

May 15<sup>th</sup>, 2023

U.S. Department of Education  
Office for Civil Rights  
Lyndon Baines Johnson Department of Education Bldg  
400 Maryland Avenue, SW  
Washington, DC 20202-1100

**RE: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams**

Howard Brown Health is a federally qualified health center in Chicago, and we provide comprehensive care to about 35,000 patients annually. About 20% of our patients identify as transgender, genderqueer, and nonbinary. We are one of the state's largest providers of gender affirming care, including affirming behavioral health and social services for trans and non-binary (TNB) youth. Howard Brown is dedicated to improving all aspects of TNB youth's lives. We see firsthand how life-saving gender-affirming spaces can be for TNB youth, especially in educational settings. **We support the Department of Education's (DoE) proposed rule and urge the DoE to finalize the guidance as soon as possible to protect the well-being of TNB and intersex students across the country. We also provide areas where changes and clarification by the DoE can be made to better protect and serve TNB and intersex students.**

This new proposed rule clearly states that Title IX does not allow categorical bans on TNB athletes, thereby making all current anti-trans sports bans enacted by states across the country unlawful. This clarification is incredibly important due to the current political climate where a record number of anti-trans legislation has been introduced in the United States over the past few years. 533 anti-trans bills have been introduced in the U.S. in 2023 alone.<sup>1</sup> In a recent survey by the Center for American Progress (CAP), 86% of trans individuals reported the number of anti-trans laws had affected their mental health or made them feel less safe.<sup>2</sup> Many of these bills are aimed specifically at TNB youth, including bills aimed at restricting participation of TNB students in school sports aligned with their

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<sup>1</sup> Trans Legislation Tracker. "2023 Anti-Trans Bills: Trans Legislation Tracker." *Translegislation.com*, 2023, [translegislation.com/](https://translegislation.com/).

<sup>2</sup> Medina, Caroline, and Lindsay Mahowald. "Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022." *Center for American Progress*, 12 Jan. 2023, [www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/](https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/).

gender identity. Currently 21 states have enacted anti-trans sports bans and the U.S. House of Representatives recently passed an anti-trans sports bill that would ban trans women and girls from competing in female athletics.<sup>3,4</sup> The proposed rule will be critical in combatting this wave of anti-trans legislation and protecting the rights of TNB and intersex youth across the country.

Properly enforced, the proposed rule will also sharply restrict a school's ability to discriminate against or exclude TNB and intersex athletes. Notably, we support the proposed rule's preamble language clarifying that restrictions on trans athletes based on transphobic myths and overbroad assumptions will violate Title IX. Many of these anti-trans sports bans are based on myths, including that trans athletes have unfair advantages compared to their cisgender peers.<sup>5</sup> More research about the experience of trans athletes is needed, but a 2017 systematic review showed no direct or consistent research that suggested trans athletes have any advantage at any stage of their gender-affirming care, including being on hormones or completing any gender-affirming surgeries.<sup>6</sup> This report recommends that policies that place restrictions on trans athletes need to be reconsidered.<sup>7</sup> There are also false narratives that participation by TNB athletes will take opportunities away or reduce participation in sports by cisgender athletes. Anti-trans extremists rely on cherry-picked examples of trans athlete success stories but the evidence actually shows that inclusion of trans athletes does not impact cisgender women's participation in sports or athletic achievements overall. For example, California has had trans-inclusive sports policies since 2014, and participation in sports by high school girls has only increased since then.<sup>8</sup> Additionally, many professional athletics organizations have come out in support of TNB and intersex athletes, including the National Coalition for Women and Girls in Education, the NBA, WNBA, MLB, to name a few.

Overall, we believe that the proposed rule will have a strong impact on reducing health disparities and increasing positive educational experiences for TNB and intersex athletes.

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<sup>3</sup> "Movement Advancement Project | Bans on Transgender Youth Participation in Sports." *Www.lgbtmap.org*, [www.lgbtmap.org/equality-maps/youth/sports\\_participation\\_bans](http://www.lgbtmap.org/equality-maps/youth/sports_participation_bans);

<sup>4</sup> Wong, Scott. "House Republicans Pass Transgender Sports Ban for Schools." *NBC News*, 20 Apr. 2023, [www.nbcnews.com/politics/congress/house-republicans-poised-pass-transgender-sports-ban-schools-rcna80102](http://www.nbcnews.com/politics/congress/house-republicans-poised-pass-transgender-sports-ban-schools-rcna80102).

<sup>5</sup> Strangio, Chase, and Gabriel Arkles. "Four Myths about Trans Athletes, Debunked." *American Civil Liberties Union*, American Civil Liberties Union, 30 Apr. 2020, [www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked](http://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked).

<sup>6</sup> Jones, B. A., Arcelus, J., Bouman, W. P., & Haycraft, E. (2017). Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies. *Sports medicine (Auckland, N.Z.)*, 47(4), 701–716. <https://doi.org/10.1007/s40279-016-0621-y>

<sup>7</sup> *Ibid.*

<sup>8</sup> Goldberg, Shoshana K. "Fair Play." *Center for American Progress*, 8 Feb. 2021, [www.americanprogress.org/article/fair-play/](http://www.americanprogress.org/article/fair-play/).

The proliferation of anti-trans sports bans contributes to and worsens existing health disparities for TNB youth, including higher risk for poor mental health, suicide, substance use, and experiencing violence.<sup>9</sup> TNB and intersex youth face significant discrimination at school based on their gender expression or identity. Based on the GLSEN 2021 School Climate survey, 57.4% of TNB students experienced verbal harassment based on gender expression while 8.2% experienced physical harassment based on gender expression.<sup>10</sup> Sports participation is a valuable tool for addressing these disparities, as it is associated with increased self-esteem and self-confidence, improved academic performance, stronger feelings of school connectedness and school-based social support, and broader social capital and community connectedness. All youth should have equal access and opportunity to experience the benefits of school sports participation. The proposed rule is a vital step forward in protecting that right for TNB and intersex youth and improving mental and physical well-being through sports participation.

### Recommendations

With the growing number of anti-trans sports bans across the country, this proposed rule for Title IX is a much-needed update that will protect TNB and intersex students' right to participate in sports that align with their gender identity and expression. We support the proposed rule, and we urge the DoE to make the following changes in the final rule to ensure that the rights of TNB and intersex students are robustly and proactively protected.

The DoE should explicitly state within the rule that Title IX requires inclusion of all students in athletics consistent with gender identity. Allowances for schools to restrict participation by TNB and intersex athletes are only permitted under very narrow circumstances that must be properly and clearly communicated and robustly enforced. Schools can only limit students' participation in sports consistent with gender identity if the restriction is substantially related to an important educational activity and it minimizes harm to any student whose opportunity to participate is restricted. The Department can strengthen this proposed rule by providing clear examples in the regulatory text of problematic and transphobic "justifications" for restriction of trans athletes that would not be considered substantially related to an important educational activity and therefore prohibited by the rule.

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<sup>9</sup> CDC. "Resilience and Transgender Youth." *Centers for Disease Control and Prevention*, 4 Nov. 2021, [www.cdc.gov/healthyouth/disparities/ryt.htm#:~:text=Transgender%20and%20other%20gender%20diverse%20youth%20experience%20stigma%20and%20discrimination](https://www.cdc.gov/healthyouth/disparities/ryt.htm#:~:text=Transgender%20and%20other%20gender%20diverse%20youth%20experience%20stigma%20and%20discrimination).

<sup>10</sup> GLSEN. "The 2021 National School Climate Survey." *GLSEN*, 2022, [www.glsen.org/research/2021-national-school-climate-survey](https://www.glsen.org/research/2021-national-school-climate-survey).

For example, the final rule could clearly state in the regularly text that it is prohibited for schools to restrict TNB and intersex athletes based on transphobic and overbroad stereotypes and disinformation including:

- The assumption that trans athletes have categorical advantages over cis athletes, and other sex-stereotypes that are not based in science, such as a trans woman's athletic abilities being the same as a cisgender man's athletic abilities.
- Anecdotal evidence, including but not limited to evidence that particular TNB or intersex students excelled in sports over their cisgender counterparts.
- Using the idea of "injury prevention" to apply restrictions to TNB and intersex athletes. This feeds into the myth that TNB and intersex athletes may pose a physical risk to their cisgender counterparts.
- As with injury prevention, clearly stating "fairness in competition" cannot be used as a justification to enact restrictions against TNB and intersex athletes. Again, this presumes transphobic and unfounded "evidence" about unfair physical advantages TNB and intersex athletes have over cisgender athletes. Additionally, physiological and biological differences have always existed in sports, and so restricting access to only one group of students based on assumptions about physiological differences or advantages is discriminatory.

Providing these and other clear examples in the preamble and the regulatory text is crucial because anti-trans extremists rely on unfounded evidence to advance their agenda. This clarity would prevent administrators and legislators from attempting to enact unlawful and harmful sports bans due to ambiguity in interpreting the rule.

The DoE should further clarify that restrictions on participation for TNB and intersex students in K-12 and college club and intramural sports are prohibited under Title IX. The DoE states that any restrictions on participation must take into consideration the age, sport, and level of competition of the athletic activity. Taking age and level of competition into mind, intermural and club sports and sports for children in grades K-12 are played primarily for the educational, social, and health benefits from participation, not for elite competition. The applicability of Title IX to school sports is built on the idea that sports provide important educational experiences first and foremost. As such, Title IX must protect and enforce equal access to these benefits for youth across the country, overriding any perceived justification for exclusion of TNB athletes.

The final rule should also explicitly state that unnecessary and harmful verification procedures, including medical examinations and visual examinations of the body and

genitalia in pursuit of “determining” gender, are never permitted. A few states have discussed including physical examinations, including examinations of genitalia, as a criteria to determine gender. This is a traumatic and harmful practice that harms all students. The American Medical Association (AMA) have adopted policy opposing any mandatory testing, surgery, or treatment, including physical examinations for TNB and intersex athletes.<sup>11,12</sup> Examinations or testing to determine gender is not only harmful to the TNB and intersex athletes, it harms all student athletes. For example, a Utah school secretly investigated if a winning female athlete was transgender due to complaints by parents of two girls who lost. The winner was a cisgender female athlete.<sup>13</sup> These investigations are particularly harmful for BIPOC girls owing to racist and sexist stereotypes that link “femininity” with whiteness.<sup>14</sup> Providing explicit protections against this harmful practice is necessary for all students.

## Conclusion

All students deserve the same chance to learn teamwork, sportsmanship, leadership, self-discipline, and to build a sense of belonging with their peers through participation in school sports. This proposed rule is an important next step to reach the goals of the Biden Administration to increase LGBTQI+ equity. Finalizing this proposed rule with the additional clarification requested above will foster positive, welcoming environments for trans, non-binary, and intersex students and work to reduce health disparities. We thank the Department of Education for the opportunity to submit a comment and appreciate your consideration. If you would like to discuss our recommendations further, please reach out to Tim Wang, the Director of Policy and Advocacy, at [TimothyW@howardbrown.org](mailto:TimothyW@howardbrown.org).

Sincerely,  
David Ernesto Munar  
President and CEO

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<sup>11</sup> American Medical Association, “Physicians oppose mandatory gender-based treatments for athletes,” November 15, 2022, <https://www.ama-assn.org/delivering-care/population-care/physicians-oppose-mandatory-gender-based-treatments-athletes>

<sup>12</sup> “Athlete Ally, interACT, NWLC and NCTE Respond to AMA Inclusive Policy,” November 17, 2022, <https://www.athleteally.org/athlete-ally-interact-nwlc-and-ncte-respond-to-ama-inclusive-policy/?fbclid=IwAR2G-gzO3dKoNhs5gl4AWjP7pmeWvlllx7-lMwAxV48aTCDipf13KiJbbok>.

<sup>13</sup> Press, Associated. “Utah School Secretly Investigated If Winning Female Student Athlete Is Transgender.” *The Guardian*, 19 Aug. 2022, [www.theguardian.com/us-news/2022/aug/18/utah-school-investigates-student-transgender](http://www.theguardian.com/us-news/2022/aug/18/utah-school-investigates-student-transgender).

<sup>14</sup> *Hecox vs. Little*, brief amicus curiae National Women’s Law Center, Lawyers’ Committee for Civil Rights Under Law and 60 Additional Organizations in Support of Appellees and Affirmance, December 20, 2021, available at <https://nwlc.org/wp-content/uploads/2020/12/ECF-Stamped-Hecox-Amicus-12.21.2020.pdf>



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