the Seventh Circuit took this approach when it held that Title IX protected a transgender boy's access to the boys' bathroom in *Whitaker v. Kenosha Unified School District*.⁷⁵ *Whitaker*, decided prior to *Bostock*, relied heavily on prior interpretations of Title VII and noted that the term "sex" is undefined in the Title IX statutory or regulatory language.⁷⁶ The court determined that, "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."⁷⁷ Similarly, in *Grimm v. Gloucester County School Board*, the Fourth Circuit held for a plaintiff who was likewise barred from using the boys' restroom at school because he was transgender.⁷⁸ The court compared the plaintiff to the other boys at his school, and held that "Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender... In that sense, he was treated worse than similarly situated students."⁷⁹ The Third and Ninth Circuits have also interpreted Title IX to not prohibit schools from allowing transgender students to access sex-separated facilities consistent with their gender identity.⁸⁰

These cases provide some of the foundational precedents for interpreting Title IX's application to transgender discrimination, and in particular, establishing that gender identity discrimination is not permissible under Title IX.⁸¹

Further, as the Department notes in the preamble to this proposed rule, courts have specifically found that policies excluding transgender students from sex-separated sports teams likely violate both Title IX and federal constitution. For example, when Idaho enacted the first U.S. state ban preventing transgender women and girls from participating in women and girls' sports,⁸² the District Court for the District of Idaho preliminarily enjoined the law, holding that it likely

⁷⁵ *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *abrogated on other grounds by Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

⁷⁶ *Id.* at 1047.

⁷⁷ *Id.* at 1049.

⁷⁸ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), reh'g en banc denied, 976 F.3d 399 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021).

⁷⁹ *Id.* at 618.

⁸⁰ *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), cert. denied, No. 20-62, 141 S. Ct. 894 (U.S. Dec. 7, 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018). *See Barr*, 949 F.3d at 1227 ("Nowhere does the statute explicitly state, or even suggest, that schools may not allow transgender students to use the facilities that are most consistent with their gender identity."); *Doe*, 897 F.3d at 535 ("The School District's policy allows all students to use bathrooms and locker rooms that align with their gender identity. It does not discriminate based on sex, and therefore does not offend Title IX."). *See also Dodds v. United States Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (denying an appeal of an injunction protecting a transgender girls' access to the girls' bathroom because the appellant school district could not show a likelihood of success on appeal).

⁸¹ Additionally, since at least 2000, courts have interpreted Title IX to prohibit discrimination, harassment, and bullying based on gender non-conformity as well. *See e.g., Montgomery v. Indep. School Dist.*, 109 F. Supp. 2d 1083 (D. Minn. 2000) (Plaintiff stated a cognizable claim under Title IX where he alleged harassment due to failure to meet masculine stereotypes); *Theno v. Tonganoxie Unified School Dist. No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005) (Plaintiff raised genuine issue of fact as to whether he was harassed due to perceived lack of masculinity).

⁸² IDAHO CODE §§ 33-6201 to -6206 (2022).

violated the Equal Protection Clause of the Fourteenth Amendment.⁸³ Applying intermediate scrutiny to the justifications offered for the ban, the court noted the “dearth of evidence in the record to show excluding transgender women from women’s sports supports sex equality, provides opportunities for women, or increases access to college scholarships.”⁸⁴ Subsequently, when considering a Title IX challenge to a similar ban enacted in Indiana in 2022,⁸⁵ the District Court for the Southern District of Indiana held for the plaintiff, echoing *Whitaker* when it wrote that “a law that prohibits an individual from playing on a sports team that does not conform to his or her gender identity punishes that individual for his or her gender non-conformance... which violates the clear language of Title IX.”⁸⁶ The Second Circuit has similarly held that “discrimination based on transgender status is generally prohibited under federal law” when considering a challenge under Title IX to Connecticut’s inclusive athletics policy.⁸⁷

B. Courts That Have Held Otherwise Have Inappropriately Focused on Narrower Definitions of Sex Discrimination and Biological Sex

While some courts have interpreted Title IX to allow the exclusion of transgender students from sex-separated facilities or programs, they have done so by narrowing Title IX to only prohibit discrimination based on cramped definitions of “biological sex.”⁸⁸ For example, the Eleventh Circuit, sitting en banc in *Adams v. School Board of St. Johns County*, upheld a school district bathroom policy separating students by “biological sex” under Title IX.⁸⁹ Reasoning that the term “sex” under Title IX must mean “biological sex” and is therefore determined by reproductive function,⁹⁰ the *Adams* court insisted that the purpose of Title IX’s “sex-based carve-outs,”⁹¹ such as bathrooms, locker rooms and housing,⁹² would be undermined if transgender people were included.⁹³ The court therefore upheld the policy. Judge Pryor’s dissent illuminates the problem with this reasoning:

The [School District’s bathroom use policy]’s definition of “biological sex,” ... is at odds with the medical-science definition of the term, which encompasses numerous biological components, including gender identity. And the policy fails to account for the primacy of gender identity (an immutable characteristic) when a student’s biological markers of sex

⁸³ *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020).

⁸⁴ *Id.* at 983.

⁸⁵ IND. CODE § 20-33-13-4 (2022).

⁸⁶ *A.M. ex rel. E.M. v. Indianapolis Public Schools*, 617 F. Supp. 3d 950, 966 (S.D. Ind. 2022), *vacated as moot by* *A.M. ex rel. E.M. v. Indianapolis Public Schools*, 2023 WL 371646 (7th Cir. 2023) (quoting *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017), *abrogated on other grounds by* *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020)) (internal quotations omitted).

⁸⁷ *Soule v. Connecticut Ass’n of Schools*, 57 F.4th 43, 55 (2nd Cir. 2022) (affirming a dismissal of a challenge to a policy prohibiting discrimination based on gender identity in athletics).

⁸⁸ See, e.g. *Adams ex rel. Adams v. School Brd. of St. John’s Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc); *B.P.J. v. West Virginia State Bd. of Ed.*, 2023 WL 111875 (S.D. W.Va. 2023).

⁸⁹ *Adams*, 57 F.4th at 796.

⁹⁰ *Id.* at 812, 814. See also *Id.* at n.6.

⁹¹ 20 U.S.C. §§ 1681(a), 1986; 34 C.F.R. § 106.33.

⁹² *Adams*, 57 F.4th at 812-14.

⁹³ *Id.* at 814.

diverge—as they will with all transgender students because, by definition, their gender identity is different from their sex assigned at birth. So, even though at least one primary biological component of a transgender student’s “biological sex” is, for example, male, that transgender student is deemed female under the School District’s policy.⁹⁴

Although some lower courts have applied a “biological sex” frame,⁹⁵ Judge Pryor’s emphasis on the “primacy” of gender identity is consistent with the Third, Fourth, Seventh, and Ninth Circuit decisions described above. More fundamentally, as the Seventh Circuit stated succinctly in *Whitaker*, “absent from the [Title IX] statute is the term ‘biological,’ which the [defendant] maintains is a necessary modifier.”⁹⁶

The court in *B.P.J. v. West Virginia*, which deals with a ban on sports participation at the secondary and college levels,⁹⁷ also focused on “biological sex” and not “gender identity” discrimination.⁹⁸ In *B.P.J.*, the district court initially entered a decision granting preliminary injunction and observing that the state’s ban may run afoul of Title IX because it “stigmatizes and isolates” the plaintiff, as “[a]ll other students in West Virginia secondary schools—cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions trying to play on the boys’ teams—are permitted to play on sports teams that best fit their gender identity.”⁹⁹ However, the court subsequently granted summary judgment in favor of the defendants, allowing the law to be implemented.¹⁰⁰ In that decision, while noting that “B.P.J. does not challenge, on a broad basis, sex-separation in sports,” the court goes on to reason in its Equal Protection Clause analysis that “a transgender girl is biologically male,” and “the State is permitted to legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.”¹⁰¹ For the purposes of Title IX, the court then reasons that “there is no serious debate that Title IX’s endorsement of sex-separation in sports refers to biological sex” and “transgender girls are

⁹⁴ *Id.* at 831-60 (Pryor, J., dissenting) (discussing why the case is not about “biological sex”).

⁹⁵ At least one district court has applied a similar “biological sex” framing to Title IX in the context of interpreting its application to transgender health coverage under Section 1557 of the Affordable Care Act. *Neese v. Becerra*, 2022 WL 16902425 (N.D. Tex. 2022). Judge Matthew Kaczmarek reasoned that Title IX “presumed sexual dimorphism” throughout the statute, ultimately ruling that Title IX’s definition of sex “turned on reproductive function.” *Id.* at 12. The Department of Justice appealed that decision, arguing that the court failed to “explain how an entity could discriminate on the basis of sexual orientation or gender identity without also discriminating based on sex.” Brief for Defendants-Appellants at 4, *Neese v. Becerra*, No. 23-10078, ECF No. 19 (5th Cir. Mar. 27, 2023), https://storage.courtlistener.com/recap/gov.uscourts.ca5.212038/gov.uscourts.ca5.212038.19.0_1.pdf. Notably, the District of Maryland considered a similar question in a case involving access to a hysterectomy for a transgender man, and applying *Bostock* and *Grimm*, *inter alia*, came to the opposite conclusion – that Title IX does protect against discrimination on the basis of gender identity, and therefore so too does Section 1557. *See Hammons v. University of Maryland System Corporation*, 2023 WL 121741 (D. Md. 2023).

⁹⁶ *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017), *abrogated on other grounds by Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

⁹⁷ *See* W.VA. CODE §18 – 2 – 25d (2022).

⁹⁸ *B.P.J. v. West Virginia State Bd. Of Ed.*, 2023 WL 111875 (W.D. W.Va. 2023).

⁹⁹ *B.P.J. v. West Virginia State Bd. Of Ed.*, 550 F.Supp.3d 347, 356 (W.D. W.Va. 2023).

¹⁰⁰ *B.P.J.*, 2023 WL 111875.

¹⁰¹ *Id.* at *8.

biologically male.”¹⁰² The district court’s decision on summary judgment therefore hinged on the principle that biological sex is determinative – which many other courts, including the Fourth Circuit in *Grimm*, have rejected. Notably, the Fourth Circuit granted a stay of the order in *B.P.J.* and preserved the injunction of the law pending appeal, which was upheld by the Supreme Court.¹⁰³

IV. More than Half of High School-aged Transgender Youth Live in States That Already Allow Them to Participate in Sports in a Manner Consistent with Their Gender Identity

Most statewide policies addressing transgender students’ participation in athletics apply to high school sports. Of the 21 states with bans on transgender participation by gender identity, all of them apply at the high school level. Similarly, most states that do not ban participation based on gender identity have policies that allow transgender students to play high school sports on a team that affirms their gender. An estimated 172,500 transgender youth ages 13-17 live in states with supportive policies – more than half of the total population of high school-aged transgender youth in the U.S.¹⁰⁴ These jurisdictions demonstrate that allowing transgender students to participate in sports consistent with their gender identity can be done without undermining any legitimate educational objective. The Department must ensure that the proposed rule does not have the effect of limiting access in any of these states by incentivizing the addition of new barriers to participation.

Twenty-two states,¹⁰⁵ the District of Columbia, and a number of localities currently have laws and policies that explicitly allow transgender students to participate in high school sports

¹⁰² *Id.* at *9.

¹⁰³ *B.P.J. ex rel. Jackson v. West Virginia State Bd. Of Ed.*, 2023 WL 2803113 (4th Cir. 2023); *West Virginia v. B.P.J. ex rel. Jackson*, 143 S.Ct. 889 (2023).

¹⁰⁴ HERMAN, FLORES & O’NEILL, *supra* note 4, at 5.

¹⁰⁵ These states are California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin. CAL. EDUC. CODE §221.5(f) (2023); CAL. INTERSCHOLASTIC ASS’N, 2022-23 CONSTITUTION AND BYLAWS, GUIDELINES FOR GENDER IDENTITY PARTICIPATION (2022) [hereinafter California]; COLO. HIGH SCH. ACTIVITIES ASS’N, BYLAW 300: CHSAA Transgender Inclusion Bylaw & Policy (2023), https://chsaanow.com/documents/2021/7/28//TRANSGENDER_POLICY_STATEMENT_2019.pdf?id=420 [hereinafter Colorado]; CONN. INTERSCHOLASTIC ATHLETIC CONF., 2022-2023 HANDBOOK 54 (2022), https://www.casciac.org/pdfs/ciachandbook_2223.pdf [hereinafter Connecticut]; DEL. INTERSCHOLASTIC ATHLETIC ASS’N, FAQs Concerning 1008 DIAA High School Interscholastic Athletics, <https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/348/FAQs%201008.pdf> (last visited May 4, 2023) [hereinafter Delaware]; ILL. HIGH SCH. ASS’N, IHSA HANDBOOK (2022-23), Policy 34: Policy and School Recommendations for Transgender Participation, https://www.ihsa.org/documents/equity/Equity-Transgender_Policy_Revised.pdf [hereinafter Illinois]; Maine Principals’ Ass’n, 2021-2022 Handbook, Bylaws of the Maine Principals’ Ass’n Div. of Interscholastic Activities, Art. II § 12, https://www.transathlete.com/files/ugd/2bc3fc_cdade68c458b4068af09eec230db6f47.pdf [hereinafter Maine]; MD. ATHLETIC ASS’N, *MPSSAA Guidance for Participation of Transgender Youth in Interscholastic Athletics* (Aug. 2016), https://www.mpssaa.org/assets/1/6/MPSSAA_Transgender_Guidance_revised_8.16.pdf [hereinafter Maryland]; Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity, MASS. DEP’T OF ELEMENTARY AND SECONDARY EDUC., <https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html> (last visited May 4,

consistent with their gender identity. Although the policies vary somewhat from state to state in terms of requirements related to establishing eligibility to participate in sports consistent with gender identity, most do not create different rules for different sports or different grade levels, with limited exceptions.¹⁰⁶ Almost all policies provide that once a student has established their gender identity, they are allowed to participate in all sports consistent with their gender identity throughout their high school career.¹⁰⁷

In 13 of these states and the District of Columbia, transgender students can establish their gender identity and eligibility for sports teams through self-attestation, meaning that they need only notify the school of their gender identity.¹⁰⁸ They are not required to provide a doctor's note or other medical documentation regarding their transgender identity. For example, California

2023) [hereinafter Massachusetts]; MICH. DEP'T OF EDUC., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* (Sept. 14, 2016) <https://www.michigan.gov/-/media/Project/Websites/mde/2016/09/15/SBStatementonLGBTQYouth.pdf?rev=83c59267fc5f46a8ba30061969f91359> [hereinafter Michigan]; MICH. HIGH SCH. ATHLETIC ASS'N, ELIGIBILITY OF TRANSGENDER STUDENT-ATHLETES, <https://cdn.factcheck.org/UploadedFiles/TransgenderPolicy.pdf> (last visited May 5, 2023); MINN. STATE H.S. LEAGUE, 2022-2023 MSHSL OFFICIAL HANDBOOK 61 (2022), <https://www.mshsl.org/sites/default/files/2022-07/MSHSL%20Handbook%202022-2023%20300%20Series.pdf> [hereinafter Minnesota]; NEB. SCH. ACTIVITIES ASS'N, *Gender Participation Policy* (Jan. 14, 2016) <https://nsaa-static.s3.amazonaws.com/about/gppolicy.pdf> [hereinafter Nebraska]; NEV. INTERSCHOLASTIC ACTIVITIES ASS'N, *NIAA Transgender Participation Position Statement and Policy* (Apr. 6, 2016), https://www.niaa.com/publications/Transgender_Participation_Policy_NACRevised11-2-21.pdf [hereinafter Nevada]; N.H. INTERSCHOLASTIC ATHLETIC ASS'N, By-Law Art. II § 21 (2022-23), https://www.nhiaa.org/ckfinder/userfiles/files/4HB%2022-23%20%20II%20Eligibility%20Updated%2012_2022.pdf [hereinafter New Hampshire]; N.J. State Interscholastic Athletic Ass'n, *Transgender Policy – Frequently Asked Questions* (June 8, 2022), <https://www.njsiaa.org/sites/default/files/documents/2022-06/Transgender%20FAQ%27s%20Approved%206-8-22.pdf> [hereinafter New Jersey]; N.Y. State Public High School Athletic Ass'n, *Handbook Bylaws § 32* (2023), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewicvbDpmN3-AhX8k4kEHdoSCIUQFnoECBgQAQ&url=https%3A%2F%2Fnysphsaa.org%2Fdocuments%2F2022%2F2%2F15%2FNYSPHSAA_Handbook_002.pdf&usq=AOvVaw032vBhdASkR6piK2f9bBvX [hereinafter New York]; OHIO HIGH SCHOOL ATHLETICS ASS'N, *OHSAA Transgender Student Policy*, <https://ohsaaweb.blob.core.windows.net/files/Eligibility/OtherEligibilityDocs/TransgenderPolicy.pdf> (last visited May 5, 2023) [hereinafter Ohio]; OR. STATE HIGH SCHOOL ATHLETICS ASS'N, 2022-2023 HANDBOOK, GENDER IDENTITY PARTICIPATION 80 (2022), <https://www.osaa.org/docs/handbooks/osaahandbook.pdf> [hereinafter Oregon]; R.I. INTERSCHOLASTIC LEAGUE R. AND REG. Art. 3 § 3(B) (June 21, 2022), <https://www.riil.org/page/3033> [hereinafter Rhode Island]; VT. PRINCIPALS' ASS'N, *Athletic Policies* https://docs.google.com/document/d/1_DMIEHHX3zIzO2jgqzaXLv2Puklx-o4y7IriQtRj00I/edit (last visited May 5, 2023) [hereinafter Vermont]; VA. HIGH SCH. LEAGUE, INC., *Handbook and Policy Manual 28A-8-1* (2022-23), <https://drive.google.com/file/d/1OxLAgeE0tBHCgcHBdYoMBDGepYL2fN7W/view> [hereinafter Virginia]; WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *WIAA HANDBOOK 2022-23 35, 41-43* (2022), <https://wiaa.com/results/handbook/2022-23/FullHandbook.pdf> [hereinafter Washington]; WIS. INTERSCHOLASTIC ACTIVITIES ASS'N, *Transgender Participation Policy*, <https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf> (last visited May 5, 2023). [hereinafter Wisconsin].

¹⁰⁶ For example, New York and Colorado both have inclusive guidelines, but have specific rules for transgender participation in some activities, such as wrestling. See e.g. Colorado High School Activities Association, *Recommendations for High School Weigh Ins for Transgender Wrestlers in Colorado* (July 23, 2021), https://chsaanow.com/documents/2021/7/23//CHSAA_recommendations_for_transgender_wrestlers.pdf?id=144; Colorado, *supra* note 105; New York, *supra* note 105.

¹⁰⁷ See e.g., Connecticut, Rhode Island, New Hampshire, and Vermont, *supra* note 105.

¹⁰⁸ These states are California, Connecticut, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, *supra* note 105.

guarantees the right to participate in sports based on gender identity by statute,¹⁰⁹ and its statewide athletics policy merely requires notification to the school.¹¹⁰ Similarly, Oregon’s policy states that “once a transgender student has notified the student’s school of their gender identity, the student shall be consistently treated as that gender for the purposes of eligibility for athletics and activities [...]”¹¹¹ Massachusetts’s policy is broad and simple, stating that “all students must be allowed to participate in a manner consistent with their gender identity,” in interscholastic and intramural sports.¹¹² While some state policies require the school to play a verification role, such as Connecticut, New Hampshire, Rhode Island and Vermont, the presumption is that the student’s self-identified gender will be respected.¹¹³

Simple and accessible policies like these at the state level enable affirming policies and practices at the regional level. For example, in New York City¹¹⁴ and Los Angeles County,¹¹⁵ the largest school districts in the country,¹¹⁶ students may participate in sports consistent with their gender based on self-attestation. Supportive policies are not limited to large, urban areas; many smaller jurisdictions have also adopted policies that allow transgender students to participate in sports consistent with their gender identity. For example, the athletics policy in Framingham, Massachusetts requires that students be permitted to participate in a manner consistent with their gender identity, even if the student records do not match, the student has not undergone any medical treatments, and has not undergone any counseling or mental health treatments.¹¹⁷ Both Los Angeles and Framingham provide explicit recommendations for non-binary youth in addition to those for male- and female- identified youth.¹¹⁸ Even in states with unclear or inconsistent policies, some cities have enacted relatively affirming practices, such as Philadelphia.¹¹⁹

¹⁰⁹ CAL. EDUC. CODE §221.5(f) (2023).

¹¹⁰ California, *supra* note 105.

¹¹¹ Oregon, *supra* note 105.

¹¹² Massachusetts, *supra* note 105.

¹¹³ *See e.g.*, Connecticut, *supra* note 105.

¹¹⁴ Guidelines to Support Transgender and Gender-expansive Students, NYC Public Sch., <https://www.schools.nyc.gov/school-life/school-environment/guidelines-on-gender/guidelines-to-support-transgender-and-gender-expansive-students> (last visited May 4, 2023). Note: New York City places limits on participation of transgender students in “wrestling and mixed competition.”

¹¹⁵ Policy Bulletin, No. BUL-6224.2, LAC Unified Sch. Dist., Gender Identity and Students – Ensuring Equity and Nondiscrimination (May 17, 2019), <https://achieve.lausd.net/cms/lib/CA01000043/Centricity/Domain/383/BUL-6224.2%20Transgender%20Policy%205%2013%2019.pdf>.

¹¹⁶ Digest of Educ. Stat., Table 215.30: Enrollment, Poverty, and Federal Funds for the 120 Largest Sch. Dist., by Enrollment Size in 2019: 2018-19 and fiscal year 2021, Nat’l Ctr. for Educ. Stat., https://nces.ed.gov/programs/digest/d21/tables/dt21_215.30.asp.

¹¹⁷ FRAMINGHAM H.S., 2021-2022 FRAMINGHAM HIGH SCH. ATHLETIC HANDBOOK (2021), <https://www.framingham.k12.ma.us/cms/lib/MA01907569/Centricity/Domain/81/2021/05.05.21/FHS%20Athletics%20Handbook%202022.pdf>.

¹¹⁸ *Id.*

¹¹⁹ The School District of Philadelphia allows students to participate in physical education classes and intramural sports based on their gender identity and determines competitive team participation on a case-by-case basis. SCHOOL

In nine states, transgender students must provide additional verification of their gender identity to establish eligibility for sports teams, such as a doctor’s note or a letter from a parent or guardian verifying the student’s gender identity.¹²⁰ These policies are slightly more restrictive in that a student must do more than simply notify their school of their gender identity, and there is an evaluation process by the school in which third party evidence is considered. On the more flexible end of such policies, Colorado and Maryland require written statements and will consider but do not require additional documentation.¹²¹ On the more restrictive end, several states require submission of medical documentation.¹²² Maine’s policy requires the submission of extensive supporting documentation, including medical documents, and a formal hearing.¹²³

Eight states and the District of Columbia provide an appeal process for transgender students who are denied eligibility to participate in sports consistent with their gender identity.¹²⁴ In Minnesota, a person is considered eligible upon asserting their gender identity to the school, unless the student’s school makes a determination that the person is ineligible, in which case the student may appeal.¹²⁵ Washington State¹²⁶ and the District of Columbia¹²⁷ have similar policies that begin with a presumption of eligibility. The District of Columbia also offers an intermediary mediation option if disagreements arise about student eligibility based on gender identity.¹²⁸ Notably, the Washington State and District of Columbia policies both require that review panels include physicians, therapists and advocates with expertise in transgender issues.¹²⁹ This is a direct recommendation of the LGBT Sports Foundation, which published a model inclusive sports policy in 2016.¹³⁰ Some states, such as Delaware¹³¹ and New Jersey,¹³² will not allow a student to appeal a school’s determination.

DISTRICT OF PHILADELPHIA, TRANSGENDER AND GENDER-NONCONFORMING STUDENTS (POLICY NO. 252) (2016), <https://www.philasd.org/src/wp-content/uploads/sites/80/2017/06/252.pdf>. Pennsylvania’s statewide policy leaves discretion entirely up to the principal of the student’s school. *See* PENN. INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC., 2022-2023 PIAA POLICIES 15 (2022), <https://www.piaa.org/assets/web/documents/Handbook%20-%20Section%20II%20-%20Policies%20and%20Procedures.pdf>.

¹²⁰ These states are Colorado, Delaware, Illinois, Maine, Nebraska, Nevada, Ohio, Virginia, and Wisconsin, *supra* note 105.

¹²¹ Colorado and Maryland, *supra* note 105.

¹²² Delaware, Illinois, Maine, Ohio, Virginia, and Wisconsin, *supra* note 105.

¹²³ Maine, *supra* note 105.

¹²⁴ These states are Maine, Maryland, Minnesota, New York, Ohio, Virginia, Washington, and Wisconsin, *supra* note 105.

¹²⁵ Minnesota, *supra* note 105.

¹²⁶ Washington, *supra* note 105.

¹²⁷ D.C., *supra* note 105. D.C. STATE ATHLETIC ASS’N, 2022-23 MEMBER HANDBOOK 54-56 (2022).

¹²⁸ *Id.*

¹²⁹ *See* Washington, *supra* note 105.

¹³⁰ LGBT SPORTS FOUNDATIONS, “ALL 50”: THE TRANSGENDER-INCLUSIVE HIGH SCHOOL SPORTS AND ACTIVITIES POLICY AND EDUCATION PROJECT, PROPOSED MODEL HIGH SCHOOL POLICY (2016), <https://www.nclrights.org/wp-content/uploads/2016/05/All-50-Model-High-School-Policy.pdf>.

¹³¹ Delaware, *supra* note 105.

¹³² New Jersey, *supra* note 105.

Some states allow transgender students to participate in sports consistent with their gender identity but provide a mechanism for other students to challenge inclusion of a transgender athlete. For example, New Jersey’s otherwise inclusive policy allows appeals of transgender sports determinations for the purposes of [fair] competition and safety; however, it is important to note that “the [committee] will not consider whether the school has properly determined the student’s sex-assignment.”¹³³ Similarly, Delaware’s policy explicitly allows for other schools to challenge a student’s participation in their own school team if it “would adversely affect competitive equity or safety of teammates or opposing players.”¹³⁴

V. Recommendations

The Department must ensure that the language of the rule embraces the full potential of Title IX to protect equity in sports, rather than expanding the limits of its exceptions. This means that it should not allow discrimination on the basis of gender identity. While an athletics policy making a distinction between different gender identities (e.g., between treatment of female- and male-identified student athletes) is currently permitted in some circumstances by the implementing regulations of Title IX,¹³⁵ the language of the proposed rule would address policies making a distinction between different people of the *same* gender identity (such as cisgender women and transgender women). As stated in the 2016 “Dear Colleague” letter issued by the Obama Administration, Title IX requires that “a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”¹³⁶ Although that guidance has been rescinded,¹³⁷ we believe the foundation remains the same. A rule categorically prohibiting gender identity discrimination in athletics would be consistent with that interpretation.

However, assuming the Department intends to retain the balancing test proposed here, which could in application still invalidate most if not all bans on transgender sports participation, we recommend that the Department make the following changes.

¹³³ *Id.*

¹³⁴ Delaware, *supra* note 105.

¹³⁵ See 34 C.F.R. § 106.41(b); 88 Fed. Reg. 22866.

¹³⁶ Catherine E. Lhamon, Assistant Sec’y for C.R., Off. for C.R., U.S. Dep’t of Ed. & Vanita Gupta, Principal Deputy Assistant Att’y Gen. for C.R., C.R. Div., U.S. Dep’t of Just., Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. Note: The Dear Colleague Letter contemplated that jurisdictions may address competitive fairness or physical safety concerns in athletics: “Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.” *Id.*, at 3, n. 18. However, the Letter also states that “A school may not . . . adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.” *Id.*, at 3, n. 17.

¹³⁷ Sandra Battle, Acting Assistant Sec’y for C.R., Off. For C.R., U.S. Dep’t of Ed & T.E. Wheeler, II, Acting Assistant Att’y Gen. for C.R., C.R. Div., U.S. Dep’t of Just., Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

A. Proposed Rule Should Be Clarified Further for Efficiency of Enforcement

The Department welcomes comment on “[w]hether 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.”¹³⁸

We believe that the Department should amend the regulatory text in order to provide clearer guidance to recipients.

The Department proposes to adopt a balancing test that would be applied to policies that limit or deny participation on a team consistent with a student’s gender identity (included here for convenience):

(b)(2) If a recipient adopts or applies sex related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

(i) Be substantially related to the achievement of an important educational objective; and

(ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.¹³⁹

For states, school districts, and athletic organizations subject to Title IX, the proposed language would make it exceedingly difficult to justify all but the most carefully crafted, evidence-based restrictions. This would likely have a significant policy impact: as noted above, currently 21 states have some form of categorical ban on participation by transgender youth in sports that would appear inconsistent with the law.¹⁴⁰ At least 70 such bills were introduced in the legislative session in 2023,¹⁴¹ of which three were enacted¹⁴² and several remain pending.¹⁴³ This

¹³⁸ 88 Fed. Reg. 22878.

¹³⁹ 88 Fed. Reg. 22891.

¹⁴⁰ *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last visited Apr. 26, 2023).

¹⁴¹ *Anti-transgender Student Athletics*, EQUALITY FEDERATION, <https://www.equalityfederation.org/tracker/anti-transgender-student-athletics> (last visited May 6, 2023).

¹⁴² H.B. 2238, 2023-2024 Leg., Reg. Sess. (Kan. 2023); H.B. 1249, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.B. 1489, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); S.F. 133, 67th Leg., Reg. Sess. (Wyo. 2023).

¹⁴³ Missouri’s legislature recently passed a ban, but it has not been enacted as of the date of this comment. *See* Summer Ballentine & John Hanna, *Missouri Lawmakers Ban Gender-affirming Care, Trans Athletes; Kansas City Moves to Defy State*, AP NEWS (May 10, 2023), <https://apnews.com/article/transgender-nonbinary-hormone-puberty-missouri-lawmakers-5a8922430ffab9e43cf9b7ce254bff9f>; *See also* S.B. 39, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).

trend is continuing, as demonstrated by the fact that one of these bills was signed even after the proposed rule language was announced.¹⁴⁴

Nonetheless, the criteria proposed here will still necessitate case-by-case application, which could lead to delays in compliance, unfair exclusions of individual athletes, potential legal challenges arising therefrom, inter-jurisdictional inconsistencies, inter-jurisdictional challenges by schools, and resultant investigation and resolution expenses. Where possible, a bright-line principle can help avoid “slippery, murky, and difficult”¹⁴⁵ application of the law, and we believe there are indeed opportunities to clarify the rule to provide states with further guidance that will reduce the burdens of investigation and adjudication. More specifically, we recommend the proposed rule be clarified in the following ways:

1. Adding language to clarify that nothing in the rule precludes recipients from adopting categorically inclusive policies;
2. Clarifying that bans on transgender participation in athletics by gender identity at the K-8 level cannot survive the balancing test and therefore violate Title IX;
3. Clarifying that bans on transgender participation in “no-cut” teams, intramural teams, or other teams where selection is not based on competitive skill cannot survive the balancing test and therefore violate Title IX;
4. Limiting the use of the balancing test to elite or competitive sports at the high school and collegiate level; and
5. Providing concrete examples of ways that schools are expected to minimize harm to transgender students who are denied the ability to participate in sports as a result of sex-based criteria.

i) The Department Should Clarify That Nothing in the Rule Precludes Recipients from Adopting Categorically Inclusive Policies

We recommend that the Department clearly state, in the rule itself, that nothing in the rule precludes a recipient from adopting policies which categorically permit students to participate in sports based on their gender identity across all sports, levels of competition, and grade or education levels. The proposed rule indicates this intent through use of the language, “*If a recipient adopts sex-related criteria that would limit or deny a student’s eligibility to participate...consistent with their gender identity*” (emphasis added). This view is consistent with decisions issued by five federal courts of appeal, several district courts, and executive actions dating back to 2011. As outlined above, the Second, Third, and Ninth Circuits have explicitly stated that Title IX does not prohibit schools from enacting gender-affirming policies in

¹⁴⁴ Trisha Ahmed, *North Dakota Governor Signs Trans Athlete Bans into Law*, AP NEWS (Apr. 11, 2023), <https://apnews.com/article/north-dakota-transgender-lgbtq-sports-ban-04c0f81665e763a63760c793fb67948a>.

¹⁴⁵ See *Oregon v. Elstad*, 470 U.S. 298, 359 (1985) (Brennan, J., dissenting) (discussing application of the Fourth and Fifth Amendments).

athletics¹⁴⁶ or sex-separated facilities.¹⁴⁷ This is also consistent with the holdings of the Fourth Circuit in *Grimm* and the Seventh Circuit in *Whitaker*, and the interpretation of Title IX embodied in the Dear Colleague letter issued under President Obama.¹⁴⁸

Incorporating a clear statement to this effect would preserve existing laws and policies that allow transgender students to participate in school sports consistent with their gender identity and may encourage other recipients to adopt inclusive policies. There are at least 22 states which affirmatively allow transgender students to participate in high school and other sports consistent with their gender identity. Although the policies vary somewhat from state to state in terms of requirements for establishing eligibility to participate consistent with gender identity, 14 policies (including the District of Columbia) permit student participation based on self-attestation, and most do not create different rules for different sports or different grade levels, with limited exceptions.¹⁴⁹ Moreover, additional states and school districts may be likely to simplify their policies or enact broader policies if it were clear that they would be compliant with the Department’s regulations. Accordingly, we recommend that the Department clearly state in the rule itself that the rule does not prohibit recipients from adopting more inclusive policies. We proposed adding the following text:

§106.41 Athletics.

(b) * * *

(2)(iv) Nothing in this section prohibits a recipient from adopting a policy that permits all students to participate in sports consistent with their gender identity.

ii) Transgender Students in Grades K-8 Should Be Categorically Permitted to Participate in Sports Teams That Align with Their Gender Identity

The Department welcomes comments on “[w]hether any sex-related eligibility criteria can comply with this proposed regulation when applied to students in earlier grades and, if so, the types of criteria that may comply with the proposed regulation.”¹⁵⁰

We recommend that the Department include, in the rule, a provision categorically requiring inclusion of transgender athletes in kindergarten through eighth grade. Language used by the Department in existing regulations and throughout the preamble to the proposed rule supports creating a distinction between K-8 sports and higher-level athletics. First, the language of the current rule states that section 106.41(b) applies “where selection for such teams is based on competitive skill or the activity involved is a contact sport.”¹⁵¹ The Department makes a clear distinction between these types of activities and lower grade sports in the preamble, noting that “the mission of athletics in [middle school] is to encourage broad participation, basic skills

¹⁴⁶ See *Soule v. Connecticut Ass’n of Schools*, 57 F.4th 43 (2nd Cir. 2022) (discussing sister circuit decisions).

¹⁴⁷ *Dodds v. United States Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), cert. denied, No. 20-62, 141 S. Ct. 894 (U.S. Dec. 7, 2020).

¹⁴⁸ *Lhamon & Gupta*, *supra* note 136.

¹⁴⁹ See States with transgender-inclusive policies, *supra* note 105; states with policies based on self-attestation, *supra* note 108; states with inclusive polices with exceptions for certain sports, *supra* note 106.

¹⁵⁰ 88 Fed. Reg. 22875.

¹⁵¹ 34 C.F.R. § 106.41(b).

development, and other aspects of student well-being.”¹⁵² The Department additionally describes the role of team sports at this grade level, noting “athletic teams offered by schools for students in earlier grades, including those in elementary and middle school ... present an important opportunity to introduce students to new activities for which little or no prior experience is required, acquire basic skills associated with a particular sport, and develop introductory skills related to physical fitness, leadership, and teamwork.”¹⁵³ Lastly, the Department notes that “many [jurisdictions] prioritize broad participation and teaching basic skills...are often not highly selective...and rarely provide elite competition opportunities.”¹⁵⁴

Existing research establishes that participating in sports—particularly team sports—is good for youth. As described above, there are significant health benefits to participation in sports, including better physical¹⁵⁵ and mental health,¹⁵⁶ and research has linked physical activity in youth to lower rates of adverse health outcomes later in life, including lower incidence of diabetes, hypertension and other cardiovascular diseases, and bone disease.¹⁵⁷ Youth who participate in sports are also more likely to maintain an active lifestyle through adulthood.¹⁵⁸ These benefits are particularly recognized in team sports.¹⁵⁹ For many youth, sports are also fun. One mixed-method study in 2015 looked at common elements of enjoyment among youth soccer players, their parents, and coaches, and found that “trying hard,” “being a good sport” and “positive coaching” correlated to increased fun experienced by youth.¹⁶⁰ These aspects align well with the earlier grade objectives described by the Department in the preamble to the proposed rule.

Existing research also establishes that it is particularly important to encourage younger children to participate in physical activity, and making school-based sports as accessible as possible helps to meet this goal. Several studies indicate that many children do not meet government recommended guidelines for physical activity, and activity levels drop off sharply in middle school. The U.S. Department of Health and Human Services recommends that school-aged youth (ages 6-17) do 60 minutes of moderate-to-vigorous physical activity daily.¹⁶¹ A 2016 analysis of the National Health and Nutrition Examination Survey (“NHANES”) found that 42.5% of youth

¹⁵² 88 Fed. Reg. 22875 (citing examples of benefits cited by various athletic association policies).

¹⁵³ 88 Fed. Reg. 22874 (citing Kelsey Logan & Steven Cuff, *Organized Sports for Children, Preadolescents, and Adolescents*, 143 PEDIATRICS e20190997 (2019)).

¹⁵⁴ 88 Fed. Reg. 22875.

¹⁵⁵ *E.g.*, Song & Shi, *supra* note 27; Lachytova et al., *supra* note 27; Zullig & White, *supra* note 27; Snyder et al., *supra* note 27.

¹⁵⁶ Eime et al., *supra* note 30; Hoffman et al., *supra* note 30.

¹⁵⁷ Logan et al., *supra* note 28; Snyder et al., *supra* note 27; Ortega et al., *supra* note 28.

¹⁵⁸ Snyder et al., *supra* note 27; Tammelin, *supra* note 29.

¹⁵⁹ *Id.* at 19.

¹⁶⁰ Amanda J. Visek et al., *The Fun Integration Theory: Towards Sustaining Children and Adolescent Sport Participation*, 12 J. PHYS. ACT. & HEALTH 424, 428 (2015).

¹⁶¹ U.S. DEP’T. HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS, 2ND ED. 48 (2018), https://health.gov/sites/default/files/2019-09/Physical_Activity_Guidelines_2nd_edition.pdf.

ages 6-11 met these guidelines, but only 7.5% of youth ages 12-15.¹⁶² Other studies suggest that school-based team sports programs are likely among the primary ways that students in lower and middle school achieve recommended benchmarks. An analysis of Sport & Fitness Industry Association data by the Aspen Institute showed that between 37% - 45% of youth ages 6-12 participated in team sports on a regular basis between 2008 and 2021 in 2021.¹⁶³ The Aspen Institute study further noted the importance of school-based sports in particular, stating that they “remain the best opportunity to deliver sports and physical activity for all youth given that cost and transportation barriers are often removed for families.”¹⁶⁴

Together, this research establishes that denying transgender children the opportunity to participate in K-8 sports would create substantial harm by depriving them of many benefits associated with sports participation at this age.

Research also indicates that limiting participation through the application of sex-related criteria within this age range does not serve important educational objectives. During primary and middle school years, competitive training and the development of athletic advantage or specialization are not recommended priorities. For example, a review of youth sport epidemiology by the American Academy of Pediatrics documented the potential benefits of the Long-term Athletic Development (“LTAD”) model.¹⁶⁵ Under the LTAD model, a version of which is used by the U.S. Olympic Committee,¹⁶⁶ children ages 6-10 should focus entirely on fun-based skills building, and youth ages 10-14 should focus on learning the basic skills of specific sports, but competitive training does not begin until ages 13-18.¹⁶⁷ The American Academy of Pediatrics also recommends that youth participate in multiple different sports in early years, delaying specialization until approximately 15 years of age, in part to lower risk of injuries and other harms.¹⁶⁸

As the educational objectives at the elementary and middle school level are largely understood to prioritize participation and skills building, as noted by the Department and described above, and denying transgender students the opportunity to fully participate in K-8 sports would create

¹⁶² Peter T. Katzmarzyk et al., *Results from the United States of America's 2016 Report Card on Physical Activity for Children and Youth*, 13 J. PHYS. ACT. & HEALTH. S307 (2016).

¹⁶³ PROJECT PLAY, *Youth Sports Facts: Participation Rates*, <https://www.aspenprojectplay.org/youth-sports/facts/participation-rates> (last visited May 5, 2023).

¹⁶⁴ PROJECT PLAY, *Participation Trends*, <https://www.aspenprojectplay.org/state-of-play-2022/participation-trends> (last visited May 5, 2023).

¹⁶⁵ Joel S. Brenner, COUNCIL ON SPORTS MED. & FITNESS, AM. ACAD. OF PEDIATRICS, *Sports Specialization and Intensive Training in Young Athletes*, 138 PEDIATRICS e20162148 (2016).

¹⁶⁶ See U.S. OLYMPIC & PARALYMPIC COMM., *American Development Model*, <https://www.teamusa.org/About-the-USOPC/Coaching-Education/American-Development-Model> (last visited May 5, 2023) (recommending “Discovery, Learning and Play” for children ages 0-12).

¹⁶⁷ Brenner, *supra* note 165.

¹⁶⁸ *Id.* at 2, 5; See also NAT’L ALL. FOR YOUTH SPORTS, *AAP Recommends Delaying Specialization Until 15*, Sep. 2, 2016, <https://www.nays.org/sklive/sure-shots/aap-recommends-delaying-specialization-until-age-15/>.

substantial harm, the application of sex-related eligibility criteria that deny or limit opportunities for transgender children in K-8 sports cannot comply with the proposed regulation. Accordingly, we recommend that the language of the rule be amended to state that all recipients must allow children to participate on male or female teams consistent with their gender identity in kindergarten through eighth grade, as follows:

§106.41 Athletics.

(b) ***

(2)(i) A recipient may not adopt or apply sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity at the elementary or middle school level, or for any team at any level where participation is not based on competitive skill.

iii) The Department Should Additionally Specify That Recipients Must Allow Students to Participate Consistent with their Gender Identity in “No-cut” Teams or Teams Where Participation Is Not Determined by Athletic Ability or Competitive Advantage, at All Levels, Including K-12 and Higher Education.

The Department welcomes comments on “[w]hether and how the permissibility of particular sex-related eligibility criteria should differ depending on the level of sport, level of competition, grade or education level, or other considerations.”¹⁶⁹

We recommend that the Department include, in the rule, a provision categorically requiring inclusion of transgender athletes in all “no cut” teams, or teams where participation is not determined by athletic ability or competitive advantage. Some teams at the K-12 level use a “no-cut” approach, where everyone who wants to play is automatically allowed to participate, and tryouts are not required.¹⁷⁰ Some schools only offer “no-cut” participation, such as the University Lake School in Waukesha, Wisconsin.¹⁷¹ The school’s philosophy is that sports are about “becoming a better athlete and a better person” and “instilling the ideals of hard work, high achievement and commitment.”¹⁷² In the 2018-2019 school year, the school reported that 95% of its upper school students and 70% of its middle school students participated in sports.¹⁷³ Other schools offer both “cut” teams and “no-cut” teams, to allow varying levels of competition, such as Brookline High School in Brookline, Massachusetts.¹⁷⁴ Whether a particular sport is “cut” or “no-cut” “reflects recent trends” and most sports fall into one category or another, but each

¹⁶⁹ 88 Fed. Reg. 22875.

¹⁷⁰ See e.g., *Level of Competition*, 88 Fed. Reg. 22875.

¹⁷¹ UNIVERSITY LAKE SCH., *Athletics*, <https://www.universitylake.org/student-life/athletics> (last visited May 5, 2023). Notably, Clayton County, Missouri public schools used a “no-cut” approach to athletics for 40 years, but recently changed it. Alex Cohen, Isabel Erdman & Kaia Mills-Lee, *Changing The Policy*, THE GLOBE, Apr. 7, 2022, <https://www.chsglobe.com/45223/sports/changing-the-policy/>. The County’s athletics policy currently combines “cut” and “no-cut” athletics options. See e.g. CLAYTON HIGH SCHOOL, *CHS Greyhound Mission Statement*, <https://www.claytonschools.net/Page/21390> (last visited May 6, 2023).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ BROOKLINE HIGH SCH., *Welcome to BHS Athletics*, https://bhs.brookline.k12.ma.us/uploads/8/0/1/5/801512/welcome_to_bhs_athletics_class_of_2025.pdf (last visited May 5, 2023).

season there are offerings of both types for both boys and girls. The school’s mission statement explains that “every student-athlete, male and female, shall be afforded the opportunity to participate at the most appropriate level to achieve optimal personal growth.”¹⁷⁵

Many student athletes in the K-12 level participate in “no-cut” teams, and at the higher education level, most student athletes participate in club, intramural, and other types of teams¹⁷⁶ where the barriers to entry are much lower than elite competitive athletics. Given that eligibility for such teams is not typically defined by athletic ability or competitive advantage, it is unlikely that application of sex-related criteria that deny or limit opportunities for transgender students would be substantially related to any important educational objective. Accordingly, we recommend that the Department add a provision categorically requiring inclusion of transgender athletes in all teams where eligibility is not based on competitive skill, as follows:

§106.41 Athletics.

(b) * * *

(2)(i) A recipient may not adopt or apply sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity at the elementary or middle school level, or for any team at any level where participation is not based on competitive skill.

iv) Application of The Balancing Test Should Be Limited to Competition in Exclusive, Elite Sports at the High School or Collegiate Level

The Department welcomes comments on “[w]hether and how the permissibility of particular sex-related eligibility criteria should differ depending on the level of sport, level of competition, grade or education level, or other considerations.”¹⁷⁷

If the Department is to apply the proposed balancing test to participation policies, it would be most consistent with the language of the present regulations and the objectives described in the preamble to limit application to “where selection for such teams is based on competitive skill or the activity involved is a contact sport.”¹⁷⁸ This commonly begins at high school, where students compete more intensively in varying levels of sport, often broken down into freshman, junior varsity, and varsity teams.¹⁷⁹ At the collegiate level, elite athletes compete within athletic associations, within which there are also divisions.¹⁸⁰

Clarity and direction will be particularly important to transgender, gender non-conforming, nonbinary, and intersex athletes in these leagues, as they are currently forced to navigate a patchwork of different policies with varying degrees of burden and invasiveness. As noted above, 21 states have bans on participation in sports by gender identity for some or all

¹⁷⁵ *Id.*

¹⁷⁶ See e.g. AM. COLLEGE HEALTH ASS’N, *supra* note 17.

¹⁷⁷ 88 Fed. Reg. 22875.

¹⁷⁸ 34 C.F.R. § 106.41(b).

¹⁷⁹ See e.g. NCSA, *What Are the Differences Between JV and Varsity?*, <https://www.ncsasports.org/blog/jv-vs-varsity> (last visited May 6, 2023).

¹⁸⁰ See e.g., NCSA, *supra* note 10.

transgender youth, all of which apply at the high school level. Seventeen states have bans that apply at the collegiate level. Of the states that do not currently have legislative bans, 22 and the District of Columbia have adopted inclusive statewide athletic policies at the high school level. Participation of transgender students at the collegiate level is regulated by each athletic association, such as the NCAA, and the governing body for a particular sport.¹⁸¹

a. Important Educational Objectives

In the notice of proposed rulemaking, the Department discusses several educational objectives that policymakers may advance regarding participation of transgender people in sports. Examining *Hecox v. Little* and related caselaw regarding transgender sports bans, including the cases discussed above, the Department noted numerous objectives: “supporting sex equality, providing opportunities for women, access to scholarships,” “redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes.”¹⁸² These were found by at least one court to be “legitimate and important government interests” justifying sex-separation, but as the Department notes, the exclusion of transgender girls from girls’ sports was not found to be substantially related to the achievement of these objectives.¹⁸³ In other words, for many important educational objectives, sex-separation may be an appropriate remedy, but not transgender exclusion.

The Department recognizes two additional educational objectives as important: fairness in competition and prevention of sports-related injury.¹⁸⁴ The Department suggests that in addition to sex-separation, Title IX could allow the application of criteria specific to transgender, gender non-conforming, nonbinary, or intersex people in some circumstances to promote fairness or prevention of injury. For example, the Department concedes that “a recipient would be permitted...to rely on fairness in competition as an important educational objective to justify its use of sex-related criteria that would limit or deny students’ eligibility to participate consistent with their gender identity— but only if those criteria are substantially related to ensuring fairness in competition in that particular sport at the applicable level of competition and grade or education level.”¹⁸⁵ The power of the Department’s rule to express the full scope of Title IX therefore hinges entirely on the substantial relationship test.

b. Substantially Related

“Sex-related criteria would be substantially related to achievement of an important educational objective if there is a ‘direct, substantial relationship between’ a recipient’s objective and the means used to achieve that objective, ... and if the criteria do not rely

¹⁸¹ NCAA, TRANSGENDER STUDENT-ATHLETE PARTICIPATION POLICY (Apr. 17, 2023), <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>.

¹⁸² 88 Fed. Reg. 22868 (quoting *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020)).

¹⁸³ *Id.*

¹⁸⁴ 88 Fed. Reg. 22872-73.

¹⁸⁵ 88 Fed. Reg. 22873.

on overly broad generalizations about the talents, capacities, or preferences of male and female students, ...”¹⁸⁶

The Department explains that to pass the “substantially related” test, a recipient jurisdiction’s policy “may not rely on false assumptions about transgender students.”¹⁸⁷ If Title IX is understood to protect against gender identity discrimination as a form of sex discrimination, consistent with the *Bostock* decision, the 2016 Dear Colleague letter, and the principles of *Grimm* and *Whitaker* described above, it is hard to imagine any policy that could distinguish between cisgender and transgender competitors without relying on stereotypes or false assumptions. As the Department notes, citing a Utah state court decision, “being transgender is not ‘a legitimate, accurate proxy’ for athletic performance.”¹⁸⁸ The Utah court goes on to explain:

Many transgender girls—including two of the plaintiffs in this case—medically transition at the onset of puberty, thereby never gaining any potential advantages that the increased production of testosterone during male puberty may create. *Id.*

The court also noted that other transgender girls “may simply have no discernible advantage in any case, depending on the student’s age, level of ability, and the sport in which they wish to participate.”¹⁸⁹

The International Olympic Committee Framework on Fairness, Inclusion, and Nondiscrimination on the Basis of Gender Identity and Sex Variations states that “no athlete should be precluded from competing or excluded from competition on the exclusive ground of an unverified, alleged or perceived unfair competitive advantage due to their sex variations, physical appearance, and/or transgender status.”¹⁹⁰ While evidence supports some association between testosterone levels and athletic performance,¹⁹¹ research has shown that genetic composition,¹⁹² body mass

¹⁸⁶ 88 Fed. Reg. 22873 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), *U.S. v. Virginia*, 518 U.S. 515, 533 (1996)).

¹⁸⁷ 88 Fed. Reg. 22874.

¹⁸⁸ 88 Fed. Reg. 22873.

¹⁸⁹ 88 Fed. Reg. 22873-74.

¹⁹⁰ INT’L OLYMPIC COMMITTEE, IOC FRAMEWORK ON FAIRNESS, INCLUSION, AND NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND SEX VARIATIONS (Nov. 16, 2021), <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>.

¹⁹¹ Ruth I. Wood & Steven J. Stanton, *Testosterone and Sport: Current Perspectives*, 61 HORM. BEHAV. 147 (2012). See also Sara Chodosh, *The Complicated Truth about Testosterone’s Effect on Athletic Performance*, POPULAR SCIENCE, Nov. 20, 2019, <https://www.popsci.com/story/science/testosterone-effect-athletic-performance/>.

¹⁹² See e.g., Lisa M. Guth & Stephen M. Roth, *Genetic Influence on Athletic Performance*, 25 CURR. OPIN. PEDIATR. 653 (2013) (reviewing literature on genetics and athletic performance, especially in youth).

index,¹⁹³ strength,¹⁹⁴ and height¹⁹⁵ also affect athleticism. At the individual level, athletes of all genders possess unique combinations of these factors based on their own genetics and life experiences. For example, a pooled analysis of global population-based studies found significant variation in factors such as height and body mass between global populations, based on genetics, access to nutrition, and quality of life.¹⁹⁶ While some individual transgender, gender non-conforming, nonbinary, or intersex people may possess advantageous traits, others may not, and the same is true for cisgender people. At least one systematic international review of the literature regarding transgender sport participation found “no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition.”¹⁹⁷ A recipient policy that presumes transgender, gender non-conforming, nonbinary, or intersex individuals would categorically possess any specific traits that would provide an unfair advantage or risk of injury to others, especially if such assumption were made across multiple sports or levels, would likely be seen as using transgender status as a proxy for athletic performance.

Furthermore, a policy may not survive the “substantially related” prong of the proposed balancing test if the objective could be accomplished through means that would not limit or deny participation based on gender identity.¹⁹⁸ The only approach we can imagine that might satisfy the “substantial relationship” test in the limited circumstances where fairness or risk of injury are in consideration is an individualized determination of competitive characteristics for each student athlete. However, nothing in Title IX requires that only transgender, gender non-conforming, nonbinary, or intersex people should be subjected to such a determination and not cisgender

¹⁹³ See e.g., Adrien Sedaud et al. *BMI, A Performance Parameter for Speed Improvement*, 9 PLOS ONE 390183 (2014) (examining body mass index and performance of 100 top international men’s track competitors).

¹⁹⁴ See e.g., Timothy J. Suchomel, Sophia Nimphius & Michael H. Stone, *The Importance of Muscular Strength in Athletic Performance*, 46 SPORT MED. 1419 (2016) (reviewing literature on muscular strength in athletics).

¹⁹⁵ See e.g., Ronnie Lidor & Gal Ziv, *Physical and Physiological Attributes of Female Volleyball Players – A Review*, 24 J. STRENGTH & CONDITIONING RESEARCH 1963 (2010) (examining tallness as one of several factors in athletic performance in women’s volleyball). See also Vanessa Heggie, *Forget Testosterone, There’s Another ‘T’ We Need to Tackle to Make Sports Fair*, GUARDIAN, Apr. 30, 2014, <https://www.theguardian.com/science/the-word/2014/apr/30/forget-testosterone-theres-another-t-we-need-to-tackle-to-make-sports-fair>.

¹⁹⁶ NCD Risk Factor Collaboration, *Height and Body-Mass Index Trajectories of School-Aged Children and Adolescents from 1985 to 2019 in 200 Countries and Territories: A Pooled Analysis of 2181 Population-based Studies with 65 Million Participants*, 396 LANCET 1511 (2020) (examining BMI of youth ages 5-19 across 200 Countries).

¹⁹⁷ Bethany Alice Jones et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 SPORTS MED. 701 (2017) (examining evidence of athletic distinctions between transgender and cisgender athletes). See also Bethany Alice Jones et al., *Authors’ Reply to Richardson and Chen: Comment on “Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies.”* 50 SPORTS MED. 1861 (2020) (responding to critical feedback of original study). C.f. Joanna Harper et al. *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review with a Focus on the Implications for Sport Participation*, 55 BRITISH J. SPORTS MED. 865 (2021) (review of evidence suggesting there may be specific types of athletic advantage in some transgender athletes in some sports, noting the “absence of studies in transgender athletes,” and recommending more research).

¹⁹⁸ 88 Fed. Reg. 22874.

students. For example, if there are height or weight considerations in a sport at a competitive level, they could be applied across the board to cisgender and transgender students. Similarly, evaluation of testosterone levels¹⁹⁹ or other factors involving medical testing could be applied to all students, regardless of transgender status.

Finally, the Department should place limits on how “harm” is considered under the current and proposed rules. While the Department “recognizes that prevention of sport-related injury is an important educational objective,”²⁰⁰ and while the existing regulations interpreting Title IX allow special carveouts for “contact sports,” which would include any sport where the “purpose or major activity...involves bodily contact,”²⁰¹ the Department should nonetheless ensure that risk of harm to self is not used as a justification for blanket transgender athletic policies. For example, a policy should not categorically prohibit transgender men from wrestling on the assumption that they would be at greater risk for injury, when a case-by-case determination generally applicable to all wrestlers would meet that same objective.

With the foregoing considerations in mind, we recommend that the Department revise the proposed rule as follows:

§106.41 Athletics.

(b) ***

(2)(ii) If a recipient adopts or applies sex- related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity where participation is contingent upon competitive skill at the high school or collegiate level, such criteria must, for each sport and level of competition and ~~grade or education level:~~

- 1) be based on an individualized inquiry into student eligibility and not generalizations about transgender students;**
- 2) be applied in a non-discriminatory way to all students;**
- 3) be substantially related to the achievement of an important educational objective; and**
- 4) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.**

Such criteria should be no broader than is necessary to advance an educational objective.

(2)(iii) A recipient may not adopt a per se ban on transgender student participation or participation consistent with a student’s gender identity.

c. Participation in Sports Should Be Meaningful

Regardless of whether a recipient applies criteria for participation consistent with gender identity or permits categorical participation by gender identity, it should also ensure that transgender students are afforded a meaningful opportunity to share the benefits and opportunities of sport described above. Under the current regulations, the Department requires that recipients

¹⁹⁹ See e.g., NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA Transgender Student Athlete Eligibility Review Procedures (Jan. 19, 2023), <https://www.ncaa.org/sports/2022/1/28/transgender-student-athlete-eligibility-review-procedures.aspx> (requiring serum testosterone testing for transgender athletes).

²⁰⁰ See e.g. 88 Fed. Reg. 22860.

²⁰¹ 34 C.F.R. §106.41(b).

permitting sex-separated teams “shall provide equal athletic opportunity for members of both sexes.”²⁰² Considerations listed by the Department include “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes,” “[t]he provision of equipment and supplies,” and “[o]ppportunity to receive coaching and academic tutoring.”²⁰³ This same consideration should apply *within* sex-separated teams, including between cisgender and transgender students. In other words, the Department should ensure among recipients that where transgender students are admitted to a team, such admission is meaningful and not perfunctory or pro forma.

v) The Department Should Provide Guidance on How Recipients Can Minimize Harms

The Department seeks input on “[h]ow 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.”²⁰⁴

As explained in the preamble to the proposed rule and in Section I above, existing research demonstrates that transgender students experience significant psychological harm as a result of stigma and discrimination, and that participation in school sports is linked to better physical health, mental health, academic achievement, and social outcomes. Excluding transgender students from sports participation consistent with their gender identity not only exacerbates the impact of stigma and discrimination they face, but also deprives them of benefits related to sports participation.

We believe that schools would benefit from clear guidance regarding their duty to minimize harm to transgender students who would be impacted by sex-related criteria. To that end, we recommend that the rule provide concrete examples of ways that schools are expected to minimize harm to transgender students who are denied the ability to participate in sports as a result of sex-based criteria.

²⁰² 34 C.F.R. §106.41(c).

²⁰³ See 34 C.F.R. §106.41(c)(1)-(10).

²⁰⁴ 88 Fed. Reg. at 22878.

For example, in the rule, the Department could direct schools to minimize harm by:

1. *Ensuring that transgender students have equal access to the benefits of a particular team they would be excluded from.*

The proposed rule notes that “some sex-related distinctions in sports are permissible as long as a recipient ensures overall equal athletic participation opportunity regardless of sex.”²⁰⁵ This could result in transgender students being denied the opportunity to participate in a particular sport about which they are passionate. If a policy were enacted that were to deny a student the ability to participate in a manner consistent with their gender identity on the grounds of fairness in competition, they may lose access to benefits arising directly from that particular sport, at that particular school, or related to their career or personal goals. For example, they could lose access to particular coaches, benefits of training with teammates, benefits of training in a particular venue, among other consequences. One way recipients could mitigate these harms is by allowing the student to be a part of the team in all respects except for participating in competitions. In other words, the student would be able to practice with the team, have access to professional coaching, have access to the team’s equipment and other resources, and travel with the team, but would not compete as part of the team.

2. *Ensuring that transgender students have other meaningful opportunities to participate in competitive, school-based team sports consistent with their gender identity.*

Similarly, if participation in the student’s preferred sport is not permitted under a recipient’s sex-based criteria, in order to comply with the rule and minimize harm to transgender students, recipients should be required to ensure that *other* meaningful opportunities to participate in competitive, school-based team sports consistent with a student’s gender identity are available. Thus, if a school applies sex-related criteria to any particular sport at any particular grade level, it must consider the impact of that policy in light of its entire athletic program, rather than in isolation. If a set of exclusionary policies across various sports at various grade levels—even if individually justifiable—have the cumulative impact of depriving transgender students of meaningful opportunities to participate in competitive, school-based team sports consistent with their gender identity, then a school has not met its duty to minimize harm to transgender students.

3. *Ensuring that transgender students have meaningful opportunities to develop social relationships with their classmates through other school-based extracurricular activities, such as academic and social clubs, intramural sports, and co-ed sports teams.*

As explained above, research has shown that participation in school sports—particularly team sports—is associated with improved social interactions, improved relationships, more

²⁰⁵ 88 Fed. Reg. 22866.

friendships, higher self-confidence, more school connectedness, and better social skills. Research has also indicated that these benefits can flow from other school-based extracurricular activities, such as academic and social clubs and intramural sports.²⁰⁶ In order to minimize harm to transgender students, schools that seek to apply sex-related criteria in the context of competitive sports should be required to ensure that transgender students have other meaningful opportunities to develop these positive social outcomes at school. Under this consideration, schools can meet their duty to minimize harm if they offer other school-based extracurricular activities for students such as co-ed teams, intramural sports, and academic and social clubs, that students may join consistent with, or regardless of, their gender identity.

4. *Providing culturally competent mental health support for transgender students.*

As explained above, exclusion and discrimination negatively impact transgender people's mental health and wellbeing. Research has demonstrated the specific importance of culturally competent school-based mental health support for transgender students who often face exclusion, rejection, bullying, and other mistreatment at school.²⁰⁷ However, research also indicates that many school counselors, psychologists, and other mental health care providers lack knowledge about transgender youth and are not adequately prepared to work with transgender students.²⁰⁸ Schools can develop cultural competency among mental health providers by providing training, access to educational materials, and other resources related to transgender students.²⁰⁹ In order to minimize harm to transgender students, schools that seek to apply sex-related criteria in the context of competitive sports should be required to develop culturally competent mental health support for transgender students who may experience mental health challenges as a result of negative school experiences.

5. *Maintaining policies and practices that support transgender students, such as an anti-bullying policy that expressly includes gender identity, policies that support use of transgender students' names and pronouns, inclusive restroom policies, a student*

²⁰⁶ Patrick Buckley & Paul Lee, *The Impact of Extra-Curricular Activity on the Student Experience*, 22 ACTIVE LEARNING HIGHER EDUC. 3 (2021); Eva Oberle et al., *Benefits of Extracurricular Participation in Early Adolescence: Associations with Peer Belonging and Mental Health*, 48 J. YOUTH & ADOLESC. 2255 (2019); Joy Pantzer et al., *Importance of Bonding in Middle School Intramural Sports Participation: Psychosocial Outcomes based on Gender and Grade-Level Differences*, 75 PHYS. EDUC. 661 (2018); Casey A. Knifsend & Sandra Graham, *Too Much of a Good Thing? How Breadth of Extracurricular Participation Related to School-Related Affect and Academic Outcomes During Adolescence*, 41 J. YOUTH ADOLESC. 379 (2012).

²⁰⁷ Francis Yong Chen et al., *Psychoeducational Assessment of Transgender and Gender Nonconforming (TGNC) Individuals: Recommendations for Best Practices*, 38 J. APPLIED SCH. PSYCH. 39 (2021); Roberto L. Abreu et al., *Supporting Transgender Students: School Counselors' Preparedness, Training Efforts, and Necessary Support*, 17 J. LGBT YOUTH 107 (2020); Joseph Agee-Aguayo et al., *School Psychologists in Support of Transgender and Gender Diverse Students in Light of California's AB 1266 (School Success and Opportunity Act): Implications and Opportunities*, 21 CONTEMP. SCH. PSYCH. 152 (2017).

²⁰⁸ Abreu et al., *supra* note 207; Agee-Aguayo et al., *supra* note 207; Inas Mahdi et al., *Survey of New Mexico School Health Professionals Regarding Preparedness to Support Sexual Minority Students*, 84 J. SCH. HEALTH 18 (2014).

²⁰⁹ Abreu et al., *supra* note 207; Agee-Aguayo et al., *supra* note 207.

organization for LGBTQ youth, and incorporation of LGBTQ topics into school curriculum.

Schools can protect and support transgender students in many ways beyond providing culturally competent mental health care. Research has shown that supportive school climates benefit transgender youth (and LGBTQ youth more broadly) by increasing their sense of safety, resiliency, and feelings of belonging and school connectedness.²¹⁰ In particular, such outcomes have been linked to protective policies, use of proper names and pronouns, the existence of gay-straight alliances or other LGBTQ student organizations, supportive teachers and school personnel, and LGBTQ-inclusive curriculum, among other factors.²¹¹ In order to minimize harm to transgender students, schools that seek to apply sex-related criteria in the context of competitive sports should be required to maintain policies and practices that support and include transgender students outside of competitive sports.²¹²

6. *Ensuring that application of sex-related criteria does not risk “outing” transgender students to their teachers, classmates, and others.*

Transgender students may not be open about their transgender status to their classmates, teachers, and others at school. Coming out as transgender, or being openly transgender in school, should be a personal decision made by the student and their family; school policies should not result in forcing transgender students to come out against their wishes. As explained by some transgender students, concealing their gender identity is important as “a matter of protecting their privacy and executing some control over how peers and teachers treated them at school,” and “as an explicit move to ensure their safety, fearing violence and maltreatment if others knew they were transgender.”²¹³

In order to minimize harm to transgender students, schools that seek to apply sex-related criteria in the context of competitive sports should be required to ensure that application of sex-related criteria does not risk “outing” transgender students at school. To illustrate, application of sex-related criteria that exclude transgender girls from playing on a competitive volleyball team could “out” transgender girls who are interacting with their school environment in every other way consistent with their gender identity. As research has shown, this forced outing could not

²¹⁰ Carolyn M. Porta, *LGBTQ Youth’s Views on Gay-Straight Alliances: Building Community, Providing Gateways, and Representing Safety and Support*, 87 J. SCH. HEALTH 489 (2017); Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH & ADOLESC. 1175 (2010).

²¹¹ Porta, *supra* note 210; McGuire et al., *supra* note 210; GLSEN, RESPECT FOR ALL: POLICY RECOMMENDATIONS TO SUPPORT LGBTQ STUDENTS 1 (2019); McGuire; Nicholas C. Heck, *Offsetting Risks: High School Gay-Straight Alliances and Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 26 SCH. PSYCH. Q. 161 (2011).

²¹² For additional resources related to best practices for supporting transgender and non-binary students in school environments, see GLSEN, Supporting Trans and GNC Students, <https://www.glsen.org/supporting-trans-and-gnc-students> (last visited May 4, 2023).

²¹³ Michelle M. Johns et al., *Minority Stress, Coping, and Transgender Youth in Schools—Results from the Resilience and Transgender Youth Study*, 91 J. SCH. HEALTH 883 (2021). See also Janie Kelley et al., *School Factors Strongly Impact Transgender and Non-Binary Youths’ Well-Being*, 9 CHILDREN 1 (2022).

only take away the students' sense of personal agency, but could also open them up to further discrimination, harassment, and rejection. Schools should be required to minimize this risk in adopting and applying sex-related criteria to sports participation.

7. *Applying sex-based criteria equally to cisgender and transgender students based on their gender identity.*

As suggested above, schools could minimize harm to transgender students by applying sex-based criteria equally to cisgender and transgender students. For example, if a school sets height or weight limits for participation girls' or boys' teams that apply to particular sports at particular levels,²¹⁴ the school could require that all students not exceed those limits in order to participate. Such a policy would ensure equal treatment of transgender students and cisgender students and would eliminate any competitive advantages associated with extreme physiological differences between individuals.

8. *Providing information about exclusionary sex-based criteria to all parents and students.*

Schools could minimize harm to transgender students by providing adequate notice, to all students and parents, of all sex-related criteria related to sports participation. Access to this information well in advance of an expressed desire to participate in sports will help students and their parents make decisions about what sports and activities to participate in, what to expect if a student approaches a coach or team about participating in a particular sport, and even where to go to school. We recommend that such notice be provided equally to all students and parents, not just to transgender students and their parents.

In our view, requiring schools to take certain supportive actions aimed at minimizing harm to transgender students will help to ensure that any application of sex-related criteria is not rooted in a desire to harm transgender people and does not have the effect of imposing more than a de minimis harm on transgender students.

This list of suggested actions provided here is intended to guide the Department in developing more specific guidance around minimizing harms to transgender students associated with applying sex-related criteria in sports. We encourage the Department to expand upon this list as it finds appropriate.

VI. Conclusion

The Department proposes to make important changes to the regulations clarifying the enforcement of Title IX in the athletics context. As researchers studying the impact of public policy on anti-LGBT discrimination, we believe the proposed changes as discussed herein will make a positive difference in ensuring equal access to athletics for transgender, gender non-

²¹⁴ See e.g., USA WRESTLING, USA WRESTLING TRANSGENDER GUIDELINES, <http://content.themat.com/forms/USAWrestling-Transgender-Policy.pdf> (last visited May 6, 2023) (setting out testosterone parameters for transgender competitors and competitors with hyperandrogenism).

conforming, nonbinary, and intersex students, particularly for adolescents, where participation is known to be especially beneficial.

Thank you for your consideration of the information and comments provided herein. Please direct any correspondence to redfield@law.ucla.edu.

Respectfully Submitted,

Elana Redfield, J.D.
Federal Policy Director
The Williams Institute
UCLA School of Law

Christy Mallory, J.D.
Legal Director
The Williams Institute
UCLA School of Law

Will Tentindo, J.D.
Daniel H. Renberg Law Fellow
The Williams Institute
UCLA School of Law

Brad Sears, J.D.
Founding Executive Director
The Williams Institute
Associate Dean of Public Interest Law
UCLA School of Law