

END RAPE ON CAMPUS

May 15, 2023

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

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

Submitted via www.regulations.gov

Re: ED Docket No. ED-2022-OCR-0143-0001, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams

Dear Secretary Cardona and Assistant Secretary Lhamon,

The following comment is submitted on behalf of End Rape On Campus to the Department of Education (ED) in response to the proposed rule regarding the enforcement of Title IX in cases related to sex-related eligibility for gendered sports teams.¹ While we are pleased that the proposed amendment provides protections against blanket bans of transgender athletes playing on teams that align with their gender identity, we are concerned that the protections do not do enough to protect all student athletes, particularly at the collegiate level. In allowing schools flexibility to develop their own team eligibility criteria, the proposed amendment does not go far enough to ensure that schools do not discriminate against transgender athletes.

Who We Are:

End Rape On Campus (EROC) is a national initiative of Civic Nation working to ensure the rights of students who experience sexual violence in an educational context. EROC was founded by survivors of campus sexual violence who experienced violations of their Title IX rights as students. The voices and experiences of survivors and students continue to lead our work today.

What We Do:

¹ Dep't of Educ., Office for Civil Rights, *Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams (April 6, 2023)*, <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>

We work to end campus sexual assault by providing survivor support, education, and policy reform from the campus to the federal levels while centering historically marginalized student survivor communities. Driven by our Centering the Margins framework,² we address the disparity of resources for marginalized student survivors by providing virtual and in-person community spaces, mental health and legal resources, and advocacy through legislation that protects students' rights and holds schools accountable. We proudly work to ensure equal access to education for all survivors, celebrating their identities and the experiences they bring. Ultimately, we seek to build a world free from sexual violence. Until then, we focus on centering survivor voices, reforming systems that harm them, and holding systems and individuals accountable.

Our Concerns and Recommendations

Our concerns regarding the proposed rule are as follows:

- 1. In allowing schools flexibility to develop their own team eligibility criteria, the proposed amendment does not go far enough to ensure that schools do not discriminate against transgender athletes.**

While the proposed amendment does prohibit a one-size-fits-all policy categorically banning transgender students from participating on teams consistent with their gender identity and laying out specific criteria to consider when crafting such policy, it leaves large loopholes in which transgender and non-binary students, particularly at the college level, are left without protection. The proposed amendment specifies that any policy that limits or denies student access to a team that corresponds with their gender identity must be “substantially related to the achievement of an important educational objective.”³ The example of such an educational objective cited throughout ED’s Fact Sheet is fairness in competition.⁴ The unspoken premise here is that it would be unfair to cisgender athletes to have them play against athletes whose biological make-up differs from their own. This premise ignores the biodiversity of athletes regardless of gender.⁵ Additionally, there is no data to support the idea that trans athletes, specifically transgender women and girls, dominate the sports they play, despite years of their participation.⁶ Transgender and non-binary athletes do not represent a threat to fairness in competition. To the contrary, excluding athletes from teams that match their gender identity structurally undermines fairness by limiting their access to the many benefits of participating in school sports.⁷

Secondly, much of the guidance within the Fact Sheet for the proposed amendment emphasizes the likelihood that elementary students “would generally be able to participate on

² End Rape On Campus. (2023). *Centering The Margins*. End Rape on Campus. <https://endrapeoncampus.org/centering-margins/>

³ Dep’t of Educ., Office for Civil Rights, *Fact Sheet: U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams* (April 6, 2023), <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>

⁴ Ibid

⁵ National Women’s Law Center (2022). *Fulfilling Title IX’s promise: Let transgender and intersex students play*. Resource. <https://nwlc.org/resource/trans-and-intersex-inclusion-in-athletics/>

⁶ Goldberg, S. K. (2021). Fair play: The importance of sports participation for transgender youth. *American Progress*. <https://www.americanprogress.org/article/fair-play/>

⁷ Movement Advancement Project. (2021). Talking about transgender youth participation in sports. <https://www.lgbtmap.org/file/talking-about-transgender-youth-sports-participation.pdf>

school sports teams consistent with their gender identity”.⁸ While this goal is important and the benefits of children participating in sports are well-documented,⁹ it ignores the needs of athletes as they age. Protecting young children is a worthwhile cause. So is protecting college students. Many students, for a variety of reasons, do not come out as transgender or non-binary until after adolescence.¹⁰ Others do not do so until they are no longer living under the roof of conservative family members or within the geographic bounds of a restrictive community.¹¹ Students who have grown up playing sports should not lose access to those sports teams because they reach an age, and find the safety, to explore their own identities. Additionally, transgender students face increased risk for suicide as a result of disproportionate discrimination, hostility, and stigma that they face.¹² It is well documented that sports participation fosters increased emotional, mental, and physical well-being.¹³ Transgender students, particularly as they come out, are at increased risk, and the stability of remaining engaged in sports can be a lifeline.

The guidance around the proposed amendment indicates that schools can use level of competitiveness as one way to determine the appropriateness of policies banning transgender students from participation. There is not a clear definition of “competitiveness.” Putting aside the loss to athletics programs that would occur if more elite collegiate athletes are excluded from teams they identify with, the vagueness of the term “competitiveness” leaves room for anti-trans advocates to co-opt this policy and use it to exclude transgender athletes in ways that go against the general intention of this amendment.

2. For the protections that the proposed amendment does provide, additional clarification is explicitly needed.

It is critical that ED explicitly affirm in this amendment the presumption that Title IX requires the inclusion of all students in athletics consistent with their gender identities. Additionally, ED should clearly state that any restrictions on the participation of trans, non-binary, and intersex students consistent with their gender identity (or for non-binary students, on the team with which they feel most comfortable playing) in K-12 and college club and intramural sports are prohibited under Title IX.¹⁴ There have been numerous attacks of transgender students within the last few years,¹⁵ including 21 states with blanket bans on transgender youth participating in sports corresponding with their gender identities.¹⁶ Without

⁸ Dept of Educ., Office for Civil Rights, *Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams* (April 6, 2023).

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

⁹ National Women's Law Center (2022). *Letter from women's and girl's rights organizations opposing H.R. 734*. Resource.

<https://nwlcl.org/resource/letter-from-womens-and-girls-rights-organization-opposing-h-r-734/>

¹⁰ e.g., Kosciw, J.G., Palmer, N. A., & Kull, R.M. (2014). Reflecting resiliency: Openness about sexual orientation and/or gender identity and its relationship to well-being and educational outcomes for LGBT students. *American Journal of Community Psychology*, 55, 167-178. <https://link.springer.com/article/10.1007/s10464-014-9642-6>

¹¹ e.g., Katz-Wise, S.L., Rosarios, M., & Tsappis, M. (2016). LGBT youth and family acceptance. *Pediatrics Clin North Am*, 63(6), 1011-1025.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5127283/>

¹² The Trevor Project (2022). *2022 National survey on LGBTQ Youth Mental Health*.

https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf

¹³ National Women's Law Center (2022). *Letter from women's and girl's rights organizations opposing H.R. 734*. Resource.

<https://nwlcl.org/resource/letter-from-womens-and-girls-rights-organization-opposing-h-r-734/>

¹⁴ National Womens' Law Center (2023). Department of Education Title IX athletics NPRM talking points.

<https://docs.google.com/document/d/1ro76plyem-v06QMu47xNFO4Sk7GordnV56KVUHpOSTE/edit>

¹⁵ ACLU. (2023). *The ACLU is tracking 474 anti-LGBTQ bills in the U.S.* 2023 Legislative Session.

<https://www.aclu.org/legislative-attacks-on-lgbtq-rights>

¹⁶ Movement Advancement Project. (2023). *Bans on transgender youth participation in sports*. Equality Maps.

https://www.lebtmap.org/equality-maps/youth/sports_participation_bans

explicitly stating the intentions of the proposed amendment, ED leaves the amendment available to these anti-trans actors to misinterpret.

Finally, a major threat represented by the potential of banning transgender students from participation on gendered athletics teams is gender policing. Invasive and dangerous “sex verification” practices police students’ bodies by forcing them to submit to a variety of humiliating and unscientific practices for the purported purpose of determining their “real” sex. These procedures make all students vulnerable to sexual abuse, but are especially likely to be used to target Black and brown women and girls who do not conform to white ideals of femininity,¹⁷ other women and girls who do not conform to sexist stereotypes, and nonbinary and gender nonconforming students.¹⁸ Therefore, it is critical for ED to specifically clarify that Title IX protects all students from dangerous and intrusive sex verification procedures, including medical examinations and visual inspections of students’ genitals.

3. Students cannot wait for protections against attacks that are happening now. ED must act quickly to strengthen and finalize this proposed amendment, along with the Title IX rules that were proposed in June 2022, to ensure all students can access an education free from violence.

In addition to bans prohibiting transgender athletes from playing on sports teams that align with their gender identity, young trans people have faced many attacks on their rights in recent years. They have faced increasing barriers in accessing gender-affirming healthcare,¹⁹ ongoing regulations around what public restrooms they have access to,²⁰ and so-called “religious liberty” bills that enshrine discrimination into statute.²¹ There is no time for a lengthy consideration process of this proposed amendment. Transgender students need the protections it would offer now. Similarly, all students need the protections that the June 2022 Title IX proposed rule would enact. Student survivors and advocates across the United States have held protests on their campuses to demonstrate the severity that the Trump/DeVos Title IX regulations have had on their experience, including but not limited to facing retaliation and being forced to withdraw, transfer to a different school, or drop out entirely.²² If these guidelines do not come out this month, May 2023, schools will not have the time needed to implement changes before the 2023-2024 school year and students will likely be forced to continue suffering under the harmful Trump/DeVos regulations for the entire 2023-24 school year – through May 2024, nearly 3.5 years since Biden took office and nearly 4 years since the Trump/DeVos regulations

¹⁷ For example, Idaho passed a sports ban in 2020 which prevented transgender, intersex, and nonbinary students from competing according to their gender identity, along with an alarming provision allowing anyone to challenge the sex of girls or women seeking to play for their school’s girls’ or women’s teams. A student whose sex was challenged would then have to shoulder the humiliating burden of “verifying” their sex in order to play. H.B. 500, 2020 Leg., 65th Sess. (Id. 2020). There is currently a temporary injunction blocking enforcement of this sports ban, pending further review. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), on appeal, No. 20-35815 WL 2189094 (9th Cir. 2022).

¹⁸ National Women’s Law Center (2022). *Letter from women’s and girl’s rights organizations opposing H.R. 734*. Resource. <https://nwlcc.org/resource/letter-from-womens-and-girls-rights-organization-opposing-h-r-734/>

¹⁹ Redfield, E. Conron, K.J., Tentindo, W., & Browning, E. (2023). *Prohibiting gender-affirming medical care for youth*. <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/>

²⁰ Peters, A. (2023) *4 big problems with anti-trans bathroom bills - and how you can help*. <https://www.glsen.org/blog/4-big-problems-anti-trans-bathroom-bills-and-how-you-can-help>

²¹ Narea, N. & Cineas, F. (2023). *The GOP’s coordinated national campaign against trans rights, explained*. <https://www.vox.com/politics/23631262/trans-bills-republican-state-legislatures>

²² Civic Nation (2023). #EDActNow. <https://civiction.org/wp-content/uploads/2023/04/EDActNow-Sign-On-Letter-to-Biden-April-2023.pdf>

became law.²³ ED must move quickly to finalize the proposed amendment and release the finalized rule change to Title IX in order to protect students and ensure their right to an education free from violence and discrimination.

4. Additional funding must be allocated to the Office of Civil Rights (OCR) to balance the staff to case work ratio.

As noted in the 2022 Fiscal Report, the Office of Civil Rights (OCR) has seen a significant increase in the number of civil rights complaints related to Title IX.²⁴ We want to underscore the need for additional funding to ensure an increase in staff funding so that complaints are processed in a timely manner and investigations are thorough. With the current limited resources, it will be challenging for OCR to handle the potentially large influx of complaints that may arise when the proposed rule is implemented. Additional funding allocated to OCR to support their caseload will help ensure that all students have equal access to their athletic opportunities and are protected from discrimination based on their gender identity.

Conclusion

As recognized by the U.S. Supreme Court,²⁵ numerous Federal courts,²⁶ and the U.S. Department of Education,²⁷ sex discrimination *includes* discrimination based on gender identity and sex characteristics.²⁸ While the Department of Education's proposed amendment is a step toward progress, as written it leaves transgender athletes, especially at the collegiate level, without sufficient protections. The protections it does provide need to be stated more explicitly. The need for these protections is urgent and ED must act swiftly to strengthen and finalize the amendment, along with the Title IX rule proposed in June of 2022. The time is now to ensure that all students, including transgender and non-binary students, have access to an education without fear of discrimination or violence.

If you have any questions or concerns, please contact Kenyora Parham, Executive Director of End Rape On Campus, at eroc@civcnation.org.

Thank you,
End Rape On Campus

²³ Ibid

²⁴ U.S. Department of Education Office for Civil Rights. (2023). *Fiscal Year 2022 Annual Report*. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2022.pdf>

²⁵ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

²⁶ *Soule v. Connecticut Ass'n of Schools*, No. 21-1365 (2d. Cir. 2022); *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) See also *Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) (wherein an Idaho district court granted a preliminary injunction barring enforcement of an Idaho law that banned transgender students from competing on women and girls' sports teams based on the plaintiff's likelihood of success in demonstrating that the law was unconstitutional sex discrimination against transgender students under the Equal Protection Clause).

²⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41571 (proposed 34 C.F.R. § 106.10) (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), <https://federalregister.gov/d/2022-13734> (clarifying that "discrimination on the basis of sex" includes discrimination based on "sex stereotypes, sex characteristics...and gender identity"). See also *id.* at 41571 (proposed 34 C.F.R. § 106.31(a)(2) (explaining that "adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex").

²⁸ National Women's Law Center (2022). *Letter from women's and girls' rights organizations opposing H.R. 734*. Resource. <https://nwlc.org/resource/letter-from-womens-and-girls-rights-organization-opposing-h-r-734/>