

May 15, 2023

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

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

Re: 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)

Dear Secretary Cardona and Assistant Secretary Lhamon:

The undersigned organizations are pleased to submit these comments on the Department of Education's (Department's) Notice of Proposed Rulemaking¹ (NPRM) proposing a regulatory standard under Title IX of the Education Amendments of 1972 (Title IX) governing the inclusion of transgender athletes (Proposed Athletics Rule).

We commend the Department of Education for proposing a rule that protects the ability of transgender students to participate in sports. While strongly supporting the proposed rule, we urge the Department of Education to provide more clarity around enforcement, as that is where some school districts may otherwise misunderstand or misapply the rule.

I. Our Organizations

The **National Center for Lesbian Rights (NCLR)** is a non-profit, public interest law firm that litigates precedent-setting cases at the trial and appellate court levels, advocates for equitable public policies affecting the lesbian, gay, bisexual, transgender and queer (LGBTQ) community, provides free legal assistance to LGBTQ people and their advocates, and conducts community education on LGBTQ issues. NCLR has been advancing the civil and human rights of LGBTQ people and their families across the United States through litigation, legislation, policy, and public education since its founding in 1977. We also seek to empower individuals and communities to assert their own legal rights and to increase public support for LGBTQ equality through community and public education. Since starting our youth project nearly 25 years ago, NCLR has been at the forefront of efforts to ensure that schools are a safe and welcoming learning environment for all students, including those who are LGBTQ. We have represented LGBTQ students who experienced severe bullying and harassment in their schools and challenged district- and state-wide policies that harm LGBTQ students, such as policies that

¹ Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf>.

prohibit educators from talking about LGBTQ-related issues in their classes. NCLR is also a leader in advocating for the needs of transgender youth in schools, both in courts and within school districts, including through litigation challenging bans on transgender youth participation in sports. (<https://www.nclrights.org/>)

Founded in 2001, **Equality Utah** is Utah's largest LGBTQ civil rights organization. Its mission is to secure equal rights and protections for LGBTQ Utahns and their families, and its vision is of a fair and just Utah. Equality Utah leads efforts for LGBTQ civil rights at the state and local levels by: sponsoring LGBTQ legislation and opposing negative bills; lobbying elected officials; building coalitions; and empowering individuals and organizations alike to engage in the legislative process. Working to advance the rights of the LGBTQ community in a deeply conservative state, Equality Utah has achieved impressive statutory wins, including: the passage of a bill to amended the Utah Antidiscrimination and Fair Housing Acts to ensure further protections against discrimination on the basis of sexual orientation or gender identity in 2015, the repeal of a prohibition on the "advocacy of homosexuality" in schools in 2017, and a prohibition on the use of conversion therapy on LGBTQ youth in 2023. (<https://www.equalityutah.org/>)

For over 40 years, **Family Equality** has worked to advance legal and lived equality for LGBTQ+ families and those who wish to form them. Our mission is to ensure that everyone has the freedom to find, form, and sustain their families through building community, changing hearts and minds, and driving policy change. Family Equality is the only national organization exclusively dedicated to securing justice and equality for LGBTQ+ parents and their children by advancing legal and lived equality for all families. (<https://familyequality.org/>)

Founded in 1995, **Georgia Equality** is Georgia's largest LGBTQ+ civil rights organization. Its mission is to advance fairness, safety and opportunity for LGBTQ Georgians and People Living with HIV/AIDS. As a statewide advocacy organization, Georgia Equality is in a unique place to impact policy and facilitate the exchange of information between elected officials, policy makers, providers of HIV services and the LGBT community. (<https://georgiaequality.org/>)

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has worked on numerous cases on behalf of transgender students seeking equality and inclusion in schools, including advocating for them to be able to participate equally in school athletic programs. (<https://www.glad.org/>)

GLMA: Health Professionals Advancing LGBTQ+ Equality is a national organization committed to advancing health equity for lesbian, gay, bisexual, transgender, and queer ("LGBTQ+") people and equality for LGBTQ+ health professionals in their work and learning environments. To achieve this mission, GLMA utilizes the scientific expertise of its diverse multidisciplinary membership to inform and drive advocacy, education, and research. (<https://glma.org/>)

Since 1969 the **Los Angeles LGBT Center** has cared for, championed, and celebrated LGBT individuals and families in Los Angeles and beyond. Today the Center's nearly 800 employees provide services for more LGBT people than any other organization in the world, offering programs, services, and global advocacy that span four broad categories: Health, Social Services and Housing, Culture and Education, Leadership and Advocacy. (<https://lalgbtcenter.org/>)

The **National Education Association (NEA)** is more than 3 million people—educators, students, activists, workers, parents, neighbors, friends—who believe in opportunity for all students and in the power of public education to transform lives and create a more just and inclusive society. Our mission is to advocate for education professionals and to unite our members and the nation to fulfill the promise of public education to prepare every student to succeed in a diverse and interdependent world. (<https://www.nea.org/>)

The **National LGBT Cancer Network** works to improve the lives of LGBTQIA+ cancer survivors and those at risk by educating our communities about our increased cancer risks and the importance of screening and early detection; training health care providers to offer more culturally-competent, safe and welcoming care; and advocating for expanded focus on our communities in mainstream cancer organizations, the media, and research. We approach this work through a lens of anti-racist and anti-sexist activities and are firmly rooted in countering the deleterious social determinants of health which cause downstream health disparities. (<https://cancer-network.org/>)

The **National LGBTQ+ Bar Association** is a nonprofit membership-based 501(c)(6) professional association. The National LGBTQ+ Bar Association's more than 10,000 members and subscribers include lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of lesbian, gay, bisexual, transgender, and queer ("LGBTQ+") rights. The National LGBTQ+ Bar Association and its members work to promote equality for all people regardless of sexual orientation or gender identity or expression, and fight discrimination against LGBTQ+ people as legal advocates. The National LGBTQ+ Bar Association is a membership organization and files this brief on behalf of its members, who value diversity in education on the bases of race and ethnicity as well as sexual orientation and gender/gender identity or expression. (<https://lgbtqbar.org/>)

The **National LGBTQ Task Force** advances full freedom, justice and equality for LGBTQ people. We are building a future where everyone can be free to be their entire selves in every aspect of their lives. Today, despite all the progress we've made to end discrimination, millions of LGBTQ people face barriers in every aspect of their lives: in housing, employment, healthcare, retirement, and basic human rights. These barriers must go. That's why the Task Force is training and mobilizing millions of activists across our nation to deliver a world where you can be you. (<https://www.thetaskforce.org/>)

One Colorado is the state's leading advocacy organization for LGBTQ+ Coloradans and our families. We work to progress the lived and legal equality of LGBTQ+ Coloradans. One Colorado collaborates with partners across the state in areas of health, schools, food access, and community engagement to ensure the voices of LGBTQ+ Coloradans are heard and represented

within halls of power and through elections, so that all LGBTQ+ families and their communities can thrive. As a part of supporting safe schools, One Colorado supports The Colorado GSA (Gender and Sexualities Alliance clubs) Network, launched to empower LGBTQIA2+ (lesbian, gay, bisexual, transgender, queer, intersex, asexual, Two-Spirit, +) and allied students by providing them the tools and resources to combat bullying and make their schools safer. All students who participate in the leadership council are paid to be regional representatives to provide feedback and support for GSA's across the state and One Colorado's programming, as well as get access to GSA-related & Queer Youth resources, opportunities, events & training. (<https://one-colorado.org/about/>)

SAGE is the country's largest and oldest organization dedicated to improving the lives of LGBTQ+ older people. Founded in 1978 and headquartered in New York City, SAGE is a national organization that offers supportive services and consumer resources to LGBTQ+ older people and their caregivers. SAGE also advocates for public policy changes that address the needs of LGBTQ+ elders and older people living with HIV, and it provides training for agencies and organizations that serve these populations. Pursuant to a grant from the Administration for Community Living, SAGE, in collaboration with 24 leading organizations nationwide, operates the National Resource Center on LGBTQ+ Aging ("NRC"), which is the country's first and only technical-assistance resource center aimed at improving the quality of services and supports offered to LGBTQ+ older people. The NRC provides training, technical assistance, and educational resources to aging providers, LGBTQ+ organizations, and LGBTQ+ older adults. In addition, the NRC has published, and made widely available, best practice guides, such as *Making Your State Plans on Aging LGBTQ+ and HIV+ Inclusive*. (<https://www.sageusa.org/>)

The **Transformation Project**, which is based in South Dakota, is an organization whose mission is to support and empower transgender individuals and their families, while also educating communities in our state and the surrounding region about gender identity and expression. By providing a safe and inclusive space, the Transformation Project (TPSD) aims to create a sense of belonging and foster resilience among transgender individuals, ensuring they receive the support they need. Moreover, the organization actively engages in community outreach, organizing educational programs and initiatives to raise awareness about the challenges faced by transgender individuals and promote a more understanding and accepting society. Through its advocacy work, TPSD strives to break down barriers, promote equality, and create a more inclusive environment for transgender individuals in South Dakota and beyond. (<https://www.transformationprojectsd.org/>)

The **Transformation Project Advocacy Network (TPAN)**, based in South Dakota, is a dynamic and dedicated organization committed to empowering and transforming the community. Our mission is to advocate for the dignity and well-being of transgender South Dakotans. Through social and political action, we partner with all South Dakotans to confidently advocate for transgender equity and justice. With a strong focus on advocacy, the organization actively engages in promoting social change, justice, and equality. Through collaboration and strategic partnerships, the Transformation Project Advocacy Network advocates for inclusive policies and works towards addressing the pressing issues faced by transgender South Dakotans. By

fostering a sense of unity, amplifying voices, and implementing innovative solutions, TPAN strives to create a brighter and more equitable future for the trans community, making our state a place where transgender individuals can thrive. (<https://www.transadvocacysd.org/>)

The **Trevor Project** is the leading suicide prevention and crisis intervention organization for LGBTQ young people in the United States and Mexico. We are a non-profit that provides 24/7 life-saving support via phone, text, and chat. We also operate the world's largest safe space social networking site for LGBTQ youth and run innovative research, education, and advocacy programs. We've been saving lives every day for over 25 years. (<https://www.thetrevorproject.org/>)

The **United State of Women (USOW)** aims to create a world in which all people of marginalized genders can thrive. Born out of the Obama Administration's White House Council on Women and Girls, USOW holds a unique position within the gender equity movement. We sit at the uncommon intersection of policy, community engagement, culture change, and leadership development. Since 2016, we've served as a go-to platform for partners, stakeholders, and our community to address issues facing women and all people of marginalized genders. Through education, community, and action, USOW amplifies issues at the intersection of gender and racial justice, and galvanizes organizations, public figures, elected officials, and everyday feminists of all genders to drive policy and culture change. (<https://usow.org/>)

II. A New Rule Clarifying Schools' Obligations Around Athletics Under Title IX is Necessary

In recent years, attacks on the LGBTQ community in the form of hostile state legislation have escalated. While these bills target our community in myriad ways, many focus specifically on transgender people, and youth in particular. At least 20 states have enacted (and more are considering) policies barring transgender students from participating in school sports. The undersigned oppose those policies and agree with the Department of Education that they violate federal law.

As the proposed rule recognizes, these bans violate Title IX, which bars discrimination based on sex, including discrimination based on transgender status.² The statute requires that no one "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" on the basis of sex,³ and its scope has for decades been universally recognized to include school sports. States and educational institutions need clear guidance from the Department of Education stating that exclusions of transgender athletes from sports are unlawful, and we are grateful that the proposed rule provides that clarity.

² The Supreme Court has held that sex discrimination includes discrimination against transgender people. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

³ 20 U.S.C. §§ 1681 et seq.

State bans harm all students by depriving transgender students of the benefits of playing sports and by teaching students that discrimination is permissible. The benefits to students of playing sports are well documented. Participating in sports is associated with higher grades and standardized test scores, as well as higher rates of school completion.⁴ Sports teach students about teamwork, help build leadership skills, and confer psychological benefits, such as feelings of well-being, a sense of belonging among peers, and connectedness to the school community.⁵

These benefits should be available to all students. Preventing students from playing school sports based solely on the fact that they are transgender exacerbates the poor educational and mental health outcomes for which they are already at risk due to widespread harassment and discrimination,⁶ including and increasingly from elected officials at the local, state, and federal levels. But when transgender students are allowed to play sports, they tend to receive higher grades⁷ and experience increased feelings of belonging, higher self-esteem, and lower levels of depression.⁸

⁴ Nat'l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

⁵ See, e.g., *id.* at 42; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. OF SPORT MANAGEMENT 349, 349–50 (2013); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 J. OF SCHOOL HEALTH 397–401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 INT'L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 98 (2013).

⁶ In a national survey of LGBTQ+ students, an alarming number of students reported being harassed because of their LGBTQ+ status, with an overwhelming majority of all students (76.1%) reporting experiencing verbal harassment on this basis, and over one-third of students (31.2%) reporting physical harassment on this basis. This hostility in turn impacts students' academic outcomes: many students reported not having plans to finish school, with 51.5% of students reporting hostile school climate (e.g., harassment and transphobic policies) as the reason they did not plan to graduate. See GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* 19, 34 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

⁷ GLSEN, *The Experiences of LGBT Students in School Athletics*, (2013) <https://www.glsen.org/sites/default/files/2020-06/The%20Experiences%20of%20LGBT%20Students%20in%20Athletics.pdf>; The Trevor Project, *The Well-Being of LGBTQ Youth Athletes* (Aug. 2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/08/LGBTQ-Youth-Sports-and-Well-Being-Research-Brief.pdf>.

⁸ Russell B. Toomey & Stephen T. Russell, *An initial investigation of sexual minority youth involvement in school-based extracurricular activities*, 23 J. OF RESEARCH ON ADOLESCENCE 304, <https://doi.org/10.1111/2Fj.1532-7795.2012.00830.x>; GLSEN, *LGBTQ Students and School Sports Participation* (2021), <https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf>.

III. The Proposed Rule is Sound Policy and Should Be Adopted

The Proposed Athletics Rule is a welcome and necessary follow-on to the broader draft rule on sex discrimination in education that the Department published for comment in 2022.⁹ It incorporates the prevailing legal standard for evaluating claims of sex discrimination, and it emphasizes inclusion and harm reduction. The rule was developed based on extensive stakeholder input and a thorough review of the history and purpose of Title IX, as well as applicable judicial decisions and constitutional principles. Our organizations support its adoption.

The Proposed Athletics Rule affirms that Title IX prohibits discrimination against transgender students in school sports. It states that any policy that categorically bans transgender girls or women from playing on girls or women's sports teams, or that prohibits transgender boys or men from playing on boys or men's sports teams, is prohibited. It thus clarifies that the state laws referenced above that bar transgender girls from playing on girls' teams are presumptively invalid under Title IX.

The rule as proposed effectively would prohibit any policy restricting the ability of transgender students to participate in school sports in elementary and middle school, and it would permit any such restrictive policies in high school only in rare circumstances and only at highly competitive levels. Because it prohibits categorical bans of transgender athletes at any level, including colleges and universities, the Proposed Athletics Rule would thus bar those institutions from enforcing bans adopted by sport governing bodies.

The presumption in the proposed rule is that any restriction on transgender students is invalid, putting a high burden on the government or educational institution to justify any restrictions based on specific, demonstrable, and important educational objectives. Any criteria for exclusion would have to be specific to each sport, level of competition, and grade or educational level. This prohibits the adoption of categorical rules that would apply across sports and ages based on, for example, identity markers on government documents, physical examinations, or hormone levels. Justifications that would not pass muster under the rule include anti-transgender bias, stereotypes, or unsupported assertions that transgender women and girls have a competitive advantage over non-transgender women and girls.

IV. Strengthening the Rule Through Clarifications in the Preamble

As noted above, our organizations support adoption of the text of the proposed rule as set forth in the NPRM. We offer here some suggestions for clarifications that could be made in the preamble to the final rule to provide the strongest possible guidance for educational

⁹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), <https://federalregister.gov/d/2022-13734>.

institutions regarding their obligations under Title IX.

The preamble and text of the proposed rule establish a strong presumption that transgender students generally must be permitted to play consistent with their gender identity and that the burden to justify any additional requirements rests squarely on school districts. We recommend stating this unequivocally in the preamble, as well as including a statement that categorical bans are presumptively invalid.

The Trevor Project has provided suicide prevention and crisis services to LGBTQ young people between the ages of 13 and 24 - encompassing middle school, high school, and college age students - for over 25 years. Their experience and data show that sports bans have a detrimental effect on the mental health of young people (see Rebecca's story in our 'Learn With Love' video¹⁰). The preamble to the final rule should emphasize even more strongly that younger athletes in elementary and middle school should be able to play based on their gender identity.

We appreciate the proposed rule's declaration that any policy would need to "minimize harms to students whose opportunity to participate on a...team consistent with their gender identity would be limited or denied." We suggest that minimizing harm include a requirement that - regardless of what team a young person plays on - their preferred name, pronouns, and gender expression through clothing preferences be respected; that they have access to locker rooms consistent with their gender identity; that coaches/athletic staff be trained in best practices for addressing the mental health needs of LGBTQ youth; that young athletes have access to mental health support. These recommendations are grounded in data from The Trevor Project's 5th U.S. National Survey,¹¹ which shows that creating affirming spaces and respecting pronouns are protective factors that reduce suicide risk and improve mental health outcomes for LGBTQ young people.

We also strongly recommend that the preamble make clear that policies must include strict, need-to-know privacy protections for any documentation regarding a young person's gender identity and that under no circumstances should these policies allow for a young person's right to participate be challenged by third parties. This is necessary to prevent the harmful situations that have arisen in some states in which opposing coaches, parents, or fans have "accused" non-transgender girls of being transgender. A critical and essential component of minimizing harm is to ensure that any requirements for participation be subject to a genuinely confidential process that does not open the door to such devastatingly harmful occurrences.

Similarly, the Department should state plainly in the preamble that physical examinations to confirm a student's gender are prohibited under Title IX. It should further state that any other means employed to confirm eligibility for a sex-specific team be limited to elite competitions,

¹⁰ Available at <https://www.thetrevorproject.org/blog/the-trevor-project-releases-documentary-short-film-learn-with-love-uplifting-transgender-youth-stories/>.

¹¹ Available at <https://www.thetrevorproject.org/survey-2023/>.

be supported by an exceedingly persuasive justification, and that they must employ stringent safeguards for privacy and confidentiality.

It would also be helpful for the final rule to provide additional examples of the types of restrictions that would fail to meet the rule's stringent standard, to help recipients and students better understand the robust protections provided by the rule and to minimize any possible confusion or misapplication.

Thank you for the opportunity to comment on this important proposal. If you have any questions, please feel free to contact Julianna S. Gonen, NCLR's federal policy director, at jgonen@nclrights.org or (202) 734-3547.

Sincerely,

National Center for Lesbian Rights (NCLR)

Joined by

Equality Utah
Family Equality
Georgia Equality
GLBTQ Legal Advocates and Defenders (GLAD)
GLMA: Health Professionals Advancing LGBTQ+ Equality
Los Angeles LGBT Center
National Education Association
National LGBT Cancer Network
National LGBTQ+ Bar Association
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Trevor Project
USOW