



HARVARD LAW SCHOOL  
LGBTQ+ Advocacy Clinic



ATHLETE ALLY

*Submitted via regulations.gov*

May 15, 2023

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

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

**Re: 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 (Federal Register 88, no. 71); ED-2022-OCR-0143**

Dear Secretary Cardona and Assistant Secretary Lhamon:

The Transgender Legal Defense & Education Fund (TLDEF),<sup>1</sup> the Harvard Law School LGBTQ+ Advocacy Clinic,<sup>2</sup> and Athlete Ally<sup>3</sup> appreciate the opportunity to submit the following comments in response to the Department of Education’s (“the Department”) Notice of Proposed Rulemaking (“proposed rule”) regarding nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance.

The Department’s proposed rule represents an important step toward protecting the rights of transgender, nonbinary, and intersex (“TNI”) students in athletics under Title IX. However,

---

<sup>1</sup> Founded in 2003, TLDEF is a 501(c)(3) nonprofit whose mission is to end discrimination and achieve equality for transgender people, particularly those in our most vulnerable communities. Our strategies include pathbreaking transgender rights cases and *amicus curiae* briefs regarding key issues of employment, health care, education, and public accommodations. Through this work, TLDEF has gained first-hand experience assisting transgender people who have experienced discrimination in schools and athletic programs, including through discriminatory bans and regulations.

<sup>2</sup> The Harvard Law School LGBTQ+ Advocacy Clinic engages in cutting-edge impact litigation, legislative and policy advocacy, and public education on behalf of the LGBTQ+ community. Founded in 2020, the Clinic aims to shape the future of LGBTQ+ advocacy by advancing the rights of LGBTQ+ people as whole persons embedded in the wider fabric of society and their local communities, with a particular emphasis on issues affecting the most marginalized members of the LGBTQ+ community. The Clinic works with community members, advocates, non-profit organizations, educators, medical professionals, and governmental entities to advance the rights of LGBTQ+ people at both the national and local levels.

<sup>3</sup> Athlete Ally believes sport will change the world when it welcomes and empowers all people. Founded in 2011, Athlete Ally’s mission is to end homophobia and transphobia in sport and to activate the athletic community to exercise their leadership to champion LGBTQI+ equity. Athlete Ally works to dismantle the structural and systemic oppression that isolates, excludes and endangers LGBTQI+ people in sport through education, sport policy advocacy, research and athlete activism.

we are concerned that the proposed rule fails to meaningfully engage with the racist history of gender-based policing in sports; does not sufficiently guard against the use of pernicious stereotypes about TNI people that have long been used to justify restricting the rights of marginalized groups; and lacks meaningful guidance on how the rule should be applied to nonbinary and intersex students. Given the context of the increasingly hostile environment for TNI young people today, we urge the Department to consider the following recommendations to clarify the final rule to achieve what Title IX already requires.

In Part I, we explain that, as history teaches us, sex-testing regulations do not reflect a medically accurate picture of sex, but rather enforce a constructed concept of the gender binary that is rooted in white supremacy and misogyny. Sex-testing regulations fail to account for the true scope of gender diversity in the world, including the widespread, global, and historical existence of TNI people. The human cost of these regulations has been borne largely by intersex women and girls of color, who policymakers have persistently and disproportionately targeted to undergo humiliating and invasive “sex-verification” procedures. We highlight the ways in which sex-testing regulations have always been, and will continue to be, used to enforce sex- and race-based stereotypes, and express our concern that the proposed rule does not sufficiently guard against sex-testing procedures that would infringe on the privacy rights of TNI students.

In Part II, we urge the Department to recognize that the same rhetoric that has long been used to justify discrimination against racial and gender minorities is now being deployed to restrict the rights of TNI students. We urge the Department to remove language from the preamble that could be used to validate the harmful myth that equal treatment of TNI students imperils fairness and safety for all students, any more than the integration of other minority groups has harmed the fabric of American society.<sup>4</sup> We provide examples from the lived experiences of transgender, nonbinary, and intersex student-athletes in today’s hostile climate, who already face significant barriers to equal opportunities and access to school sports, as well as a vicious anti-LGBTQI+ movement that is set on denying them the freedom to be themselves. As we explain below, opponents of transgender equality are perpetuating the myth that trans people—and specifically trans women and girls—are a threat to cisgender (cis) women and girls. In reality, trans, nonbinary, and intersex students are some of the most vulnerable to sex discrimination and their inclusion is central—not in opposition—to the fulfillment of Title IX’s promise of gender equality in school sport.

In Part III, we explain that, properly interpreted, Title IX’s prohibition on discrimination on the basis of sex in educational programs and activities receiving federal financial assistance includes discrimination against transgender, nonbinary, and intersex students. The Department has rightfully affirmed this interpretation several times in executive orders and guidance, including in the preamble of the proposed rule. However, we are concerned that the proposed rule itself is not sufficiently explicit in its text and does not meaningfully explain how it should be applied to nonbinary and intersex students. We urge the Department to expand upon its analysis of the applicability of the proposed rule to the context of nonbinary and intersex students and provide some recommendations for how to do so.

---

<sup>4</sup> 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, 88 Fed. Reg. 71, 22860 (April 13, 2023) (to be codified at 34 CFR pt. 106).

**I. The final rule should meaningfully engage with the racist and sexist legacy of gender-based policing in sports.**

The proposed rule requires that sex-based criteria in school sports be “substantially related to achievement of an important educational objective” and “minimize harm” to transgender students.<sup>5</sup> The Department has rightfully acknowledged that sex-based criteria may not “require adherence to sex stereotypes.”<sup>6</sup> However, we are concerned that the text of the proposed rule will be misused in an attempt to justify the very kinds of harmful regulations it is intended to guard against. Indeed, *all* regulations that have the effect of prohibiting transgender students from participating in school sports consistent with their gender identity necessarily rely on improper sex stereotypes. Enforcement of any sex-based criteria will unnecessarily and unlawfully deprive TNI students of educational opportunities and invade students’ privacy. History has shown us that sex testing has been, and will continue to be, used to target women and girls of color, trans and cis alike.

We are concerned that the proposed rule fails to consider the potential for abuse of the test it imposes. We urge the Department to make clear in its final rule that all forms of “sex testing” are unlawful under Title IX when they occur in school. We are concerned that schools, states, or localities may implement harmful laws or policies based on stereotypes, prejudice, and inconclusive scientific evidence, such as testosterone testing, chromosomal tests, or medical exams, under the guise of “important educational objectives.” These “sex verification” policies may be used to target any child who is perceived as TNI or gender nonconforming. A century of elite women’s athletics shows that sex verification policies are invasive, humiliating, and consistently weaponized against women and girls of color who do not conform to cultural and racial stereotypes of what a woman should look like or compete like.<sup>7</sup>

**A. Race-based anxieties undergirded the adoption of “sex-testing” regulations in women’s sports, and their application has targeted women and girls of color the most.**

Medical experts, including the American Medical Association, have long recognized that sex is made up of a number of factors, including but not limited to: “external genital appearance, internal reproductive organs, structure of the gonads, endocrinologic sex, genetic sex, nuclear sex, chromosomal sex, psychological sex, [and] social sex.”<sup>8</sup> When laws and policies single out one or two of these traits, such as genitalia, chromosomes, or hormones, they ignore the multitude of other factors that make up a person’s sex.

---

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 22872.

<sup>7</sup> HUMAN RIGHTS WATCH, “*They’re Chasing Us Away from Sport*”: *Human Rights Violations in Sex Testing of Elite Women Athletes* (Dec. 4, 2020), [https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#:~:text=\(Geneva%2C%20December%204%2C%202020,in%20a%20report%20released%20today](https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#:~:text=(Geneva%2C%20December%204%2C%202020,in%20a%20report%20released%20today)

<sup>8</sup> See Shayna Medley, *(Mis)interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports*, 45 N.Y.U. REV. L. & SOC. CHANGE 673, 685-86 (2022) (citing Keith L. Moore, *The Sexual Identity of Athletes*, 205 JAMA 163, 164 (1968)); see AM. MED. ASSOC., *Medical Spectrum of Gender D-295.312* (2018).

Sex testing regulations fail to account for the natural diversity of sex characteristics among the population. Such restrictions threaten to exclude the millions of people with intersex traits, which include people with intersex traits, or innate variations in physical sex characteristics that differ from narrow, binary sex stereotypes.<sup>9</sup> They're also not effective proxies for athlete ability, as no single biological marker predicts athletic performance.<sup>10</sup> Many categorical bans at the state level exclude students from sports based on genitalia or chromosomes, which have no bearing on athletic ability. At the professional level, one of the more common types of sex testing regulations are testosterone limits for women athletes, both for cisgender women and transgender women.<sup>11</sup> Katrina Karkazis and Rebecca Jordan-Young—researchers, scholars, and experts on sex and gender—in their book, *Testosterone: An Unauthorized Biography*, debunk the myth that testosterone elevates athletic performance across the board and point to the many problems with the studies used to justify such regulations on trans and intersex athletes.<sup>12</sup> Furthermore, social factors like nutrition, training, and access to equipment have significant impact on an athlete's performance, yet are consistently overlooked as a performance advantage.<sup>13</sup>

Sex-testing regulations in sports do not reflect a medically accurate picture of sex, but rather serve to enforce a concept of the gender binary rooted in white supremacy. Many communities around the globe recognize a nonbinary understanding of gender. Part of the project of European and American colonialism in the eighteenth and nineteenth centuries was to force indigenous people and people of color into a western concept of the gender binary and erase the unique and expansive understandings of gender that many indigenous communities held.<sup>14</sup> The nineteenth century eugenics movement conceptualized their belief in the existence of two distinct sexes as evidence of white, civilized society.<sup>15</sup> By contrast, they believed all other races “had only one sex.”<sup>16</sup>

Racist stereotypes about women of color not being “woman enough” or “feminine enough” have been used throughout history to justify slavery, forced labor, and discrimination.<sup>17</sup>

---

<sup>9</sup> NAT'L ACAD. OF SCI., ENG'G, AND MED., UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS 370 (Charlotte J. Patterson, Martín-José Sepúlveda & Jordyn White, eds., 2020), <https://doi.org/10.17226/25877>.

<sup>10</sup> CANADIAN CENTRE FOR ETHICS IN SPORT (CCES), *Transgender Women Athletes and Elite Sport: A Scientific Review* (2021), <https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-scientificreview-e-final.pdf>.

<sup>11</sup> *Id.* at 34 (“Since 1966 we have witnessed different waves of femininity tests implemented by sports organizations. Anatomical at first, then genetics, and now hormonal. All tests were inconclusive because contrary to the medical assumption that led to these tests, men and women are not dimorphic and show overlap in all those areas” (citations omitted)).

<sup>12</sup> KATRINA KARKAZIS & REBECCA JORDAN-YOUNG, *TESTOSTERONE: AN UNAUTHORIZED BIOGRAPHY* 160-61 (2019).

<sup>13</sup> CANADIAN CENTRE FOR ETHICS IN SPORT *supra* note 10, at 6.

<sup>14</sup> *Id.* (citing Sandy O'Sullivan, *The Colonial Project of Gender (and Everything Else)*, 5 *GENEALOGY* 67 at 3 (2021), <https://www.mdpi.com/2313-5778/5/3/67>).

<sup>15</sup> See KYLA SCHULLER, *THE BIOPOLITICS OF FEELING: RACE, SEX, AND SCIENCE IN THE NINETEENTH CENTURY* 59 (2018).

<sup>16</sup> *Id.*

<sup>17</sup> Medley, *supra* note 8, at 679.

Throughout the nineteenth and twentieth centuries women were dissuaded from participating in sports, as people believed that sports would cause women to develop features considered unattractive for docile, feminine, white women.<sup>18</sup> These stereotypes have been used to subject women of color to invasive and degrading sex testing measures.<sup>19</sup> We encourage the Department to recognize the history and context of racism in sex testing regulations in its final rule.

From the earliest days of international women's sports competition, cultural anxieties about gender norms have resulted in a variety of sex-testing policies and protocols intended to reinforce a strict gender binary. Women began participating in the Olympics in 1900 despite widespread fears that female athletes were too masculine to truly be women.<sup>20</sup> In the 1936 Olympics, Norman Cox, a member of the International Olympic Committee, proposed a rule to force Tidy Pickett and Louise Stokes—the first Black women to represent the United States in the Olympics—to compete in their own category separate from white women.<sup>21</sup> During the 1952 Olympics, the Soviet delegation's success in women's sports (especially more “masculine” sports like track and field) led to renewed suspicions and accusations that the athletes were not entirely women.<sup>22</sup> These early conflicts created a sports culture that subjected women athletes to scrutiny if they were too successful in events that were considered unfeminine. Of course, femininity itself was and is defined by stereotypes based on white, western womanhood.

From 1968 to 1998, the International Olympic Committee (IOC) performed mandatory sex tests on all athletes competing in female divisions.<sup>23</sup> The IOC and the International Association of Athletic Federations (IAAF, now World Athletics) used chromosomal tests to “prove” sex, but high rates of false positive results led both organizations to terminate the practice of routinely conducting chromosome testing on all female athletes by the 1990s.<sup>24</sup>

---

<sup>18</sup> *Id.* at 681 (citing DEBORAH L. RHODE, JUSTICE AND GENDER 301 (1991)).

<sup>19</sup> *Id.* at 680 (citing Maya A. Jones, New Study Examines History of Black Women Fighting to be Respected as Athletes, UNDEFEATED (June 25, 2018), <https://andscape.com/features/morgan-state-university-study-examines-history-of-black-women-fighting-to-be-respected-as-athletes/> (“[t]he politicization of black women's bodies that began in slavery has yielded in our day portrayals of black female athletes as alternately mannish or overly sexualized.”).

<sup>20</sup> S. Mahomed & A. Dhai, *Global injustice in sport: The Caster Semenya ordeal - prejudice, discrimination and racial bias*, 109(8) SOUTH AFRICAN MED. J., 548, 549 (2019), <https://pubmed.ncbi.nlm.nih.gov/31456545/>.

<sup>21</sup> Brief for Amici Curiae Nat'l Women's Law Ctr., Law. Comm. for Civil Rts. Under L. and 60 Additional Org. in Support of Appellees & Affirmance at 20, *Hecox v. Little*, Nos. 20-35813, 20-35815 (9th Cir. Dec. 21, 2020) [hereinafter NWLC Brief] (citing MILTON KENT, EDWARD ROBINSON, RON TAYLOR & TONYAA WEATHERSBEE, MORGAN STATE UNIV., BEATING OPPONENTS, BATTLING BELITTLEMENT: HOW AFRICAN-AMERICAN FEMALE ATHLETES USE COMMUNITY TO NAVIGATE NEGATIVE IMAGES 9 (Stella Hargett & Jacqueline Jones eds., 2018), <https://www.documentcloud.org/documents/4528427-The-Image-of-Black-Women-inSports2.html#document/>).

<sup>22</sup> Lindsay Parks Pieper, *Sex Testing and the Maintenance of Western Femininity in International Sport*, 31(13) INT'L J. OF THE HIST. OF SPORTS 1561-62 (2014), <https://www.tandfonline.com/doi/abs/10.1080/09523367.2014.927184>.

<sup>23</sup> Mahomed & Dhai, *supra* note 20, at 549.

<sup>24</sup> Krystal Batelaan & Gamal Abdel-Shehid, *On the Eurocentric nature of sex testing: the case of Caster Semenya*, 27(2) SOCIAL IDENTITIES 146, 153 (2021) <https://www.tandfonline.com/doi/full/10.1080/13504630.2020.1816452>.

However, even today, both World Athletics and IOC reserved the right to investigate the sex of athletes whose sex or gender was “suspicious.”<sup>25</sup> Once again, any athlete that fell too far outside the subjective constraints of gender norms would be subject to scrutiny.

The regulation of women’s sports is intertwined with ideas about how women should look or behave. Women of color, especially Black women, are more likely to be tested under the “suspicion” model because their femininity has been pathologized and considered threatening to white competitors and standards of white femininity. In two well-known more recent cases, two women of color endured sex testing while the public speculated about their bodies. In 2006, an Indian runner named Santhi Soundarjan was subjected to a sex-verification exam and blood testing after winning the silver medal in the Asian Games.<sup>26</sup> After these tests, the IAAF stripped her of her medals and barred her from future events. In 2009, an 18-year-old Caster Semenya won her event at the World Track and Field Championship. Her competitors immediately and publicly questioned her gender, and the IAAF agreed; Semenya was subjected to sex verification tests and humiliating public scrutiny about the intimate details of her body.<sup>27</sup> The South African government condemned the IAAF’s targeted harassment of Semenya as part of its “racist and sexist” legacy.<sup>28</sup> Semenya had been fighting to compete without forced medical intervention for nearly a decade, and lost her appeal in 2019.<sup>29</sup> She has spoken publicly about how alienating and degrading it was for her gender to be scrutinized, both medically and in the media, describing the process as “the most profound and humiliating experience of my life.”<sup>30</sup>

B. Bans and restrictions targeting TNI student-athletes disproportionately harm students of color.

Allowing these harms to replicate in the school context will only further stigmatize girls of color. Black girls already face discriminatory school environments, in part because of discretionary discipline and stereotypes around how girls are supposed to behave. Black girls are routinely assumed to be more adult and less innocent than their white peers.<sup>31</sup> In school, Black girls are subject to more punishment for behaviors that do not conform to dominant stereotypes of what girls should sound or act like.<sup>32</sup> Black and Indigenous girls experience disproportionate disciplinary action in school, in part because of societal stereotypes around how girls should behave.<sup>33</sup> The history of sex verification in elite sports foreshadows that regulation of TNI students’ participation in sports will become another mechanism for Black and brown girls’

---

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 161 n.8.

<sup>27</sup> *Id.* at 149-50.

<sup>28</sup> Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (Jul. 3, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

<sup>29</sup> *Mokgadi Caster Semenya v. International Association of Athletics Federations*, CT. OF ARBITRATION FOR SPORT, 2018/O/5794, ¶¶ 625-26 (Apr. 30, 2019).

<sup>30</sup> *Id.* at ¶ 74.

<sup>31</sup> Rebecca Epstein et. al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood 4*, GEORGETOWN L. CTR. ON GENDER & INEQUALITY (2020), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>.

<sup>32</sup> NAT’L WOMEN’S L. CTR., *Stopping School Pushout for: Girls of Color* (Apr. 17, 2017), <https://nwlc.org/resource/stopping-school-pushout-for-girls-of-color/>.

<sup>33</sup> *Id.*

presence and existence to be stigmatized and policed. Black and brown children are already less likely to participate in sports than their white counterparts.<sup>34</sup> Girls of color are subjected to bias and discrimination for both their race and sex.<sup>35</sup> Schools that serve primarily students of color have fewer opportunities to play sports, and 40% of these schools have a large opportunity gap between boys' and girls' sports (as compared to 16% of majority-white schools).<sup>36</sup>

Women and girls, and Black women and girls in particular, are disproportionately impacted by sports bans and regulations, as evidenced by the long history of scrutiny of their gender based on their perceived non-conformity with white ideals of femininity.<sup>37</sup> Given this history, it is no surprise that trans girls of color have been subjected to the most backlash for their participation in girls' sports, and that cis girls of color have had their gender called into question during the rise of anti-trans sports bans and restrictions.

Connecticut runners Andraya Yearwood and Terry Miller were the subject of an intense anti-trans, anti-Black media campaign when they placed first and second in a state track meet. Parents yelled transphobic comments at them, petitioned to exclude them from the sport, and filed a lawsuit against the State of Connecticut challenging their policy of including transgender athletes.<sup>38</sup> Though the cis plaintiffs had placed ahead of Terry and Andraya in other races, anti-trans groups like Alliance Defending Freedom (ADF) capitalized on Terry and Andraya's win to fuel a national campaign against transgender athletes.<sup>39</sup> Two out of the three cisgender plaintiffs currently run competitively in college, while neither Andraya nor Terry do.<sup>40</sup> An otherwise

---

<sup>34</sup> Lindsey I. Black et. al., *Organized Sports Participation Among Children Aged 6–17 Years: United States, 2020* 1, CTR. FOR DISEASE CONTROL (2022), <https://www.cdc.gov/nchs/products/databriefs/db441.htm>.

<sup>35</sup> Brooke LePage, *In Schools, Black Girls Confront Both Racial and Gender Bias*, FUTURE ED. (June 13, 2021), <https://www.future-ed.org/in-schools-black-girls-confront-both-racial-and-gender-bias/>.

<sup>36</sup> Annie Ma & Cliff Brunt, *Title IX: Strides for women of color in sports lag under law*, ASSOC. PRESS (June 22, 2022), <https://apnews.com/article/sports-college-education-race-and-ethnicity-lacrosse-d70a7ab6361cbbee851d16acb177c819>.

<sup>37</sup> NAT'L WOMEN'S LAW CTR. & WOMEN'S SPORTS FOUND., *WSF & NWLC Letter to President Biden Regarding Athletics NPRM* (Aug. 10, 2022) <https://nwlc.org/resource/wsf-nwlc-letter-to-president-biden-regarding-athletics-nprm/> (citing Patricia Vertinsky et al., *More Myth than History: American Culture and Representations of the Black Female's Athletic Ability*, 25 J. OF SPORT HIST. 532, 541 (1998) ("Black women athletes are often described as "masculine," which is rooted in the myth that African Americans were suited for physical labor during slavery because of their "'natural' brute strength"))).

<sup>38</sup> Madeline Carlisle, *Andraya Yearwood, a Star of Hulu's New Changing the Game Documentary, Talks Life as a Trans Athlete*, TIME (Jun. 10, 2021), <https://time.com/6072672/andraya-yearwood-changing-the-game/>.

<sup>39</sup> See *The Coordinated Attack on Trans Student Athletes*, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbtq-rights/the-coordinated-attack-on-trans-student-athletes>; Nico Lang, *A Hate Group Is Reportedly Behind 2021's Dangerous Wave of Anti-Trans Bills*, THEM (Feb. 19, 2021), <https://www.them.us/story/hate-group-reportedly-behind-2021-anti-trans-bills>.

<sup>40</sup> See Brief of Amicus Curiae Connecticut Transadvocacy Coalition and PFLAG Hartford in Support of Defendants-Appellants at 19 fn. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, 57 F.4th 43 (2d Cir. 2022) [https://www.acluct.org/sites/default/files/amicus\\_brief\\_-\\_ct\\_transadvocacy\\_coalition.pdf](https://www.acluct.org/sites/default/files/amicus_brief_-_ct_transadvocacy_coalition.pdf); Isaac Sederbaum, *Biological Essentialism Hurts all Athletes*, INSIDE HIGHER ED (Jan. 31, 2022) <https://www.insidehighered.com/views/2022/02/01/how-biological-essentialism-hurts-all-college-athletes-opinion>.

unnoteworthy high school athletic competition became a national news story because of the fact that Terry and Andraya are Black transgender girls.<sup>41</sup>

When states and localities are emboldened to police students' gender, it also negatively impacts cisgender students of color. Mili Hernandez, a cisgender Latinx girl from Nebraska who was kicked out of her girls' soccer team when she was eight years old, told the LA Times she was discriminated against because she had short hair. Officials incorrectly listed her as male on the team's roster, and her sister explained the tournament refused to change their decision even after they presented "all different types of IDs... insurance card and documentation that showed [Hernandez] is a female."<sup>42</sup>

C. Enforcement of any "sex-testing" regulations in schools will unnecessarily and unlawfully deprive students of educational opportunities and invade their privacy.

As the history of elite athletics shows, "sex-verification" processes are ripe for abuse against athletes suspected of being transgender, intersex, or otherwise gender nonconforming, and are disproportionately used to target women and girls of color. We urge the Department to issue a final rule that makes clear that "sex-testing" requirements are never justified in the education context. Indeed, it is impossible to implement any such requirements without relying on sex-stereotypes in violation of Title IX or impermissibly invading students' privacy.

Current laws being proposed and passed at the state level illustrate how these violations play out. Adopting varied approaches, these bills aim to limit sex-segregated sports teams to students' sex assigned at birth.<sup>43</sup> Some states, such as Florida<sup>44</sup> and Texas,<sup>45</sup> have passed laws requiring students to submit original birth certificates to "prove" their gender, even if those certificates have been corrected to reflect the student's gender identity. Some states, such as Kentucky, require students to either verify their sex assigned at birth via unedited birth certificate or submit an affidavit from a physician, physician assistant, advanced practice registered nurse, or chiropractor attesting to their "biological sex."<sup>46</sup> Oklahoma requires a parent or legal guardian to sign an affidavit attesting to the student's sex assigned at birth.<sup>47</sup> A few states, such as Idaho, have statutes that include a provision for testing sex if it is "disputed, allowing anyone to dispute a student's sex and subject them to a test."<sup>48</sup> Allowing schools to scrutinize or "dispute" a student's gender will invariably result in the enforcement of stereotypes and invasions of

---

<sup>41</sup> Medley, *supra* note 8, at 699-700.

<sup>42</sup> Chuck Shilken, *Girl with short hair kicked out of soccer tournament: 'They only did it because I look like a boy,'* L.A. TIMES (June 6, 2017), <https://www.latimes.com/sports/sportsnow/la-sp-girl-disqualified-soccer-20170606-story.html>.

<sup>43</sup> E.g., Relating to prohibiting a biological male from participating on an athletic team or sport designated for females; and to prohibiting a biological female from participating on an athletic team or sport designated for males, S.B. 211, 2003 Leg., Reg. Sess. (Ala. 2023); Revising provisions governing athletics in schools, A.B. 375, 82nd Leg. Sess. (Nev. 2023).

<sup>44</sup> FLA. STAT. § 1006.205 (2022).

<sup>45</sup> TEX. EDUC. CODE ANN. § 33.0834 (Vernon).

<sup>46</sup> KY. REV. STAT. ANN. § 156.070(2)(g) (West 2023).

<sup>47</sup> OKLA. STAT. tit. 70, § 27-106(D) (2022).

<sup>48</sup> *See, e.g.*, IDAHO CODE § 33-6203(3) (2022) ("A dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex. . . .").

privacy. For example, in Utah, a high school athletics association investigated whether an athlete competing on a girls' sports team was transgender after the parents of two girls she finished ahead of in a competition complained that they suspected she was transgender.<sup>49</sup> The investigation, which was not communicated to the student or her parents, involved “poring over her school records dating back to kindergarten” to verify she was assigned female at birth.<sup>50</sup> The Utah High School Activities Association has continued to receive complaints, which include “when an athlete doesn’t look feminine enough.”<sup>51</sup>

International sports federations like the IOC or World Athletics have been trying to define sex for over a century. As described above, suspicion of certain athletes performing too well or appearing too masculine have led to invasive and public challenges to athletes’ sex. These policies devolve into humiliating, targeted intrusion into the bodily autonomy of athletes based on their nonconformity with the standards of white femininity. Elite women’s athletics shows that this kind of regulation—whether in fear of transgender people, “impostors” in women’s sports, or cultural anxiety about femininity—does not work.

The effect of this tremendous invasion of privacy is amplified when applied to children and young people trying to access the benefits of school sports. Sex testing has failed elite, *adult* women athletes for decades: the final rule cannot allow these practices to continue on youth. Moreover, as states increasingly attempt to ban and restrict access to transgender health care, regulations that require students to meet certain medical standards, like testing testosterone levels, will become increasingly onerous. For students with intersex variations, such regulations may also lead to increased pressure to modify their bodies to more closely conform to sex stereotypes—a pressure that intersex youth and their families already face outside the context of athletics.<sup>52</sup>

Such tests also have serious privacy implications under federal and constitutional law. Many courts have held transgender people have an informational privacy right not to be forced to disclose information about their gender identity.<sup>53</sup> Certain restrictions may also violate students’ rights to refuse medical treatment, if state laws or policies require them to undergo surgical or hormonal interventions as a condition for participation.<sup>54</sup> Sex testing procedures that require invasive exams may also violate students’ right to be free from unreasonable searches.<sup>55</sup>

---

<sup>49</sup> *Utah Officials Secretly Investigated Female Athlete’s Gender*, ASSOC. PRESS (Aug. 18, 2022), <https://apnews.com/article/sports-education-utah-school-athletics-government-and-politics-dc6451adde255f47e31229f502f773ad>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See HUMAN RIGHTS WATCH, *I Want To Be Like Nature Made Me’: Medically Unnecessary Surgeries on Intersex Children in the U.S.* (2017), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>.

<sup>53</sup> See, e.g., *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

<sup>54</sup> See Medley, *supra* note 8, at 723 (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 262 (1990) (“A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment.”)).

<sup>55</sup> See *id.* (citing *Doe v. Woodard*, 912 F.3d 1278, 1290 (10th Cir. 2019) (“[The Fourth Amendment] ‘protects the right of the people to be “secure in their persons” from government intrusion whether the threat to privacy arises from a policeman or a [school] administrator.’”)).

The final rule should make clear that invasive sex testing and medical requirements for student-athletes can never be justified under Title IX because they always rely on impermissible sex stereotypes and invade student privacy. The preamble mentions, but does not explicitly condemn, “sex-verification” practices. Without strong clarification from the Department of Education, bad actors will attempt to assert pretextual reasons to justify these kinds of harmful and invasive tests.

## **II. The final rule should reject pernicious stereotypes about TNI people that have long been used to unjustly restrict the rights of marginalized groups.**

The same rhetoric that has long been used to justify discrimination against racial and gender minorities is now being deployed to restrict the rights of TNI students. Opponents to the Civil Rights Act of 1964 used “safety” arguments about protecting women and children that were rooted in false and pernicious stereotypes to justify the racial segregation of bathrooms, swimming pools, and recreational facilities.<sup>56</sup> One generation later, opponents to lesbian and gay equality used similar arguments to justify firing gay teachers and scoutmasters.<sup>57</sup> In this generation, the same specious argument that the equal treatment of TNI people poses a unique threat to others is being used to exclude TNI people from access to medical care, legal recognition, bathrooms, locker rooms, and athletic activities.

In this environment, we applaud the Department for acknowledging that transphobic stereotypes are not a valid ground for restricting the rights of TNI students.<sup>58</sup> However, we are concerned about the Department’s suggestion that an educational interest in “fairness” or “prevention of sports-related injury” might ever substantially relate to a policy that resulted in the exclusion of a TNI student athlete.<sup>59</sup> We urge the Department to remove reference to these interests so they cannot be erroneously applied to validate the harmful myth that the equal treatment of TNI students imperils fairness and safety for all students, any more than the integration of other minority groups has harmed the fabric of American society.

### **A. Bans and restrictions on trans students’ participation in sports are part of a broader legislative effort to eradicate LGBTQI+ people, with an emphasis on TNI youth.**

In recent years, state legislatures have launched an all-out attack on LGBTQI+ people. This year alone, over 500 anti-LGBTQI+ bills were introduced, with a majority focused on transgender youth.<sup>60</sup> These bills have continued to increase each year over the past several

---

<sup>56</sup> Brief of NAACP Legal Defense and Education Fund as Amicus Curiae, pp. 4-5, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

<sup>57</sup> See, e.g., Brief of Family Research Council as Amicus Curiae, p. 30, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (“Unless this Court reverses the decision, the constitutional rights of a private association and the health, safety and morals of Boy Scouts will be sacrificed on the altar of a civil right that belies its name.”).

<sup>58</sup> 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, 88 Fed. Reg. at 22872.

<sup>59</sup> *Id.*

<sup>60</sup> MOVEMENT ADVANCEMENT PROJECT, *Under Fire: Erasing LGBTQ People from Schools and Public Life*, 1 (Mar. 2023), [https://www.mapresearch.org/file/MAP-Under-Fire-Erasing-LGBTQ-People\\_2023.pdf](https://www.mapresearch.org/file/MAP-Under-Fire-Erasing-LGBTQ-People_2023.pdf).

years.<sup>61</sup> The legislative efforts to ban TNI students, and trans girls in particular, from school sports is part of this broader effort to erase LGBTQI+ people from public life, including efforts to ban transgender health care, drag performances, access to sex-separated facilities, and speech, expression, and education about LGBTQI+ people and issues.<sup>62</sup> It is critical that the Department recognize this context as it considers how to evaluate sex-based sports criteria in its final rule.

As of May 15, 2023, twenty-one states have enacted laws restricting transgender students' participation in sports.<sup>63</sup> Last month, the House passed H.R. 734, which would categorically prohibit trans women and girls from participating on sports teams consistent with their gender.<sup>64</sup> At least eleven states have passed restrictions on gender-affirming healthcare for trans youth,<sup>65</sup> and at least nineteen states are actively considering similar legislation.<sup>66</sup> As a result, at least 146,300 trans youth have lost or are at risk of losing gender-affirming healthcare across the states.<sup>67</sup> And some states are even trying to ban such care for adults, which would impact many college students.<sup>68</sup>

The hostile legislative climate is taking a serious toll on students' mental and physical health. Trans, nonbinary, and intersex youth have reported increased thoughts of suicide, and both youth and their caregivers have reported "increased anxiety and hypervigilance."<sup>69</sup> According to a survey by the Trevor Project, laws and policies that ban transgender youth from

---

<sup>61</sup> There were 42 anti-LGBTQ bills introduced in state legislatures in 2018; 51 in 2019; 77 in 2020; 154 in 2021; and 180 in 2022. Annette Choi, *Record Number of Anti-LGBTQ Bills Have Been Introduced This Year*, CNN (Apr. 6, 2023), <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html>.

<sup>62</sup> MOVEMENT ADVANCEMENT PROJECT, *supra* note 60.

<sup>63</sup> MOVEMENT ADVANCEMENT PROJECT, *Equality Maps: Bans on Transgender Youth Participation in Sports*, [https://www.lgbtmap.org/equality-maps/youth/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans) (last accessed May 15, 2023). In addition to these states, the Missouri legislature recently passed a similar law that has not yet been signed. *See* Establishing guidelines for student participation in athletic contests organized by sex, S.B. 39, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).

<sup>64</sup> Protection of Women and Girls in Sports, H.R. 734, 118th Cong. (2023).

<sup>65</sup> Elana Redfield et. al., Prohibiting Gender Affirming Medical Care for Youth, WILLIAMS INST., 3 (Mar. 2023), <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See, e.g.*, Experimental Interventions to Treat Gender Dysphoria, 15 CSR 60-17.010 (Mo. 2023) (this "Emergency Rule," issued April 13, 2023 and effective April 27, 2023, which has been enjoined until at least May 15th, 2023, *South Hampton Community Healthcare v. Bailey*, No. 4:2023cv00538 (St. Louis Cty. Ct. 2023)); Treatments for Sex Reassignment, C.S./S.B. 254, 2023 Leg., Reg. Sess. (Fl. 2023) (passed and has yet to be signed into law); Relating to Prohibitions on the Provision to Certain Children of Procedures and Treatments for Gender Transitioning, Gender Reassignment, or Gender Dysphoria and on the Use of Public Money or Public Assistance to Provide those Procedures and Treatments, S.B. 14, 88th Leg., Reg. Sess. (Tex. 2023) (bill has passed the Out of House Committee and has yet to be voted on by the House).

<sup>69</sup> Laura E. Kuper, Brett M. Cooper & Megan A. Mooney, *Supporting and Advocating for Transgender and Gender Diverse Youth and their Families Within the Sociopolitical Context of Widespread Discriminatory Legislation and Policies*, CLINICAL PRACTICE IN PEDIATRIC PSYCHOLOGY 336, 339 (2022).

playing on teams consistent with their gender identity make 64% of transgender and nonbinary youth feel angry, 44% feel sad, 39% feel stressed, and 30% feel hopeless.<sup>70</sup>

It is in this context that the Department should consider the impact of its rulemaking and the potential for abuse and misinterpretation. Laws and policies excluding trans youth from participation in school sports are not borne of a desire to achieve “fairness,” but from a bare desire to harm.<sup>71</sup> Women’s rights organizations and high profile women athletes have been increasingly vocal about their support for TNI youth in sport, and the actual challenges women and girls face in sports.<sup>72</sup> Moreover, research by the Women’s Sports Foundation, founded by gender equity trailblazer Billie Jean King, clearly outlines the major challenges women and girls face in sport, including woefully uneven implementation of Title IX, abuse and misconduct, decline of women in coaching, lack of equity and access for women and girls of color and girls with disabilities, and more.<sup>73</sup> Trans women and girls are not among these challenges. They affirm that “Title IX’s support for the rights of transgender girls to compete consistent with their gender identities in girls’ sports does not conflict with the role the statute has played in securing athletic opportunities for women and girls.”<sup>74</sup>

As recent years have shown, anti-trans legislative efforts are only increasing. TNI youth would benefit from a rule that makes prohibitions on these laws and policies as clear as possible.

B. TNI students benefit from sport and are deeply harmed when denied access to participation.

Youth sports often play a significant role in children’s lives and development.<sup>75</sup> Sports settings can often foster positive psychological growth in children after they experience adversity. Such growth stems from the opportunities to interact with peers and develop “supportive relationships with adults and coaches.” Sports programs also give youth “the opportunity to develop physical skills and a sense of accomplishment, confidence, and self-esteem, which are key factors for promoting PYD [positive youth development] in sport.”<sup>76</sup>

---

<sup>70</sup> Trevor News, *New Poll Emphasizes Negative Impacts of Anti-LGBTQ Policies on LGBTQ Youth*, THE TREVOR PROJECT (Jan. 19, 2023) <https://www.thetrevorproject.org/blog/new-poll-emphasizes-negative-impacts-of-anti-lgbtq-policies-on-lgbtq-youth/>.

<sup>71</sup> Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 16, 2023), <https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html>.

<sup>72</sup> NAT’L WOMEN’S L. CTR., Letter from Women’s and Girl’s Rights Organization Opposing H.R. 734, (Mar. 7, 2023), <https://nwlc.org/resource/letter-from-womens-and-girls-rights-organization-opposing-h-r-734/>.

<sup>73</sup> See generally Ellen J. Staurowsky et. al., *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women*, WOMEN’S SPORTS FOUND. (2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>.

<sup>74</sup> Ellen J. Staurowsky et. al. *50 Years of Title IX: We’re Not Done Yet*, WOMEN’S SPORTS FOUND., 55 (2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf>.

<sup>75</sup> Katherine A. Tamminen & Kacey C. Neely, *Positive Growth in Sport*, in Nicholas L. Holt, POSITIVE YOUTH DEVELOPMENT THROUGH SPORT, 193, 200 (2d. ed. 2016).

<sup>76</sup> *Id.*

For many TNI students, sports provide an essential sense of community, purpose, and belonging. Participation in sports can also decrease feelings of hopelessness and suicidality, which is particularly important to TNI youth who are at a significantly higher risk for suicide.<sup>77</sup> When TNI students are denied these opportunities because of restrictive laws or policies that prohibit them from participating consistent with their identity, it can have a host of negative consequences. When this kind of discrimination happens in school, it also violates federal law.

When TNI youth are forced out of the sports they love, it has serious negative impacts on their mental health and wellbeing. These impacts are already being felt, as evidenced by interviews with TNI youth. LG, a 12-year-old trans girl in Texas, loves to play sports. LG loves making new friends who understand her and make her feel like she's part of a community. "I have a lot of friends on my running team who are also LGBTQ and we talk a lot about how it sucks that we can't be on an actual team because we play sports in Texas, which is really difficult for kids like us. It makes me feel upset, sad, angry, and disappointed...because so many people have so many childhood memories playing sports. It makes me really upset that they don't want LGBTQ youth to make memories like that. We aren't even that different – we're just other human beings."

The discrimination and dehumanization felt by LG is echoed by O., a 17-year-old trans boy, who found a love for powerlifting despite growing up in an environment that is hostile to trans youth. "I love the inclusion of being on a team. I deal with a lot of prejudice outside of the team, but on the team I'm just another lifter...and it's great because they see me as me, not as a preconception or a stereotype." For O., sports helped boost his confidence, and being part of a team made him want to build more inclusive spaces for other young people. "The stigma and discrimination I experience being trans already puts me in a position where I understand discrimination and isolation and I never want people to feel the same way."

Transgender athletes who report being able to participate in sports consistent with their identity speak about how important this inclusion is to their ability to live their full and authentic lives. Experiences of TLDEF's clients and athletes in the Athlete Ally network underscore these experiences. Former college athlete, Chloe, recalls being bullied and abused as a child, and sports was one of the few outlets she found joy in. Sports made her feel "like everything was going right, that I had goals, and was focused, and could be happy." She came out as transgender before entering college, and while the NCAA policy allowed her to participate on the women's volleyball team, the lack of a supportive environment caused serious and lasting harm to Chloe. She transferred to a new university and, because she needed the focus and goals sports provide her, joined a women's crew (rowing) team. Chloe received nothing but positivity and inclusion from her crew team, and that strength contributed to her ability to share her story and advocate for transgender athletes and against anti-trans sports laws and policies that, as Chloe states, "are taking away so much from transgender athletes without any reason other than fear and with no

---

<sup>77</sup> Brief of Amici Curiae 176 Athletes in Women's Sports, The Women's Sports Found., and Athlete Ally in Support of Plaintiffs-Appellees and Affirmance at 23, *Hecox v. Little*, Nos. 20-35813, 20-31815 (9th Cir. Dec. 21, 2020) (citing Lindsay Taliaferro et. al., *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, 78 J. SCH. HEALTH 545, 545-53 (2008); Erin Buzuvis, *Transgender Student-Athletes and Sex Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. LAW 1, 48 (2011)).

basis in science or reality, almost as though [proponents of the law] had never spoken with a transgender person.”

For nonbinary student-athletes, the ability to participate consistent with their nonbinary identity poses even more challenges. Ab, a former cross-country athlete, notes that while running had become “an integral part” of their identity, it “morphed into a source of pain” as participating in races forced them into a binary gender category. “It felt like I had to choose whether to honor my core identity as an athlete or as a nonbinary person.”

For Kris, a nonbinary, disabled student-athlete, athletics always felt “inaccessible” due to their gender identity and disability. When they found curling in college, “the world opened” for them: “I was able to participate with a team that was approximately half men and half women, with trans and nonbinary leadership both before and during my tenure. I was able to participate with my team and in a camaraderie that did not single me as ‘the odd one out.’” Despite the other ongoing discrimination they face as a nonbinary student, the knowledge that their home team is inclusive and welcoming “makes it all worth it.”

Mika, a nonbinary person and former DIII swimmer, explains that policies that do not fully and explicitly include TNI youth would have made it “impossible for a kid like me to be able to have a future. I’m not talking about a prosperous future or an average future. I’m talking about any future.” For Mika, sports were lifesaving. “[Without sports], we would’ve never known what that little kid was capable of... Their mother and father would’ve had to put their kid in the ground if they didn’t have sports. Their brother would’ve returned from deployment without seeing his little sibling ever again. They would’ve never known what love was because sports enabled them to love themselves. [Exclusionary policies] aren’t just taking sports away from children, it is also taking away friends, possibilities, and lives away from them, too.”

C. The final rule should make clear that TNI inclusion in school sports is not at odds with interests in injury prevention or gender equity and fairness.

The Department rightly recognizes that sex-based criteria for school athletics may not be based on inaccurate assumptions or overbroad generalizations without factual justification under Title IX.<sup>78</sup> Properly interpreted, we believe that a law or policy aimed at excluding trans students could never be justified on an “injury prevention” or “fairness” rationale under this standard. We urge the Department to make this clear in the preamble.

- i. *The Department should make clear that laws and policies aimed at excluding TNI students do not further an interest in prevention of sports-related injury.*

As described above, anti-LGBTQI+ advocates have relied on inaccurate and unfounded stereotypes about trans women and girls to justify their exclusion, including the harmful stereotype that trans women and girls are more likely than cis girls to cause sports-related injuries. Like the “sex testing” policies previously described, these justifications will inevitably be weaponized against girls of color who are perceived to be too strong or too masculine based on white standard of femininity.

---

<sup>78</sup> See 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, 88 Fed. Reg. at 22873 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

Though neither the proposed rule nor corresponding guidance says anti-trans policies can be justified by this rationale, we are concerned that, by listing “prevention of sports-related injury” as an example of an interest schools may assert, this language may be misconstrued to perpetuate the harmful stereotype that trans women and girls are a threat to cis women and girls. Though prevention of sports-related injury may be an important educational objective in general, its inclusion in the preamble of the proposed rule is ripe for misuse. We urge the Department to make clear that policies excluding TNI students are not substantially related to the achievement of such an interest.

- ii. *The Department should make clear that laws and policies aimed at excluding TNI students do not further an interest in fairness.*

The promise of Title IX is about equal opportunity and access to the benefits that participation in school sports provides. During the time Title IX was passed in 1974, Bernice Sandler, one of Title IX’s original creators, expressed concerns about gender inequality in sports, pointing to things like budgets, scholarships, mentoring, coaching, and facilities.<sup>79</sup> The purpose of Title IX is to ensure equal opportunity and access, regardless of sex. Any regulations that ban or restrict TNI students from participating consistently with their identity hinder, rather than further, this goal.

Many of the same issues Sandler identified persist today, including disparities in funding and scholarships for girls’ sports, and increased risk of harassment and abuse.<sup>80</sup> Disparities for girls of color are even worse. A study by the National Women’s Law Center found that “girls at heavily minority high schools ha[d] [o]nly 39 percent of the opportunities to play sports as girls at heavily white schools do.”<sup>81</sup>

When it comes to the real issues of gender inequality in school sports, proponents of anti-trans sports bans and sex testing regulations are simply not interested in addressing them. Instead, these regulations target an already vulnerable community. TNI students are already at a deficit when it comes to accessing the benefits of school sports. LGBTQ youth, and transgender youth in particular, face high levels of harassment and abuse while playing sports and participate in sports with less frequency due to discrimination. A report by the Trevor Project found that transgender and nonbinary youth reported a 17% participation rate in sports compared to 27% reported by cisgender LGBQ youth.<sup>82</sup> Students who were less out at school were more likely to participate in athletics than those who were more out about their gender identity. The report cited discrimination, safety concerns, and “structural discrimination in the form[] of trans-exclusive policies” as potential reasons for these results.<sup>83</sup>

Intersex youth likewise face significant barriers in equal access to education. A recent Trevor Project survey found that 45% of LGBTQ intersex youth reported experiencing

---

<sup>79</sup> Medley, *supra* note 8, at 690.

<sup>80</sup> *Id.* at 692.

<sup>81</sup> *Id.* (citing NAT’L WOMEN’S L. CTR., *Finishing Last: Girls of Color and School Sports Opportunities*, 4 (2015), [https://pracc.org/pdf/GirlsFinishingLast\\_Report.pdf](https://pracc.org/pdf/GirlsFinishingLast_Report.pdf)).

<sup>82</sup> THE TREVOR PROJECT, *The Trevor Project Research Brief: LGBTQ Youth Sports Participation*, 1 (June 2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/06/June-2020-Brief--Youth-Sports-Participation-Research-Brief.pdf>.

<sup>83</sup> *Id.* at 1-2.

discrimination on the basis of their gender identity from teachers or administrators in schools.<sup>84</sup> The same survey found that intersex youth who did not have an affirming school environment reported a higher rate of suicide attempts compared to intersex youth whose schools were LGBTQ-affirming (23% compared to 16%).<sup>85</sup>

Opponents of TNI equality have used an erroneous concept of “fairness” to target TNI students, using cis girls as a pawn.<sup>86</sup> “Sex testing” in athletics relies on the idea that white cisgender girls and women need to be protected from “unfair competition” from other women: women of color, intersex women, and transgender women.<sup>87</sup> Jordan-Young and Karkazis write: “The regulation rests on the premise that ‘women athletes’ are a vulnerable class that needs protection. But from whom? History is full of examples of how the ‘female vulnerability’ argument has benefited women with more privilege (whether from class, race, sexuality, gender presentation, or region) over women with less privilege, who are ironically but systematically seen as less vulnerable.”<sup>88</sup>

TNI students are not dominating school sports like opponents would have people believe.<sup>89</sup> TNI students already participate in sports at disproportionately lower numbers due to stigma and exclusion, and are at an increased risk of harassment and discrimination when they do participate. Any policy that excludes students from participation in school athletics and denies them the benefits that come with being part of a team only further exacerbate the inequalities that students face in school sports on the basis of sex.

But just like cisgender student-athletes, TNI student-athletes deserve to have their wins celebrated when they do manage to overcome these obstacles and succeed. And when TNI students can participate as themselves, all students benefit. CDC data show girls’ participation in high school sports remained unchanged from 2011-2019 in states that adopted transgender-inclusive policies, but decreased in states with policies excluding trans student-athletes.<sup>90</sup> As the

---

<sup>84</sup> THE TREVOR PROJECT, *The Mental Health and Well-being of LGBTQ Youth who are Intersex*, 14 (2021), <https://www.thetrevorproject.org/wp-content/uploads/2021/12/Intersex-Youth-Mental-Health-Report.pdf>.

<sup>85</sup> *Id.* at 15.

<sup>86</sup> See, e.g., Shayna Medley & Galen Sherwin, *Banning Trans Girls From School Sports Is Neither Feminist Nor Legal*, ACLU (Mar. 12, 2019), <https://www.aclu.org/news/lgbtq-rights/banning-trans-girls-school-sports-neither-feminist-nor-legal>. Opponents of transgender equality have relied on similar myths in various contexts, trying to paint trans women and girls as a threat to cis women and girls, which have been debunked time and time again. See, e.g., Dawn Ennis, *Anti-LGBTQ Activist Admits Bathroom Predator Myth Was ‘Concocted’ As Cover for Transphobia*, INTO MORE (Dec. 5, 2018), <https://www.intomore.com/impact/anti-lgbtq-activist-admits-bathroom-predator-myth-was-concocted-as-cover-for-transphobic-hate/>.

<sup>87</sup> Medley, *supra* note 8, at 684.

<sup>88</sup> Jordan-Young and Karkazis, *supra* note 12, at 200.

<sup>89</sup> See Cyd Zeigler, *Meet Some Trans Athletes Who Work Hard, Train Like Mad and (Almost) Never Win*, OUT SPORTS (Dec. 3, 2019, 8:18 AM), <https://www.outsports.com/2019/12/3/20990763/trans-women-athlete-sports-winning-losing-transgender>.

<sup>90</sup> See CTR. FOR DISEASE CONTROL, *Youth Risk Behavior Surveillance — United States, 2019*, 88 (2020), <https://www.cdc.gov/healthyyouth/data/yrbs/index.htm>; see also Carrie Richgels, Sean Cahill, et. al., *State Bills Restricting Access of Transgender Youth to Health Care, School Facilities, and School Athletics Threaten Health and Well-Being (Policy Brief)*, FENWAY HEALTH, 1, 15 (Mar. 16, 2021).

National Women’s Law Center and Women’s Sports Foundation explained, “[t]his data suggests that excluding these students benefits no one, and that there may be a chilling effect from state policies that reenforce overbroad sex stereotypes, including white-centric notions of femininity and the idea that there is something suspiciously masculine about athletic achievement.”<sup>91</sup>

Properly interpreted, there is no conceivable important educational interest that could justify excluding TNI students from school athletics under Title IX. We are concerned that opponents will misuse the text of the proposed rule to further anti-TNI policies under the guise of fairness and protection for cis women and girls. We urge the Department to remove from the preamble the idea that “fairness” would constitute a legitimate government interest justifying the exclusion of TNI athletes.

### **III. The final rule should more explicitly protect nonbinary and intersex students, as well as transgender students.**

Properly interpreted, Title IX’s sex discrimination prohibition includes discrimination on the basis of any sex-based characteristics and sex stereotypes, which encompasses discrimination against TNI students. We commend the Department for affirming this interpretation in previous guidance and in the preamble of the proposed rule. However, we urge the Department to make this interpretation explicit in the text of the final rule itself. We further encourage the Department to include a more robust discussion of the application of Title IX to nonbinary and intersex students.

#### **A. Anti-transgender discrimination is sex discrimination under Title IX, and the final rule should make that explicit in its text.**

Discrimination against transgender students constitutes discrimination on the basis of sex, which the Supreme Court confirmed in *Bostock v. Clayton County, Georgia*, and the Biden Administration and the Department of Education have rightfully acknowledged in several executive orders and Dear Colleague Letters.<sup>92</sup> Excluding transgender students from school sports amounts to discrimination “on the basis of sex” in violation of the plain text of Title IX. As the Supreme Court explained in *Bostock*, “it is impossible to discriminate against a person for being... transgender without discriminating against that individual based on sex.”<sup>93</sup> Put another way, “transgender status [is] inextricably bound up with sex.”<sup>94</sup> Several courts have applied analogous reasoning to conclude anti-trans discrimination is sex discrimination under the Equal

---

<sup>91</sup> NAT’L WOMEN’S L. CTR. & WOMEN’S SPORTS FOUND. *WSF & NWLC Letter to President Biden Regarding Athletics NPRM*, (Aug. 10, 2022), <https://nwlc.org/resource/wsf-nwlc-letter-to-president-biden-regarding-athletics-nprm/>.

<sup>92</sup> See *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>; *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 11, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>; U.S. Dep’t of Justice, Civil Rights Division, and U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter on Title IX and Transgender Students* at 3 (May 13, 2016) (rescinded in 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>93</sup> *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020).

<sup>94</sup> *Id.* at 1742.

Protection Clause, and that transgender people are themselves a quasi-suspect class entitled to heightened scrutiny.<sup>95</sup>

We commend the Department for acknowledging this analysis in the past<sup>96</sup> and in the preamble of the proposed rule, which rightfully suggests that the Department continues to view anti-transgender discrimination as sex discrimination under Title IX. We support the Department's acknowledgement in the preamble that categorical bans on the participation of TNI athletes do not meet the standard that the proposed rule lays out.<sup>97</sup> However, we are concerned that the text of the Proposed Rule itself does not go far enough in making this explicit. Given the onslaught of anti-trans legislation grounded in bias, stereotypes, and junk science, we are concerned that bad actors at the state level or in subsequent administrations may not properly interpret the text as written.

B. Discrimination based on nonbinary identity or intersex traits is also sex discrimination under Title IX and *Bostock*.

Nonbinary and intersex people each represent significant proportions of the American population. By some measures, the number of nonbinary and intersex people each exceed the number of transgender people.<sup>98</sup> However, the proposed rule provides limited guidance on how it should be applied to nonbinary students or students who have intersex traits. We encourage the Department to make explicit in its final rule that Title IX's protections extend to nonbinary and intersex students, and expand the preamble to include guidance on how to prevent sex discrimination against nonbinary and intersex students and distinguish between the interests of each group.

Applying the Supreme Court's reasoning in *Bostock*, discrimination against nonbinary people can be conceptualized in several distinct but complementary ways: (1) as a form of, or as indistinguishable from, discrimination based on transgender status and/or gender identity; (2) as necessarily relying on sex as a but-for cause; and (3) as discrimination based on gender non-

---

<sup>95</sup> See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610–13 (4th Cir. 2020); *Karnoski v. Trump* 926 F.3d 1180, 1200 (9th Cir. 2019); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Penn. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704719–22 (D. Md. 2018); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015).

<sup>96</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022) (to be codified at 34 CFR pt 106).

<sup>97</sup> 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, 88 Fed. Reg. at 22873 (explaining that "Criteria that categorically exclude all transgender girls and women from participating on any female athletic teams, for example, would not satisfy the proposed regulation because, in taking a one-size-fits-all approach, they rely on overbroad generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply.").

<sup>98</sup> Bianca Wilson & Ilan Meyer, *Nonbinary LGBTQ Adults in the United States*, WILLIAMS Inst. (2021), <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>. *Health of People with Intersex Variations*, VICTORIA HEALTH DEPT., <https://www.health.vic.gov.au/populations/health-of-people-with-intersex-variations#:~:text=Intersex%20variations%20are%20natural%20biological,identities%20as%20non%20intersex%20people> (writing that intersex variations occur in up to 1.7% of all births).

conformity or sex stereotypes more generally in violation of Title IX’s prohibition on sex discrimination. Similarly, as the Department of Justice recognized in its post-*Bostock* addendum to the Title IX Legal Manual, the Court’s reasoning “applies with equal force to discrimination against intersex people,” which can be conceptualized as being based on: (1) “perceived differences between an individual’s specific sex characteristics and their sex category (either as identified at birth or some subsequent time);” (2) “anatomical or physiological sex characteristics (such as genitals, gonads, chromosomes, and hormone function) [which are] inherently sex-based;” or (3) “sex stereotypes, as intersex people by definition have traits that do not conform to stereotypes about male or female bodies.”<sup>99</sup>

The Court in *Bostock* held that Title VII’s bar on sex discrimination categorically prohibits unlawful discrimination against individuals based on transgender status.<sup>100</sup> The Court implicitly relied on a common definition of what makes someone transgender: not identifying with their sex assigned at birth. Nonbinary people (who were assigned male or female at birth) do not identify as male or female. Although some nonbinary people self-identify as transgender and others do not, the Court’s functional definition of transgender status in *Bostock* clearly covers nonbinary people and discrimination against them. Several lower courts have already adopted this approach, treating nonbinary people as transgender for purposes of *Bostock*.<sup>101</sup> Importantly, people do not have to identify as “transgender” or “nonbinary” to be covered by Title VII, based on the same reasoning that men who have sex with men are protected from sexual orientation discrimination even if they do not identify as “gay” or “homosexual.”<sup>102</sup>

Whether or not one considers nonbinary people to fall within a category of “transgender people,” discrimination against them is clearly based on their gender identity. Federal courts and agencies have long held that gender identity discrimination is sex discrimination and have treated

---

<sup>99</sup> U.S. DEP’T OF JUSTICE, OFFICE OF THE ASSISTANT ATTORNEY GENERAL, *Title IX Legal Manual* (updated August 12, 2021), <https://www.justice.gov/crt/title-ix#Bostock>.

<sup>100</sup> *Bostock*, 140 S. Ct. at 1737.

<sup>101</sup> See *Lammers v. Pathways to a Better Life, LLC*, No. 18-C-1579, 2021 WL 3033370, at \*2 (E.D. Wis. July 19, 2021). See also *L.O.K. by & through Kelsey v. Greater Albany Pub. Sch. Dist. 8J*, No. 6:20-CV-00529-AA, 2022 WL 2341855, at \*15 (D. Or. June 28, 2022) (considering claims for sex-based harassment brought by a non-binary and intersex student after they experienced hostility from teachers and peers after coming out, and interpreting Title IX’s prohibition on sex discrimination to encompass “situations where ‘the discriminator is necessarily referring to the individual’s sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator’s actions,’” (quoting *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)). More courts have at least referenced non-binary people in their analysis of sex discrimination prohibitions to transgender people, even if they were not directly presented with the application to nonbinary plaintiffs. See, e.g., *A.M. by E.M. v. Indianapolis Pub. Sch.*, No. 122CV01075JMSDLP, 2022 WL 2951430, at \*5 (S.D. Ind. July 26, 2022), *appeal dismissed sub nom.* No. 22-2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023) (holding trans girl likely to succeed on merits of Title IX claim against Indiana’s anti-trans sports ban, and acknowledging trans and non-binary people have gender identities different from their sex assigned at birth); *B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 727 (S.D. Ind. 2022) (citing expert testimony that “transgender and gender nonbinary middle and high school students” experience greater stress and victimization, and holding trans boys likely to succeed on merits of Title IX and equal protection claims against school for barring them from boys’ restrooms).

<sup>102</sup> Cf. *Bear Creek Bible Church v. EEOC*, 571 F. Supp 3d. 571, 622 (N.D. Tex.2021) (rejecting argument that *Bostock* does not apply to discrimination based on “bisexual conduct”).

*Bostock* as confirming this conclusion.<sup>103</sup> Indeed, courts have often used the terms interchangeably.<sup>104</sup> By definition, being nonbinary is a matter of gender identity. No matter whether a person describes their identity as other than male or female, having elements of both, being fluid, or as having no gender at all, discrimination on any of these bases is clearly based on “gender identity.”

Discrimination based on intersex status or traits likewise necessarily relies on sex as a but-for cause, whether based on specific sex characteristics or sex stereotypes. By definition, intersex people defy sex stereotypes, whether those are related to how intersex people are sorted between binary sex categories, or based on how their bodies vary from expectations associated with binary sex categories. In other words, an assumption that sex or gender is binary is the ultimate sex stereotype. Numerous precedents have applied this application of sex stereotyping to anti-transgender discrimination, and their holdings are equally applicable to discrimination on the basis of being nonbinary or having intersex traits.<sup>105</sup>

Under *Bostock*, discrimination on the basis of nonbinary identity or intersex traits is “inextricably bound up with sex.”<sup>106</sup> As the *Bostock* Court emphasized, Title VII prohibits discrimination “[s]o long as the plaintiff’s sex was one but-for cause of that decision” or where “a protected trait like sex was a ‘motivating factor.’”<sup>107</sup> Thus, the employee in *Bostock* who is a transgender woman would not have been fired if she had been assigned female at birth.<sup>108</sup>

---

<sup>103</sup> See, e.g., *Texas v. EEOC*, No. 2:21-cv-194, 2022 WL 4835346, at \*1 (N.D. Tex. May 26, 2022) (describing *Bostock* as holding “gender identity” discrimination prohibited); *Walker v. Azar*, 480 F. Supp. 3d 417, 419 (E.D.N.Y. 2020) (same). See also U.S. Dep’t of Justice & U.S. Dep’t of Educ., *Dear Colleague Letter on Transgender Students* (May 13, 2016) (“This prohibition encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status”).

<sup>104</sup> Compare *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034, 1047 (7th Cir. May 30, 2017) (framing claim as whether “a transgender student who alleges discrimination on the basis of his or her transgender status can state a claim of sex discrimination”), with *id.* at 1051 (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”) See also U.S. Department of Justice, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (March 26, 2021).

<sup>105</sup> See e.g., *Glenn v. Brumby*, 663 F.3d 1312 1318-19 (finding transgender employee stated a Title VII sex discrimination claim because anti-trans discrimination is necessarily discrimination based on gender non-conformity) (11th Cir. 2011); *Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (affirming preliminary injunction under Title IX allowing trans student to use restroom consistent with her gender identity) (“gender nonconformity, as defined in *Smith v. City of Salem*, is an individual’s ‘fail[ure] to act and/or identify with his or her gender.... Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.”) (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that a prison guard targeting a transgender woman based on her stereotypically feminine appearance and demeanor constituted sex discrimination under Title VII and the Gender Motivated Violence Act).

<sup>106</sup> *Bostock*, 140 S. Ct. at 1742.

<sup>107</sup> *Id.* at 1739-40. The Court reasoned that it is not possible for an employer to make an employment decision based on whether an individual conforms to certain sex-based standards (e.g., of personality traits or of conduct) without sex being a but-for cause of that decision. *Id.* at 1741-42.

<sup>108</sup> *Id.* at 1741 (“[I]f changing the employee’s sex would have yielded a different choice by the employer . . . a statutory violation has occurred.”).

Although the *Bostock* decision does not mention nonbinary or intersex people,<sup>109</sup> its causal test yields the same result for them as it did for plaintiff Aimee Stephens.<sup>110</sup>

C. The final rule should make clear that nonbinary and intersex students must be afforded a meaningful opportunity to participate in school athletics under Title IX.

Applying these familiar principles, just as it is impermissible discrimination to require transgender people to use facilities, follow dress codes, or display gendered identification cards or badges in a manner that singles them out and causes harm, the same is true for nonbinary and intersex people under Title IX. Thus, existing Labor Department guidance, and state and local interpretive guidance, provide that a nonbinary student should be able to use facilities “where the student feels most comfortable regarding their gender identity.”<sup>111</sup> In some circumstances, where being forced to choose between male and female options would impose significant harms on an individual and there is no sufficient competing interest or legal exception, nondiscrimination laws may require that they be provided some alternative opportunity. For example, the current passport “X” gender option resulted, in part, from a lawsuit by a person who is nonbinary and intersex presenting an Equal Protection claim.<sup>112</sup> Similarly, just as an employer could not require all employees to be identified as “Mr.” in business communications, nor could it require all

---

<sup>109</sup> The Court does not have to mention nonbinary people specifically for the same reasons that there is no “canon of donut holes” in Title VII. *See id.* at 1747 (“[T]here [is not] any such thing as a ‘canon of donut holes,’ in which Congress’s failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.”).

<sup>110</sup> A school who targets a nonbinary student might argue that nonbinary status fails in *Bostock*’s but-for test because it would not have treated the nonbinary student differently if the student had a different sex assigned at birth. Under this view, unlike a transgender woman or man’s transgender status, being nonbinary is not tied to a person’s sex assigned at birth. However, *Bostock* makes plain that discriminating against all nonbinary students regardless of their assigned sex is no defense, and insisting that a student identify and otherwise comport with expectations for either their assigned sex or for another binary sex is no less because of sex. The fact that a school discriminates against students of more than one sex, or for factors other than sex, does not exonerate it for discriminating against any individual at least in part because of that student’s sex. The majority in *Bostock* rebutted a similar argument multiple times throughout the decision, especially when it explained that an employer who seeks to discriminate against both men and women who are gay, transgender, or gender nonconforming does not “avoid[ ] Title VII exposure,” but “doubles it”. *Bostock*, 140 S. Ct. at 1741. Thus, discrimination against nonbinary people, including gender nonconforming people who do not identify as nonbinary, is sex discrimination.

<sup>111</sup> *See, e.g.*, DEP’T OF LABOR, JOB CORPS, *IN 15-15: FAQs for Ensuring Equal Opportunity for Transgender Applicants and Students* (2015), <https://prh.jobcorps.gov/Information%20Notices/Pages/default.aspx?RootFolder=%2FInformation%20Notices%2FPRH%20Information%20Notices%2FPY%2015>; NEW YORK DIVISION OF HUMAN RIGHTS, *Guidance on Protections From Gender Identity Discrimination* (2020), <https://dhr.ny.gov/genda>; NYC HUMAN RIGHTS COMM., *Gender Identity/Gender Expression: Legal Enforcement Guidance* (2019), <https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page>.

<sup>112</sup> *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1260 (D. Colo. 2018) (finding Administrative Procedure Act violations and entering injunction), *vacated and remanded*, 958 F.3d 1014 (10th Cir. 2020) (finding APA violations and remanding to agency). While the rulings in this case did not address the merits of the Equal Protection claim, key aspects of the reasoning for the Administrative Procedure Act arbitrariness holdings would have been relevant to the constitutional claim. *Cf. also Morris v. Pompeo*, No. 19-00569, 2020 WL 6875208 at \*7 (D. Nev. Nov. 23, 2020) (finding Equal Protection implicated where a restriction on passport applicant’s gender marker selection, in effect, “only applies to transgender passport applicants”).

employees to choose to be referred to as either “Mr.” or “Ms.” where this would result in adverse action towards a nonbinary employee.<sup>113</sup>

With respect to nonbinary and intersex students, the preamble of the proposed rule currently states:

The Department believes the proposed regulation would provide an appropriate Title IX framework for analyzing a recipient’s adoption or application of sex-related criteria that limit or deny an intersex student’s eligibility to participate on a male or female team consistent with their gender identity. When applying sex-related criteria to nonbinary students, a recipient may need to determine whether the criteria do, in fact, limit or deny a nonbinary student’s eligibility to participate on a male or female team consistent with their gender identity to determine whether the proposed regulation would apply.”<sup>114</sup>

We appreciate the Department’s recognition that the sex discrimination prohibition of Title IX applies with equal force to nonbinary and intersex students, as is required by proper interpretation of the statute’s plain text. However, we urge the Department to expand on this analysis by specifying that under Title IX, nonbinary and intersex students must be afforded a meaningful opportunity to participate in school athletics. Without more meaningful and explicit language on how nonbinary and intersex student-athletes must be afforded opportunity and are protected from discrimination under Title IX, we are concerned that bad actors at the state level or in subsequent administrations may improperly attempt to exclude them.<sup>115</sup> As the Department has long recognized, students must be afforded “real, not illusory” athletic participation opportunities under 34 C.F.R. § 106.41.<sup>116</sup>

At a bare minimum, this means that in contexts where only male and female teams are offered, nonbinary students (including nonbinary students who are intersex) should be given the opportunity to participate in the manner that is most comfortable to them and causes the least harm. The Department should specify that a nonbinary student’s participation in a male or female team should not be used as a justification to misgender the student or otherwise treat them in a manner inconsistent with their gender identity. Likewise, the Department should make clear that laws and policies may not rely on impermissible sex stereotypes to determine a nonbinary or intersex student’s gender. Finally, the Department should also encourage schools to develop additional meaningful athletic participation opportunities that are not based on binary sex categories, while being mindful that schools are not permitted to force TNI students into a “third category” against their will.

---

<sup>113</sup> NYC HUMAN RIGHTS COMM., *Gender Identity/Gender Expression: Legal Enforcement Guidance* (2019), <https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page>.

<sup>114</sup> 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, 88 Fed. Reg. at 22869.

<sup>115</sup> Anti-LGBTQ advocates attempted to make similar arguments about bisexual people, arguing if they were not explicitly mentioned in *Bostock* they were not protected under the law, which the court rejected. *Bear Creek Bible Church*, 571 F. Supp. 3d at 622.

<sup>116</sup> *Biediger v. Quinipiac Univ.*, 691 F.3d 85, 93 (2d Cir. 2012) (quoting Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, OCR, U.S. DOE, to Colleagues, at 4 (Jan. 16, 1996)).

We urge the Department to make explicit in the rule’s final text that laws and policies excluding TNI students from participation in school sports that most closely aligns with their gender identity amounts to sex discrimination in violation of Title IX. At minimum, the Department should make clear in the text of the final rule that no educational interest can justify a categorical ban on TNI students’ participation. Indeed, this is already required by the text of Title IX and proper interpretation of the Department’s guidance.

## **Conclusion**

The Department’s proposed rule represents an important step toward protecting the rights of TNI students in athletics under Title IX. However, as described above, we are concerned that the proposed rule lacks sufficient clarity to prevent misinterpretation and abuse by bad actors at the local, state, or federal level given the context of current attacks on TNI youth.

In its final rule, we encourage the Department to engage with the racialized history of gender-based policing in sports described in this comment. We urge the Department to acknowledge that so-called “sex testing” regulations always rely on impermissible sex-stereotypes, invade students’ privacy, and will inevitably be disproportionately enforced against students of color. As such, they are never permissible in the context of school athletics under Title IX. The Department should likewise be sure not to leave any room for impermissible stereotypes that equal treatment of TNI students imperils fairness and safety for all students, any more than the integration of other minority groups has harmed the fabric of American society.<sup>117</sup> Thus, we respectfully request that the Department adopts a final rule that omits any suggestion that an educational interest in “fairness” or “prevention of sports-related injury” would ever substantially relate to a policy that resulted in the exclusion of a TNI athlete.

Instead, we urge the Department to vindicate the promise of Title IX by recognizing that its guarantees of equal opportunity apply fully to transgender, nonbinary, and intersex students by affirming the following core principles:

- Title IX’s bar on sex discrimination encompasses nonbinary and intersex discrimination, as well as transgender discrimination;<sup>118</sup>
- Transgender, nonbinary, and intersex students must be afforded a meaningful opportunity to participate in school athletics;
- Sex testing regulations must not be adopted or applied to student-athletes;
- Sex-related athletics criteria must not be adopted or applied in ways that disproportionately target or harm students of color, including transgender, nonbinary, and intersex students, as well as students who do not conform to racialized gender norms.

---

<sup>117</sup> 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, 88 Fed. Reg. at 22890.

<sup>118</sup> The Department has rightfully affirmed this interpretation several times in executive orders and guidance, including in the preamble of the proposed rule. However, we are concerned that the proposed rule itself is not sufficiently explicit in its text, and may be misapplied by bad actors attempting to advocate for exceptions that swallow the rule.

We look forward to continuing to work with the Department to achieve Title IX's promise of equal educational opportunities for all students. If you would like to discuss these recommendations, please contact Alexander Chen of the Harvard Law School LGBTQ+ Advocacy Clinic at [achen@law.harvard.edu](mailto:achen@law.harvard.edu). Thank you for your consideration.

Sincerely,

Transgender Legal Defense & Education Fund  
Harvard Law School LGBTQ+ Advocacy Clinic  
Athlete Ally

***Joined by:***

April Haus, Inc.  
Beyond Binary Legal  
Center for Constitutional Rights  
InterACT: Advocates for Intersex Youth  
The National Trans Bar Association  
Transathlete  
Transgender Law Center