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May 15, 2023

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

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

## **RE: Comment from Legal Momentum, the Women's Legal Defense and Education Fund, Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, ED-2022-OCR-0143**

Dear Secretary Cardona and Assistant Secretary Lhamon:

Legal Momentum, the Women's Legal Defense and Education Fund, originally founded as the NOW Legal Defense and Education Fund in 1970, is the nation's first and longest-serving civil rights organization dedicated to advancing women's rights and gender equality. For more than 50 years Legal Momentum has worked to advance equal opportunities for women and girls in education and eliminate discrimination and harassment rooted in sex-based stereotypes through effective policy and enforcement. We have realized much of the progress made in the last 50 years as a result of Title IX's protections. Yet throughout these last five decades women and girls have had to, and continue to have to, fight to root out persistent sexist stereotypes that hold back full equity in educational programs and activities—including athletics. Those same sex-based stereotypes harm transgender, nonbinary and intersex students in addition to cisgender girls. Legal Momentum is thankful for the opportunity to provide this comment in response to, and in support of, the Department of Education's Notice of Proposed Rulemaking (the "proposed rule"). We support unequivocally, and without restriction, the right of transgender, nonbinary and intersex students to participate in school sports consistent with their gender identity.

Overall Legal Momentum supports the proposed rule and applauds the Department for making clear that categorical bans on inclusion of transgender, nonbinary and intersex students on athletic teams aligned with their gender identity violate Title IX. We do, however, urge the Department to incorporate further clarity and specificity to the protections provided by the proposed rule in order to ensure that all students can play sports free from sex discrimination and consistent with Title IX's broad mandate.

## **Title IX's Broad Sweep Is Consistent With, And Requires, Protections for Transgender, Nonbinary And Intersex Students To Participate In School Sports That Align With Their Gender Identity**

Enacted in 1972 with an intentionally broad mandate, Title IX promises that no one will 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>1</sup> Since its inception, Title IX has been applied to school sports and, while inequities remain, it has led to enormous change. Looking at participation in school sports alone, in the school year immediately before Title IX was enacted fewer than 300,000 girls participated in U.S. high school athletics and fewer than 30,000 women participated in college athletics. Compare that with the 2015-2016 school year, which saw 3.3 million high school female athletes and 214,000 female collegiate athletes, a tenfold and sevenfold increase respectively.<sup>2</sup> While early criticism of Title IX’s potential impact initially centered around fear that equal opportunities for female student athletes would mean decreases in opportunities for male students, that has simply not borne out as male student athlete participation numbers in both high school and college athletics only steadily increased during Title IX’s first 45 years.<sup>3</sup> Similar fear mongering is happening now, with opponents claiming opportunities for cisgender women and girls will be thwarted by inclusion of transgender, nonbinary and intersex students on teams that align with their gender identity. This, too, is already proving unfounded and provides no justification for violating the Title IX and equal protection rights of transgender, nonbinary and intersex students.<sup>4</sup>

### **Benefits Of Sports Participation And The Lack Of Justification To Deny Such Benefits To Transgender, Nonbinary And Intersex Students**

Participation in school sports has enormous health and social benefits for students. Regular physical activity lessens the chance of health conditions such as obesity, heart disease, osteoporosis and breast cancer.<sup>5</sup> Participation in school sports has demonstrated valuable mental health benefits for female student athletes as well. In particular, girls and women who participate in sports have higher levels of confidence, more positive body image, and lower levels of depression.<sup>6</sup> Additionally, there are clear academic benefits to female student athletic participation. Girls who play sports are more likely to graduate from high school and college, have better grades, and score higher on standardized tests than non-athletes.<sup>7</sup>

All students should have equal access to the athletic opportunities that provide these demonstrable health and social benefits. Yet today, many transgender, nonbinary and intersex students are being denied these opportunities. Recent national surveys found that LGBTQ+ students were half as likely as non-LGBTQ+ students to participate in school sports—both interscholastic and intramural—and that

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<sup>1</sup> 20 U.S.C. §§ 1681 et seq.

<sup>2</sup> See National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> Mandating equal opportunity for transgender, nonbinary and intersex students and the mandate of the proposed rule is consistent with U.S. Supreme Court precedent establishing that sex discrimination includes discrimination against transgender people. *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020). Likewise the proposed rule is consistent with the protections enumerated in the Department’s 2022 proposed rule 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>

<sup>5</sup> *Id.*; Women’s Sports Foundation, *Her Life Depends on It III: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women*, (2015), [https://www.womenssportsfoundation.org/wp-content/uploads/2015/05/hldoi-iii\\_full-report.pdf](https://www.womenssportsfoundation.org/wp-content/uploads/2015/05/hldoi-iii_full-report.pdf).

<sup>6</sup> *Id.*; Women’s Sports Foundation, *Go Out and Play: Youth Sports in America* (2008), [http://www.womenssportsfoundation.org/wp-content/uploads/2016/08/go\\_out\\_and\\_play\\_exec.pdf](http://www.womenssportsfoundation.org/wp-content/uploads/2016/08/go_out_and_play_exec.pdf).

<sup>7</sup> *Id.*

transgender and nonbinary students were less likely to participate in athletics than their cisgender peers.<sup>8</sup> In 2021, nearly half of transgender students and more than a quarter of nonbinary students reported that they had been barred from playing on a school sports team consistent with their gender identity, a rate that had nearly doubled from 2019.<sup>9</sup> The existing 21 state categorical bans on transgender, nonbinary and intersex students playing school sports consistent with their gender identity encourage, indeed mandate, the increased denial of these opportunities—based solely on sex and sex stereotypes.

By banning or preventing transgender, nonbinary and intersex students from participating in school sports these youth are not just being denied the health, social and academic benefits that their athlete peers are receiving but are being actively harmed. According to GLSEN data, students subjected to anti-LGBTQ+ discrimination, including barring them from athletic participation consistent with their gender identity, is associated with a nearly threefold increase in absences, lower GPAs, decreased educational aspirations, lower levels of self-esteem, higher levels of depression, and a twofold increase in the likelihood of seriously contemplating suicide as compared to LGBTQ+ students who have not been subjected to such discrimination.<sup>10</sup>

The proposed rule makes clear that a categorical ban against transgender, nonbinary and intersex students from participating in school sports violates Title IX and outlines that Title IX’s mandate requires eligibility of students—including transgender, nonbinary and intersex students—to play on school sports teams consistent with their gender identity. The proposed rule would, importantly, invalidate the 21 state categorical bans currently in place and prevent any others. The proposed rule would sharply restrict a school’s ability to exclude transgender, nonbinary and intersex student athletes from school sports by imposing a stringent standard that would require schools to advance an important educational objective that is substantially related to the sex-based restriction. And by requiring schools to minimize the harm to students whose opportunity to participate in sports consistent with their gender identity would be limited or denied by a lawful restriction, the proposed rule would further strengthen the protection provided by the proposed rule. **We strongly support the proposed rule for these reasons.** However, we urge the Department to consider in the final rule including some additional clarity to these strong protections to ensure that the rule is implemented consistent with the Department’s intentions and that perceived ambiguities cannot be exploited to further prevent school sports participation of transgender, nonbinary and intersex student athletes.

## **Recommendations To Strengthen The Proposed Rule**

*The text of the rule must state that categorical bans are unlawful without exception.*

The text of rule itself must state that categorical bans against transgender, nonbinary and intersex student athletic participation on male-female sports teams consistent with their gender identity are unlawful and cannot ever meet the stringent standard set forth in the rule. While this standard is apparent as explained in the proposed rule’s preamble, the rule would benefit from its inclusion in the text of the rule itself.

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<sup>8</sup> GLSEN, *LGBTQ Students and School Sports Participation: Research Brief* (2021), <https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf>

<sup>9</sup> GLSEN, *The 2021 National School Climate Survey: The experiences of LGBTQ+ youth in our nation’s schools*, (2021) <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

<sup>10</sup> *Id.*

*The text of the rule must clearly establish a presumption of participation on teams consistent with a student's gender identity without restriction.*

The text of rule must clearly state that, where a recipient operates sex-separate teams, there is a presumption of participation on the team consistent with a student's gender identity without restriction. The text must also set forth that the burden will always be on the recipient to overcome this presumption of participation consistent with gender identity.<sup>11</sup> Additionally, the rule text should specifically include that, where only sex-separate teams are offered, nonbinary students should have opportunity to participate on whichever team they feel most comfortable.

*The rule should provide examples of the sorts of restrictions that would fail to meet the rule's stringent standard.*

The proposed rule would only permit sex-based restrictions that are "substantially related to achievement of an important educational objective."<sup>12</sup> This means that there would need to be a "direct, substantial relationship between a recipient's objective and the means used to achieve that objective."<sup>13</sup> Any purported objective and the means to achieve it cannot rely "on overtly broad generalizations about the talents, capacities or preferences of male and female students" and the recipient must "minimize harm" to excluded students.<sup>14</sup> This is a stringent standard but students will be harmed by misinterpretation or misapplication of it. In order to give recipients and students a clear understanding of the robust protections provided by the rule and to avoid unnecessary confusion or harmful misapplication, the rule should include examples of impermissible restrictions on the rights of students to participate on sports teams consistent with their gender identity.

- Prevention of injury: The preamble refers to the educational interest in preventing sports-related injury as one which may meet this standard. We strongly urge the Department to clarify that recipients will rarely, if ever, be able to overcome the presumption of inclusion when relying on preventing sports-related injury. To invoke this as justification to exclude participation by transgender, nonbinary and intersex students would necessarily rely on impermissibly overbroad sex-based generalizations which harm transgender, nonbinary, intersex and cisgender students alike.

Some level of risk of injury is inherent in all sports. There is no reliable evidence that transgender women and girls pose a risk of injury to other women and girls. There will always be body diversity among athletes. Excluding transgender, nonbinary and intersex students on the basis of injury prevention would rely solely on sex-based stereotypes about femininity and the female body and would expose all student athletes to body scrutiny based on assumptions and stereotypes about femininity which are typically rooted in ideals of white femininity. As a result, transgender, nonbinary, intersex and cisgender female student athletes will all be harmed, in particular Black female students who are often scrutinized based on these persistent notions of femininity rooted in white

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<sup>11</sup> This is consistent with U.S. Supreme Court precedent. *See* US v. Virginia, 518 U.S. 515, 533 (1996) "The burden of justification [of sex-based classifications] is demanding and it rests entirely on the state."

<sup>12</sup> U.S. Department of Education, "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," at 22873.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 22891.

femininity. Excluding any female athlete from sport on the basis of assumptions about what their body should look like, or the strength it should be able to exert, constitutes sex discrimination and violates Title IX and the Equal Protection Clause. Schools have numerous nondiscriminatory ways to minimize risk of injury that are actually substantially related to achieving this interest, i.e., providing sport-specific recommended protective equipment, adopting sport-specific accepted safety protocols, ensuring effective coaching.

- Fairness in competition: The preamble also refers to the educational interest in ensuring fairness in competition as one which may meet this standard. For the same reasons as prevention of injury, the Department must make clear that a stated objective of fairness of competition will rarely, if ever, overcome the presumption of inclusion for transgender, nonbinary and intersex students. Body diversity and diversity of athletic ability has always been part of sport and exclusion of transgender, nonbinary and intersex students on this basis would have to rely exclusively on impermissible sex-based stereotypes and assumptions. In cisgender athletes these differences are often celebrated rather than viewed as an unfair advantage. For example, Simone Biles, an Olympic gold medal gymnast has significantly shorter stature than the average American woman<sup>15</sup>; and Michael Phelps, the most decorated Olympian of all time, has been observed as possessing numerous physical qualities which contribute to his overall athleticism and capability in swimming.<sup>16</sup> Moreover, since the adoption of the currently existing 17 state laws which are protective of transgender students' right to participate in school sports consistent with their gender identity, and the many athletic associations to allow the same, there has been no dominance by transgender athletes nor threat to girls' sports.<sup>17</sup>
- Sex verification procedures: The Department must specifically and clearly mandate that sex verification procedures violate Title IX. Those seeking to exclude student participation in sport have imposed harmful, stigmatizing sex verification practices on students which have included demanding medical documentation, hormonal and chromosomal testing, genital examinations, or collection of young students' reproductive health information in order to "prove" a student is a girl in order to play sports. These practices are traumatic and invade students' rights regarding bodily autonomy and privacy. They are based on impermissibly broad sex-stereotypes and assumptions about femininity. Black and brown girls have historically been exposed to the brunt of these stigma as ideals about femininity are rooted in biases about race. For example, Serena Williams has been subjected to sexist and racist scrutiny about her body, strength and capability throughout her successful athletic career, including false claims about her sex

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<sup>15</sup> See National Women's Law Center, Fulfilling Title IX's Promise: Let Transgender and Intersex Athletes Play, (June 14, 2022), <https://nwlc.org/resource/trans-and-intersex-inclusion-inathletics/>

<sup>16</sup> Phelps has been observed to possess a "disproportionately vast wingspan", "double-jointed ankles" and "produces just half the lactic acid of a typical athlete" contributing to his overall athleticism and capability in swimming. Monica Hesse, We Celebrated Michael Phelps's Genetic Differences. Why Punish Caster Semenya for Hers?, Washington Post (May 2, 2019), [https://www.washingtonpost.com/lifestyle/style/we-celebrated-michael-phelpss-genetic-differences-why-punish-caster-semenya-for-hers/2019/05/02/93d08c8c-6c2b-11e9-be3a-33217240a539\\_story.html](https://www.washingtonpost.com/lifestyle/style/we-celebrated-michael-phelpss-genetic-differences-why-punish-caster-semenya-for-hers/2019/05/02/93d08c8c-6c2b-11e9-be3a-33217240a539_story.html)

<sup>17</sup> See *A.M. v. Indianapolis Public Schools*, brief amicus curiae National Women's Law Center and 58 Additional Organizations in Support of Appellee and Affirmance (November 10, 2022), <https://nwlc.org/wp-content/uploads/2022/11/2022.11.10-NWLC-Amicus.pdf>

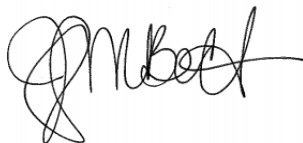
and gender and comparing her physique to that of a man.<sup>18</sup> These procedures further no legitimate educational objective and cause serious harm.

- Procedures to establish a student’s gender identity: The Department must make clear in the rule that, with regard to athletic participation—like any other activities covered by Title IX—only minimally burdensome measures may be used to establish a student’s gender identity. In general, recipients should not be empowered to call into question the sincerity of a students’ gender identity. A student’s assertion of their gender identity should be sufficient. Otherwise, the means to establish a student’s gender identity should be flexible such as a statement from a family member, healthcare provider, or friend. While state-issued documentation including a gender-marker (such as a state id, driver’s license or amended birth certificate) might also be accepted, students should not be limited to these means as they are not available in every jurisdiction and, even where they might be, there often exist other barriers to obtaining these documents.
- Unduly burdensome requirements to participation: The Department must include in the rule that a recipient imposing requirements on transgender, nonbinary and intersex students in order to play sports that are impossible or impracticable to meet would amount to a categorical ban and thus be violative of Title IX. For example, if a student was required to undergo gender-affirming hormone suppression or replacement therapy as a condition of eligibility to play on a sports team that aligns with their gender identity in a state that bans or greatly burdens ability to access such care and treatment.

For the reasons outlined above, Legal Momentum supports the proposed rule and unequivocally supports the right for all students to participate in school sports consistent with their gender identity, without restriction based on sex-based stereotypes. We urge the Department to finalize this rule with the clarity suggested in this comment so that transgender, nonbinary and intersex students can actually participate in school sports in accordance with the intention of the rule and without exploitation of any perceived ambiguity to the clear protections laid out within it.

We appreciate the opportunity to provide this comment.

Sincerely,



Jennifer M. Becker  
Legal Director  
Legal Momentum, the Women’s Legal Defense and Education Fund

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<sup>18</sup> See 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>.