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May 15, 2023

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

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

**Re: Comment from 41 Women’s and Girls’ Rights & Gender Justice Organizations:
Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving
Federal Financial Assistance, ED-2022-OCR-0143**

Dear Secretary Cardona and Assistant Secretary Catherine Lhamon:

The National Women’s Law Center, and the undersigned 40 organizations advocating for the rights of women and girls, and for gender justice, appreciate the opportunity to comment on the Department of Education’s (“the Department”) proposed rule addressing transgender, nonbinary, and intersex¹ students’ right to play on sex-separated sports teams under Title IX of the Education Amendments of 1972 (“Title IX”) consistent with their gender identity.² As advocates for gender equity, we are well aware of the significance and transformative power of Title IX’s mandate that all students must be able to access the benefits of an education free from sex discrimination. Since Title IX’s passage over 50 years ago, women and girls have been fighting sexist stereotypes in sports that equate femininity with being slower, weaker, and ultimately unequipped to excel in athletics. We are troubled to see now that these same tropes are being used to target transgender, nonbinary, and intersex students—and especially, to push transgender and intersex women and girls out of school sports.³

We thus applaud the Department for proposing a strong rule that makes clear that state laws that categorically ban transgender, nonbinary, and intersex students from playing sports violate Title IX and that would otherwise sharply restrict the ability of schools to deny these students the right to play sports. However, we urge the Department to specify further the clear protections provided by the rule, in order to ensure that *all* women and girls—including transgender and intersex women and girls—and nonbinary

¹ The term “intersex” is an umbrella term used to refer to people who are born with or naturally develop variations in sex characteristics, such as genitals, chromosomes, hormones, and/or internal organs that may be perceived as not fitting binary definitions of male or female. This comment also uses the term “endosex,” which is used to refer to someone who is not intersex, meaning their sex characteristics fit into the binary categories of male or female.

² Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf> (hereinafter “Proposed Rule”).

³ Many anti-trans bans and policies target transgender and intersex boys and girls, and nonbinary people—but throughout the comment we focus particularly on transgender girls and women due both to the intense, transmisogynistic vitriol that has been heaped on them and because of the organizations’ collective focus on women’s and girls’ rights.

students can play sports alongside their peers, free from sex discrimination and consistent with Title IX's far-reaching protections.

I. Because Title IX protects the rights of all students to access the educational benefits of sports participation without discrimination on the basis of sex, escalating threats to the rights of transgender, non-binary, and intersex student athletes require strong Title IX regulations.

Over 50 years ago, Title IX was enacted to broadly protect against sex discrimination in education. Title IX ensures that no one can “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” on the basis of sex,⁴ a broad sweep that has for many decades been universally recognized to include school sports. Before Title IX, women and girls were explicitly and as a matter of course denied opportunities to play sports, denied equal training and support, and otherwise denied the opportunities to develop their athleticism provided to men and boys, all based on the assumption that men and boys were categorically athletically superior and naturally inclined towards physical activity and competition in a way that women and girls were not.⁵ By requiring schools to take ongoing action to achieve gender equity in sports, Title IX has created an enormous cultural shift toward embracing women and girls' sports and creating a vast array of new opportunities that have sharply increased women and girls' engagement in sports and athleticism.⁶

The educational benefits of playing sports are well documented. Playing sports is associated with higher grades and standardized test scores, as well as higher rates of school completion.⁷ It teaches students about teamwork, helps build their leadership skills, and confers psychological benefits, such as feelings of well-being, a sense of belonging among peers, and connectedness to the school community.⁸ **All students deserve equal access to these benefits.** Preventing transgender, intersex,⁹ and nonbinary students from playing school sports based solely on the fact that they are transgender or nonbinary is a form of sex discrimination that exacerbates the poor educational and mental health outcomes they are already at risk for due to the significant rates of in-school and out-of-school victimization they face.¹⁰ But when

⁴ 20 U.S.C. §§ 1681 et seq.

⁵ Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 86 (2023) (citing SUSAN CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH CENTURY WOMEN'S SPORT 4 (1994)) (“Women were long protected out of sports due to beliefs about the frailty of ‘the fairer sex’ and a purported threat to women’s fertility...[and] the belief that women are naturally inferior to men in sports competition.”).

⁶ Women's Sports Foundation, *50 Years of Title IX: We're Not Done Yet* 7–8 (2022)

<https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf>.

⁷ Nat'l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

⁸ See, e.g., *id.* at 42; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. OF SPORT MANAGEMENT 349, 349–50 (2013); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 J. OF SCHOOL HEALTH 397–401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 INT'L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 98 (2013).

⁹ Because of the absence of inclusive data, less is known about intersex students' experiences with school sports. However, recent reporting from the Washington Post indicates that intersex students often avoid or are discouraged from participating in sports for fear of scrutiny. See Anne Branigin, *Intersex youths are also hurt by anti-trans laws, advocates say*, WASHINGTON POST (July 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>.

¹⁰ In a national survey of LGBTQ+ students, an alarming number of students reported being harassed because of their LGBTQ+ status, with an overwhelming majority of all students (76.1%) reporting experiencing verbal harassment on this basis, and over one-third of students (31.2%) reporting physical harassment on this basis. This hostility in turn impacts students' academic outcomes: many students reported not having plans to finish school, with 51.5% of students reporting hostile school climate

transgender and nonbinary students are allowed to play sports, they tend to receive higher grades¹¹ and experience increased feelings of belonging, higher self-esteem, and lower levels of depression.¹² These benefits are significant and could even be lifesaving for transgender and nonbinary students.¹³

Despite the well-documented benefits of playing sports and Title IX's broad mandate prohibiting sex discrimination, in recent years hostile lawmakers have displayed a horrifying tenacity in attacking transgender, nonbinary, and intersex students' right to play, passing at least 21 state laws that categorically ban these students from playing sports alongside their peers.¹⁴ State bans have been introduced under the guise of "protecting women's and girls' rights" in the absence of any evidence that transgender youth's participation in sports has harmed anyone.¹⁵ These bans do nothing to address the actual, ongoing profound gender inequities that persist in athletics;¹⁶ to the contrary, they heighten the risk of sex discrimination for all women and girls who play sports. At their core, anti-trans sports bans and restrictions codify sexist stereotypes of how women and girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity, whether transgender or cisgender. This threatens all women and girls' safety and athletic opportunities.

As affirmed by the Department of Education in its 2022 proposed Title IX regulations, Title IX was passed to ensure that *all* students could access the benefits of education programs and activities free from

(e.g., harassment and transphobic policies) as the reason they did not plan to graduate. See GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* 19, 34 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

¹¹ GLSEN, *The Experiences of LGBT Students in School Athletics*, (2013) <https://www.glsen.org/sites/default/files/2020-06/The%20Experiences%20of%20LGBT%20Students%20in%20Athletics.pdf>; The Trevor Project, *The Well-Being of LGBTQ Youth Athletes* (Aug. 2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/08/LGBTQ-Youth-Sports-and-Well-Being-Research-Brief.pdf>.

¹² Russell B. Toomey & Stephen T. Russell, *An initial investigation of sexual minority youth involvement in school-based extracurricular activities*, 23 J. OF RESEARCH ON ADOLESCENCE 304, <https://doi.org/10.1111%2Fj.1532-7795.2012.00830.x>; GLSEN, *LGBTQ Students and School Sports Participation* (2021), <https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf>.

¹³ Among LGBTQI+ youth, transgender, nonbinary, and intersex students have elevated suicide risk. More than half (53%) of transgender and nonbinary youth seriously considered attempting suicide in the past year, compared to 45% of LGBTQ youth. The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* (2022), <https://www.thetrevorproject.org/survey-2022/>.

¹⁴ Movement Advancement Project, *Bans on Transgender Youth Participation in Sports*, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last updated May 1, 2023).

¹⁵ Recent data from the CDC shows that state policies that prevent transgender high school students from playing are correlated with lower participation by all high school girls between 2011 and 2019; meanwhile, participation by all girls remained unchanged in states with policies allowing transgender students to play. Ctr. for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth 14-17* (2021), <https://www.americanprogress.org/wp-content/uploads/2021/02/Fair-Play-correction2.pdf>. See also David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7>.

¹⁶ None of these state sports ban laws address actual gender inequities in sports. Women and girls still lack significant opportunities to play sports as compared to men and boys, with Black and brown women and girls being disproportionately denied opportunities to play; schools still prioritize funding and resourcing men's and boys' teams while giving women's and girls' teams second-class treatment; and sexual harassment and abuse of student athletes still persists. Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women; Nat'l Women's Law Center, *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), <https://nwlc.org/resources/finishing-last>; Dean Golembeski, *Gender Equality Remains Elusive in College Sports*, BEST COLLEGES (Nov. 10, 2021), <https://www.bestcolleges.com/news/2021/07/01/gender-equality-remains-elusive-in-college-sports/>.

sex discrimination.¹⁷ Unquestionably, denying transgender, non-binary, or intersex students the right to play sports, and all the significant educational benefits associated with playing sports, because of their gender identity, transgender status, or sex characteristics, constitutes sex-based discrimination prohibited by Title IX.¹⁸

II. The proposed Title IX athletics rule is a significant step toward protecting the rights of transgender, non-binary, and intersex students' right to play, and the Department should further specify the protections provided by the rule in several key ways.

Consistent with the Department's June 2022 proposed regulation codifying the rights of transgender, nonbinary, and intersex students to be free from sex discrimination under Title IX,¹⁹ this proposed rule outlines for the first time the eligibility of transgender, nonbinary, and intersex students to play sports alongside their peers consistent with their gender identity. Specifically, it would sharply restrict schools' ability to exclude transgender, non-binary, and intersex athletes from school sports by imposing a stringent standard that would require schools to advance an important educational objective that is substantially related to the sex-based restriction. This proposed rule is further strengthened by requiring schools to minimize the harm to students whose opportunity to play sports consistent with their gender identity would be limited or denied by the restriction.

Particularly significant is that the rule would prevent state laws and policies that categorically ban transgender, nonbinary, and intersex students from playing school sports, thus invalidating the existing 21 state categorical bans. Preventing categorical bans on sports participation sends a much-needed message to transgender, nonbinary, and intersex youth that the federal government will not tolerate bigoted efforts to target these students for discrimination and differential treatment. If properly implemented and vigorously enforced, the proposed rule would severely limit schools' ability to impose anti-trans restrictions in sports. However, clarity about the strong protections the rule would provide is necessary to prevent anti-trans opponents from weaponizing any perceived ambiguities to harm transgender, non-binary, and intersex students' ability to play with their peers.

A. The Department should state explicitly that there is a presumption of inclusion in sports without restriction on the basis of sex under Title IX, which cannot ever be overcome at K-12 and college club and intramural levels, and should provide examples of application of the proposed rule's standard.

As outlined above, Title IX protects students' access to the panoply of educational and participatory benefits of playing sports. Because of this strong protection and the importance of this right, the Department should state in the text of the rule itself that there is always a presumption of inclusion of transgender, nonbinary, and intersex students in school sport without restriction on the basis of sex, and the demanding burden is always on the recipient to justify any restriction,²⁰ as students should never have to shoulder the burden of demonstrating that they deserve the same educational opportunities as their

¹⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), <https://federalregister.gov/d/2022-13734> (hereinafter "2022 Proposed Rule").

¹⁸ The Supreme Court has made clear that sex discrimination includes discrimination against transgender people. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). This is also consistent with the Department's recognition in the June 2022 proposed regulations implementing Title IX that its bar on sex-based discrimination includes discrimination against transgender, nonbinary, and intersex students. 2022 Proposed Rule at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).

¹⁹ 2022 Proposed Rule at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).

²⁰ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (hereinafter "*VMI*") ("The burden of justification [of sex-based classifications] is demanding and it rests entirely on the State.").

peers under Title IX. Further, the Department should specify in the context of K-12, college intramural, and college club sports, which are settings that prioritize the social, mental, and physical health benefits of sports participation over competition, that a recipient will not be able to meet the demanding standard set out in this rule and thus that this presumption cannot be overcome. In other words, the Department should expressly prohibit schools from adopting sex-based restrictions for student participation in the K-12, college intramural, or club sports.

Moreover, the Department should state in the rule text itself that in order to be permissible, any sex-based restrictions must address a well-founded and substantial concern and cannot be based on overbroad generalizations or sex-based stereotypes. The Department should also state in the rule text that categorical bans are unlawful. While this is all already part of the proposed rule's standard (as explained in the proposed rule's preamble discussion), the final rule would benefit from including these important safeguards and explanations in the rule text itself. In addition to these changes to the rule, the Department should also provide additional examples of the types of restrictions that would fail to meet the rule's stringent standard, to help recipients and students better understand the robust protections provided by the rule and to minimize any possible confusion or misapplication.

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

The proposed rule would only permit sex-based restrictions that are substantially related to an important educational interest and that minimize harm to excluded students. The Department's preamble to the proposed rule suggests that restrictions on the ability of transgender, nonbinary, and intersex students to play may meet this test if the restrictions are furthering educational interests in preventing injury and ensuring fairness in competition.²¹ It is of course the case that preventing injury and promoting fairness are important educational interests. However, we are deeply concerned that recipients may read the Department's preamble to suggest that recitation of such interests is sufficient to justify restrictions, when in fact the requirement that any such restriction on transgender students' ability to play be *substantially related* to achieving these interests would doom such restrictions in most, if not all, cases.

The idea that restrictions on transgender students' athletic participation forwards these interests is typically premised on transphobic and sexist myths that assume transgender and intersex women and girls are bigger, faster, and stronger and thus pose an inherent threat to the physical safety and athletic success of their peers. They echo biological essentialist²² rhetoric from extremists, claiming that to be a woman or a girl means to fit within a narrowly defined box. And they purport to strip transgender, non-binary, and intersex student athletes of the many educational benefits of playing sports—benefits that have nothing to do with winning or being the “best” athlete—simply because of who they are.

As organizations committed to advancing the rights of all women and girls, we firmly oppose efforts to deny transgender, nonbinary, and intersex students' right to play sports alongside their peers and reject sexist stereotypes and myths underlying the presumption that inclusive sports policies threaten safety or fairness in women's and girls' sports.

²¹ Proposed Rule at 22872.

²² Biological essentialism is a notion based heavily in sex stereotypes, which dictates that certain traits are innate and natural to men and women based on their sex assigned at birth, and does not recognize any gender outside of the binary construct. Anti-trans actors have applied this framework in the context of sports to further a dangerous binary biological understanding of sex that claims that the male sex is innately linked to athletic success and traits associated with it (such as strength, speed, and a muscular build), while the female sex and athleticism are opposed. See Deborah L. Brake, *supra* note 5, at 85, 88.

Specifically, given that, consistent with Supreme Court precedent under the Equal Protection Clause, the proposed rule would forbid restrictions that rely on overbroad sex-based generalizations “about . . . different talents [or] capacities,”²³ we urge the Department to clarify that any sex-based restriction excluding transgender students from playing sports consistent with their gender identity is an extremely poor and inexact proxy not substantially related to the important interest in avoiding injury. It will inevitably be both overinclusive (sweeping in transgender students who do not have such physical characteristics) and underinclusive (failing to regulate cisgender students who do have such physical characteristics).²⁴ Ultimately, some risk of injury is inherent in playing sports, but precisely because of this lack of close fit and substantial relationship between a sex-based restriction and preventing injury, there is no reliable evidence demonstrating that transgender women and girls specifically pose a risk of injury to other women and girls.²⁵ Schools instead have a multitude of nondiscriminatory ways to minimize risk of injury in sports that are in fact substantially related to achieving this interest, such as protective equipment and effective coaching on the rules and safety protocols of a sport.

For the same reasons, recipients will rarely, if ever, be able to overcome the presumption of inclusion when relying on competitive fairness as an interest in order to prevent transgender, nonbinary, and intersex students from playing consistent with their gender identity, and the Department should explain this. The suggestion that competitive fairness is a likely basis for preventing transgender, nonbinary, and intersex students from playing is rooted in stereotyped and sexist ideas about their bodies. Fairness in sports has *never* been about equalizing all physiological differences among athletes. In fact, body diversity is an inherent part of sports, and there are numerous physiological differences that impact athletic ability²⁶ that, unlike transgender status or sex characteristics, are not subject to scrutiny when it comes to determining athletes’ eligibility to play. When some women are not allowed to play sports because they fall outside stereotyped ideals of what women’s bodies should look like, this contravenes Title IX’s purpose and constitutes sex discrimination.²⁷ Indeed, there are numerous sources of competitive advantage that are not policed under a mandate of fairness and that contribute to inequities in athletic success. Socioeconomic factors, such as the ability to afford and access quality equipment, coaching, and nutrition, in addition to having enough time to train are hugely significant in contributing to athletic success—yet these factors are not scrutinized or written into team eligibility policies.²⁸ Any of these,

²³ Preamble at 22872 (citing *VMI*, 518 U.S. at 533); *id.* at 22863 (citing *id.* at 532–33).

²⁴ *VMI*, 518 U.S. at 540 (heightened scrutiny requires courts to examine closely sex-based generalizations so that “state actors controlling gates to opportunity...[do] not exclude qualified individuals based on fixed notions concerning the roles and abilities” of women and men) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (noting that the Supreme Court has applied heightened scrutiny to invalidate statutes that “employ[] gender as an inaccurate proxy for other, more germane bases of classification” when the “loose-fitting characterizations” about the abilities of women and men those statutes relied on were “incapable of supporting state statutory schemes that were premised upon their accuracy”).

²⁵ Much of the “evidence” trotted out by anti-trans politicians to support their contention that including transgender women and girls pose a risk of injury to cisgender women and girls is anecdotal and based in transphobic stereotypes.

²⁶ Deborah L. Brake, *supra* note 5, at 91 (noting that there are over 200 genetic differences other than sex that affect athletic ability, including “height, blood flow, muscle mass, pain threshold, and respiratory and cardiac functions”) (citing Joanna L. Grossman & Saraswati Rathod, *Trashing the Playing Field: State Legislators Misguided Move to Ban Transgender Women and Girls from Competing in Women’s Sports*, JUSTICIA: VERDICT (Apr. 27, 2021), <https://perma.cc/V6HB-J3LH>).

²⁷ Athletes come in all shapes and sizes. For example, gymnast Simone Biles’ height of 4’8” and basketball player Brittney Griner’s height of 6’9” are celebrated and seen as positive factors in their athletic success—as they should be.

²⁸ Canadian Center for Ethics in Sports, *Transgender Women Athletes and Elite Sports: A Scientific Review*, 6 (2022), https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-ascientificreview-executivesummary-e_0.pdf.

however, would be more substantially related to the interest in competitive fairness than transgender, nonbinary, or intersex status.

C. The Department must clarify that mandated sex verification procedures violate Title IX.

We urge the Department to specify that Title IX prohibits requiring sex verification practices given that such practices pose significant harm to impacted students. Over the past few years, hostile actors have imposed sex verification practices on students including demands for medical documentation, hormonal and chromosomal testing, genital exams, or the collection of young students' reproductive health information for the purported purpose of "proving" whether a student is truly a woman or girl in order to play sports. These practices are unscientific and fundamentally at odds with the proposed rule's harm minimization requirement, as they traumatize and stigmatize students, in addition to violating students' bodily autonomy and privacy rights.

Sex verification fundamentally encourages sex discrimination, as it imposes traumatizing and stigmatizing procedures on a discriminatory and arbitrary basis, which often results in the policing of any woman or girl who falls outside sexist, stereotyped ideals of femininity. For example, a Utah commission established to implement the state's sports ban launched an investigation to determine whether a cisgender girl was truly a girl on the basis that she didn't "look feminine enough" and was outperforming other students.²⁹

Sex verification is also disproportionately enforced against Black and brown women and girls, whose bodies have historically been subject to excessive scrutiny for nonconformity with white-centric ideals of femininity. For example, throughout her career, Serena Williams has endured racist and sexist scrutiny of her body, including comments alleging that "[s]he is built like a man" or that "[she] was born a guy" because of "[her] arms, or because [she's] strong."³⁰ Another Black woman, Caster Semenya, was forced to submit to a battery of invasive medical tests because of her speed and success as an Olympic track athlete, for the purpose of determining whether she was "feminine enough" to continue competing with women.³¹ And, when Dutee Chand, an Indian woman sprinter, faced scrutiny from fellow athletes for her "stride and musculature" being too "masculine," she was ordered by an international sporting body to undergo invasive medical exams.³² The federal government cannot endorse a scheme that uses Title IX to empower hostile actors to police women's and girls' bodies on the basis that they excel at sports, have

²⁹ Marjorie Cortez, *After a girl beat their daughters in sports, Utah parents triggered investigation into whether she was transgender*, DESERT NEWS (Aug. 17, 2022), <https://www.deseret.com/utah/2022/8/17/23310668/school-investigates-female-athlete-transgender-complaint>.

³⁰ Gina Vivinetto, *Serena Williams on How She Struggles with Cruel Remarks About Her Body*, TODAY (Sept. 7, 2017), <https://www.today.com/style/serena-williams-body-shamers-i-don-t-let-anything-break-t116063>; Jason Pham, *Serena Williams Shut Down Body Critics: 'I Am Strong and Muscular — and Beautiful'*, BUSINESS INSIDER (May 31, 2018), <https://www.businessinsider.com/serena-williams-shut-down-body-critics-who-said-she-was-born-a-guy-2018-5>.

³¹ Anna North, *"I Am a Woman and I Am Fast: What Caster Semenya's Story Says about Gender and Race In Sports,"* VOX (May 3, 2019), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>; Dawn Ennis, *IAAF Called Caster Semenya Biologically Male*, OUTSPORTS (June 19, 2019), <https://www.outsports.com/2019/6/19/18691210/iaaf-caster-semenya-biologically-male-testosterone-olympics-southafrica-athlete>.

³² See Human Rights Watch, *"They're Chasing Us Away from Sport: Human Rights Violations in Sex Testing of Elite Women Athletes"* (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#6040>. That Chand was later successful in her challenge of the regulations prohibiting her from competing due to her higher natural levels of testosterone at the Court of Arbitration for Sport does not take away from the intense humiliation and stigma she was subjected to. *Id.*

short hair, are especially muscular, or for any other reason do not conform to sex-based stereotypes and expectations of woman- or girlhood.

Sex verification reifies the dangerous myth that to be a girl or women, a student must be able to demonstrate biological purity,³³ which requires proving that their gender aligns with their sex assigned at birth, or that their sex characteristics fit neatly into binary categories of “male” or “female.” Requiring this as a condition of participating on sex-separated teams is directly contrary to Title IX’s purpose of achieving gender equity in education. It is thus imperative for the Department to address this serious harm by explicitly stating that sex verification is *never* the least harmful way to advance an important educational objective, and that such practices are thus expressly prohibited by Title IX.

D. The Department must state that requirements that are impossible or impracticable for students to reasonably meet would be unlawful.

If recipients impose requirements that are impossible or impracticable for students to comply with, that requirement would amount to a categorical ban on participation and would thus be unlawful under the proposed rule. This would be the case if, for example, students are required to undergo gender-affirming hormone suppression or replacement therapy as a condition of eligibility to play sports in a state that bans or greatly burdens access to this same gender affirming care. When finalizing this rule, we urge the Department to account for how state attacks on gender-affirming care will impact students’ abilities to comply with certain sex-related eligibility criteria. Currently, 16 states have bans preventing youth from accessing gender-affirming care, with three making providing such care a felony.³⁴ Many states are now considering similar limitations on gender-affirming care for adults. And, even in states where access to gender-affirming care has not been outlawed, students may still face significant barriers to accessing such care, including affordability and the ability to access trans-affirming providers. We thus urge the Department to clarify that where students face such barriers to meeting a sex-related requirement to play sports, the requirement would violate Title IX.

III. Conclusion

The proposed Title IX rule is a tremendous step in the right direction to protect transgender, non-binary, and intersex students’ right to play sports consistent with their gender identity under Title IX. However, the Department should further strengthen and explain the essential protections this proposed rule offers to ensure Title IX’s broad promise of gender equity in education is actualized.

Sincerely,

National Women’s Law Center, *joined by*

Advocates for Youth
American Association of University Women
Autistic Self Advocacy Network
Care in Action
Chicago Alliance Against Sexual Exploitation (CAASE)

³³ Deborah L. Brake, *supra* note 5, at 48.

³⁴ Movement Advancement Project, *Bans on Best Practice Medical Care for Trans Youth*, https://www.lgbtmap.org/equality-maps/healthcare/youth_medical_care_bans (last updated May 1, 2023). These bans will impact students at the elite, collegiate level, as many start college between the ages of 17 and 18. Most bans outlaw gender-affirming care for youth up to age 18, and at least one state, Alabama, bans gender-affirming care up to ages 19. *Id.* Further, there are states that are considering banning gender-affirming care up for youth to ages 19, *see, e.g.*, L.B. 574, 108th Leg., Reg. Sess. (Ne. 2023), and even some considering bills that would ban care for youth up to ages 26, *see, e.g.*, H.B. 4754, 88th Leg., Reg. Sess. (Tx. 2023).

Education Law Center - Pennsylvania
Equal Rights Advocates
ERA Coalition
Family Violence Appellate Project
Feminist Majority Foundation
Futures Without Violence
Girls Inc.
GLSEN
Healthy Teen Network
Illinois Accountability Initiative
Illinois Coalition Against Sexual Assault
Institute for Women's Policy Research
Iowa Coalition Against Sexual Assault
Just Solutions
Know Your IX
Legal Momentum, the Women's Legal Defense and Education Fund
Men Stopping Violence, Inc.
National Council of Jewish Women
National Disability Rights Network (NDRN)
National Domestic Workers Alliance
National Education Association
National Organization for Women
National Partnership for Women & Families
National Women's Political Caucus
NARAL Pro-Choice America
Planned Parenthood Generation Action
Public Justice
Reproductive Health Access Project
Sexual Violence Prevention Association (SVPA)
Stop Sexual Assault in Schools (SSAIS)
The Army of Survivors
The Every Voice Coalition
Union for Reform Judaism
United State of Women
YWCA USA