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**Re: Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, 88 Fed. Reg. 22860, Docket ID ED-2022-OCR-0143**

Dear Secretary Cardona and Assistant Secretary Lhamon:

The National Women's Law Center (NWLC) appreciates this opportunity to comment on the proposed regulations from the Department of Education (the Department) interpreting and implementing Title IX of the Education Amendments of 1972 (Title IX).<sup>1</sup>

**I. Introduction**

NWLC is a nonprofit organization that has worked for over 50 years—since 1972—to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year Title IX was enacted, NWLC has participated in all major Title IX cases before the Supreme Court as counsel<sup>2</sup> or amicus. NWLC is committed to eradicating all forms of sex discrimination in school, including sex-based harassment, discrimination against LGBTQI+ students, discrimination against pregnant and parenting students, and intersectional discrimination that is based on both sex and another protected characteristic, such as discrimination against girls of color and girls with disabilities. We equip students with the tools to advocate for their own Title IX rights at school, assist federal and state policymakers in enforcing Title IX and strengthening protections against sex discrimination, and litigate on behalf of students whose rights to be free from sex discrimination have been violated.

We strongly support school policies that are fully inclusive of transgender, nonbinary, and intersex<sup>3</sup> students, including in school sports. Discrimination against students on the basis of their transgender

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<sup>1</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. 22860 (proposed Apr. 13, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf> [hereinafter "Proposed Rule"].

<sup>2</sup> E.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>3</sup> "Intersex" refers to people who have naturally occurring variations in sex-linked characteristics, which may include hormones, chromosomes, or anatomy, so that the person's body does not align with binary definitions of male or female. InterAct, *What Is Intersex?* (Jan. 26, 2021), <https://interactadvocates.org/faq/>. This comment also uses "endosex" to refer to people who do not have these natural variations in their sex characteristics.

status or sex characteristics *is* sex discrimination, as underscored by many years of federal court decisions<sup>4</sup> and the Department’s June 2022 proposed Title IX rules.<sup>5</sup> Title IX’s broad mandate thus unequivocally encompasses LGBTQI+ students’ right to be protected from harassment, mistreatment, and all forms of discrimination in education that they experience simply because of who they are. Transgender, nonbinary, and intersex students must be able to fully access education as their full selves; Title IX guarantees no less.

Unfortunately, sex discrimination in school remains a pressing concern for LGBTQI+ students, with transgender students facing especially alarming rates of harassment, assault, disproportionate discipline, and other discrimination in school based on transgender status and/or perceived nonconformity with sex stereotypes. These harms have recently been exacerbated by an unprecedented wave of attacks on transgender youth’s civil rights and safety, ranging from hostile state laws and policies, including attacks on access to necessary, lifesaving healthcare, to coordinated nationwide bomb threats against hospitals that serve transgender youth.<sup>6</sup> The proliferation of attacks upon transgender youth have especially singled out and harmed transgender girls and women, attacking their rights to access sex-separated school activities and spaces, including restrooms, locker rooms, and school sports.

To that end, we appreciate that the Department is moving to provide long-needed clarity to further the enforcement of Title IX’s broad and remedial protections, including the rights of transgender, non-binary, and intersex students to play school sports. We especially appreciate that in proposing these regulations, the Department has clearly stated that categorical bans excluding transgender, non-binary, and intersex students from playing school sports consistent with their gender identity are illegal. While, if properly implemented and vigorously enforced, the proposed rule would sharply limit schools’ ability to impose anti-trans restrictions in sports, in the context of this human rights crisis, trans, nonbinary, and intersex students (“TNI students”) need additional clarity from the Department to protect them from anti-trans extremists seeking to construct and weaponize any possible ambiguities out of a bare desire to harm these young people.

In this comment, we first set out broad context regarding Title IX, its history addressing gender equity in school sports, and the escalating threats to the rights of TNI students—especially in school athletics. We then discuss the benefits of the proposed rule, as well as ways that this rule could be strengthened to ensure it fulfills Title IX’s broad mandate. Specifically, we urge the Department to clarify in the preamble that there would be exceedingly few, if any, sex-related eligibility criteria applicable to *any student* that could comply with the proposed regulation. *At a minimum*, we ask the Department to expressly prohibit, either in the preamble or final rule text, anti-trans bans or restrictions in K-12 education and in

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<sup>4</sup> See, e.g., *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7<sup>th</sup> Cir. 2017); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 564 (M.D. Pa. 2019); *A.M. v. Indianapolis Pub. Sch.*, 2022 WL 2951430 (S.D. Ind. July 26, 2022); *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020).

<sup>5</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), <https://federalregister.gov/d/2022-13734> [hereinafter “2022 Proposed Rule”].

<sup>6</sup> Anya Zoledziowski, *How 2022 Became the Year Trans Hate Went Mainstream*, VICE News (Dec. 21, 2022), <https://www.vice.com/en/article/5d383z/anti-trans-violence-2022> (“[W]e’ve seen anti-trans discourse go from ‘trans people are potentially a danger to women’s athletics somehow’ to ‘they are absolutely a danger to all children’ [said Gillian Branstetter of the ACLU] ‘manifesting policies that are seeking to... label us [trans people] as inherently obscene, and functionally erase us from public life.’ ... a number of US hospitals that offer gender-affirming care had doctors threatened with ‘execution,’ received bomb threats, and [were] forced to take information off their websites specifically because of rhetoric from LibsofTikTok’s Raichik and *Daily Wire’s* Walsh.”).

university/higher education club and intramural sports, and to explicitly state that all TNI students participating in competitive intercollegiate sports enjoy a presumptive right of inclusion. We also provide detailed recommendations where the rule could otherwise provide greater specificity and guidance, including recommending that the Department explicitly state that Title IX prohibits inherently harmful sex testing and verification practices, and that Title IX prohibits recipients from relying on unreliable sources to justify restricting or excluding TNI student athletes from school sports.

We also recommend that the Department make changes to the regulatory text itself, reflecting the positions that the Department has already taken in the preamble to the proposed rule, including: an explicit statement that Title IX disallows categorical bans in sports participation based on TNI status; an express statement that under the relevant standard that there is always a presumption of inclusion for TNI students and the burden is always on the recipient to justify any restriction;<sup>7</sup> and an express statement that a sex-based restrictions must address a well-founded and substantial concern and cannot be based on overbroad generalizations or sex-based stereotypes.

## **II. Title IX’s purpose as a broad remedial statute, its history in protecting gender equity in athletics, and current threats to transgender, non-binary, intersex students all require strong Title IX regulations.**

For over 50 years, Title IX has offered broad protections against sex discrimination in education. Title IX ensures that no one can “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” on the basis of sex,<sup>8</sup> a broad sweep that has for many decades been universally recognized to include school sports. Title IX’s broad protections against sex discrimination also unequivocally apply to LGBTQI+ students.<sup>9</sup>

After Congress adopted a statutory directive by Senator Jacob Javits in 1974 that required the Department of Health, Education, and Welfare (“HEW”) to issue Title IX regulations “with respect to intercollegiate athletic activities reasonable provisions considering that nature of particular sports,”<sup>10</sup> the agency issued regulations in 1975 that addressed gender equity in school sports. Those regulations permitted, but did not *require*, sex-separated sports teams where “selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>11</sup> And those regulations also made clear that the purpose of separate gender teams is not to facilitate “elite” competition, but rather to foster the equitable participation of women and girls in school sports in a context where they have been systematically excluded and denied such opportunities.<sup>12</sup> In other words, the regulations permitted the

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<sup>7</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996) [hereinafter “*VMI*”] (“The burden of justification [of sex-based classifications] is demanding and it rests entirely on the State.”).

<sup>8</sup> 20 U.S.C. §§ 1681 et seq.

<sup>9</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and transgender status because those forms of discrimination necessarily entail discrimination based on sex and conformity to sex stereotypes); 2022 Proposed Rule at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).

<sup>10</sup> Known as the Javits Amendments, this directive replaced the Tower Amendment, which were proposed by Senator John Tower and sought to exempt from Title IX, any sport that produced gross revenue or donations from a school. 120 Cong. Rec. 15,322-23 (May 20, 1974); S. Conf. Rep. No. 93-1026, at 4271 (1974). See also NCWGE, *Title IX Timeline* (2008), <https://www.ncwge.org/PDF/Title%20IX%20Timeline.pdf>.

<sup>11</sup> 34 C.F.R. § 106.41(b).

<sup>12</sup> Unlike the regulatory process today, in 1975 Congress had authority to decide whether agency-proposed regulations reflected the statutory intent of Title IX. Thus, following HEW’s release of the proposed rule in 1974 and during the Congressional review period that took issue broadly with Title IX affording equal opportunity in school sports, several bills and

creation of sex-separated sports to ensure that women and girls were given the resources and opportunities to develop their athleticism given the historical and ongoing denial of those opportunities in sports, and *not* in order to enforce separation based on purportedly innate differences between men and women.<sup>13</sup> The Department’s proposed rule would, for the first time, address eligibility criteria for participation in sex-separated sports for TNI students.

Before Title IX, women and girls were explicitly and as a matter of course denied opportunities to play sports, denied equal training and support, and otherwise denied the opportunities to develop athleticism that were provided to men and boys, all based on the assumption that men and boys were categorically athletically superior and naturally inclined towards physical activity and competition in a way that women and girls were not.<sup>14</sup> By requiring schools to take ongoing action to achieve gender equity in sports, Title IX has created an enormous cultural shift toward embracing women and girls’ sports and is still creating a vast array of new opportunities that sharply increase women and girls’ engagement in sports and athleticism.<sup>15</sup>

Unfortunately, the same tropes that were used to justify denying women and girls equal opportunity to sports 50 years ago, are now being used to target TNI students—and especially, to push transgender and intersex women and girls out of school sports.<sup>16</sup> Decades ago, opponents of gender equity in sports assumed women and girls were less athletic, basing their beliefs on biological determinism—a belief that certain traits are innate and natural to men and women based on their sex assigned at birth. This biological determinism advances a narrow idea of gender by not recognizing any gender identity or expression outside of the male/female binary and underlies much sex discrimination throughout society.<sup>17</sup> Today, extremists are relying on biological determinism in the context of sports to exclude

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resolutions were introduced in Congress that specifically sought to exempt revenue generating intercollegiate athletics, including NCAA sports, under Title IX. These and similar efforts to exempt or otherwise privilege competition in elite sports over students’ equal opportunities to participate were rejected. *See, e.g.,* A bill to amend Title IX of the Education Amendments of 1972, S. 2106, 94th Cong. (1975); A bill to amend title IX of the Education Amendments of 1972, H.R. 8394, 94th Cong. (1975); Concurrent resolution to disapprove certain sections of the Department of Health, Education, and Welfare regulations relating to nondiscrimination on the basis of sex in education programs and activities receiving or benefiting from Federal financial assistance applicable to athletic programs and grants, "H.R. 311, 94th Cong. (1975); Concurrent resolution disapproving certain regulations of the Department of Health, Education, and Welfare, S. 52, 94th Cong. (1975); Women’s Sports Foundation, *History of Title IX* (Aug. 13, 2019) <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>; Deborah L. Brake, *Title IX’s Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 70–74 (2023) (citing Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, in OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S. at 11 (“explaining that some supporters of sex separation emphasized the structural inequities that have deprived girls and women from fully developing their athletic talents, such that lumping girls and women into competition with male athletes would exacerbate an already unequal playing field.”).

<sup>13</sup> Deborah L. Brake, *supra* note 11, at 70–74 (“Similar to the case for women-only discussion groups, the concern was that male players might hog the playing field, refusing to fully engage with women as teammates or opponents, creating negative sport experiences that would further suppress girls’ and women’s interests and abilities.”) (citing Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, in OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S. at 23).

<sup>14</sup> *Id.* at 86 (citing Susan Cahn, *Coming on Strong: Gender and Sexuality in Twentieth Century Women’s Sport* 4 (1994)) (“Women were long protected out of sports due to beliefs about the frailty of ‘the fairer sex’ and a purported threat to women’s fertility...[and] the belief that women are naturally inferior to men in sports competition.”).

<sup>15</sup> Women’s Sports Foundation, *50 Years of Title IX: We’re Not Done Yet* 7–8 (2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf><https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf>.

<sup>16</sup> Many anti-trans bans and policies target transgender and intersex boys and girls, and nonbinary people—but throughout the comment we focus particularly on transgender girls and women due both to the intense, transmisogynistic vitriol that has been heaped on them and because of our organization’s focus on women’s and girls’ rights. “Transmisogyny” refers to the unique discrimination transgender women face due to the intersection of misogyny and anti-trans animus.

<sup>17</sup> *See* Deborah L. Brake, *supra* note 11 at 85, 88.

transgender women and girls, and are simultaneously denying the existence of transgender women and girls. They claim that the male sex is innately linked to athletic success while the female sex and athleticism are opposed—the very same misogyny and stereotypes that women and girls fought so hard against before and during Title IX’s passage. And they claim that transgender women are “biological males,” who will always outperform cisgender women and girls, and thus do not belong in women’s sports. These arguments perpetuate discriminatory and outdated gender constructs, which vindicate both anti-trans discrimination and indeed discrimination against any women and girls who challenge sex stereotypes. As Professor Deborah Brake so pointedly stated, “[t]he argument that opening girls’ sports to all athletes who identify as girls would unfairly prejudice cisgender girls sends an even more powerful message of innate biological female inferiority than sex separation from boys. The notion that even a tiny number of trans girls is enough to undermine the competitive opportunity of cisgender girls speaks volumes about how fragile their athleticism must be.”<sup>18</sup>

The reasons for providing women and girls equal access to school sports when Title IX was enacted decades ago are just as important today for ensuring that TNI students have an equal opportunity to play school sports, which means being able to play as who they are. The educational benefits of playing sports are well documented. When students participate in school sports, they experience an increase in academic achievement, attendance, and retention rates; health benefits; and the opportunity to build social skills, learn life lessons, and develop feelings of belonging amongst their peers and connectedness with the school community.<sup>19</sup> Research shows this holds true for transgender and nonbinary youth, who have higher grades, higher self-esteem, and lower rates of depression when they are allowed to play school sports.<sup>20</sup>

TNI students face high rates of sex harassment and bullying in school, which is responsible for the high health risks and other disparities that are linked to marginalization, such as poor mental health outcomes, like depression and anxiety, and reduced academic achievement, like lower grades and increased absence from school.<sup>21</sup> Black transgender and nonbinary youth experience greatly increased rates of sex-based victimization compared to both their Black, cisgender LGBQ peers and compared to white transgender or nonbinary youth—with a full 40% of Black transgender and nonbinary youth

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<sup>18</sup> *Id.* at 72–73, 92 (“This cultural understanding sets up a conflict between femininity and athleticism that Title IX has long sought to resist. Behind the sweeping anti-trans bans is the narrative that male physiology is superior across the board, at every age, in every sport, and at every level of competition.”).

<sup>19</sup> National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41, 42 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 *J. OF SPORT MANAGEMENT* 349, 349-50 (2013); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 *J. OF SCHOOL HEALTH* 397-401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 *INT’L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY* 98 (2013).

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

<sup>21</sup> See GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation’s Schools* 34 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

reporting physical threats or harm due to sexual orientation or gender identity.<sup>22</sup> In a survey of LGBTQ+ students across the country, an overwhelming majority of all students (76.1%) reported being verbally harassed because of their sexual orientation, gender identity, or perceived gender expression, and over one-third of students (31.2%) reported experiencing physical harassment on the basis of these characteristics. Students also frequently reported disproportionate discipline by faculty, with well over one third of students (40.7%) reporting being subjected to such discipline.<sup>23</sup> The same survey also showed that transgender students experienced higher rates of victimization than students of all other gender identities, with nonbinary students experiencing the second highest rates of victimization as compared to cisgender students.<sup>24</sup>

But none of the health risks and other outcomes from the high rates of discrimination and harassment TNI students face are inevitable. Sports is a way to alleviate these risks. Denying TNI students the right to play sports, and all the significant educational benefits associated with playing sports, because of their gender identity, transgender status, or sex characteristics, not only constitutes sex-based discrimination prohibited by Title IX, but deprives these students of needed benefits—benefits that could even be lifesaving.<sup>25</sup>

Despite the well-documented benefits of playing sports and Title IX’s broad mandate prohibiting sex discrimination, in recent years hostile lawmakers have displayed a horrifying tenacity in attacking TNI students’ right to play, passing laws in at least 21 states that categorically ban these students from playing sports alongside their peers.<sup>26</sup> State bans have been introduced under the guise of “protecting women’s and girls’ rights” in the absence of any evidence that transgender youth’s participation in sports has harmed anyone.<sup>27</sup> These bans do nothing to address the actual, ongoing profound gender inequities that persist in athletics;<sup>28</sup> to the contrary, they heighten the risk of sex discrimination for all

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<sup>22</sup> The Trevor Project, *Mental Health of Black Transgender and Nonbinary Young People*, (Feb. 28, 2023), <https://www.thetrevorproject.org/research-briefs/mental-health-of-black-transgender-and-nonbinary-young-people-feb-2023/> (last visited May 15, 2023).

<sup>23</sup> *The 2021 National School Climate Survey*, *supra* note 21, at 19, 34.

<sup>24</sup> *Id.* at 84. Notably, there is an absence of data about intersex students’ experiences with in-school harassment and discrimination. However, recent reporting from the Washington Post indicates that intersex students often avoid or are discouraged from participating in sports for fear of scrutiny and discrimination. See Anne Branigin, Intersex youths are also hurt by anti-trans laws, advocates say, Washington Post (July 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>.

<sup>25</sup> Among LGBTQI+ youth, transgender, nonbinary, and intersex students have elevated suicide risk. More than half (53%) of transgender and nonbinary youth seriously considered attempting suicide in the past year, compared to 45% of LGBTQ youth. The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* (2022), <https://www.thetrevorproject.org/survey-2022/>.

<sup>26</sup> Movement Advancement Project, *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 updated May 1, 2023).

<sup>27</sup> Recent data from the CDC shows that state policies that prevent transgender high school students from playing are correlated with lower participation by all high school girls between 2011 and 2019; meanwhile, participation by all girls remained unchanged in states with policies allowing transgender students to play. Ctr. for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth 14-17* (2021), <https://www.americanprogress.org/wp-content/uploads/2021/02/Fair-Play-correction2.pdf>. See also David Crary & Lindsay Whitehurst, *Lawmakers Can’t Cite Local Examples of Trans Girls in Sports*, AP (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7>.

<sup>28</sup> None of these state sports ban laws address actual gender inequities in sports. Women and girls still lack significant opportunities to play sports as compared to men and boys, with Black and brown women and girls being disproportionately denied opportunities to play; schools still prioritize funding and resourcing men’s and boys’ teams while giving women’s and girls’ teams second-class treatment; and sexual harassment and abuse of student athletes still persists. Women’s Sports

women and girls who play sports. Indeed, CDC data shows that from 2011-2019, states that enacted anti-trans sports bans also saw a *decrease* in sports participation by all girls.<sup>29</sup>

Moreover, restrictions on TNI students' ability to play threaten to sweep up any girl or woman who does not conform to white-centric stereotypes of femininity.<sup>30</sup> Such restrictions can dangerously allow anyone to question whether any woman or girl is actually a woman or a girl for purposes of playing sports.<sup>31</sup> We know from the history of international competitive athletics that medicalized, pseudoscientific "sex verification" practices have resulted in widespread abuses against Black and brown women athletes in particular,<sup>32</sup> including medical abuse, leaks of private medical information, and harassment campaigns featuring racist caricatures<sup>33</sup>—all causing serious damage to the targeted women and benefitting nobody. These reasons are central to NWLC's conclusion that the Department must ensure that Title IX can never be weaponized to reinforce sex-based stereotypes, including by excluding students from sex-separated sports teams just because they are transgender, non-binary, or intersex. All girls and women deserve the opportunity to learn without harassment, invasions of privacy, or having their access to educational spaces conditioned on harmful and inappropriate "sex verification" requirements.

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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](https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women); Nat'l Women's Law Center, *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), <https://nwlc.org/resources/finishing-last>; Dean Golembeski, *Gender Equality Remains Elusive in College Sports*, BEST COLLEGES (Nov. 10, 2021), <https://www.bestcolleges.com/news/2021/07/01/gender-equality-remains-elusive-in-college-sports/>.

<sup>29</sup> Ctr. for American Progress, *supra* note 27, at 14–17.

<sup>30</sup> Human Rights Watch, *"They're Chasing Us Away from Sport": Human Rights Violations in Sex Testing of Elite Woman Athletes* (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elitewomen>.

<sup>31</sup> Marjorie Cortez, *After a girl beat their daughters in sports, Utah parents triggered investigation into whether she was transgender*, DESERT NEWS (Aug. 17, 2022), <https://www.deseret.com/utah/2022/8/17/23310668/school-investigates-female-athlete-transgender-complaint> (explaining that Utah established a commission to implement its anti-trans sports ban, which investigated whether a cisgender high school girl was "truly a girl" because of complaints from the school community that she didn't "look feminine enough" and was excelling in her sport).

<sup>32</sup> 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"); Anna North, *I Am a Woman and I Am Fast: What Caster Semenya's Story Says about Gender and Race In Sports*, Vox (May 3, 2019), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>; Dawn Ennis, *IAAF Called Caster Semenya Biologically Male*, OUTSPORTS (June 19, 2019), <https://www.outsports.com/2019/6/19/18691210/iaaf-caster-semenya-biologically-male-testosterone-olympics-southafrica-athlete> (outlining how Caster Semenya, a Black woman and a sprinter, was forced to submit to a battery of invasive medical tests because of her speed and success as an Olympic track athlete, for the purpose of determining whether she was "feminine enough" to continue competing with women); See Human Rights Watch, *supra* note 30 (explaining the scrutiny Dutee Chand, an Indian woman sprinter, faced from fellow athletes who accused her "stride and musculature" of being too "masculine," which resulted in her being ordered by an international sporting body to undergo invasive medical exams).

<sup>33</sup> Milton Kent et al., *Beating Opponents, Battling Belittlement: How African-American Female Athletes Use Community to Navigate Negative Images*, Sch. of Glob. Journalism & Commc'ns, Morgan State Univ., 9, <https://www.documentcloud.org/documents/4528427-The-Image-of-Black-Women-in-Sports2.html#document/> (last visited May 12, 2023). See also Yelena Dzhanova, *The Olympics has a race problem. Athletes everywhere are calling out the sporting body for a history of banning Black women.*, INSIDER (July 13, 2021), <https://www.businessinsider.com/the-olympics-history-of-racism-sexism-black-women-2021-7> ("Since the 1930s, sports commentators have described Black women in racist terms, referring to them as "dancing monkey"...[and] [i]n the 1950s and 1960s, renowned Black sprinter Wilma Rudolph was called the "Black Gazelle"...adding to the commentary that isolated her femaleness and Blackness.").

At their core, anti-trans sports bans and restrictions function to codify sexist stereotypes of how women and girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity, whether transgender or cisgender. This threatens all women and girls' safety and athletic opportunities. Thus, strong Title IX protections are thus a key part of solving this crisis, including by ensuring that it protects the rights of *all* students to play school sports, free from exclusion or restrictions based on who they are.

### **III. The demanding standard set out in the Department's Title IX rule would provide important and needed protections for transgender, nonbinary, and intersex students.**

We appreciate the Department's continued affirmation that the logic of *Bostock* applies to Title IX and prohibits policies and practices targeting transgender students for discrimination based on their transgender status. We also appreciate the Department's broad and continued recognition, both in previous guidance<sup>34</sup> and its June 2022 proposed regulation,<sup>35</sup> that Title IX has always protected the rights of LGBTQI+ students.

This proposed rule would, for the first time, specifically restrict recipient schools' ability to exclude TNI students from participating in school sports programs consistent with their gender identity. It accomplishes this by establishing a stringent standard that any restrictions on TNI students' ability to play must meet. Under the proposed rule, any such restriction must be substantially related to an important educational interest. As the Supreme Court has stated in describing the parallel standard of review for sex classifications under the Equal Protection Clause, "The burden of justification is demanding and it rests entirely on the State,"<sup>36</sup> or, in this context, the recipient. Indeed, the proposed rule further strengthens that demanding standard, requiring that any such restriction be tailored by schools to the particular age, grade level, sport, and competition level affected. The proposed rule further builds on the heightened scrutiny standard by requiring schools to minimize the harm to students whose opportunity to play sports consistent with their gender identity would be limited or denied by such a restriction.

As the Department recognizes in the preamble to the proposed rule, application of this standard would indisputably invalidate all state laws and policies that categorically bar TNI students from school sports. These categorical bans have caused and continue to cause terrible harms, especially to transgender girls and women, and to Black and brown girls and women given how transmisogyny<sup>37</sup> echoes and reinforces white centric standards of femininity. At their core, anti-trans sports bans and restrictions codify sexist

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<sup>34</sup> See, e.g., U.S. Dep't of Justice & U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools* (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>; U.S. Dep't of Educ., Office of Civil Rights, *Supporting Intersex Students* (Oct. 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>; U.S. Dep't of Justice & U.S. Dep't of Educ., *Dear Colleague Letter on Transgender Students* (May 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>35</sup> 2022 Proposed Rule at 41571 (proposed 34 C.F.R. § 106.10) (explaining that "sex discrimination" under Title IX includes discrimination based on gender identity, sex 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) ("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").

<sup>36</sup> *VMI*, 518 U.S. 515, 533 (1996).

<sup>37</sup> As mentioned above, transmisogyny refers to the unique discrimination transgender women face due to the intersection of misogyny and anti-trans animus. See also Talia Lavin, "Why Transphobia is at the Heart of the White Power Movement," *The Nation*, Aug. 18, 2021, available at <https://www.thenation.com/article/society/transphobia-white-supremacy/>.



stereotypes of how women and girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity, whether transgender or cisgender. Eliminating these bans is essential to ending sex discrimination against *all* women and girls. The proposed rule's preemption of categorical anti-trans bans not only would end those harms, it would also send a much-needed message to TNI youth that the federal government will not tolerate hostile actors' efforts to target them for discrimination and second-class status in school.

**IV. The Department should make additions to the rule text itself and to the preamble to the final rule further explaining the demanding nature of the rule's standard.**

The standard set out in the rule, when properly applied and vigorously enforced, would ensure that the vast majority of TNI youth are protected in their rights to access and play sports. However, the final rule and preamble would benefit from greater specificity describing the high burden its standard imposes, and we make several suggestions below to that end. We hope that the Department will take this opportunity to issue a strong, inclusive rule with these added clarifications to avoid the harm of hostile actors seeking to construct and weaponize ambiguity in the rule's protections, to the detriment of vulnerable and marginalized youth.

**A. The Department should state in the final rule that categorical bans targeting transgender, non-binary, and intersex student athletes would violate Title IX.**

As stated above, we commend the Department for clarifying that categorical bans against the participation of TNI students consistent with their gender identity enacted in at least 21 states violate Title IX. However, to ensure there is strong implementation of this protection, we urge the Department to include language in the final rule itself that categorical bans are prohibited under Title IX.

Reiterating this significant protection in the rule text itself would ensure that this protection is clear and accessible to LGBTQI+ students and their families, who will be reassured that they have strong civil rights protections during this time of intense threats and attacks on their rights and wellbeing. Such textual clarification would also ensure that every recipient who sees the regulatory text will be on clear notice of its obligations.

**B. The Department must state in the rule text that there is a presumption of inclusion for transgender, nonbinary, and intersex students to play sports consistent with their gender identity, and further explicate the demanding nature of the rule's standard.**

Under the standard set out in the proposed rule, the burden would always be on the recipient to justify any sex-based restriction that limits TNI students' ability to play.<sup>38</sup> Because of the importance of this protection, and for the same reasons the prohibition on categorical bans should be in the rule text itself, we strongly urge the Department to state in the text of the rule itself that there is always a presumption of inclusion of TNI students in school sport without restriction on the basis of sex, and the recipient always shoulders a demanding burden to justify any restriction. This is consistent with the framework under the Equal Protection Clause of the U.S. Constitution, which presumes sex-based classifications are

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<sup>38</sup> *VMI*, 518 U.S. at 533 ("The burden of justification [of sex-based classifications] is demanding and it rests entirely on the State.") (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). See also Proposed Rule at 22872 ("As with the single-sex classes regulation, this proposed regulation is informed by case law interpreting the Equal Protection Clause, which requires public schools to demonstrate that any sex-based classification they seek to impose is substantially related to the achievement of an important governmental objective.") (citing *VMI*, 518 U.S. at 532–33).

unlawful unless the government actor relying on those classifications can prove they meet a stringent test similar to the proposed rule's standard: that they serve an important governmental objective and are substantially related to the achievement of those objectives.<sup>39</sup> Students should never have to shoulder the burden of demonstrating that they deserve the same educational opportunities as their peers under Title IX, and any such required showing would be deeply inconsistent with Title IX's purpose, history, and enforcement framework.

Moreover, while the proposed Title IX rule already prohibits schools from "rely[ing] on overly broad generalizations about the talents, capacities, or preferences of males and female students,"<sup>40</sup> to ensure that this important limitation to any sex-based eligibility criteria and protection is clear and accessible to students, families, and schools, the text of the rule itself should include this cabining of the rule's standard. The Department should make clear in the rule text that sex-based criteria cannot be based on overbroad generalizations and sex-based stereotypes, and that such criteria must address a well-founded and substantial concern about equal access to school sports. Below, in Section IV.E, this comment describes in further detail the additional clarity that the Department should provide about the types of evidence that schools can or cannot rely on to comply with these requirements.

**C. The Department should state that schools must allow transgender, non-binary, and intersex students in K-12 and college club and intramural sports teams to play consistent with their gender identity.**

Because of the demanding nature of the standard in the proposed rule, which enhances the heightened scrutiny test for sex classifications under the Equal Protection Clause, properly applied the rule will protect all or nearly all students' rights to participate in school sports consistent with their gender identity. We urge the Department to state as much in issuing the final rule. At a minimum, the Department should specifically state, whether in the text of the final rule itself or the preamble, that K-12 students,<sup>41</sup> and students participating in college club or intramural sports, have the right to play school sports consistent with their gender identity and free from sex discrimination, and that any sex-

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<sup>39</sup> *VMI*, 518 U.S. at 533. Consistent with our recommendation above, the Department should clarify that this presumption cannot ever be overcome in K-12 and college club and intramural sports. In the context of competitive intercollegiate sports, student athletes should benefit from a strong presumption of inclusion with the burden being on the recipient to demonstrate why exclusion is justified in the specific sport and level of competition at issue, and any sex-based criteria must minimize harm to TNI students; *see also* the Department's framing that "to satisfy the substantial relation requirement, a recipient [school] would not be permitted to rely on false assumptions about transgender students." Proposed Rule at 22874 (emphasis added).

<sup>40</sup> Proposed Rule at 22873.

<sup>41</sup> While the Department states in the preamble that "it would be particularly difficult for a recipient to comply with the proposed regulation by excluding students immediately following elementary school from participating on male or female teams consistent with their gender identity," it would be particularly egregious for the Department to not explicitly prohibit restrictions at middle schools. We are concerned that this language could be seen as green-lighting the pernicious myths anti-trans advocates have pressed to justify excluding trans children by arguing that, once they go through puberty, they become dangerous to cisgender students (see our discussion below of risk of injury/competitive fairness below in Section D). It is egregious to keep *any* students out of sports, but especially so when they are so young, and any suggestion that inclusion interests at middle school are less strong than in elementary school reinforces overbroad, transphobic and sexist stereotypes about TNI students. Moreover, the Department correctly noted that the emphasis on participation beyond elementary school is clear both from the fact that middle school sports are not regulated at the state level in half the country, and also from the explicit emphasis placed on participation (and its attendant benefits of wellbeing, teamwork, and fitness) in the handful of states associations that do address middle grades. Proposed Rule at 22875. We reiterate, however, our recommendation to prohibit any restrictions in the K-12 and college club and intramural levels, as the approach most consistent with rejecting these stereotypes.

related eligibility criteria that would exclude or limit them from playing based on transgender status and/or intersex status would not be related to an important educational interest. (See Section IV.D *infra*, for additional discussion regarding the appropriate application of this test.) Any such restrictions clearly fail the test proposed by the Department because school sports at these levels are designed to prioritize the social, mental, and physical health benefits of sports participation. In these settings, excluding students from receiving the participation-based benefits from playing sports, such as academic, social, emotional, and physical health benefits, cannot be substantially related to an important educational interest, and the Department should so state.<sup>42</sup>

**D. The Department must most fully explain the demanding nature of the test it has set forth for restrictions that purportedly seek to prevent injury or ensure fairness in competition.**

In general, sex-based classifications that limit or prevent TNI students from playing school sports rely on overbroad generalizations and sex-based stereotypes that are prohibited by the proposed rule. We are concerned that the Department's preamble to the proposed rule nevertheless suggests that restrictions on the ability of TNI students to play may be permissible if the restrictions are forwarding educational interests in preventing injury or ensuring fairness in competition. It is of course the case that preventing injury and promoting fairness are important educational interests. However, we are deeply concerned that recipients may read the Department's preamble to suggest that recitation of such interests is sufficient to justify restrictions, when in fact the requirement that any such restriction on transgender students' ability to play be *substantially related* to achieving these interests would doom such restrictions in most, if not all, cases. We urge the Department to take steps to make this clear when promulgating the final rule.

These steps include adding a clear statement in the preamble that the Department is *not* promulgating this rule based on any assumption that TNI students have, in fact, displayed any competitive athletic advantages compared to their cisgender, endosex peers. Similarly, we urge the Department to clearly state in the preamble that it is not promulgating this rule based on any presumption that TNI students pose anyone a greater-than-average risk of injury when they participate in sports consistent with their gender identity. Such assumptions and presumptions would represent the type of overbroad generalizations and inaccurate stereotypes that the proposed rule rightly rejects as the basis for limitations on TNI students' ability to play.<sup>43</sup>

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<sup>42</sup> Moreover, neither competition for athletic scholarships nor university recruitment of student athletes requires a different conclusion in the high school context. First, the vast majority of students who play high school sports do not seek to play elite competitive sports in college (not to mention that 98% of NCAA student athletes do not continue to the Olympic level). See Joanna Hoffman, *Athlete Ally and Chris Mosier Respond to New NCAA Trans Inclusion Policy*, ATHLETE ALLY (Jan. 20, 2022), <https://www.athleteally.org/athlete-ally-mosier-respond-ncaa-new-trans-policy>. Second, there continues to be a widespread misconception that high school sports teams are a central focus for the very small number of youth who are seeking to enter elite athletic competitions, including pathways to professional sports. This is generally untrue—young people seeking entry to elite or professional sports almost always participate in invitational, travel, and similar youth leagues *outside* of high school, all of which maintain their own eligibility requirements. See Eddie Matz, *Are youth sports ruining childhoods*, ESPN MAGAZINE (Feb. 21, 2014) [https://www.espn.com/espn/story/\\_/id/10496416/are-youth-sports-ruining-kids-childhoods-espn-magazine](https://www.espn.com/espn/story/_/id/10496416/are-youth-sports-ruining-kids-childhoods-espn-magazine). Third, an intense focus on IHE scholarships and recruitment has been weaponized in the context of creating policies designed to harm TNI student athletes who are *not* involved in elite IHE sports, with many policymakers expressing a fixation on the successes of one or a few highly competitive university athletes when crafting policies to exclude TNI students as young as age 5. It is thus important for the Department to recognize these troubling dynamics and avoid reinforcing these misconceptions and misleading narratives in future interpretations of Title IX.

<sup>43</sup> Proposed Rule at 22873–74.

The premise that excluding or restricting participation by TNI student athletes will often further the interests of “fairness” or “safety” invokes false and harmful transmisogynistic myths—specifically, that transgender and intersex women and girls are categorically bigger, faster, and stronger and pose an inherent threat to the physical safety and athletic success of their peers. They thus rely on biological determinist notions that to be a woman or a girl means to fit within a narrowly defined box. Policies rooted in these myths cannot survive the scrutiny required by the proposed rule.<sup>44</sup>

Given that, and consistent with Supreme Court precedent under the Equal Protection Clause, the proposed rule would forbid restrictions that rely on overbroad sex-based generalizations “about . . . different talents [or] capacities,”<sup>45</sup> we urge the Department to clarify that any sex-based restriction on TNI students playing sports consistent with their gender identity is relying on an extremely poor and inexact proxy for injury risk and thus not substantially related to the important interest in avoiding injury. Such a restriction will inevitably be both overinclusive (sweeping in transgender students who do not have any physical characteristics that create a particular risk of injury) and underinclusive (failing to regulate cisgender students who do have such physical characteristics).<sup>46</sup> Ultimately, some risk of injury is inherent in playing sports, but precisely because of this lack of close fit and substantial relationship between a sex-based restriction and preventing injury, there is no reliable evidence demonstrating that transgender women and girls specifically pose a risk of injury to other women and girls.

Schools have a multitude of nondiscriminatory ways to minimize risk of injury in sports that are, in fact, substantially related to achieving this interest, including adequate and effective coaching resources, training for student athletes on best safety practices and compliance with rules in their particular sport, incorporating protective gear into uniforms as applicable, and maintenance and inspection of equipment and facilities.<sup>47</sup> The availability of alternative, more effective ways to minimize the risk of injury in sports suggests that any assertion that sex-related criteria limiting TNI students’ ability to play is necessary to prevent injury is nothing more than a pretext for animus against TNI students.<sup>48</sup> Indeed, “risk of injury in sports” is often used by extremists as a dog-whistle term to indicate their transphobic

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<sup>44</sup> *Id.*

<sup>45</sup> *VMI*, 518 U.S. 515, 533 (1996).

<sup>46</sup> Using injury prevention to justify banning transgender women and girls from playing sports consistent with their gender identity assumes that all transgender women and girls are especially tall, fast, or strong. However, this assumption will also harm the many transgender athletes who do not possess these physical traits, as is often the case given that body diversity is a natural part of sports and that athletes come in all shapes and sizes.

<sup>47</sup> One such way a recipient can minimize risk of injury without preventing transgender, nonbinary, and intersex students from playing is to ensure student athletes are effectively coached on the rules of each sport. For example, in rugby, a contact sport, players must be trained to tackle their opponents properly to comply with the rules of the sport and play safely. Both USA Rugby and World Rugby—the national and international governing bodies for the sport, respectively—instruct that players must tackle using their arms and shoulders, aiming to make contact with their opponent’s hips to safely complete the tackle and reduce the risk of injury to the player and their opponent. Effective coaching on the rules of rugby can help players avoid dangerous tackling techniques, such as “high tackling,” which involves tackling above their opponents’ shoulders, and, as explained by both USA Rugby and World Rugby, players can be suspended for, as it substantially increases the risk of injury to all players. See USA Rugby, *Rugby 101*, <https://usa.rugby/rugby101>; World Rugby, *Laws by Number: Foul Play*, <https://www.world.rugby/the-game/laws/law/9>.

<sup>48</sup> Proposed Rule at 22874.

belief that transgender and intersex women aren't truly women, but "biological men." It would be deeply harmful for the federal government to reiterate this worldview, even implicitly.<sup>49</sup>

For the same reasons, recipients will also rarely, if ever, be able to overcome the presumption of inclusion when relying on competitive fairness as an interest in order to prevent TNI students from playing consistent with their gender identity, and the Department should explain this. Here too, denying TNI students the ability to play based on generalizations about their abilities would be inconsistent with the Supreme Court's interpretation of the Equal Protection Clause prohibiting state actors from relying on overbroad generalizations to support sex-based classifications.<sup>50</sup>

Fairness in sports has *never* been about equalizing all physiological differences among athletes. In fact, body diversity is an inherent part of sports, and there are numerous physiological differences that impact athletic ability<sup>51</sup> that, unlike transgender status or sex characteristics, are not subject to scrutiny when it comes to determining athletes' eligibility to play. When some women are not allowed to play women's sports because they fall outside stereotyped ideals of what women's bodies should look like, this contravenes Title IX's purpose and constitutes sex discrimination.<sup>52</sup>

Additionally, there are numerous sources of competitive advantage that are not policed under a mandate of fairness and that contribute to inequities in athletic success. Socioeconomic factors, such as the ability to afford and access quality equipment, coaching, and nutrition, in addition to having enough time to train are hugely significant in contributing to athletic success—yet these factors are not scrutinized or written into team eligibility policies.<sup>53</sup> Any of these, however, would be more substantially related to the interest in competitive fairness than TNI status.

If the Department does not affirmatively state that recipients will rarely, if ever, be able to overcome the presumption of inclusion when relying on competitive fairness or injury prevention as an interest to prevent TNI students from playing consistent with their gender identity, then we urge the Department to consider remaining silent and not identifying in the final rule or preamble any particular educational interest, including competitive fairness or injury prevention, as one that recipients might rely on in seeking to meet the rule's stringent standard. The government has no obligation to offer up arguments to those seeking to impose sex-based classifications preventing TNI students from playing sports. The need for the Department to consider silence on these points is especially urgent since hostile politicians and advocates have admitted that policies targeting transgender youth, specifically anti-trans school

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<sup>49</sup> Moreover, if the Department were to finalize this rule and preamble as proposed, legitimizing reliance upon an interest in injury prevention (or fairness) as a basis for sex-based criteria to exclude students from sports teams consistent with their gender identities could have unforeseen consequences. For example, it could be cited as a rationale for policies that exclude all of the largest or heaviest women and girls, both cisgender and transgender, from playing sports with their peers—if, say a school believed that all girls above the 95<sup>th</sup> percentile in height or weight presented a high risk of injury to their peers in school sports teams.

<sup>50</sup> *VMI*, 518 U.S. at 533.

<sup>51</sup> Deborah L. Brake, *supra* note 11, at 91 (noting that there are over 200 genetic differences other than sex that affect athletic ability, including "height, blood flow, muscle mass, pain threshold, and respiratory and cardiac functions") (citing Joanna L. Grossman & Saraswati Rathod, *Trashing the Playing Field: State Legislators Misguided Move to Ban Transgender Women and Girls from Competing in Women's Sports*, JUSTICIA: VERDICT (Apr. 27, 2021), <https://perma.cc/V6HB-J3LH>).

<sup>52</sup> Athletes come in all shapes and sizes. For example, gymnast Simone Biles' height of 4'8" and basketball player Brittney Griner's height of 6'9" are celebrated and seen as positive factors in their athletic success—as they should be.

<sup>53</sup> Canadian Center for Ethics in Sports, *Transgender Women Athletes and Elite Sports: A Scientific Review*, 6 (2022), [https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-ascientificreview-executivesummary-e\\_0.pdf](https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-ascientificreview-executivesummary-e_0.pdf).

sports bans followed by bans on gender affirming care for younger people,<sup>54</sup> were the first step in a nationwide strategy to "eradicate" all transgender people,<sup>55</sup> create broad avenues for government enforcement of sex stereotypes, and reduce legal protections for the LGBTQI+ community in all areas of life.<sup>56</sup> Therefore, it is very likely that such extremists will be eager to exploit any arguments suggested by the Department to seek to justify anti-trans sports bans.

**E. The Department should prohibit recipients from relying on misleading and unreliable forms of "evidence" targeting TNI student athletes.**

In its preamble to the proposed rule, the Department has appropriately noted that the proposed rule would not allow sex-based restrictions based on animus or a desire to single out students for disapproval or harm.<sup>57</sup> It has also, as described above, noted that overbroad generalizations and false assumptions cannot support such restrictions.<sup>58</sup> In releasing its final rule, the Department should build on this guidance and explicitly note that recipients cannot rely on baseless and unscientific "evidence" of the type hostile actors have consistently leveraged to enact and promote anti-trans restrictions.

Specifically, the preamble should explicitly state that the following showings are insufficient to show a substantial relationship with an important educational objective:

1. Anecdotal examples of one or a few TNI students succeeding in competition. TNI students' right to participate in sports cannot be contingent on them never winning. The mere fact that a TNI student has succeeded is not a sufficient basis for restrictions on future TNI students' ability to play. Opportunities for athletic success do not exist in opposition with prioritizing the ability of students to play—because Title IX is not concerned with a specific student's ability to win, but the ability of all students to grow, play, and receive the same education benefit of sport as the rest of their peers.
2. Information from elite or professional sports to justify restrictions on substantially different age or grade levels, or competition settings. For example, a recipient may not regulate high school sports by relying on information from competitive intercollegiate sports. The preamble to the proposed rule indicates as much, noting that "students of varying grades or education levels are not necessarily similarly situated with respect to the purposes of team participation, the harms

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<sup>54</sup> Erin Reed, *It Was Never About Sports: the strategy of the anti-trans right*, ERIN IN THE MORNING (Jan. 11, 2021), <https://www.erininthemorning.com/p/it-was-never-about-sports-the-strategy> ("To the hypothetical time traveler who jumped from 2020 to 2023, it may seem that the anti-trans panic of the last few years came out of nowhere. To the people planning the attack, though, it was always meant to happen this way. The intent was to start with sports in order to shift the Overton window to the elimination of all transgender rights in America."). See also Sarah Murray, *Republicans build momentum as they drive anti-LGBTQ legislation nationwide*, CNN (Apr. 22, 2022), <https://www.wral.com/republicans-build-momentum-as-they-drive-anti-lgbtq-legislation-nationwide/20247265/> (quoting hate group leader Terry Schilling, explaining that "the women's sports issue was really the beginning point... because what it did was, it got opponents of the LGBT movement comfortable with talking about transgender issues.").

<sup>55</sup> Alex Cooper, *CPAC Speaker Michael Knowles: 'Transgenderism Must Be Eradicated'*, THE ADVOCATE (Mar. 4, 2023), <https://www.advocate.com/media/cpac-transgenderism-eradicated>.

<sup>56</sup> Madison Pauly, *Inside the Secret Working Group that Helped Push Anti-Trans Laws Across the County*, MOTHER JONES (Mar. 8, 2023), <https://www.motherjones.com/politics/2023/03/anti-trans-transgender-health-care-ban-legislation-bill-minors-children-lgbtq/> (detailing leaked collaboration messages by national organizations working to harm LGBTQI+ people choosing to prioritize eliminating all gender affirming healthcare, starting with children, "because that's 'where the consensus is.'" The coalition is dominated by hate groups who have worked to enact severe human rights abuses against LGBTQI+ people such as forced sterilization and conversion therapy.).

<sup>57</sup> Proposed Rule at 22872.

<sup>58</sup> *Id.* at 22873–74.

resulting from exclusion from participation, their athletic skills development, other developmental factors, or their legal status as a minor or adult,”<sup>59</sup> but the preamble to the final rule should specifically reject the notion that evidence from one context can justify restrictions in a substantially different context.

3. Analysis that assumes research or studies of cisgender men, examining the relationship between men’s physiological factors and athletic success, are applicable to transgender and intersex women and girls to support restrictions on their ability to play.<sup>60</sup> Similarly, research or studies regarding the bodies and capabilities of cisgender women are irrelevant to crafting participation policies that govern transgender and intersex men and boys. The Department indicated as much in its preamble to the proposed rule and should reiterate this in issuing the final rule.<sup>61</sup>

Finally, the preamble must make it extremely clear that the rule’s stringent test mandates a fact-specific analysis outlining the need for the restriction that is based on the specific age, sport, and competition level, and why such restriction overcomes the strong presumption of inclusion.

**V. The Department should provide more specificity on the proposed rule’s requirement that sex-based criteria minimize harm, specifically as it applies to sex-verification procedures and documentation requirements.**

We strongly support the proposed rule’s requirement that a sex-related restriction on TNI students’ ability to play consistent with their gender identity must not only be substantially related to an important educational objective, but also be designed to minimize harm to affected students. As explained by the Department, this harm minimization requirement prohibits recipients from adopting sex-related criteria if the recipient “can reasonably adopt or apply alternative criteria that would be a less harmful means of achieving the recipient’s important educational objective.”<sup>62</sup> We agree that Title IX does not permit imposition of such a requirement when a less harmful one would meet the recipient’s objectives and urge the Department to further specify what follows from this important principle.

**A. The final rule should prohibit sex testing and verification practices, which inherently cause harm because of their invasive and traumatizing nature.**

We strongly urge the Department to specify that Title IX prohibits recipients from imposing sex verification practices given that such practices pose significant harm to impacted students. It is critical that the Department address the troubling proliferation of anti-trans athletics sex verification practices being threatened or imposed by hostile actors, up to and including genital examinations, hormonal and chromosomal testing, burdensome documentation requirements targeting some of the most marginalized students, and even surgical requirements—all for the purported purpose of “proving” whether a student is truly a woman or a girl to play school sports. These practices are fundamentally at odds with the proposed rule’s harm minimization requirement, as they traumatize and stigmatize students, in addition to violating students’ bodily autonomy and privacy rights.

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<sup>59</sup> *Id.* at 22874.

<sup>60</sup> Canadian Center for Ethics in Sports *supra* note 53, at 1.

<sup>61</sup> Proposed Rule at 22873 (“As courts have noted, for example, it would not be reasonable to assume that all transgender girls and women are similarly situated in their physical abilities to cisgender boys and men.”).

<sup>62</sup> *Id.* at 22877.

Sex verification practices fundamentally encourage sex discrimination, as they impose traumatizing and stigmatizing procedures on a discriminatory and arbitrary basis, which often result in the policing of any woman or girl who falls outside sexist, stereotyped ideals of femininity. For example, journalists recently exposed a Utah commission secretly investigating whether a cisgender girl was “a real girl” based on complaints that she didn’t look “feminine enough” and was performing well in her sport, in an effort to enforce the state’s anti-trans sports ban.<sup>63</sup>

Sex verification is also disproportionately enforced against Black and brown women and girls, whose bodies have historically been subject to excessive scrutiny for nonconformity with white-centric ideals of femininity. For example, throughout her career, Serena Williams has endured racist and sexist scrutiny of her body, including comments alleging that “[s]he is built like a man” or that “[she] was born a guy” because of “[her] arms, or because [she’s] strong.”<sup>64</sup> Another Black woman, Caster Semenya, was forced to submit to a battery of invasive medical tests because of her speed and success as an Olympic track athlete, for the purpose of determining whether she was “feminine enough” to continue competing with women.<sup>65</sup> And, when Dutee Chand, an Indian woman sprinter, faced scrutiny from fellow athletes for her “stride and musculature” being too “masculine,” she was ordered by an international sporting body to undergo invasive medical exams.<sup>66</sup>

The federal government cannot endorse a scheme that uses Title IX to empower hostile actors to policewomen’s and girls’ bodies on the basis that they excel at sports, have short hair, are especially muscular, or that for any other reason these women and girls do not conform to sex-based stereotypes and expectations of woman- or girlhood. Sex verification procedures reify the dangerous myth that to be a girl or women, a student must be able to demonstrate biological purity,<sup>67</sup> which requires proving that their gender aligns with their sex assigned at birth, or that their sex characteristics fit neatly into binary categories of “male” or “female.” This makes it clear that there is no way to single out TNI students’ bodies for scrutiny and regulation without recreating deeply harmful sex and race stereotypes and giving them legal imprimatur.

To justify reliance on sex verification practices, anti-trans advocates often list specific factors that supposedly confer athletic advantages upon transgender women, such as lung capacity, arm length, and muscle surface area—but if a university creates a policy saying that any student with an arm span over 5’ 8” is ineligible for the girls swimming team, they will inevitably exclude some cisgender women who happen to have greater height and arm reach when attempting to exclude only trans women, and vice versa. The same holds true for every physiological metric, including hormone levels and chromosomes. As a factual matter, schools cannot single out the body of a transgender student, versus a cisgender student, for scrutiny or “medicalized” requirements without enforcing impermissible sex stereotypes.

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<sup>63</sup> Marjorie Cortez, *supra* note 31.

<sup>64</sup> Gina Vivinetto, *Serena Williams on How She Struggles with Cruel Remarks About Her Body*, TODAY (Sept. 7, 2017), <https://www.today.com/style/serena-williams-body-shamers-i-don-t-let-anything-break-t116063>; Jason Pham, *Serena Williams Shut Down Body Critics: ‘I Am Strong and Muscular — and Beautiful,’* BUSINESS INSIDER (May 31, 2018), <https://www.businessinsider.com/serena-williams-shut-down-body-critics-who-said-she-was-born-a-guy-2018-5>.

<sup>65</sup> Anna North, *supra* note 32; Dawn Ennis, *supra* note 32.

<sup>66</sup> See Human Rights Watch, *supra* note 30. That Chand was later successful in her challenge of the regulations prohibiting her from competing due to her higher natural levels of testosterone at the Court of Arbitration for Sport does not take away from the intense humiliation and stigma to which she was subjected. *Id.*

<sup>67</sup> Deborah L. Brake, *supra* note 11, at 48.



For these reasons, permitting sex verification as a condition of participating on sex-separated teams is directly contrary to Title IX's purpose of achieving gender equity in education. It is thus imperative for the Department to address this serious harm by explicitly stating that sex verification is *never* the least harmful way to advance an important educational objective, and that such practices are thus expressly prohibited by Title IX.

**B. The Department should also identify other sex-related eligibility requirements that cause impermissible harms, given the availability of less harmful alternatives.**

In addition to prohibiting required examinations for sex verification practices, the Department should also provide examples in the preamble of other harmful restrictions on TNI students which are categorically barred by Title IX, including:

1. A requirement of third-party documentation of a student's gender by a health care provider (e.g. nurse, counselor, psychologist, physician)
2. A requirement of production of government-issued identity document confirming the student's gender (e.g. driver's license, state or local ID, passport, or birth certificate)
3. Mandatory psychiatric review of a student athlete for verifying sincerity or consistency in gender identification and/or experiences of gender dysphoria as a threshold for eligibility
4. Documentation of gender-affirming medical care (e.g., puberty blocker treatment, hormone suppression and/or replacement therapy, surgical intervention) or required examinations confirming receipt of gender-affirming medical care (hormone testing, etc.)

Requirements within categories 3 and 4 are grave invasions of students' personal privacy and will typically lead to recipient schools collecting large volumes of sensitive and personal medical information, while simultaneously lacking the resources and competence to protect this information as is required in the medical and psychiatric care context.<sup>68</sup> When access to athletics opportunities for TNI students is conditioned on specific medical treatments and/or psychiatric review, some TNI students will inevitably be coerced into medical treatment that does not align with their goals and interests.<sup>69</sup> This can only be understood as a form of abuse under a thin "medical" veneer. Schools should not be permitted to impose requirements that interfere with existing doctor-patient relationships by intruding

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<sup>68</sup> See, e.g., Bennett Leckrone, *Nearly 32 Million Records Leaked in School Data Breaches Since 2005: Report*, BEST COLLEGES (Apr. 17, 2023), <https://www.bestcolleges.com/news/millions-of-records-leaked-school-data-breaches-comparitech/>; Mark Keierleber, *Trove of L.A. Students' Mental Health Records Posted to Dark Web After Cyber Hack*, THE 74 (Feb. 22, 2023), <https://www.bestcolleges.com/news/millions-of-records-leaked-school-data-breaches-comparitech/> ("[T]he revelation that student psychological records were exposed en masse and a lack of transparency by the [Los Angeles Unified School District] highlight a gap in existing federal privacy laws. Rules that pertain to sensitive health records maintained by hospitals and health insurers, which are protected by stringent data breach notification policies, differ from those that apply to education records kept by schools—even when the files themselves are virtually identical. Under existing federal privacy rules, school districts are not required to notify the public when students' personal information, including medical records, is exposed.").

<sup>69</sup> Professional, adult athletes have not been able to escape coercive pressure leading them to undergo endocrine treatments they do not want. Students in high school and university will overwhelmingly have less maturity and fewer resources to resist similar pressure in the school sports context. One recent example is Namibian runner Christina Mboma, a Black woman who is being forced to suppress her body's natural hormone production. Abby Carney, *New Regulations from World Athletics Require Christine Mboma to Undergo Hormone Therapy*, RUNNER'S WORLD (Mar. 31, 2023), <https://www.runnersworld.com/news/a43481455/christine-mboma-to-undergo-hormone-therapy/> (referencing Caster Semenya's experiences of being forced into hormone suppression treatments for 5 years, in which she felt ill, gained weight, experienced panic attacks and said, "It's like stabbing yourself with a knife every day. But I had no choice.").

into the individualized and deeply personal decision-making process that is involved with a person's path to considering and undergoing or foregoing any course of gender affirming healthcare.

Requirements within categories 1 and 2 may not, at first glance, seem as gravely harmful as the previously discussed examples, but their imposition as a condition for playing school sports places unnecessary burdens on students' ability to play by imposing requirements that may not be easily met and remain an invasion of privacy and a harm to students' dignitary interests. These requirements remain, by their nature, out of proportion to any of the recipient interests that may be achieved by excluding TNI students from educational opportunities.

Rather than requiring medical documentation or government-issued confirmation of a student's gender identity, schools could impose **less harmful restrictions** in those circumstances where sex-related criteria are found to be substantially related to an important educational interest (i.e., in the context of elite, intercollegiate student athletes). The Department could helpfully identify two such alternatives:

1. A signed document from a student attesting to their gender; or
2. Third party documentation of a student's gender. This could be a statement by a parent, friend, community member, school counselor, or other similar person who is designated by the student as a trusted individual, and need not be from a medical provider.

These requirements minimize harm to TNI students who may be excluded from athletics opportunities if they are not fulfilled. These requirements do not infringe upon students' bodily autonomy or privacy. They do not cause schools to collect databases of sensitive and personal medical records, nor do they place pressure upon doctor-patient relationships or medical decision-making processes that will greatly affect TNI students compared to their cisgender and endosex peers. The requirements do not treat students' bodies as a rubric for participation, do not impose disproportionate logistical burdens on TNI students and their families, and will not create dignitary harms that undermine TNI students' self-worth and ability to learn free from stigma.

NWLC puts these specific requirements forward as true examples of how to minimize harm. We recommend that if the Department incorporates these examples into the preamble, it also clarifies that in practice, these signed attestations will typically impose logistical burdens that are similar to those required for students to sign up for a non-athletic club, field trip, or similar educational activity.

**C. In the alternative, the Department should identify less harmful health intervention documentation requirements that may be permissible in the context of highly competitive intercollegiate athletics.**

If the Department partially disagrees with the recommendations above and concludes that, in limited circumstances, highly competitive intercollegiate student athletes *may* be potentially subjected to eligibility criteria that require documentation of health interventions, such as gender-affirming healthcare, then we make these alternative recommendations for Department clarification in the preamble:

1. In the few circumstances where competitive intercollegiate athletes may face medicalized eligibility requirements, surgical intervention requirements must never be permitted under any circumstance;

2. If IHEs may require certification that a transgender or nonbinary student is receiving gender affirming medical care, the requirement to minimize harm applies, and necessarily protects students from being forced to divulge highly detailed personal medical information as a condition of participating in competitive athletics programs, or to comply with periodic or continued reporting requirements after initial certification.
  - a. An example of a *permissible* certification requirement might be a letter from a clinic confirming that the student is receiving gender affirming care from a health provider.
  - b. An example of an *impermissible* certification requirement would be a requirement that a student prove the specific gender affirming care they are receiving, including by producing a list of prescribed medications with dosages, along with quarterly blood testing results detailing levels of sex hormones and complete blood counts.
3. An IHE may not impose requirements that would effectively bar a TNI student from competitive intercollegiate athletics for a substantial portion of their athletic career at the institution. For example, if a TNI student at a four-year university cannot comply with their IHE’s medicalized eligibility requirement for a year or more of their academic career then, depending on the sport, their exclusion may constructively result in a denial of opportunity to participate at a high level of competition during their university career. This is impermissible as it functions identically to categorical ban based on TNI status, much like the impracticable restrictions highlighted above.
4. An IHE may not impose a requirement that would be impossible or impracticable for students to reasonably meet, as further described in Section D, below.
5. Sex verification procedures that intrude upon a student’s bodily autonomy, as described in Section A above, remain prohibited by Title IX.

**D. To ensure recipients minimize harm, the Department must address interactions between TNI school sports restrictions and the targeted wave of banning and criminalizing gender affirming healthcare.**

In explaining the harm minimization requirement, the Department should explicitly prohibit recipients from imposing eligibility requirements that are impracticable or impossible for students to reasonably meet, and clarify that because impossibly burdensome requirements are functionally identical to categorical bans against TNI student athletes, they are equally prohibited by Title IX. More broadly, we urge the Department when crafting Title IX guidance and regulatory materials to continue to keep in mind the broader context of the real and serious issues LGBTQI+ students are facing currently, and how they intersect with their ability to play school sports—specifically including legislative attacks on transgender youth’s ability to access to gender-affirming care.<sup>70</sup>

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<sup>70</sup> The Department should also keep in mind the importance of finalizing a strong rule that neither echoes anti-trans sentiment, nor could be weaponized to force TNI students to conform to dangerous sex stereotypes as a condition of their eligibility to play sports consistent with their gender identity in light of the various other attacks launched by hostile legislators to attempt to eradicate LGBTQI+ youth from public life. This includes attacks on the unity of LGBTQI+ families, on their ability to access other sex-separated spaces, and on the ability of educators to provide appropriate and inclusive educational materials (including in health, history, and sex education). A strong rule that is thus essential to communicate the federal government’s support for LGBTQI+ students to learn in safety.

Students who are considering accessing gender-affirming care already face an intensely politicized environment. Many transgender youth are facing intense social and political pressure at every step of their medical decision making around transitioning and affirming their gender, especially given the high risk of being targeted for harassment and discrimination. Currently, 16 states have outright bans preventing youth from accessing gender-affirming care, with three making it a felony to provide such care.<sup>71</sup> Further, hostile states are ramping up efforts to restrict care for adults, which will impact students at the elite, collegiate level.<sup>72</sup> These attacks on gender-affirming care have seriously impacted transgender youth and their families: recent data from the Williams Institute estimates that 156,500 transgender youth live in 32 states where access to gender-affirming care has been restricted or is at risk of being banned due to bills filed this legislative session,<sup>73</sup> causing many families to consider fleeing especially hostile states because of anti-trans attacks, including gender-affirming healthcare bans.<sup>74</sup>

Any requirement that conditions TNI students' eligibility to play sports on accessing gender-affirming care would be unpracticable or impossible for students to meet in jurisdictions where access to such care is illegal and would amount to a categorical ban on their ability to play. And, even in jurisdictions where access to gender-affirming care has not been outlawed for youth, the highly politicized nature of this issue makes it essential for the Department to meet this moment and not contribute to further, undue pressure on medical decision-making that should be reserved for providers, patients, and their families. Accordingly, we urge the Department to draw clear lines stating that requirements that puts further pressure on TNI students' medical decision-making do not minimize harm.

**VI. We urge the Department to take into account additional considerations and recommendations in finalizing the rule.**

To ensure the final rule is as protective of TNI students' rights as possible, as explained below there are additional considerations the Department should take into account when finalizing the rule. This includes: highlighting the particular importance of participatory benefits of sports participation for TNI students; outlining the unique needs of nonbinary students; ensuring it does not use language that reproduces a harmful, binary understanding of sex; clarifying interactions between Title IX and other civil rights laws; and clarifying examples of impermissible animus against TNI students.

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<sup>71</sup> Movement Advancement Project, *Bans on Best Practice Medical Care for Transgender Youth* (last updated May 1, 2023), <https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf>.

<sup>72</sup> While most bans outlaw gender-affirming care for youth up to age 18, at least one state, Alabama, bans gender-affirming care up to age 19. *Bans on Best Practice Medical Care for Transgender Youth*, *supra* note 71. Further, there are states that are considering legislation that would ban gender-affirming care up for youth to ages 19, like Nebraska, *see, e.g.*, L.B. 574, 108th Leg., Reg. Sess. (Ne. 2023), with some considering bills that would ban care for youth up to ages 26, like Texas, *see, e.g.*, H.B. 4754, 88th Leg., Reg. Sess. (Tx. 2023). Further, several states are considering restricting access to gender-affirming care for transgender adults enrolled in state insurance programs like Medicaid: for example, Texas has proposed a ban that would prevent any state funds to pay for gender-affirming surgeries, without any age limit. *See* S.B. 1029, 88th Leg., Reg. Sess. (Tx. 2023).

<sup>73</sup> Elana Redfield et al., The Williams Institute, *Prohibiting Gender-Affirming Medical Care for Youth 2* (March 2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2023.pdf>.

<sup>74</sup> *See* Stephen Paulsen, "I could see you in the hope for your future:" *Transgender Texans on coming out and leaving the state*, COURTHOUSE NEWS SERVICE (Apr. 22, 2023), <https://www.courthousenews.com/i-could-see-in-you-the-hope-for-your-future-transgender-texans-on-coming-out-and-leaving-the-state/>. *See also* Abbie E. Goldberg, The Williams Institute, *The Impact of HB 1557 (Florida's Don't Say Gay Bill) on LGBTQ+ Parents in Florida* 15 (Jan. 2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf>.

**A. The preamble to the final rule should explicitly acknowledge that the social and educational benefits of sports participation are especially important for transgender, nonbinary, and intersex students.**

We appreciate the Department specifically recognizing the benefits of participating in school sports for TNI students in the preamble to the rule.<sup>75</sup> The Department correctly highlighted that inclusion in school activities, such as sports, is a critical protective factor to support TNI students' access to education, especially in light of extremely concerning health risks faced by TNI youth, such as suicidal ideation. Social support can thus be lifesaving for TNI youth,<sup>76</sup> and for many youth, the understanding and supportive adult in their life may well be their sports coach.

We additionally recommend that the Department explicitly acknowledge that for many TNI students, the social support and feelings of inclusion they experience within their school sports community may directly protect them from the worst effects of sex discrimination at school, where they may face critically important support from sports teammates in the face of challenges such as sex harassment, assault, disproportionate discipline, and a generally hostile environment from other students and staff. In other words, the experiences of belonging and support that students receive from school sports are extremely important for TNI youth and indirectly may serve to protect their access to equal educational opportunity as Title IX requires.

**B. The Department's final rule should account for the needs and experiences of non-binary student athletes.**

Currently, the legal authority and guidance available to schools on Title IX and sex-separated athletics is overwhelmingly written with the assumption that all students fit neatly into the categories of "girls and women" or "boys and men." In addition to experiencing many of the same discrimination risks as transgender youth, nonbinary students face additional precarity when they are treated as invisible or nonexistent in education policies. The Department should strongly encourage schools to make accommodations for nonbinary students to participate in all gender-separated programming and spaces and to offer flexibility to these youth as members of a protected class. Some examples that would clearly protect nonbinary students' access to participation while imposing minimal administrative burdens on schools include: flexibility on what sports uniform a nonbinary student athlete must wear; using correct and respectful language in sporting announcements and written materials; and offering a student access to single-person spaces for changing and restroom needs if desired by the individual student.

For this rule, the Department should clarify that a nonbinary student has the same right as their peers to participate in school sports "consistent with their gender identity," including joining the sex-separated team that is the "least bad" fit, as determined by the individual student. The Department should also state clearly in the rule that singling students out for restrictions or exclusion based on nonbinary status is presumptively a violation of Title IX. For example, if a school denies a nonbinary student access to either a boys' team or a girls' team for a specific sport because neither is fully consistent with the student's identity, that policy would amount to a categorical ban that is prohibited by Title IX.

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<sup>75</sup> Proposed Rule at 22861, 22879.

<sup>76</sup> The Trevor Project, *Gender-Affirming Care for Youth* (Jan. 2020), <https://www.thetrevorproject.org/wp-content/uploads/2021/08/Gender-Affirming-Care-January-2020.pdf>.

**C. The Department should use language consistent with the fact that Title IX does not require that sports be separated based on a binary notion of biological sex.**

We applaud the Department for noting that a small number of federal court decisions have misinterpreted Title IX's implementing regulations and mistakenly concluded that Title IX's permissive carve out for sex-separated sports teams enshrines eligibility factors of "male or female biological sex" for all school sports or mandates that sex-separated facilities or programs must be demarcated by a student's sex assigned at birth.<sup>77</sup> In other words, Title IX's reference to "sex" is not a requirement that school sports be separated by assigned birth sex, or a prohibition on transgender students from playing on teams that align with their gender. As the Department succinctly highlighted, Congressional approval of sex-separated sports teams does not presuppose that such teams exist for the purpose of dividing students based on a binary, anti-trans definition of sex.<sup>78</sup> For these reasons we recommend that the Department remove the terms "male or female" where they are used throughout the proposed rule, so that the final regulation would refer to participating "on a team consistent with their gender identity" rather than participating "on a male or female team consistent with their gender identity." This will recognize recipients' discretion to organize teams based on binary sex categorizations or otherwise, and ensure that the rule protects students' ability to play on teams consistent with their gender identity across a variety of settings.

**D. The Department should clarify that the Title IX final rule does not preclude student athletes from pursuing other statutory or Constitutional claims.**

The Department should briefly clarify that this rule deals only with the baseline requirements of Title IX and should state that nothing in the final rule should be interpreted to lessen protections under any other civil rights law. This will help avoid any confusion or misunderstanding for students seeking accommodations or civil rights remedies for disability and/or learning needs through avenues such as the Americans with Disabilities Act or the Individuals with Disabilities Act. This is especially important given that some legislators and activists are exploiting fears of disability and neurodivergence by linking transgender status to autism and other disabilities in a blatant attempt to remove the agency and freedom of transgender youth to make decisions about their lives.<sup>79</sup> The contours of Title IX's protections similarly do not constrain students' potential remedies for sex discrimination or other forms of discrimination under the Equal Protection Clause or other provisions of the U.S. Constitution.

**E. The Department should outline examples of animus against transgender, nonbinary, and intersex students that would prevent recipients from meeting the test set out in the proposed rule.**

We appreciate the Department stating that schools could not justify exclusion of students from playing sports based on disapproval of transgender students, a desire to harm a particular student, or a desire

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<sup>77</sup> Proposed Rule at 22868 (citing e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618–19 (4th Cir.), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878 (2021); *A.M.*, 2022 WL 2951430, at \*7–11)).

<sup>78</sup> *Id.* at 22868.

<sup>79</sup> Ma'ayan Anafi, "It's Time to Embrace Disabled Trans People," National Women's Law Center, Mar. 31, 2023, available at <https://nwl.org/its-time-to-embrace-disabled-trans-people/> ("For anti-trans extremists, the overlap of trans and autistic people is a sign of something nefarious. They claim... that we can't truly understand our own gender, that we can't be left to make decisions about our care... now we're seeing this narrative reflected in [state] laws themselves.").

to exclude transgender students from sports.<sup>80</sup> As the preamble correctly identifies, states seeking to impose sex-based classifications will not meet the rule’s stringent standard if the interest justifying a law is a “bare...desire to harm a politically unpopular group;” such animus “cannot justify disparate treatment of that group” or constitute a valid government interest under the Equal Protection Clause.<sup>81</sup> So too, they would fall short of the standard set out in the proposed rule.

However, we urge the Department to further provide examples that would indicate evidence of animus against TNI students. For example, if a recipient imposes a system of restrictions for the sole purpose of excluding a single transgender student from participation, that would constitute evidence of animus against the student. Animus could also be demonstrated, as the Department has indicated in the proposed rule preamble, if a recipient imposes sex-related criteria restricting the ability of TNI students to play sports consistent with their gender identity, while a comparable school does not have the same restriction for the same sport, and at the same level of competition and grade or education.<sup>82</sup>

### **VII. The women’s rights and gender justice movement strongly favors trans inclusion.**

Strong protections for TNI students in school sports further the goal of the gender justice movement to expand opportunities for all women and girls. When transgender and intersex girls and women are included, celebrated, and empowered within girls’ and women’s sports, all girls and women are freer.

For years, organizations dedicated to women’s rights and gender justice have expressed consistent support for TNI youth and their Title IX rights,<sup>83</sup> specifically including the rights of transgender and intersex women and girls to be included and celebrated in sports.<sup>84</sup> We have researched and highlighted how trans-exclusionary policies harm *all* women and girls. This support makes it unmistakably clear that strong protections for TNI students to play sports are not at odds with the cause of women’s rights, but rather advance women’s rights by empowering all women and girls to participate in sports without being pressured to conform to sex stereotypes or fear that their bodies will be scrutinized and found to be insufficiently feminine to participate.

NWLC makes the above recommendations to the Department to strengthen and clarify the proposed rule based on the deep expertise and respectful, ongoing conversations among our partners within the gender justice community around how best to advance the goals of our movement, including safety and liberation for trans and intersex girls and women.

### **VIII. Responses to the Department of Education’s directed questions.**

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<sup>80</sup> Proposed Rule at 22872.

<sup>81</sup> *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>82</sup> *Id.* at 22872.

<sup>83</sup> Statement of Women’s Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People (Apr. 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>; Letter to President Joseph Biden by the National Women’s Law Center and Women’s Sports Foundation (Aug. 2022), <https://nwlc.org/wp-content/uploads/2022/08/WSF-Letter-8.10-final-version.pdf>.

<sup>84</sup> Shiwali Patel, *Gender Justice in Sports Cannot Succeed Without Trans Women and Girls*, NWLC BLOG (Mar. 31, 2023), <https://nwlc.org/gender-justice-in-sports-cannot-succeed-without-trans-women-and-girls/>. See also Becky Sauerbrunn, *Let Missouri trans girls and women play*, SPRINGFIELD NEWS-LEADER (Feb. 5, 2023), <https://www.news-leader.com/story/opinion/2023/02/05/bills-targeting-transgenders-athletes-are-cruel-and-pointless/69866434007/>; Billie Jean King, Megan Rapinoe and Candace Parker Support Brief Against Idaho Anti-Transgender Law, SPORTS ILLUSTRATED (Dec. 21, 2020), <https://www.si.com/more-sports/2020/12/21/idaho-anti-transgender-law-briefs>.

**A. Whether any alternative approaches to the Department’s proposed regulation would better align with Title IX’s requirement for a recipient to provide equal athletic opportunity regardless of sex in the recipient’s athletic program as a whole.**

As discussed above and affirmed by the Department, Title IX’s prohibition on sex discrimination includes protecting *all* students from discrimination based on LGBTQI+ status, including transgender status, nonbinary status, and intersex status. There is no way to exclude transgender students from education opportunities, especially school sports, without relying upon harmful sex stereotypes that present a danger to all women and girls in education. As we recommended in our comment on the July 2022 Proposed Rule, the Department should promulgate a rule clarifying that Title IX presumes every student has the right to participate in all school sports, consistent with their gender identity, at all levels of education. If the Department chooses not to adopt this interpretation, we have made a number of alternative recommendations in this comment, but believe that full inclusion of LGBTQI+ students is the strongest pathway to achieve gender equity in school sports and all aspects of education.

**B. What educational objectives are sufficiently important to justify a recipient imposing sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female athletic team consistent with their gender identity and whether those objectives should be specified in the regulatory text.**

See Section IV.D *supra* for a detailed discussion of the relationship between educational objectives and restrictions on school sports participation for TNI students. We strongly recommend that the Department state clearly in the preamble of the final rule that rationales of “competitive fairness” and “injury prevention” will very rarely, if ever, meet the rule’s stringent standard for allowing schools to impose restrictions on TNI participation in school sports. If the Department declines to adopt this recommendation, we recommend alternatively that the Department opt *not* to specify objectives that would be more likely to meet the rule’s standard to justify limiting or denying TNI students’ opportunities to participate in school sports.

**C. Whether and how the permissibility of particular sex-related eligibility criteria should differ depending on the sport, level of competition, grade or education level, or other considerations.**

Ideally, there would be full inclusion in school sports across grade and education levels, sports, and level of competition. (See response to directed question a.) However, if the Department decides that it must promulgate a standard that permits restrictions on some students based on their TNI status, then the Department should clarify that schools would not be able to justify any restrictions targeting TNI student athletes in the context of K-12 and college club and intramural sports. As discussed above in Section IV.C, schools will have limited room to rebut the presumption of inclusion at the level of elite, intercollegiate competitive sports, using sport-specific considerations and data.

**D. Whether any sex-related eligibility criteria can meet the standard set out in the proposed regulation when applied to students in earlier grades, and, if so, the type of criteria that may meet the proposed standard for those grades.**

No, but we are also deeply concerned about the implication from some language in the preamble that only TNI students in elementary and middle school are fully deserving of protection. In K-12 and college



level club and intramural sports, equal access to sport participation and opportunities must be the overriding factor, as all students should be able to benefit from the values of participation and teamwork that playing sports offers. Title IX is concerned with the benefits of participation that accrue to all student athletes, not constraining TNI youth from the opportunity to lose, win, or see a podium. Trans-inclusive policies are key to enabling all students in those settings to access those benefits. Moreover, Title IX has long recognized a meaningful legal distinction between K-12 and IHE athletics,<sup>85</sup> and this regulation should match the framework by setting out limited room for tailored restrictions at the competitive IHE level rather than drawing an elementary/secondary school distinction for the first time in this context.

**E. How a recipient can minimize harms to students whose eligibility to participate on a male or female athletic team consistent with their gender identity is limited or denied by the recipient's adoption or application of sex-related criteria.**

See Section V. The Department must clearly state to recipients that all forms of sex testing and medicalized requirements are impermissible, and that any documentation requirements that are unreasonably burdensome amount to (prohibited) categorical bans on participation. The only requirement the Department can impose without causing TNI students significant harm is certification (verbal or written) of the student's gender identity (whether by the student or a trusted representative, such as a family member).

**F. Whether regulatory text in addition to the text in the proposed regulation is needed to provide recipients with sufficient clarity on how to comply with Title IX's prohibition on sex discrimination, including gender identity discrimination, in the context of male and female athletic teams, consistent with the principles and concerns identified in the discussion of proposed § 106.41(b)(2).**

Yes. As discussed in Section IV, NWLC recommends three additional clarifications to the regulatory text:

1. The Department should explicitly affirm a presumption that Title IX requires inclusion of all students in athletics consistent with their gender identity, and specify in the final rule text or preamble, that this presumption cannot be overcome in K-12 and college club and intramural athletics.
2. The Department should add slightly more context to the regulatory text regarding the standard, specifically that in adopting any sex-based criteria for participating in school sports, schools cannot rely on overbroad generalizations and sex-based stereotypes, and that restrictions must address a substantial and well-founded concern affecting equal opportunities in athletics.
3. The Department should state clearly in the regulatory text, as it does in the preamble text, that under Title IX and the standard laid out, categorical bans based on TNI status are not permissible.

Thank you for your consideration of our recommendations. If you have any questions, please contact us as set out below.

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<sup>85</sup> See *supra* note 10; Section 844 of the Education Amendments of 1974, Pub. L 93-380, Title VIII, (August 21, 1974) 88 Stat. 612 (requiring HEW to issue Title IX regulations "with respect to intercollegiate athletic activities reasonable provisions considering that nature of particular sports.").

Sincerely,

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