

August 11th, 2022

The Honorable Joseph Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear President Biden:

The National Women’s Law Center and Women’s Sports Foundation, joined by 48 women’s rights and gender justice advocates, applaud your administration for releasing proposed changes to the Department of Education’s rules implementing Title IX of the Education Amendments of 1972 (“Title IX”) on June 23, which was also Title IX’s 50th anniversary (“the Title IX NPRM”).¹ By clarifying protections for LGBTQI+ and pregnant and parenting students, and ensuring that schools take meaningful and effective action to address and prevent sex-based harassment, these proposed rules are a critical step towards achieving gender equity in schools. These proposed rules, however, did not address participation in athletics, which the Department indicated it would consider in a separate rulemaking.²

We are writing to implore your administration to swiftly release a Title IX athletics rule that would ensure *all* students, including transgender, non-binary, and intersex students, can participate fully and equally in school sports. This rule should clarify that any policy governing participation should be commensurate with the level of participation with youth, non-elite level sport participation centered around inclusion, access to participation and opportunities, and the educational benefits that sports provide young athletes. This is especially critical as LGBTQI+ students face pervasive discrimination in school, including sexual and verbal harassment, violence, and excessive discipline by faculty.³ Compounding this is the barrage of vicious legislative attacks on LGBTQI+ students by state lawmakers across the country, including through recently passed state laws that ban transgender, non-binary, and intersex students from participating in sports.⁴ Data shows that such targeting of LGBTQI+ students can be deadly: these

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41571 (proposed 34 C.F.R. § 106.10) (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposed Rules], *available at* <https://federalregister.gov/d/2022-13734> (clarifying that “sex discrimination” under Title IX includes discrimination based on sexual orientation, gender identity, sex-related characteristics—including intersex traits—status as transgender or non-binary, or sex stereotypes). *See also id.* at 41571 (proposed 34 C.F.R. § 106.31(a)(2) (explaining that “adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex”).

² *Id.* at 41538.

³ GLSEN, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools* 28-30 (2020), <https://www.glsen.org/research/2019-national-school-climate-survey> (In a 2019 national survey of LGBTQI+ students, an overwhelming majority (81.0%) were verbally harassed because of their sexual orientation, gender expression, or gender identity, and more than one in three (35.1%) reported that they were verbally harassed often or frequently. Over one-third (34.2%) of LGBTQI+ students were shoved, pushed, or otherwise physically harassed because of their sexual orientation, gender expression, or gender.).

⁴ ACLU, *Legislation Affecting LGBTQ Rights Across the Country*, <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country> (last updated July 1, 2022). In addition to sports bans, numerous other anti-LGBTQI+ bills have been introduced between 2021 and 2022 banning transgender, non-binary, and intersex students from

discriminatory policies have exacerbated the high risk of depression and suicidality LGBTQI+ students already face by singling them out for mistreatment.⁵ Without regulations that clearly addresses students' rights to participate in athletics, state lawmakers will only be emboldened to go further in their quest to rob LGBTQI+ students—many of whom are young children—of their right to participate fully and equally in school sports. The Department must make it plain it will not abide targeting LGBTQI+ students. This includes, at a minimum, finalizing a Title IX athletics rule no later than the beginning of 2023, and concurrently with the pending Title IX NPRM. Students are in urgent need of protection from your administration to ensure they can benefit from Title IX's promise of equal access in school sports.

As advocates for gender equity, we are well aware of the significance of Title IX's mandate that all students must be able to access the benefits of an education free from sex discrimination. Promoting the full inclusion of all students in school sports is essential to enable them to fully access the benefits of an education. Students who play sports are more likely to graduate from high school, go to college, and achieve higher grades and scores on standardized tests.⁶ Sports participation also fosters in students self-confidence and a sense of community amongst their peers.⁷ These benefits are especially crucial for transgender, non-binary, and intersex students, as they can offer a respite from the isolation they often face at school and help alleviate the high risk of depression or suicidality they face. Further, denying transgender, non-binary, and intersex students these benefits because of who they are is impermissible sex-based discrimination under Title IX.

Ensuring that all students, including transgender, non-binary, and intersex students, can enjoy the benefits of sports is essential to achieving Title IX's promise;⁸ moreover, discriminatory and intrusive barriers to

bathrooms consistent with their gender identity, banning discussion of LGBTQI+ students' very existence in the classroom, and criminalizing educators and faculty trying to protect LGBTQI+ students' safety.

⁵ The Trevor Project, *The Trevor Project Research Brief: LGBTQ & Gender-Affirming Spaces* 3 (2020), <https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Affirming-Spaces-December-2020.pdf>. LGBTQI+ youth report high rates of poor mental health and suicidality compared to their cisgender and heterosexual peers; which is linked to a failure by schools to affirm their sexual orientation and/or gender identity. In other words, LGBTQI+ youth attending schools that prevented them from accessing spaces and facilities matching their gender identities—such as sports teams—were more likely to report attempting suicide than LGBTQI+ youth attending schools that allowed them to access these affirming spaces.

⁶ National 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>.

⁷ *Id.* at 42. See also 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) (explaining that sports participation can create social connections and a sense of community in participants, especially for youth populations, whose interest in playing sports is often born out of a desire to connect with their peers).

⁸ The efforts by state lawmakers to prevent transgender, non-binary, and intersex students from playing under the pretext of “protecting” women and girls is nothing more than an attempt to mask anti-trans sentiment, and further distracts from breaking down the many other real barriers to gender equity in school sports. These include: significant disparities in opportunities available to girls to play sports as compared to boys, with high school girls receiving over 1 million fewer opportunities to play sports than boys; disparities in opportunities available to girls of color, who have even fewer opportunities to play than their male or white peers; the second-class treatment of girls' sports teams by their schools, in that schools invest in better facilities, equipment, and travel for boys' teams; and, finally, the rampant sexual harassment and abuse of student athletes by their teammates, coaches, and team doctors. See, e.g., Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women; National Women's Law Center, *Finishing*

participation ultimately harm *all* women and girls. Indeed, allowing transgender athletes to participate in sports correlates with increased participation by all girls. CDC data shows 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.⁹ This 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. Sports bans often expressly require “sex verification” procedures,¹⁰ which subjects women and girls to a variety of humiliating, invasive, and unscientific practices for the purported purpose of determining whether they are “really” girls or women,¹¹ creating new risks for sexual abuse of young student athletes and especially harming women and girls who do not conform to stereotyped ideals about femininity,¹² whether transgender or cisgender.¹³ We urge the Department to protect students and ensure that the Title IX rule prohibits efforts by lawmakers to effectuate sports bans, and, by the same token, the idea that it is permissible to discriminate against some students because of who they are or how they look.

Last: Girls of Color and School Sports Opportunities 1 (2015), <https://nwlc.org/resource/finishing-last-girls-of-color-and-school-sports-opportunities/>; United Nations Women, *COVID-19, Women, Girls and Sport: Build Back Better* (2020),

<https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Brief-COVID-19-women-girls-and-sport-en.pdf>; Aaron Slone Jeckell et al., *The Spectrum of Hazing and Peer Sexual Abuse in Sports: A Current Perspective*, 10 *Sports Health* 558, 560 (2018),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6204631>. Notably, those who oppose trans-inclusive athletic participation policies in the name of “women’s rights” are not looking to solve these actual problems harming women and girl student athletes—only to hurt these students, spread hateful rhetoric, and score political points. ⁹ Ctr. for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth* 14-17 (2021), https://americanprogress.org/wp-content/uploads/2021/02/Fair-Play-correction2.pdf?_ga=2.1589237.597445779.1650638300-292562780.1650638300.

¹⁰ For example, Idaho passed a sports ban in 2020 which not only prevented transgender, non-binary, and intersex students from competing according to their gender identity, but included an alarming provision allowing anyone to challenge the sex of girls or women seeking to play for their school’s girls’ or women’s teams. A student whose sex was challenged would then have to shoulder the humiliating burden of “verifying” their sex in order to play. H.B. 500, 2020 Leg., 65th Sess. (Id. 2020). There is currently a temporary injunction blocking enforcement of this sports ban, but the case is still active and pending further review. *See Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), *on appeal*, No. 20-35815 WL 2189094 (9th Cir. 2022).

¹¹ Louis J. Elsas, et al., *Gender verification of female athletes*, 2 *Genetics in Medicine* 249 (2000).

¹² Black and brown women and girl athletes are disproportionately impacted by sports bans, as evidenced by the history of singling them out for racist scrutiny based on their non-conformity with white ideals of femininity. *See, e.g.*, 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”); Elizabeth Adetiba, *Caster Semenya and the cruel history of contested Black femininity*, *SB Nation* (Apr. 20, 2020), <https://www.sbnation.com/2020/4/20/21227661/caster-semenya-world-athletics-regulation-body-racism> (governing sports bodies enforce the belief that the white, cisgender woman’s body is the paradigm of “womanhood,” and anything outside of that is “manly” and “unacceptable”).

¹³ This is inconsistent with the Department’s recognition that discriminating against women and girls, transgender, non-binary, or other gender non-conforming students on the basis of their failure to conform to sex stereotypes is impermissible sex discrimination under Title IX, in addition to discriminating against intersex students on the basis of their sex characteristics. *See Proposed Rules*, 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10) (“Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes [and] sex characteristics...”).

This is an opportunity to reverse the alarming trend of lawmakers singling out LGBTQI+ students in an effort to score political points and, moreover, reject the bigoted premise that they do not deserve the same civil rights protections as their peers. In addressing athletics, the Title IX rule should do the following:

- Affirm transgender, non-binary, and intersex students' rights under Title IX to participate in sports consistent with their gender identity;
- Clarify that state sports bans against transgender, intersex, and non-binary students constitute impermissible sex-based discrimination;
- Make clear that sports bans encourage dangerous and unscientific sex verification practices, which especially impacts intersex youth and Black and brown girls;
- Clarify that Title IX preempts any state law or policy that bans transgender, non-binary, and intersex students from playing sports on their ability to play sports consistent with their gender identity; and
- Clarify that any discussion on youth, non-elite level sport participation should be centered around inclusion, access to participation and opportunities, and the educational benefits that sports provide young athletes; as such, no restrictions of any kind at this level should be permitted.

In short, the administration should make it clear to state lawmakers and decision makers that there will be consequences for effectuating sports bans and other restrictions on the ability of students to play sports simply because of their gender identity—including the potential loss of federal funding.

Despite fifty years of progress towards gender equity made under Title IX, students continue to face discrimination in school on the basis of their sex, with LGBTQI+ students facing increasing levels of targeted hate, often focused on their right to participate in sports. They need the Biden administration's full support and protection—both on and off the field. Thank you for your consideration of our call for the prompt release of an athletics rule protecting students' rights to play consistent with their gender identity. If you have any questions about this letter, please contact Auden Perino (aperino@nwlc.org) and Sarah Axelson (saxelson@WomensSportsFoundation.org).

Sincerely,

National Women's Law Center and Women's Sports Foundation, *joined by*

ADL (Anti-Defamation League)
Advocates for Youth
American Association of University Women
American Atheists
American Psychological Association
Arizona Coalition to End Sexual and Domestic Violence
Athlete Ally
Autistic People of Color Fund
Autistic Self Advocacy Network
Autistic Women & Nonbinary Network
Chicago Alliance Against Sexual Exploitation (CAASE)
End Rape On Campus

Equality Federation
Faculty Against Rape
Family Equality
Feminist Majority Foundation
Futures Without Violence
GA Coalition Against Domestic Violence
GLSEN
Healthy Teen Network
Illinois Coalition Against Sexual Assault
It's On Us
Jewish Women International (JWI)
Know Your IX, Advocates for Youth
Legal Momentum, the Women's Legal Defense and Education Fund
Maryland Network Against Domestic Violence Inc (MNADV)
Movement Advancement Project (MAP)
National Center for Lesbian Rights
National Center for Transgender Equality
National Center for Youth Law
National Coalition Against Domestic Violence
National Council of Jewish Women
National Education Association
National Organization for Women Foundation
National Women's Political Caucus
Physicians for Reproductive Health
Planned Parenthood Federation of America
Public Justice
Rocky Mountain Victim Law Center
Stop Sexual Assault in Schools
TAKE (Transgender Advocates Knowledgeable Empowering)
The Every Voice Coalition
The Inclusion Playbook
The Trevor Project
Trans Formations Project Inc.
Union for Reform Judaism
Victim Rights Law Center
YWCA USA