



May 15, 2023

Via Federal eRulemaking Portal

The Honorable Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Comments on Proposed Rule Regarding 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—Docket ID ED-2022-OCR-0143, RIN 1870-AA19, 88 Fed. Reg. 22,860 (April 13, 2023)

Dear Secretary Cardona,

We write on behalf of the States of California, Hawai'i, Illinois, Maine, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Washington, and Vermont (the "Signatory States") regarding the proposed rulemaking by the U.S. Department of Education (the "Department") relating to the criteria a recipient of federal funding may use to establish a transgender student's eligibility to participate on a particular male or female athletic team, and clarifying the obligation of schools and other recipients of federal funding that elect to adopt or apply such criteria to do so consistent with Title IX. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility*

Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22,860 (Apr. 13, 2023) (the “Proposed Rule”).

As Attorneys General of the Signatory States and jurisdictions, we have a strong interest in robust enforcement of Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 *et seq.*, and other laws that prohibit discrimination on the basis of sex, including as they relate to students participating in school-based activities. The Department’s Proposed Rule serves a critical need, and we commend the Department’s efforts. We write to share several experiences of the Signatory States in implementing policies that protect transgender,¹ nonbinary, gender non-conforming, and intersex students’ ability to participate in school sports consistent with their gender identity, to affirm that the Signatory States want all students to be able to participate in sports at all levels, and at minimum at the K-12 and in intermural levels where the interest in participation outweighs any alleged concerns over competition or safety. Further, there should be no invasive testing at any level. If that is not possible, we offer some minimum safeguards that should be written into the rule to better protect student’s privacy and help students be free from sex-based discrimination. Even at the elite level, we suggest that in place of invasive testing, less intrusive methods be used such as medical attestation or other documentation should be used.

This Proposed Rule comes amidst an unprecedented wave of legislation around the nation attacking the rights of transgender people in multiple aspects of public life, including education, family formation and healthcare. As of May 1, 2023, a total of twenty-one states have passed laws that ban transgender athletes from participating in school sports consistent with their gender identity at some or all levels of education.² Of those, four state bans are currently enjoined in full or in part.³ Further, at the school board level, there has been a concerted effort to erase the existence

¹ For ease, we use the term transgender throughout this comment to be an inclusive umbrella term and not an exclusive term to include everyone whose gender identity may not conform to their sex assigned at birth, including some intersex, gender non-conforming, and non-binary individuals. The term intersex refers to a person whose sex characteristics (chromosomes, hormones, gonads, genitalia, etc.) may not conform with a binary construction of sex as either male or female. This term may not be the same as a person’s gender identity and is not the same as a person’s sexual orientation. Some people who have intersex characteristics or identify as intersex may identify as transgender, but some do not. The term gender non-conforming is a term used to describe a person whose gender expression differs from gender stereotypes, norms, and expectations in a given culture or historical period, with terms associated with gender non-conforming including, but not limited to, gender expansive, gender variety, or gender diverse. The term nonbinary is a term used to describe a person whose gender identity is not exclusively male or female and may or may not identify as transgender. Cisgender means a person whose gender identity corresponds with their sex assigned at birth.

² *Bans on Transgender Youth Participation in Sports*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last visited May 3, 2023) (“Sports Ban Map”).

³ *Id.*; see also 88 Fed. Reg. 22,881 (noting Idaho, Montana, Utah, and West Virginia bans subject to injunctions); see, e.g., *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), *appeal argued*, No. 20-35815 (9th Cir. Nov. 22, 2022); *Barrett v. State*, No. DV-21-581B (Mont. 18th Jud. Dist. Sept. 14, 2022), *appeal docketed*, No. DA 22-0586 (Mont. Oct. 13, 2022); *Roe v. Utah High*

of transgender people in the educational system.⁴ It is against this backdrop that action by the Department is so critically needed to clarify the applicability of Title IX to transgender athletes to ensure schools are providing education programs and activities free from all forms of sex discrimination and to protect transgender students participating in school sports from discriminatory policies and practices at all levels, especially at the K-12 level.

If adopted, the Proposed Rule would clarify that blanket bans on transgender student participation in school sports is not permitted under Title IX. We commend the Department for stating unambiguously that animus towards transgender people is not a valid justification for denying participation in school sports under Title IX, nor is reliance on stereotypes or assumptions. We appreciate the Department's efforts to frame these regulations in terms of the scrutiny that courts apply to sex-based classifications, with consideration of countervailing interests.

While the Proposed Rule is a welcome step toward advancing Title IX's longstanding goal of providing equal opportunity in athletics, the Signatory States recommend providing clearer guideposts to recipients, including states, to help ensure that transgender athletes are not categorically excluded by discriminatory policies that may be facially valid under the Proposed Rule. The Signatory States recommend that the Final Rule not allow for exclusion of transgender students consistent with their gender identity at all at the K-12 level and intramural collegiate sports at a minimum, where the many benefits of guaranteeing fair and equal access to sport participation for all students regardless of gender identity far outweigh any possible countervailing considerations—to the extent any such consideration even exist that level.

To the extent that the Final Rule does permit exclusion of transgender students—which if it occurs at all should only be permitted under limited and individualized circumstances, and at the non-intramural college level—the Signatory States recommend that the Department provide greater clarity in several respects. First, we recommend that the Proposed Rule specify that transgender students are those who self-identity as such and prohibit invasive methods to determine assigned sex at birth, such as physical exams or scrutiny of identification documents. Second, the Department should clarify what counts as an “important educational objective,” particularly as it relates to sports-related injury, and require recipients to consider measures of competitiveness that are generally applicable and not based in sex discrimination before they may implement measures based on transgender status.

School Activities Ass'n, Case No. 220903262, 2022 WL 3907182 (Utah Dist. Ct. Third Dist. Aug. 19, 2022); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. April 3, 2023). Additionally, Indiana's ban was subject to a preliminary injunction, but that has now been vacated due to mootness. *See A.M. v. Indianapolis Pub. Schs.*, 617 F. Supp. 3d 950 (S.D. Ind. 2022), *vacated as moot*, No. 22-2332, 2023 WL 371646 (S.D. Ind. Jan. 19, 2023).

⁴ *See e.g.*, Matt Laviertes, “From Book Bans to ‘Don’t Say Gay’ Bill, LGBTQ Kids Feel ‘Erased’ in the Classroom: Facing limiting legislation, book bans, harassment and more, gay and transgender youth say they are being ‘erased’ from the U.S. educational system,” NBC News (February 20, 2022), <https://www.nbcnews.com/nbc-out/out-news/book-bans-dont-say-gay-bill-lgbtq-kids-feel-erased-classroom-rcna15819>; Penn America, Banned in the USA: Rising School Book Bans Threaten Free Expression and Students’ First Amendment Rights (April 2022), <https://pen.org/banned-in-the-usa/>.

We further suggest that the Final Rule clarify how a recipient is to “minimize harm” if it denies student participation, and that it specifies that any exclusion relating to a student’s gender identity be based on an individualized assessment of the student’s impact on competition, rather than relying on classifications such as age, sport, and level of competition alone. Further, recipients should be required to provide a student that cannot play on a team consistent with their gender identity with notice, consider alternative mitigating measures and whether criteria focusing on physical attributes better serves the recipient’s goals, implement measures to otherwise protect student privacy by not using invasive methods to determine sex, and provide the student an opportunity to appeal an adverse determination. Lastly, we urge the Department to make explicit in the Final Rule that the subject rule is a floor, not a ceiling, and it cannot preempt more protective state and local laws, rules, and regulations. Such clarity is necessary to eliminate any confusion or misunderstanding on the part of schools that are subject to more protective state and local laws and regulations. We welcome this opportunity to share these suggestions with the Department.

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PART I – THE HISTORY AND PURPOSE OF TITLE IX AND STATE POLICIES

I. Protections for Transgender Students Effectuate Title IX’s Purpose.

A. The Proposed Rule Fills a Gap in the Regulatory Framework.

Title IX prohibits discrimination on the basis of sex in federally funded education programs or activities.⁵ Its implementing regulations, in relevant part, mandate that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”⁶ These provisions reflect the understanding that subjecting students to differential treatment on the basis of sex in the education context is presumptively harmful and cannot be justified by reliance on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁷

While federal regulations generally allow for sex-segregated athletic teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport,”⁸ the current regulations do not address the criteria, if any, a recipient may use to determine a transgender student’s eligibility to participate on an athletic team consistent with their gender identity. As a result, there is a gap in the regulatory framework that the Department must address to ensure fair sports participation for all students.

While the Department has attempted to clarify Title IX’s requirements relating to transgender athletes, its guidance has been inconsistent and incomplete. In 2016, the Department issued a Dear Colleague letter stating that a federal funding recipient may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes . . . or others’ discomfort with transgender students[,]” but that “Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.”⁹ A federal district court issued an injunction against enforcement of that letter, and it was later rescinded.¹⁰ On January 8, 2021, the Department issued a memorandum stating that “if a recipient chooses to provide ‘separate teams for members of each sex’ under 34 C.F.R § 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of

⁵ 20 U.S.C. § 1681.

⁶ 34 C.F.R. § 106.41(a); 28 C.F.R. § 54.450(a).

⁷ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁸ 34 C.F.R. 106.41(b).

⁹ Catherine E. Lhamon, Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Off. for Civ. Rts., Dear Colleague Letter on Transgender Students, 2 (May 13, 2016, rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹⁰ 88 Fed. Reg. 22,864.

transgender status or sexual orientation, to comply with Title IX.”¹¹ That memorandum was withdrawn in February 2021.¹² In January and March of 2021, President Biden issued Executive Orders 13988 and 14021, respectively, directing federal agencies – including the Department – to review and strengthen their regulations preventing discrimination on the basis of sexual orientation and gender identity.¹³ As a result, in April 2021, the Department informed stakeholders that it would begin a review of its Title IX regulations, including public hearings, that ultimately produced this and other proposed rulemakings.¹⁴

The Proposed Rule is an important step toward filling this regulatory gap and making clear that animus towards transgender people is not a valid justification for denying participation in school sports under Title IX, nor is reliance on sex stereotypes or generalizations.

B. Courts Have Recognized that Title IX Protects Transgender Student Athletes.

There have been significant recent legal developments that bear on the interpretation of Title IX and the Department’s need to clarify that Title IX’s broad prohibition against differential treatment on the basis of sex encompasses discrimination based on gender identity. In June 2020, the U.S. Supreme Court issued its landmark decision in *Bostock v. Clayton County*, holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of gender identity and sexual orientation.¹⁵ In so holding, the Court made clear that “discrimination based on . . . transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”¹⁶ While the Court did not similarly consider whether discrimination based on an individual’s transgender status constitutes discrimination on the basis of sex under Title IX, the Court has “looked to its Title VII interpretations of discrimination in illuminating Title IX,”¹⁷ and it follows that *Bostock’s* reasoning applies in other contexts because of the similarity of various federal anti-discrimination statutes, including Title IX.¹⁸

¹¹ Dep’t of Educ., Memorandum from Principal Deputy General Counsel delegated the authority and duties of the General Counsel Reed D. Rubinstein to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights re *Bostock v. Clayton Cnty.* (Jan. 8, 2021) (archived and marked not for reliance in March 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf> (The States object to the term “biological sex” as it is harmful to transgender people, but the quote was used here by the Department in or around 2021 and was not otherwise changed for accuracy).

¹² *Id.*

¹³ 88 Fed. Reg. 22,878.

¹⁴ *Id.* at 22,865.

¹⁵ 140 S. Ct. 1731 (2020).

¹⁶ *Id.* at 1747.

¹⁷ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (the Supreme Court has explicitly “looked to its Title VII interpretations of discrimination in illuminating Title IX”); see also *Franklin v. Gwinnett Cnty. Public Sch.*, 503 U.S. 60, 75 (1992) (relying on *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a Title VII case, in determining that sexual harassment constitutes discrimination under Title IX).

¹⁸ See *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting) (listing Title IX among several statutes impacted).

Appeals courts have correctly recognized that Title IX’s bar against sex discrimination prohibits discrimination against transgender students. For example, two months after *Bostock*, the Court of Appeals for the Fourth Circuit held that a school’s policy requiring a transgender student to use the restroom based on his sex assigned at birth violated Title IX.¹⁹ Guided by *Bostock*’s conclusion, the Fourth Circuit found “little difficulty” in holding that a policy precluding a transgender student from using the boys’ restroom discriminated against him on the basis of sex because the school board could not exclude him from using the restroom consistent with his gender identity without referencing his sex assigned at birth.²⁰ Although the Eleventh Circuit reached the opposite result, the Seventh Circuit reached the same conclusion as the Fourth Circuit with respect to Title IX prohibiting discriminatory restroom policies.²¹

As the Department correctly notes, several lower courts have found that excluding transgender students from participating on athletic teams consistent with their gender identity impermissibly discriminates against these students based on sex. For example, in *A.M. v. Indianapolis Public Schools*, a federal district court preliminarily enjoined a school district from excluding a fifth-grade transgender girl from participating on the girls’ softball team under an Indiana law that categorically precluded transgender girls and women from playing on athletic teams consistent with their gender identity.²² Adopting the Supreme Court’s reasoning in *Bostock* and following Seventh Circuit authority, the court held that the plaintiff had established a strong likelihood of success on the merits of her Title IX claim because, as the court explained, prohibiting an individual from playing on a team consistent with their gender identity “‘punishes that individual for his or her gender non-conformance,’ which violates the clear language of Title IX.”²³ The court also stated that its conclusion was “not even a close call.”²⁴

Other courts considering challenges to bans on transgender participation in sports have reached the same result. In *Hecox v. Little*, a federal district court preliminarily enjoined the State of Idaho from enforcing a state law that “excludes transgender women from participating on women’s sports teams.”²⁵ The court found that, in light of “the dearth of evidence in the record to show excluding transgender women from women’s sports supports sex equality, provides opportunities for women, or increases access to college scholarships,” the transgender student

¹⁹ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (holding that the bathroom policy was a violation of the Equal Protection Clause and constituted discrimination on the basis of sex in violation of Title IX.), *cert. denied*, 141 S. Ct. 2878 (2021).

²⁰ *Grimm*, 972 F.3d at 616-17.

²¹ *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc) (while initially winning a bench trial and a panel of the 11th Circuit, the decisions were then vacated holding that the bathroom policy survives intermediate scrutiny and that the Title IX claim also fails); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (holding that the bathroom policy violates Title IX), *abrogated on other grounds as recognized by Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020).

²² 617 F. Supp. 3d at 969-70.

²³ *Id.* at 965 (internal citations omitted).

²⁴ *Id.*

²⁵ 479 F. Supp. 3d at 943.

plaintiff was likely to succeed in establishing that the Idaho statute violates her right to equal protection.²⁶ The court rightly concluded that the Idaho statute’s “categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports[.]”²⁷

These recent decisions underscore the value of clarifying the Department’s interpretation of Title IX to ensure equal and nondiscriminatory access to education for students at all education levels, regardless of sex.²⁸

II. The Proposed Rule’s Protections for Transgender Students Promote Equal Access.

The Signatory States strongly support the rights of transgender, non-binary, and intersex people to live with dignity, to be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including but not limited to student athletic programs. With approximately 300,000 transgender youth between the ages of thirteen and seventeen in the United States,²⁹ the Proposed Rule will guarantee more transgender students will be able to participate in sports and provide much-needed clarity to the twenty-one states with laws that currently prohibit many transgender youth from having an equal opportunity to play. The remaining twenty-nine states, five territories, and Washington D.C. either ensure transgender students may participate in sports consistent with their gender identity or do not ban their participation.³⁰ The Proposed Rule will send the clear message that discrimination has no place in America.

Upon announcement of the proposed rule, U.S. Secretary of Education Miguel Cardona, stated that “[e]very student should be able to have the full experience of attending school in America, including participating in athletics, free from discrimination.”³¹ And “[b]eing on a sports

²⁶ *Id.* at 983.

²⁷ *Id.* at 968.

²⁸ Most recently, the U.S. Supreme Court turned back an application by West Virginia to lift an injunction blocking enforcement of that state’s ban on transgender sports participation. *West Virginia v. B.P.J.*, 598 U.S. ___, 2023 WL 2801383 (April 6, 2023). Although the district court initially enjoined the law, concluding that the transgender student plaintiff demonstrated a likelihood of success on the merits for her Title IX claim, *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021), it subsequently lifted its injunction. *B.P.J. v. W. Va. State Bd. of Educ.*, No. 21-00316, 2023 WL 111875 (S.D. W.Va. Jan. 5, 2023). The Fourth Circuit then granted an injunction pending appeal. *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113 (4th Cir. Feb. 22, 2023).

²⁹ Jody L. Herman et al., Williams Inst., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

³⁰ Sports Ban Map, *supra* note 2.

³¹ U.S. Dep’t of Educ., *Fact Sheet: U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams* (Apr. 2023),

team is an important part of the school experience for students of all ages.”³² The Signatory States recognize the critical role that equal access to athletics plays in education and the many benefits such participation offers, and strongly support all students’ right to participate fully and equally, free from discrimination and stereotypes.

The Signatory States recognize the many non-profits and organizations have advocated for transgender inclusion in sports, such as the National Education Association,³³ the National Women’s Law Center with various LGBTQI+ non-profits,³⁴ interACT,³⁵ Women’s Sports Foundation,³⁶ and hundreds of women athletes, including history makers like Billie Jean King,³⁷ Megan Rapinoe,³⁸ Candace Parker,³⁹ Brittney Griner,⁴⁰ Layshia Clarendon,⁴¹ and Dutee Chand,⁴²

<https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>.

³² *Id.*

³³ *Title IX At 50: Where We’ve Been, Where We’re Headed, and Why It Still Matters*, Nat’l Educ. Assoc. (July 7, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/title-ix-50-where-weve-been-where-were-headed-and-why-it-still-matters>; *see also* Let Us Play, The Nat’l Ctr. for Transgender Equal., <https://letusplay.team/> (last visited May 3, 2023) (a campaign of various organizations to raise awareness of the public comment period and promote inclusion in sports for transgender youth).

³⁴ *The Department of Education’s Proposed Title IX Athletics Rule*, Nat’l Women’s Law Ctr. (Apr. 13, 2023), <https://nwlc.org/resource/the-department-of-educations-proposed-title-ix-athletics-rule/>.

³⁵ *interACT Responds to Title IX Rule on Intersex and Transgender Student Inclusion in Sports*, interACT (Apr. 6, 2023), <https://interactadvocates.org/interact-responds-to-title-ix-rule-on-intersex-and-transgender-student-inclusion-in-sports/>.

³⁶ *Participation of Transgender Athletes in Women’s Sports*, Women’s Sports Found., <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/participation-of-transgender-athletes-in-womens-sports-the-foundation-position.pdf> (last visited May 3, 2023).

³⁷ Wilton Jackson, *Megan Rapinoe, Billie Jean King, More Support Brief for Trans Youth in Sports*, Sports Illustrated (Oct 14, 2021), <https://www.si.com/high-school/2021/10/15/megan-rapinoe-billie-jean-king-support-brief-trans-youth-in-sports>.

³⁸ *Id.*

³⁹ *Billie Jean King, Megan Rapinoe, and Candace Parker Join Nearly 200 Athletes Supporting Trans Youth Participation in Sports*, Women’s Sports Found. (Dec. 21, 2020), https://www.womenssportsfoundation.org/press_release/billie-jean-king-megan-rapinoe-and-candace-parker-join-nearly-200-athletes-supporting-trans-youth-participation-in-sports/.

⁴⁰ Kevin Harrish, *World reacts to Brittney Griner transgender news*, The Comeback (Apr. 30, 2023), <https://www.msn.com/en-us/lifestyle/lifestyle-buzz/world-reacts-to-brittney-griner-transgender-news/ar-AA1ay4Ms?li=BBnbfL>.

⁴¹ Katie Barnes, *The Power of Layshia Clarendon*, ESPN (June 24, 2023), https://www.espn.com/espn/feature/story/_/id/31681454/the-power-layshia-clarendon.

⁴² OB Bureau, *Odisha’s Dutee Chand Speaks in Favour Of Transgender Athletes Again, ‘Don’t Ban Them From Competing’*, Odishabyes (June 23, 2022), <https://odishabyes.com/odishas-dutee-chand-speaks-in-favour-of-transgender-athletes-again-dont-ban-them-from-competing/>.

Kye Allums,⁴³ and Sue Bird.⁴⁴ This support is a testament to how important equal access is not just to sports and athletics, but to our civil society and the futures of transgender, nonbinary, gender nonconforming, and cisgender students alike.

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender students should not experience discrimination and categorical prohibitions that prevent them from participating on athletic teams consistent with their gender identity. We know that discrimination against transgender students has no place in our multi-cultural democracy.

Discrimination and exclusion on the basis of one’s transgender status causes tangible and real educational, economic, emotional, and health harms – harms that are particularly grave for transgender young people, who already face heightened rates of depression, substance use disorders, and suicide.⁴⁵ Courts have long recognized that “persons who are personally denied equal treatment” may incur “serious noneconomic injuries.”⁴⁶ To prevent these direct injuries, many states have adopted policies and practices aimed at combatting discrimination against transgender people and creating an inclusive and welcoming environment.⁴⁷ These policies ensure

⁴³ Katy Steinmetz, *Meet the First Openly Transgender NCAA Division I Athlete*, Time (Oct. 28, 2014), <https://time.com/3537849/meet-the-first-openly-transgender-ncaa-athlete/>.

⁴⁴ Madison Williams, *Sue Bird, and Megan Rapinoe Among 40 Athletes to Sign Letter Opposing Federal Anti-Trans Sports Ban*, Sports Illustrated (Apr. 10, 2023), <https://www.si.com/sports/2023/04/10/sue-bird-megan-rapinoe-among-40-athletes-letter-opposing-federal-anti-trans-sports-ban>.

⁴⁵ *2022 National Survey on LGBTQ Youth Mental Health*, The Trevor Project, <https://www.thetrevorproject.org/survey-2022/> (last visited May 3, 2023).

⁴⁶ *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

⁴⁷ See e.g., **California**: Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov’t Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *Id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado**: Colo. Rev. Stat. § 24-34-301(7) (definition); *Id.* § 24-34-402 (employment); *Id.* § 24-34-502 (housing); *Id.* § 24-34-601 (public accommodations). **Connecticut**: Conn. Gen. Stat. § 10-15c (schools); *Id.* § 46a-51(21) (definition); *Id.* § 46a-60 (employment); *Id.* § 46a-64 (public accommodations); *Id.* § 46a-64c (housing). **Delaware**: Del. Code Ann. tit. 6, § 4501 (public accommodations); *Id.* tit. 6, § 4603(b) (housing); *Id.* tit. 19, § 711 (employment). **Hawai’i**: Haw. Rev. Stat. § 368D-1 (education); *Id.* § 302A-461 (school athletics); *Id.* § 489-2 (definition); *Id.* § 489-3 (public accommodations); *Id.* § 515-2 (definition); *Id.* § 515-3 (housing). **Illinois**: 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *Id.* 5/1-103(O-1) (definition). **Iowa**: Iowa Code § 216.2(10) (definition); *Id.* § 216.6 (employment); *Id.* § 216.7 (public accommodations); *Id.* § 216.8 (housing); *Id.* § 216.9 (education). **Kansas**: Kansas Hum. Rts. Comm’n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court’s Bostock Decision* (Aug. 21, 2020) (advising that Kansas laws prohibiting discrimination based on “sex” in “employment, housing, and public accommodation” contexts “are inclusive of LGBTQ and all derivatives of ‘sex’”).

that transgender youth have equal access to participate in sports, whether sex-segregated or not, on an equal basis with their peers. We recommend that no transgender student should be denied the benefits of participating in athletic activities and providing equal access to all students does not deprive any student the benefits of participating in athletic activities.

Many of the Signatory States permit young people to participate in single-sex sports teams consistent with their gender identity because doing so fosters inclusive communities, workplaces, and school environments that benefit all. Categorical bans on participation by transgender athletes often resort to pretextual arguments such as competitive fairness or a presumed likelihood of more sports-based injuries, often citing sources that are not empirically grounded or sufficiently reviewed.

Maine: Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition); *Id.* § 4571 (employment); *Id.* § 4581 (housing); *Id.* § 4591 (public accommodations); *Id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov't § 20-304 (public accommodations); *Id.* § 20-606 (employment); *Id.* § 20-705 (housing); Md. Code Ann., Educ. § 26-704 (schools). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *Id.* ch. 76, § 5 (education); *Id.* ch. 151B, § 4 (employment, housing, credit); *Id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *Id.* § 363A.08 (employment); *Id.* § 363A.09 (housing); *Id.* § 363A.11 (public accommodations); *Id.* § 363A.13 (education) (education). **Nevada:** Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *Id.* §§ 613.310(4), 613.330 (employment); *Id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *Id.* § 354-A:6 (employment); *Id.* § 354-A:8 (housing); *Id.* § 354-A:16 (public accommodations); *Id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *Id.* § 10:5-12 (public accommodations, housing, employment); *Id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *Id.* § 28-1-7(A) (employment); *Id.* § 28-1-7(F) (public accommodations); *Id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law §§ 291, 296 (education, employment, public accommodations, housing). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *Id.* § 659.850 (education); *Id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *Id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *Id.* tit. 9, § 4502 (public accommodations); *Id.* tit. 9, § 4503 (housing); *Id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *Id.* § 49.60.030(1)(a)-(e) (employment, public accommodations, real estate transactions, credit transactions, and insurance transactions); *Id.* § 49.60.040(27) (definition); *Id.* § 49.60.180 (employment); *Id.* § 49.60.215 (public accommodations); *Id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A-i) (definition); *Id.* § 2-1402.11 (employment); *Id.* § 2-1402.21 (housing); *Id.* § 2-1402.31 (public accommodations); *Id.* § 2-1402.41 (education); Due to these harms and continued discrimination, at least twenty-two states and the District of Columbia, and at least 22 local governments within them, offer express protections against discrimination based on gender identity in areas such as education, housing, public accommodations and employment.

Many of the Signatory States welcome transgender students to participate in sports because to do otherwise would create an environment where transgender students are treated unfairly. These States understand that to force transgender students to compete with students who are not the same gender as themselves, simply because of their sex assigned at birth, is a discriminatory act that causes tangible and real harm. This different treatment under the law would also be discrimination on the basis of sex and violate the Equal Protection Clause of the U.S. Constitution, under any level of scrutiny.

The Signatory States recognize that discrimination against transgender youth, including denying them the opportunity to participate in extracurricular activities consistent with their gender identity, can have serious health and academic consequences. Where 71% of transgender and nonbinary youth in a 2022 survey reported being discriminated against because of their gender identity,⁴⁸ LGBTQ students who found their school to be LGBTQ affirming were less likely to attempt suicide, and students in a less affirming school were more likely to attempt suicide.⁴⁹ The 2015 U.S. Transgender Survey, the largest survey of transgender people to date, found those who reported negative experiences in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.⁵⁰ Transgender people attempt suicide at a rate nearly nine times that of the general population,⁵¹ and more than half of transgender and nonbinary youth in a 2022 mental health survey reported having considered attempting suicide in the past twelve months.⁵² Lastly, the 2015 U.S. Transgender Survey found that over three quarters (77%) of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked, more than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and approximately one in eight (13%) reported being sexually assaulted.

Discrimination in school settings also negatively affects educational outcomes. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.⁵³ Discriminatory school climates have also been found to exacerbate absenteeism. In the month before a 2019 survey, LGBTQ students who had experienced discrimination in their schools based on their sexual orientation or gender identity

⁴⁸ 2022 *National Survey on LGBTQ Youth Mental Health*, *supra* note 45 at 17.

⁴⁹ *Id.* at 4.

⁵⁰ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132, Nat'l Ctr. for Transgender Equal. (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁵¹ *Id.* at 114.

⁵² 2022 *National Survey on LGBTQ Youth Mental Health*, *supra* note 45 at 5.

⁵³ Joseph G. Kosciw et al., GLSEN, *The 2019 National School Climate Survey* 45, 48 (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf; *see also* Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* 25, 27 fig. 15 (2009), <https://files.eric.ed.gov/fulltext/ED505687.pdf> (showing that more frequently harassed transgender students had significantly lower grade point average than other transgender students who were not as frequently harassed).

were almost three times as likely (44.1% versus 16.4%) to have missed school because they felt unsafe or uncomfortable.⁵⁴ And a 2022 study found that LGBTQ+ youth experiencing discrimination attempted suicide at twice the rate of LGBTQ+ youth who did not experience discrimination.⁵⁵ Transgender youth of color, in particular, face unique difficulties as a result of their intersecting marginalized identities.⁵⁷

B. State Policies of Inclusion Yield Broad Benefits and Increase Academic Achievement and Overall Student Health

The Signatory States know that athletic participation has been linked to academic achievement and improved academic performance.⁵⁸ Participants in interscholastic sports have “higher grades, spend more time on homework, have higher educational aspirations, and are more likely to attend college than are their counterparts.”⁵⁹ Young women who participate in high school athletics, in particular, are more likely on average to complete college.⁶⁰ For LGBTQ+ people, athletic participation has also been linked to “more successful outcomes in adulthood, such as employment.”⁶¹ It is reasonable that transgender students who participate in sports experience similar outcomes to their cisgender peers as these above studies may infer, and the Signatory States recognize these benefits that enhance students’ well-being and facilitate their ability to learn.⁶²

There are also many health benefits to sports participation. Regular physical activity “decreases the risk of developing diabetes, hypertension, cancer, and obesity, as well as

⁵⁴ Kosciw et al., *The 2019 National School Climate Survey*, *supra* note 53 at 49.

⁵⁵ *2022 National Survey on LGBTQ Youth Mental Health*, *supra* note 45 at 15.

⁵⁶ James et al., *Report of the 2015 U.S. Transgender Survey*, *supra* note 50 at 131-35.

⁵⁷ Nhan L. Truong et al., GLSEN, *Erasure and Resilience: The Experiences of LGBTQ Students of Color* 3 (2020), <https://www.glsen.org/sites/default/files/2020-06/Erasureand-Resilience-Black-2020.pdf>.

⁵⁸ Alison R. Snyder et al., *Health-Related Quality of Life Differs Between Adolescent Athletes and Adolescent Nonathletes*, 19 *J. Sport Rehab.* 237, 238 (2010)

<https://pubmed.ncbi.nlm.nih.gov/20811075/>; Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females’ Educational Attainment*, 38 *Youth & Soc’y* 443, 444 (2007) <http://jvlonline.com/sportsdocs/womenHighSchooltoCollege2007.pdf>.

⁵⁹ Troutman & Dufur, *From High School Jocks to College Grads*, at 444.

⁶⁰ *Id.* at 454.

⁶¹ Scott B. Greenspan et al., *LGBTQ+ Youth’s Experiences and Engagement in Physical Activity: A Comprehensive Content Analysis*, 4 *Adolescent Rsch. Rev.* 169, 170 (2019) https://shine.lab.uconn.edu/wp-content/uploads/sites/3321/2021/06/greenspan_et_al_2019.pdf.

⁶² *See, e.g.*, Brief of Amici Curiae Sch. Adm’rs from Thirty-One States & D.C. in Support of Respondent at 3-4, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055; Office of Elementary & Secondary Educ., *Safe & Supportive Schools* (Feb. 15, 2023).

cardiovascular and bone and joint diseases.”⁶³ For transgender youth and youth generally, “[p]articipation in physical activity during childhood and adolescence has a positive impact on physical health throughout the life span.”⁶⁴ Mental health benefits also result from sports participation.⁶⁵ There is also improved “emotional regulation, decreased hopelessness and suicidality, fewer depressive symptoms, and higher self-esteem.”⁶⁶ For LGBTQI+ students in particular, sports participation has been linked to higher levels of self-esteem and lower levels of depression.⁶⁷

The experience of Signatory States with inclusive policies demonstrate that allowing their transgender students access to facilities and activities consistent with their gender identity creates school climates that enhance students’ well-being, facilitates their ability to learn, and provides other benefits.⁶⁸ Of great importance, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cisgender peers.⁶⁹ These benefits redound to society as a whole because education advances not only private interests of students, but also prepares them to contribute to society – socially, culturally, and economically.⁷⁰

⁶³ Snyder et al., *Health-Related Quality of Life*, *supra* note 58 at 237-38; *see also LGBTQ+ Youth’s Experiences and Engagement in Physical Activity*, *supra* note 61 at 170; *From High School Jocks to College Grads*, *supra* note 58 at 444.

⁶⁴ Ellis Barrera et al., *The Medical Implications of Banning Transgender Youth from Sport Participation*, 176 *JAMA Pediatrics* 223, 223 (2022)

<https://jamanetwork.com/journals/jamapediatrics/article-abstract/2786338>; *see, e.g.*, Landon D. Hughes et al., *Pediatric Provider Perspectives on Laws and Policies Impacting Sports Participation for Transgender Youth*, 9 *LGBT Health* 247, 251 (2022) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9271330/pdf/lgbt.2021.0392.pdf>.

⁶⁵ Richard Bailey, *Physical Education and Sport in Schools: A Review of Benefits and Outcomes*, 76 *J. Sch. Health* 397, 398 (2006) <https://pubmed.ncbi.nlm.nih.gov/16978162/>; Snyder et al., *Health-Related Quality of Life*, *supra* note 58 at 238, 244.

⁶⁶ Caitlin M. Clark & Joseph G. Kosciw, *Engaged or Excluded: LGBTQ Youth’s Participation in School Sports and Their Relationship to Psychological Well-Being*, 59 *Psych. Schs.* 95, 96 (2022) (citations omitted) <https://onlinelibrary.wiley.com/doi/epdf/10.1002/pits.22500>; *see also* Jennifer R. Pharr et al., *Serial Mediation Analysis of the Association of Familiarity with Transgender Sports Bans and Suicidality Among Sexual and Gender Minority Adults in the United States*, 19 *Int’l J. Env’t Rsch. & Pub. Health* 1, 11-12 (Aug. 2022) <https://www.mdpi.com/1660-4601/19/17/10641>.

⁶⁷ Caitlin M. Clark et al., GLSEN, *LGBTQ Students and School Sports Participation: Research Brief* 8 (2021), <https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf>.

⁶⁸ *See, e.g.*, Brief of Amici Curiae Sch. Adm’rs from Thirty-One States & D.C. in Support of Respondent at 3-4, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

⁶⁹ *See* Kristina R. Olson, et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, *Pediatrics* 5-7 (Mar. 2016)

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4771131/pdf/PEDS_20153223.pdf; Brief of Amici Curiae Sch. Adm’rs, *supra* note 68 at 4.

⁷⁰ *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

For example, California’s Education Code allows transgender athletes to compete based solely on their gender identity.⁷¹ Secondly, the Unruh Civil Rights Act classifies public schools as business establishment and provides equal accommodations, to all persons no matter what their sex.⁷² California as a whole instituted its inclusionary policies in K-12 school sports roughly 10 years ago. Further, since 2013 the California Interscholastic Federation, the governing body for California public and private high school sports, has provided that students should participate on teams consistent with gender identity “irrespective of the gender listed on a student’s records.”⁷³ The Los Angeles Unified School District, one of the largest school districts in the country, has implemented a transgender-inclusive sports policy for many years “without problems.”⁷⁴ As a school district official in Los Angeles has reported, the district’s policy has led to a positive “transformation” in the district’s schools: an experience that “stands in stark contrast” to “expressed concerns that students will abuse the policy.”⁷⁵

Massachusetts law also protects transgender students.⁷⁶ The Massachusetts Department of Elementary and Secondary Education has released important guidance titled “Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment - Nondiscrimination on the Basis of Gender Identity” which states in relevant part, “[w]here there are sex-segregated classes or athletic activities, including intramural and interscholastic athletics, all students must be allowed to participate in a manner consistent with their gender identity. With respect to interscholastic athletics, the Massachusetts Interscholastic Athletic Association will rely on the gender determination made by the student’s district; it will not make separate gender identity determinations.”⁷⁷ Massachusetts has found that their policy of inclusion permits students to participate fairly and without any issues.

⁷¹ Cal. Educ. Code § 221.5.

⁷² Cal. Civ. Code § 51.

⁷³ California Interscholastic Federation (CIF), Constitution and Bylaws, Bylaw 300(D) (“Gender Identity Participation”), https://www.cifstate.org/governance/constitution/300_Series.pdf; see also CIF, Gender Diversity Toolkit, https://www.cifstate.org/coaches-admin/CA_Gender_Diversity_Toolkit.pdf. (“Should we be asking for proof of gender, like a birth certificate or doctor’s statement?” “No.”)

⁷⁴ Patrick McGreevy, *California Transgender Students Given Access to Opposite-Sex Programs*, L.A. Times (Aug. 12, 2013) <https://www.latimes.com/politics/la-xpm-2013-aug-12-la-me-pc-gov-brown-acts-on-transgender-bill-20130812-story.html>.

⁷⁵ Judy Chiasson, *Success and Opportunity for Transgender Students*, Huff-Post (updated Feb. 2, 2016) https://www.huffpost.com/entry/success-and-opportunity-for-transgender-students_b_3744830.

⁷⁶ Mass. Gen. Laws ch. 76, § 5 (2011); 603 Mass. Code Regs. 26.06(5).

⁷⁷ Massachusetts Dep’t of Elementary and Secondary Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*, <https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html>.

New Jersey has also provided equal access since 2009.⁷⁸ New Jersey’s Law Against Discrimination makes it illegal to discriminate against people based on their “gender identity or expression”⁷⁹ and a second state law, adopted in 2017, required the Department of Education to: (1) develop guidelines on providing transgender students with the same opportunities to participate in physical education as other students; (2) permit the student to participate in physical education in accordance with the student’s gender identity; and (3) develop guidelines permitting a transgender student to participate in gender-segregated school activities in accordance with a student’s gender identity.⁸⁰ The New Jersey State Interscholastic Athletic Association (“NJSIAA”) has promulgated guidelines for member schools that allow transgender students to self-identify and to compete on teams consistent with their gender identity.⁸¹

New York also expressly prohibits discrimination and harassment of students on school property and at a school function on the basis of gender identity in K-12 schools.⁸² The New York State Education Department has made it clear that transgender students in K-12 schools should be allowed to access school facilities and participate in activities consistent with their gender identity.⁸³ Further, the New York State Human Rights Law prohibits discrimination on the basis of gender identity or expression and states that all protections are a floor not a ceiling, to be liberally construed, without reference to any federal law that may lead to a more restrictive result.⁸⁴

Any claims that having transgender students participate in sports consistent with their gender identity will lead to boys dominating girls’ sports is also inherently without merit. Such arguments deny the legitimacy of student’s gender self-determination and their gender identity, incorrectly equating transgender girls with boys and transgender boys with girls. Further, Massachusetts and New Jersey have policies in place for inclusive and equitable school policies and the Signatory States are unaware of any instance which equal access for transgender students had compromised fairness, reduced opportunities for cisgender athletes, or led to an increase in sport-related injuries. Many interscholastic sports organizations and local school districts in the

⁷⁸ New Jersey State Interscholastic Athletic Ass’n (NJSIAA), *Transgender Policy – Frequently Asked Questions* 3, <https://www.njsiaa.org/sites/default/files/documents/2022-06/Transgender%20FAQ%27s%20Approved%206-8-22.pdf> (NJSIAA Policy FAQ); *see also* NJSIAA, *Transgender Policy*, <https://www.njsiaa.org/sites/default/files/documents/2020-10/transgender-policy-approved-11-15-17.pdf> (Nov. 15, 2017). NJSIAA is a voluntary association whose regulations are binding on member schools, subject to the approval of the Commissioner of Education. *See B.C. v. Bd. of Educ., Cumberland Regional Sch. Dist.*, 220 N.J. Super. 214, 234-35 (App. Div. 1987); N.J. Stat. Ann. § 18A:11-3. NJSIAA has 440-member schools, both public and private. NJSIAA, *Inside NJSIAA*, [njsiaa.org/inside-njsiaa](https://www.njsiaa.org/inside-njsiaa).

⁷⁹ N.J. Stat. Ann. § 10:5-4.

⁸⁰ N.J. Stat. Ann. § 18A:36-41; N.J. Dep’t of Educ., *Transgender Student Guidance for School Districts*, <https://www.nj.gov/education/safety/sandp/climate/docs/Guidance.pdf>

⁸¹ NJSIAA Policy FAQ, *supra* note 78.

⁸² N.Y. Educ. Law §§ 11(6), 12(1).

⁸³ New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students* 9-11 (July 2015), https://p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf.

⁸⁴ N.Y. Exec. Law § 291(2); N.Y. Exec. Law § 300.

Signatory States have adopted policies to ensure that transgender students will have equal access to sports participation, and these policies have not resulted in fewer opportunities for cisgender students.⁸⁵

The experiences of the Signatory States with inclusive and equitable school athletics policies demonstrates that such policies do not compromise fairness or reduce opportunities for athletes, cisgender or otherwise and such policies further other critically important interests. Having an inclusive and supportive environment in education benefits all students,⁸⁶ and the

⁸⁵ See, e.g., **California**: California Interscholastic Fed’n, *Constitution & Bylaws* 99 (2022-23), https://cifstate.org/governance/constitution/Constitution_and_Bylaws.pdf (transgender students must be afforded opportunity to participate in sports in manner consistent with their gender identity); Fresno Unified Sch. Dist., *Fresno Unified Admin. Regul. (AR) 5145.3: Nondiscrimination/Harassment* 6 (Mar. 7, 2022), <https://bp.fresnounified.org/wp-content/uploads/5145-3-AR-Nondiscrimination-Harassment-1.pdf> (same). **Colorado**: Colorado High Sch. Activities Ass’n, *CHSAA Transgender Inclusion Bylaw & Policy 2*, https://chsaanow.com/documents/2021/7/28//TRANSGENDER_POLICY_STATEMENT_2019.pdf (same). **Maryland**: Maryland Pub. Secondary Schs. Athletic Ass’n, *MPSSAA Guidance for Participation of Transgender Youth in Interscholastic Athletics* 1-2 (Aug. 2016), https://www.mpssaa.org/assets/1/6/MPSSAA_Transgender_Guidance_revised_8.16.pdf (same, for inter-scholastic sports). **Massachusetts**: Massachusetts Interscholastic Athletic Ass’n, *Rules and Regulations Governing Athletics: A Handbook for Principals and Athletic Directors* 41 (2021-23), <https://miaa.net/wp-content/uploads/2022/04/MIAA-Handbook-21-23revised.pdf>. **Minnesota**: Minnesota State High Sch. League, *Official Handbook, 300.00: Administration of Student Eligibility Bylaws* 61 (2022-23), <https://www.mshsl.org/sites/default/files/2022-07/MSHSL%20Handbook%202022-2023%20300%20Series.pdf> (same); University of Minn., *Administrative Policy, Equity and Access: Gender Identity, Gender Expression, Names and Pronouns*, <https://policy.umn.edu/operations/genderequity> (same, for all university programs and activities). **Nevada**: Nevada Interscholastic Activities Ass’n, *NIAA Transgender Participation Position Statement and Policy* (Apr. 6, 2016), https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_d53915468a5942faa3e3a5043231aeeef.pdf (same, for “gender specific sports team[s]”). **New York**: New York State Pub. High Sch. Athletic Ass’n, *NYSPHSAA Handbook* 49-51, https://nysphsaa.org/documents/2022/2/15/NYSPHSAA_Handbook_002.pdf (equal participation by transgender students in all interscholastic sports activities consistent with their gender identity). **Oregon**: Oregon Sch. Activities Ass’n, *2022-2023 Oregon Sch. Activities Association Handbook* 80-82, <https://www.osaa.org/docs/handbooks/osaahandbook.pdf> (same). **Rhode Island**: Rhode Island Interscholastic League, *Rules and Regulations, Article 3, Eligibility* (June 21, 2022), <https://www.riil.org/page/3033> (same). **Washington**: Washington Interscholastic Activities Ass’n, *WIAA Handbook 2022-23* 35, <http://wiaa.com/results/handbook/2022-23/FullHandbook.pdf> (same).

⁸⁶ See Brief of Amici Curiae Sch. Adm’rs, *supra* note 68 at 2 (“[I]nclusive policies not only fully support the reality of transgender students’ circumstances, but also foster a safer and more welcoming learning environment for all students.”). This is especially true of sports, given the importance of teamwork and cooperation in athletic competition. See *From High School Jocks to College Grads*, *supra* note 58 at 444-45.

Signatory States recognize and strongly support the federal government’s initial proposal to create an environment where all students can achieve success and receive a quality education free from bias and discrimination. The Signatory States offer the following recommendations to further strengthen the Proposed Rule to meet the goal of inclusion.

PART II – THE SIGNATORY STATES SUPPORT EXPANDED PROTECTIONS FOR TRANSGENDER YOUTH IN THE FINAL RULE.

I. Prohibit Schools from Discriminating Based on Fairness and Safety Until at Least Elite Levels of Competition at the College Level.

We recommend that students should not be denied the ability to play consistent with their gender identity at any level, but at a minimum in K-12 schools and college intramurals. As the Department recognizes, until sports reach an elite college level, any fairness and safety concerns are nearly always outweighed by the benefits of inclusivity in sports. As the Notice of Proposed Rulemaking explains, “although competition is an integral aspect of athletics, the opportunity to participate in athletics at the elementary and secondary levels also serves other educational purposes, including learning to work as a team and building skills.”⁸⁷ For many students, participating in sports provides an opportunity to develop a connection with teammates, physically challenge oneself, and experience the simple joy of playing with friends. We encourage the Department to strengthen the Proposed Rule by clarifying that Title IX requires recipients to permit transgender students to compete on sex-segregated teams consistent with their gender identity without exception for all K-12 as well as collegiate intramurals, and to provide minimum protections at any level, and that the benefits, as well as the other social, emotional, physical, and cognitive benefits derived from playing sports described below, cannot be denied to any transgender student on the grounds of factors such as fairness or safety.

Several of the States have enacted laws or issued guidance to ensure equal opportunities for transgender students—including with regard to sports programs—and have found that such policies have not compromised fairness, made sports unsafe, or reduced opportunities for student athletes.⁸⁸ These policies do not have further requirements or limitations based on gender identity.

⁸⁷ 88 Fed. Reg. 22,870.

⁸⁸ **Connecticut:** Conn. Gen. Stat. § 10-15c (prohibiting discrimination on basis of gender identity in student access to public school activities and programs). **Michigan:** State Bd. of Educ., Mich. Dep’t of Educ., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* 5-6 (Sept. 14, 2016), <https://www.michigan.gov/-/media/Project/Websites/mde/2016/09/15/SBEStatementonLGBTQYouth.pdf?rev=83c59267fc5f46a8ba30061969f91359> (advising that K-12 students be permitted to participate in sports in accordance with their gender identity). **Minnesota:** Minnesota Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* 8 (Sept. 25, 2017) <https://education.mn.gov/MDE/dse/safe/> (same). **New Jersey:** New Jersey Dep’t of Educ., *Transgender Student Guidance for School Districts* 6 <https://www.nj.gov/education/safety/sandp/climate/docs/Guidance.pdf> (same, as to “gender-segregated classes or athletic activities, including intramural and interscholastic athletics”);

As explained *infra* in Part II § III(A), New York, and New Jersey, as well as other States are not aware of evidence that transgender athletes have dominated any sport or competition, made sports unsafe, or have caused scholarship opportunities to be unfairly denied to cisgender competitors.

Therefore, we propose that for elementary, middle school, high school, and intramural college sports, schools cannot categorically prohibit transgender students from participation based on any alleged fairness or safety concern. Even at elite levels minimum nondiscrimination protections are needed, such as those suggested below. The experiences of many Signatory States demonstrate that treating transgender students consistent with their gender identity furthers the purpose of Title IX and promotes inclusive schools without negatively impacting sport safely nor limit access to other opportunities.⁸⁹

II. Expressly Protect Student Privacy and Provide that Students May Self-Identify as Transgender.

Recipients should be required to rely on self-identification to determine who is transgender and subject to the Final Rule. The Signatory States point out that any criteria that limit or deny students' eligibility to participate in sports consistent with their gender identity may force individual students to disclose that they are transgender, which can be "extremely traumatic" and

Division on C.R., N.J. Dep't of L. & Pub. Safety, *5 Things You Should Know About LGBTQ+ Student Rights in Schools* (June 15, 2022) https://www.njoag.gov/wp-content/uploads/2022/06/fact_LGBTQ-School-Students.pdf (under the New Jersey Law Against Discrimination "students are allowed to . . . participate in extracurricular activities, including intramural or interscholastic athletics and physical education, that best correspond to their gender identity and expression"). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (prohibiting discrimination based on gender identity in public schools); Washington Off. of Superintendent of Pub. Instruction, *Gender-Inclusive Schools* <https://www.k12.wa.us/policy-funding/equity-and-civil-rights/information-families-civil-rights-washington-schools/gender-inclusive-schools> (transgender students in K-12 schools must be permitted to participate in "physical education and athletics" consistent with their gender identity). **District of Columbia:** D.C. Code §§ 2-1402.41, 38-841.02; D.C. Mun. Regs. tit. 5-F, § 102.6 (prohibiting gender identity discrimination by educational institutions generally and in the context of school athletics).

⁸⁹ Any exceptions to the rule should be very limited and if the Final Rule does allow exclusions at levels lower than elite collegiate sports, the Department should clarify how recipients may consider age and level of competition without discriminating against transgender students. As currently written, the Proposed Rules states that sex-based criteria must be tailored to each sport, level of competition, and grade or education level. 88 Fed. Reg. 22,860. Because of the "and" and "or" at the end of the sentence, a reader might read this provision disjunctively. In the Notice of Proposed Rulemaking, the Department makes clear that these three classifications should be used jointly, explaining that a school's sex-based criteria can discriminate against transgender individuals based on fairness, "but only if those criteria are substantially related to ensuring fairness in competition in that particular sport at the applicable level of competition and grade or education level."⁸⁹ We recommend that the Proposed Rule be clarified to specify that all classifications (sport, level of competition, and grade/education level) must be jointly used to tailor any prohibition to a particular sports team to minimize the harms against transgender students.

“undermine [a student’s] social transition.”⁹⁰ Forced disclosure subjects transgender individuals to potential “embarrassment, harassment, and invasion of privacy through having to verify [their] sex.”⁹¹ Forced disclosure can communicate a school’s disapproval of transgender students, “which the Constitution prohibits” in the context of public schools.⁹²

We recommend that the Department clarify in the Final Rule that any determination regarding whether a student is transgender must be made on the basis of a student’s self-identification.⁹³ Other methods are unworkable or otherwise harm students. For instance, physical examinations and testing are invasive, unnecessary, and we recommend should not be done in any case.⁹⁴ It is dangerous to rely on anything but student self-identification. Likewise, if the state is permitted to require specific medical treatment or medical attestation, that could also be burdensome. Any such requirement should be as minimally intrusive as possible to confirm the status of all students. The Department should be aware that there are significant barriers to obtaining certain gender-affirming care, including puberty blockers, hormone replacement therapy and gender affirming procedures or surgeries in states where those treatments have been banned that would make a student’s participation on a specific team contingent on having conforming identify documents or obtaining specific medical care nearly impossible.⁹⁵ For example, approximately seventeen states ban or restrict best-practice medical care for transgender youth.⁹⁶ Four states, Oklahoma, Idaho, Alabama, and North Dakota, even make it a felony crime for

⁹⁰ *A.M.*, 617 F. Supp. 3d at 961.

⁹¹ *Hecox*, 479 F. Supp. 3d at 987; *see also* 2022 *National Survey on LGBTQ Youth Mental Health*, The Trevor Project 17 (2022), <https://www.thetrevorproject.org/survey-2022/>. 71% of transgender and nonbinary youth respondents reported being discriminated against because of their gender identity.

⁹² *Hecox*, 479 F. Supp. 3d at 987 (citing *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003)).

⁹³ We note that the Department has previously deferred on defining sex and believe there is no need to provide a definition for this rule. Nondiscrimination on Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41,531 (July 12, 2022) (“[T]he Department does not propose adding a definition of ‘sex’ here because sex can encompass many traits and because it is not necessary for the regulations to define the term for all circumstances.”).

⁹⁴ *See* International Olympic Committee (IOC), *IOC Framework on Fairness, Inclusion, and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (Nov. 2021) (IOC Framework), § 7.2, https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf#_ga=2.234267037.244827753.1682098475-1493248601.1682098475, (“Criteria to determine eligibility for a gender category should not include gynecological examinations or similar forms of invasive physical examinations, aimed at determining an athlete’s sex, sex variations or gender.”).

⁹⁵ *See Bans On Best Practice Medical Care For Transgender Youth*, Movement Advancement Project (May 2, 2023), (Gender Affirming Care Ban Map), https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans.

⁹⁶ *Id.* (some bans are temporality blocked in full or part by the courts of not otherwise in effect yet).

medical providers to provide best practice care to transgender youth.⁹⁷ Students from certain states may find state-level barriers or bans to correcting their government issued documents.⁹⁸ Any requirement for consistent identity documents may also violate a student’s privacy, or otherwise be invasive and disparate such that it would violate Title IX or State specific non-discrimination laws.⁹⁹

Thus, the Signatory States recommend that the Department strengthen the Proposed Rule by explicitly prohibiting schools from requiring any invasive physical examinations, blood tests, production of a student’s medical records, or identification documents related to gender identity. Those methods should be prohibited because they are disproportionately invasive and harmful relative to the state’s interest in competition and building teamwork. If it is permitted at the elite non-intermural level, it should be as minimally intrusive as possible, such as a letter from a parent or a medical provider being deemed sufficient for placement.

For example, NJSIAA provides a good model in this respect. The Association defines “transgender student” as any student whose gender identity differs from sex assigned at birth and provides that “[t]he student must declare their gender identity. There is no medical test or official document required to establish one’s gender identity.”¹⁰⁰ Voluntary declarations also keep schools in compliance with the Family Educational Rights and Privacy Act of 1974 (“FERPA”).

III. Even if the Final Rule Does Permit Exclusion of Transgender Students in Some Limited Circumstances, Additional Clarification is Needed to Protect Transgender Students.

As a preliminary matter, none of the below methods of improving of the Final Rule are suggested to be used to justify limiting participation of transgender students before the elite collegiate level. Even at the elite level minimum nondiscrimination protections are needed, such as those suggested below. The Signatory States draw attention to these guardrails to better inform the Department of how the Final Rule may be improved to better protect the privacy rights of all students.

⁹⁷ *Id.*

⁹⁸ Identity Document Laws and Policies, Movement Advancement Project (April 25, 2023), https://www.lgbtmap.org/equality-maps/identity_document_laws.

⁹⁹ If recipients are permitted to limit access to sports based on a requirement of a student needing to submit an updated identification document, this could in effect ban many transgender athletes since recent efforts by legislatures across the United States have made it more difficult for transgender students to correct their birth certificates or identification documents, and rules and costs differ state-to-state. Although these restrictions have passed in many states, some may be struck down as previous restrictions have been. *See e.g.*, ACLU, Cases, *Marquez v. State of Montana* (April 27, 2023) <https://www.aclu.org/cases/marquez-v-state-montana#legal-documents>, (securing an injunction against a restrictive Montana identification document law); Lambda Legal, Cases, *Foster v. Andersen*, <https://legacy.lambdalegal.org/in-court/cases/foster-v-andersen> (same, in Kansas).

¹⁰⁰ NJSIAA Policy FAQ, *supra* note 78.

A. Specify How the Legitimacy of Fairness and Safety Concerns Will Be Determined.

The States commend the Department in requiring that any criteria limiting participation in sports be “substantially related to the achievement of an important educational objective.”¹⁰¹ While the Department noted that the Proposed Rule does not specify the important educational objectives that a recipient may assert, the Department identifies “ensuring fairness in competition and prevention of sports-related injury” as examples of objectives that may be asserted.¹⁰² In addition to specifying that such interests may not be asserted to justify exclusion of transgender students at least at the non-elite and K-12 levels, we encourage the Department to further clarify the types of information that should be provided by an educational institution in support of an objective of prevention of sports-related injury as a concern related to a student’s eligibility to participate on an athletic team consistent with their gender identity where such exceptions are permitted by the Final Rule. While there is some limited research relating to certain athletic performance advantages to circulating levels of testosterone, the Signatory States have not found peer-reviewed and scientifically substantiated safety issues tied to transgender participation in sports.¹⁰³ As the Department notes in the Proposed Rule, stakeholders identified that any risk of injury is already an issue in sports because “there are significant differences in size, weight, and strength among girls and women who are not transgender.”¹⁰⁴

We also encourage the Department to clarify the level of evidence needed to show that a safety concern exists to limit participation and how a school can assess whether mitigating measures (such as coaching, training, requiring the use of protective equipment, and specifying rules of play) may appropriately mitigate such concern, such that an individual student may then participate.¹⁰⁵ The Proposed Rule would also be strengthened by ensuring that any assessment of safety is done regardless of gender or gender identity and applied equally.

For example, the International Olympic Committee’s (“IOC”) framework regarding athletes’ participation in high-level international competition provides a standard for the type of evidence needed to substantiate a fairness or safety concern at that level. That framework requires that “any restrictions arising from eligibility criteria should be based on robust and peer reviewed research.”¹⁰⁶ This research must demonstrate that (1) absent the restriction, there is “an unpreventable risk to the physical safety of other athletes”; and (2) the “unpreventable risk exists for the specific sport, discipline and event that the eligibility criteria aim to regulate.”¹⁰⁷

¹⁰¹ Proposed Rule, § 106.41 (b)(2)(i); 88 Fed. Reg. 22,866.

¹⁰² 88 Fed. Reg. 22,872.

¹⁰³ See David J Handelsman et. al., Endocrine Society, Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance (October 2018), <https://academic.oup.com/edrv/article/39/5/803/5052770?login=false>.

¹⁰⁴ 88 Fed. Reg. 22,873.

¹⁰⁵ See 88 Fed. Reg. 22,872-22,873 and *infra* at Part II § III(D).

¹⁰⁶ IOC Framework, *supra* note 94 at § 6.

¹⁰⁷ *Id.* at § 6 (a) & (c).

We also encourage the Department to better align the Proposed Rule with Supreme Court precedent by clarifying the level of evidence needed to support an “exceedingly persuasive justification” for discriminatory classification and providing those educational institutions “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹⁰⁸

Adding parameters regarding to whom the safety concern is related and the evidence required to show a safety concern exists will help ensure any safety concerns are substantiated and are related to an important educational objective rather than a pretext for impermissible discrimination.

B. Categorical Prohibitions Based on Gender Identity Should not be Permitted for K-12 or in Intermural Sports.

Under the Proposed Rule, an individual transgender student who presents no fairness or safety concerns themselves could still be categorically prohibited from playing on a particular sport or team simply because they are transgender, and that result would be unjust. We encourage the Department to further assess whether categorical prohibitions in a sport, competition level, or age/grade based on gender are needed at any level because they can be an inexact and overbroad means to achieve those goals and, depending on how applied, could result in violations of students’ rights. An individual’s gender identity, standing alone, confers no advantage in sports. The Proposed Rule could be strengthened to avoid any recipient from engaging in gender identity discrimination as an indirect proxy for physical attributes that may impact the educational objectives in sports the Department identifies, i.e., fairness and safety.¹⁰⁹

Overbroad application of exclusionary rules based on generalizations or assumptions about physical attributes have been prohibited in other contexts to prevent discrimination against protected classes. For example, in *United States v. Virginia*, the Supreme Court considered whether it was constitutional for Virginia to have a male-only military academy. Virginia justified excluding women in part because of physical differences between men and women.¹¹⁰ The Supreme Court rejected the categorical prohibition based on gender. In doing so, the Court rejected “the generalizations about women on which Virginia rests” and noted that some women are capable of all of the individual activities required of Virginia Military Institute (“VMI”) cadets and “can meet the physical standards [VMI] now impose[s] on men.”¹¹¹

Similarly, in *Hecox*, the District court rejected the argument that the challenged exclusion based on gender identity was justified because transgender girls had an “absolute advantage” over their cisgender peers.¹¹² The District Court found that a categorical prohibition based on the presumption that all transgender girls have an advantage due to higher testosterone levels was overly broad and failed to acknowledge the diversity of the transgender community, including

¹⁰⁸ *Virginia*, 518 U.S. at 531.

¹⁰⁹ 88 Fed. Reg. 22,872.

¹¹⁰ *Virginia*, 518 U.S. at 540.

¹¹¹ *Id.* at 550.

¹¹² *Hecox*, 479 F. Supp. 3d at 980.

“transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty at all”¹¹³ The court similarly found that claims of absolute advantage of transgender students was undermined by the real-world experience where “millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion.”¹¹⁴ The court ultimately found that “the ‘absolute advantage’ between transgender and cisgender women athletes is based on overbroad generalizations without factual justification.”¹¹⁵ The failure to take these individual facts into account “illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.”¹¹⁶

As the court in *Hecox* found, many transgender individuals will not possess any physical attributes that present fairness concerns. Yet many state laws (currently twenty-one) still attempt to categorically prevent transgender individuals from participating in sports.¹¹⁷ We therefore recommend that to strengthen protections for transgender athletes, the proposed Rule specify that prohibitions on participation may not use gender identity as a proxy for other physical attributes that may create differences.

Instead, any exclusions should be based wherever possible on generally applicable criteria rather than generalizations using transgender status as a proxy—such as height and weight classes or use of divisions. We encourage the Department to require recipients to consider whether a sex-based criteria is necessary to achieve an important educational objective, or if a recipient could instead achieve its goals by adopting a more tailored approach focused on attributes. Moreover, if the focus remains on whether a categorical prohibition can be justified based on “fairness”, the Department should strengthen the rule by ensuring that it includes an analysis as to whether any prohibitions are sufficiently tailored, and whether the prohibition is a pretext for gender-identity discrimination.

C. Include a Robust Individualized Inquiry and Due Process Protections

We also encourage the Department to prevent categorical exclusions of transgender students by requiring schools to conduct an individualized inquiry.

Rather than relying on categorical prohibitions by age, or type of sport, we recommend that the Proposed Rule be strengthened by requiring an individualized assessment of the student being prohibited from participation. Transgender individuals are diverse with different development and medical circumstances. For example, there are many transgender girls who do not go through male puberty and girls who do not have high levels of circulating testosterone. As discussed in *Hecox* (*supra* Part II § III(B)) those individual circumstances may place those girls outside of any fairness

¹¹³ *Id.* at 980.

¹¹⁴ *Id.* at 981 (“Millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion.”).

¹¹⁵ *Id.* at 981-82.

¹¹⁶ *Id.* at 984.

¹¹⁷ Sports Ban Map, *supra* note 2.

or safety concerns that bans are allegedly addressing.¹¹⁸ An individualized inquiry would serve to minimize harm from a school’s use of sex-related criteria, consistent with the Proposed Rule.

i. A Robust Individualized Inquiry Would Protect Against Unjust Results.

An individualized inquiry can address the safety or fairness concerns raised by a school while avoiding the harm and unjust results a student could experience under a categorical prohibition. The Department should strengthen the Proposed Rule by requiring that if a school intends to exclude a student based on fairness or safety concerns, in potentially a new section of the Proposed Rule, 1) that before excluding any individual student pursuant to a policy at a particular grade/level and sport, the educational institution conduct an individualized inquiry after receiving express student permission; (2) provide the student with the alleged particularized safety and fairness concerns specific to that student, instead of using a generalized evaluation of the protected group to which they belong; and (3) offer the opportunity to appeal the first-level determination (*see infra* Part II § III(C)). The burden would remain on the school to demonstrate that the individual student’s participation poses a fairness or safety concern, without using a generalized evaluation of or stereotypes about transgender individuals.¹¹⁹ Any such individual inquiry should not involve testing or require production of identity documents. This would keep the presumption on inclusion of a transgender student’s right to participate unless fairness or safety concerns are substantiated.

Adding an individualized inquiry is particularly important because transgender people are not monolithic. For example, the plaintiff in *B.P.J. v. West Virginia State Board of Education* was an eleven-year-old transgender girl hoping to join middle school cross country and track teams when she was informed by her school that, because of a new state statute categorically prohibiting transgender girls from women’s sports, she would not be permitted to join the teams.¹²⁰ She was receiving puberty blockers when she first filed the lawsuit to allow her to participate on the girls cross country and track teams and later, hormone therapy. As a result, she never experienced and will never experience male puberty and her body will develop within the typical range for girls her age. Similarly, in *A.M. v. Indianapolis Public Schools*, a ten-year-old transgender girl had not begun puberty when her elementary school attempted to prohibit her from softball based on an Indiana law categorically prohibiting transgender girls from women’s sports.¹²¹ A properly conducted individualized inquiry would have identified these medically supported facts and permitted these students to participate.¹²² These examples demonstrate why any requirement to

¹¹⁸ See *Hecox*, 479 F. Supp. 3d at 980.

¹¹⁹ As the Notice of Proposed Rulemaking explains, this is the same burden used under the IOC Framework, which also provides that “until evidence . . . determines otherwise, athletes should not be deemed to have an unfair or disproportionate competitive advantage due to their sex variations, physical appearance and/or transgender status.” 88 Fed. Reg.22,869 (citing IOC Framework). The Proposed Rule should adopt similar language.

¹²⁰ 550 F. Supp. 3d at 351.

¹²¹ *A.M.*, 617 F. Supp. 3d at 955-56.

¹²² An individualized inquiry should also consider the continued availability of gender affirming care and identity document corrections in a state, as part of an analysis of what steps a student may reasonably be expected to take in order to compete, as discussed *infra* at Part II § III(C).

minimize harm to individual transgender students, as required in the Proposed Rule at § 106.41(b)(2)(ii), may need to require an analysis of that student’s development and specific medical circumstances.

Case law also may support an individual assessment in education. For example, in *School Board Of Nassau County, Fla. V. Arline*, 480 U.S. 273 (1987), an employee was fired as a teacher for having a contagious disease. The Supreme Court held that Section 504 of the Rehabilitation Act of 1973 requires an individualized assessment of both a disability and whether an individual is otherwise qualified for employment, not a general exclusion of a category of disabled people, and remanded the case for an individualized inquiry.¹²³ In so doing, the Court rejected the notion that the educational institution could base its termination decision on stereotypes or generalized assumptions about individuals with disabilities (or with a particular disability) as a class.¹²⁴

Requiring an individualized inquiry would also better align with the National Collegiate Athletics Association (NCAA) rules for transgender athletes.¹²⁵ The recently updated rule regarding transgender women athletes provides a pathway to for transgender athletes to participate if they conform to certain criteria set by a sport’s governing body.¹²⁶ In practice, many governing bodies use the standard set by the 2015 International Olympic Committee Transgender Policy. These policies typically include a year of testosterone suppression and a blood test demonstrating testosterone below a threshold level, usually <10 nmol/L, during the current phase of implementation.¹²⁷ Instead of a categorical ban, NCAA transgender students can address any alleged fairness or safety concerns through this type of testing.

Although testosterone suppression is used as a criterion at elite collegiate level of competition, the Signatory States find that such testing for the non-elite level is excessive and disproportionately burdensome for young children playing recreationally or in intermural sports. Thus, we encourage the Proposed Rule to reflect the importance of an individual assessment but

¹²³ *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 286, 289 (1987).

¹²⁴ *Id.* at 287 (“[An individualized] inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear”).

¹²⁵ Transgender Student-Athlete Participation Policy, NCAA (April 17, 2023) (“NCAA Policy”), <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>.

¹²⁶ *Id.*

¹²⁷ *See e.g.*, USA Fencing 2021-2022 Athlete Handbook 133, https://www.transathlete.com/_files/ugd/2bc3fc_21a7476d08a246dd8a5df52a3173555d.pdf (implementing the <10 nmol/L testosterone threshold for transgender women athletes); USA Rugby Transgender Athletes Policy, https://www.transathlete.com/_files/ugd/2bc3fc_b92f4e1bc62845c8b3aec6e34702b13b.pdf (following the IOC <10 nmol/L testosterone threshold); USA National Karate-do Federation Gender Policy (July 2017), https://www.transathlete.com/_files/ugd/2bc3fc_1d2192586fce47e3bebc30750a0ac679.pdf (before puberty no testing, after the <10 nmol/L testosterone threshold for transgender women); USA Wrestling Transgender Guidelines, https://www.transathlete.com/_files/ugd/2bc3fc_5d2c3110fe544de09393c8aa1c47c563.pdf (follows the 2015 IOC).

ensure that no such exceptions be permitted below the level of elite sports at the collegiate level. The Signatory States write this section as just one example of how student’s rights may be better protected rather than having students face overly board categorical exclusions.

ii. Provide Due Process for Transgender Students.

As part of the individualized assessment of an athlete’s impact on competition, the Department should require recipients to provide athletes notice and an opportunity to appeal any adverse eligibility determination to comport with requirements of fairness and due process. A notice and appeals process would be a safeguard against arbitrary decision making, including exclusions driven by animus or sex-based stereotyping. At minimum, the notice should 1) apprise the student of the specific reasons for denial, and how those factors, as applied to the student, led to a determination that participation would harm competition or safety; 2) include information of the right to appeal; and 3) provide the student with all documents and information used to render the determination, including the applicable law. This would require schools or other governing bodies to explain the basis for their decisions in writing, and it would give students the opportunity to contest an adverse decision with evidence of their own, such as a letter from a healthcare provider, parent, or guidance counselor that confirms their gender identity or otherwise provide support for their full inclusion in the sport.

An appeals process is a key feature of the numerous policies on transgender participation in global sports that the Department cited in its Notice of Proposed Rulemaking. For example, the International Olympic Committee’s policy provides that if eligibility criteria prevent an athlete from competing, the athlete must “be able to contest the ultimate decision of International Federations or other sports organizations through an appropriate internal mediation mechanism, such as ombudsperson, and/or procedures before the Court of Arbitration for Sport [CAS], to seek remedy.”¹²⁸ Individual sport federations have implemented similar policies. For example, World Athletics, the global governing body for track and field, provides that an athlete may appeal to CAS a determination that the athlete is ineligible to compete, or any suspension or disqualification of results.¹²⁹

States already have experience administering appeals for eligibility determinations regarding transgender students. For instance, in Minnesota, a transgender student may appeal an eligibility decision to the Minnesota High School League, which appoints an independent hearing officer.¹³⁰ The hearing officer may consider information submitted by the student, including statements from family, teachers, and medical professionals.¹³¹ In Wisconsin, their policy provides

¹²⁸ IOC Framework, *supra* note 94 at § 6.2(b); *see also* NCAA Policy, *supra* note 124 (aligning policy with IOC).

¹²⁹ *Eligibility Regulations for Transgender Athletes*, Rule C3.5 § 7, World Athletics (2023), <https://worldathletics.org/about-iaaf/documents/book-of-rules>; *see also* International Swimming Federation (FINA), *Policy on Eligibility for the Men’s and Women’s Competition Categories* § F (2022), <https://resources.fina.org/fina/document/2022/06/19/525de003-51f4-47d3-8d5a-716dac5f77c7/FINA-INCLUSION-POLICY-AND-APPENDICES-FINAL-.pdf>. (similar).

¹³⁰ MSHSL, *300.00 Administration of Student Eligibility Bylaws* 51-52 (2021), <https://www.mshsl.org/sites/default/files/2021-08/mshsl-handbook-2021-2022-300-series.pdf>.

¹³¹ *Id.*

that if a transgender student is denied participation, the student or family may file an appeal to the school, and schools should convene an appeals panel consisting of a licensed physician or psychologist and a school administrator, who are “familiar with transgender, gender identity, and gender expression issues.”¹³² Similarly, in Maryland, schools are directed to establish Appeal Review Committees which include a “[p]hysician, psychologist or licensed mental health professional familiar with gender disorders and standard of care” as well as the Title IX coordinator, school administrator, coach, and athletic director.¹³³ Lastly, New York routes appeals directly to the state Commissioner of Education.¹³⁴ These examples demonstrate that recipient states have the experience and capacity to administer an eligibility appeals process.

In addition, any appeals process for the Proposed Rule should ensure that the appeal is heard by a different person(s) than the original decisionmaker. This would also apply to the States’ proposal of an individualized inquiry (*supra* Part II § III(C)). The Final Rule should specify that the person(s) conducting the individual inquiry and appeal must not use a generalized evaluation of or stereotypes about protected groups to which the student belongs, and that the education institution would carry the burden of substantiating any fairness or safety concerns about the particular student.

iii. Intermediate Scrutiny Supports an Individualized Approach.

The Department’s Proposed Rule already adopts some aspects of an intermediate scrutiny inquiry and it is helpful here. In *Bostock*, the Supreme Court clarified that discrimination based on gender identity is necessarily sex discrimination.¹³⁵ Under the Equal Protection Clause of the Fourteenth Amendment intermediate scrutiny test, different treatment based on sex must be “exceedingly persuasive” and be substantially related to the achievement of an “important governmental objective.”¹³⁶ Any justification for such different treatment “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹³⁷

Under intermediate scrutiny, even when generalizations “have ‘statistical support,’ [the Supreme Court’s] decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn.”¹³⁸ Indeed, the fundamental role of

¹³² WIAA, *Transgender Participation Policy*, <https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf>.

¹³³ MPSSAA, *Guidance for Participation of Transgender Youth in Interscholastic Athletics* (2016), https://www.mpssaa.org/assets/1/6/MPSSAA_Transgender_Guidance_revised_8.16.pdf.

¹³⁴ *NYSPHSAA Rules & Regulations* 51, https://nysphsaa.org/documents/2022/2/15/NYSPHSAA_Handbook_002.pdf.

¹³⁵ *Bostock*, 140 S. Ct. at 1754; *see also Grimm*, 972 F.3d at 607-10; *Whitaker*, 858 F.3d at 1051-53 (applying intermediate scrutiny to a school district’s policy requiring students to use restrooms based on the sex on their birth certificates).

¹³⁶ *Virginia*, 518 U.S. at 533.

¹³⁷ *Id.*

¹³⁸ *Sessions v. Morales-Santana*, 582 U.S. 47, 64 n.13 (2017) (quoting *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 139 n.11 (1994)).

intermediate scrutiny is to ensure individuals have “equal opportunity to aspire, achieve, participate in and contribute to society based on their *individual* talents and capacities.”¹³⁹ Group based generalizations about sex may not be used to “deny[] opportunit[ies]” to people “outside the average description.”¹⁴⁰ Intermediate scrutiny rejects reliance on overbroad generalizations on gender stereotypes/assumptions, and this supports an individualized approach instead of drawing blanket categorical rules.

As such, we strongly encourage the Department to strengthen the Proposed Rule by requiring an individualized inquiry before permitting categorical prohibitions based on gender identity, even at the more nuanced sport, grade, and competition level and to offer sufficient protections to transgender students to challenge any denial of participation. We note, as the Department does in its Proposed Rule, that the burden on schools of conducting such an individualized inquiry would be minimal, in part because there are a “very small number of transgender girls and women who are student-athletes.”¹⁴¹

D. Expressly Require Mitigation Measures.

The Proposed Rule’s requirement to minimize harm to individual transgender students should be strengthened by expressly requiring recipients to institute mitigation measures. These measures should include efforts to lessen any fairness or safety issue so that a student can still compete in their sport and on their team, or to provide comparable alternatives and include an analysis of rule changes. For example, some sports, such as wrestling and certain martial arts, have weight classes that may inherently mitigate any concern.¹⁴² In other sports, such as golf, a rule change allowing a student with a substantiated unfair attribute to hit from a different tee, or change what is par, may remedy any fairness concern.¹⁴³

Similarly, to address any sports-related injury concerns, recipients should be required to analyze all potential protective measures or equipment that may protect against any added risk of injury as injuries in school sports can be common. For example, increasing penalties for illegal hits, limiting certain high-risk actions, and requiring protective padding may reduce any potential for injury such that all students may participate and even improve overall safety.¹⁴⁴ We encourage

¹³⁹ *Virginia*, 518 U.S. at 532 (emphasis added).

¹⁴⁰ *Id.* at 550.

¹⁴¹ 88 Fed. Reg. 22,874.

¹⁴² *Wrestling Weights Classes: How Do They Work and Why Do They Matter?*, World Combatives Blog (2023), <https://worldcombatives.com/wrestling-weights-classes-how-why/> (finding weight classes account for strength differences so that athletes compete more evenly on skill).

¹⁴³ USA Gold, Purpose of the World Handicap System, <https://www.usga.org/content/usga/home-page/handicapping/roh/Content/rules/1%201%20Purpose%20of%20the%20World%20Handicap%20System.htm> (Handicaps allow golfers to “[c]ompete, or play a causal round, with anyone else on a fair and equal basis”).

¹⁴⁴ *See e.g.*, The National Football League, NFL Health and Safety Related Rules Changes Since 2002 (September 26, 2019), <https://www.nfl.com/playerhealthandsafety/equipment-and->

the Department to strengthen the Proposed Rule by clarifying that the education institution should adopt a mitigation measure that minimizes harm to the student.

In addition, if a recipient makes a finding that participation in a sport is not possible for a particular student, the Proposed Rule should clarify that the school should consider whether opening access to a different opportunity for the student for the same sport or a different sport would be feasible. For example, the Department could define mitigating measures to include engaging with the student in an interactive process to offer alternative athletic and educational opportunities of equal or greater value to the student, in which the student could agree to participate on a strictly voluntary basis.¹⁴⁵ However, the Department should specify that requiring a transgender student to compete on a team inconsistent with their gender identity is not a mitigating measure, because such misplacement exacerbates harm to the excluded student. Further clarification of the Proposed Rule in this way would be consistent with Title IX's requirement to provide overall equality in access to sports and comparable opportunities for students of all genders.¹⁴⁶

E. Clarify that Minimizing Harm Requires Schools to Weigh Harms to Transgender Students.

We recommend that the Department clarify that any assessment of fairness also include fairness from the perspective of transgender athletes. Fairness concerns for transgender students include those identified by the Women's Sports Foundation, which has recommended creating a maximum timeline for hormone suppression before an athlete is allowed to compete, never requiring surgical intervention, and guaranteeing a pathway to inclusion.¹⁴⁷

And in considering fairness, it is important to consider how any athletics policy interacts with other restrictive policies at the state level that pose other harm or limitations on transgender students. For example, if a school will only allow a transgender female student to compete on a certain sport's team if her circulating testosterone is below a specific level, but that state is one in which gender-affirming care is prohibited for her, the school may have effectively banned that student from competing altogether based on her sex.¹⁴⁸ The Department should clarify how an education institution should assess fairness, where a transgender student is prevented from

innovation/rules-changes/nfl-health-and-safety-related-rules-changes-since-2002 (demonstrating how even the most watched sport in the United States regularly revises rules to accommodate player safety).

¹⁴⁵ Derived and modified from the California Environmental Quality Act, Section 15370 of the California Code of Regulations. 14 CCR § 15370 (Mitigation).

¹⁴⁶ See 34 C.F.R. 106.41(c) (Athletics) (recipients "shall provide equal athletic opportunity for members of both sexes").

¹⁴⁷ *25 Organizations Join WSF Letter to NCAA Regarding Transgender Athlete Participation Policy*, Women's Sports Found. (March 22, 2022), <https://www.womenssportsfoundation.org/advocacy/25-organizations-join-wsf-letter-to-ncaa-regarding-transgender-athlete-participation-policy/>.

¹⁴⁸ Gender Affirming Care Ban Map, *supra* note 95.

complying with sport-specific requirements because the state has prohibited gender-affirming care, and provide access to the transgender student, as needed to address the barrier created.

We also suggest that weighing any important educational objective also include a weighing of the costs of exclusionary criteria to transgender individuals. For example, research has demonstrated that discrimination against LGBTQ people—including discriminatory policies and the denial of opportunities—“increases the risks of poor mental and physical health” for LGBTQ people.¹⁴⁹ LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹⁵⁰ As stated *supra* in Part I § II(A), LGBTQ students who face discrimination have lower levels of educational attainment, higher levels of physical and mental health issues, and higher levels of suicide. Conversely, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cisgender peers.¹⁵¹ The consequences to transgender individuals should be explicitly part of any weighing before adopting criteria categorically excluding transgender individuals.

F. Clarify that States May Provide Greater Protections for Transgender Individuals Than Federal Law.

The Proposed Rule should make clear that it does not in any circumstances *require* any school to adopt sex-related criteria.¹⁵² The Proposed Rule sets a floor for protections of transgender individuals, not a ceiling. That the rule does not set a ceiling is important because many states have adopted laws and policies that wholly prohibit discrimination based on gender identity at school, including athletics.¹⁵³ To clarify this principle, we strongly suggest adopting the same language that the Department used in its prior Title IX rule, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (July 12, 2022). There, the Department provided “[n]othing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination.”¹⁵⁴ Using

¹⁴⁹ What We Know Project, Cornell University, *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?* (2009), <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-scholarly-research-say-about-the-effects-of-discrimination-on-the-health-of-lgbt-people/>; *see also* Nhan L. Truong et al., *Erasure and Resilience: The Experiences of LGBTQ Students of Color* 3 (GLSEN 2020) <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-Black-2020.pdf>.

¹⁵⁰ Kosciw et al., *The 2019 National School Climate Survey*, *supra* note 53 at 52, 75; *see also* April J. Ancheta et al., *The Impact of Positive School Climate on Suicidality and Mental Health Among LGBTQ Adolescents: A Systematic Review*, 37(2) *J. of Sch. Nursing* 76 (2021).

¹⁵¹ *See* Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, *Pediatrics*, 5-7 (Mar. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4771131/pdf/PEDS_20153223.pdf; Br. of Amici Curiae Sch. Adm’rs at 4, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

¹⁵² 88 Fed. Reg. 22,860.

¹⁵³ *See supra* note 88 (listing state policies).

¹⁵⁴ 87 Fed. Reg. 41,390, 41,569.

this same language in the Proposed Rule would ensure that states can continue to adopt inclusionary policies.

CONCLUSION

Until at least the elite collegiate level, we recommend that there be no categorical restrictions on transgender participation in sports. Further, there should be no requirements of invasive testing, physical examinations, medication interventions, or reliance on government issued identification documents for transgender youth to participate fully in sports, and any medical documentation requirements should be as minimally intrusive as possible. If restrictions are permitted at any level, the Proposed Rule should be modified to adopt some, or all of the guardrails listed above to ensure sport participation inclusive of transgender youth, protect privacy, due process, and to otherwise conform to established law.



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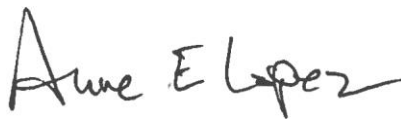
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