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VIA ONLINE SUBMISSION

U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202
<https://www.ed.gov/>

Re: Proposed Rule § 106.41(b)(2) 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

To the Department of Education:

Sanford Heisler Sharp, LLP (the “Firm”) is a national Plaintiffs’ side law firm committed to litigating and resolving public interest, social justice, and civil rights matters that significantly impact the lives of individuals, groups, and communities. The Firm has offices in Georgia, Tennessee, New York, Maryland, California, and Washington D.C., where we routinely represent members of the LGBTQ community whose civil rights have been violated. We also frequently litigate cases under Title IX of the Education Amendments of 1972 (“Title IX”).

With this experience, we submit this comment on the Department of Education’s Proposed Rule § 106.41(b)(2) 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 (the “Proposed Rule” or “Rule”).

Sanford Heisler Sharp supports the Proposed Rule’s purpose of protecting transgender students’ rights to compete in sports in accordance with their gender identity. The Rule represents an important step towards eliminating the blanket bans that have proliferated in over twenty-one states. Properly construed, the Rule would substantially restrict funding recipients’ ability to prohibit transgender students from competing in sports in accordance with their gender identity.

Nevertheless, we remain concerned that the Proposed Rule may in practice fall short of delivering on Title IX’s promise of full equity for transgender students and athletes. Specifically, we are concerned that: (i) the Proposed Rule may not in practice guarantee overall equity across athletic programs for transgender students; (ii) the language of the Proposed Rule may not be strong enough to fully deter states, localities, or funding recipients from implementing illegal restriction or bans; and (iii) the Proposed Rule may leave non-binary and intersex students in limbo.

I. The Proposed Rule May Be Insufficient to Ensure Equity Across Athletic Programs

The language of the Proposed Rule may be insufficiently strong to ensure that transgender athletes enjoy equal athletic opportunities. Under the Department’s current regulations, a “recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 CFR 106.41(b). Critically, however, “a recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.” 34 CFR 106.41(c).

The Proposed Rule creates a risk that, in practice, transgender students may lack “equal athletic opportunity” as their cisgender peers. The Rule countenances that, in certain narrow circumstances, funding recipients may treat transgender students differently from cisgender students and potentially deny transgender students the ability to compete in sports in accordance with their gender. In those circumstances, though the funding recipients might still have “equal athletic opportunity” for *cisgender* members of “both sexes,” 34 CFR 106.41(c), they might well not have equal opportunity for transgender students of “both sexes.”¹ Given that the Rule may result in differential treatment of transgender students as compared to cisgender students, the Department should provide further guidance to ensure that, under the Proposed Rule, transgender students fully enjoy overall equal athletic opportunity consistent with Title IX’s non-discrimination guarantee.²

II. The Language of the Proposed Rule May Not be Strong Enough to Fully Deter States, Localities, or Funding Recipients From Implementing Blanket Bans

a. The Proposed Rule May Be Complicated and Burdensome for Athletes and Recipients.

If the Proposed Rule is implemented in its current form, it may lead to complicated and burdensome enforcement. At present, transgender student athletes at all K-12 levels face the risk of being barred from competitions if they live in a state that has banned participation of transgender athletes in school programs or if they travel to a state that has such a ban. Unfortunately, this reality, or something akin to it, may persist even under the Proposed Rule.

Since the Rule stops short of an unconditional guarantee of equality, funding recipients may adopt erroneous interpretations of the Rule in order to grant themselves wider latitude to discriminate than the Rule actually permits. Even though such interpretations would be patently

¹ As the Department correctly notes in the preamble to the Proposed Rule, “[S]uch sex-related exclusion leaves affected students with no viable opportunity to participate in athletics if the only other option is to participate on a team that does not align with their gender identity.”

² Such guidance could serve as a helpful complement to Proposed Rule’s requirement that any restriction must be effectuated in a manner that minimizes the potential harm to affected students.

unlawful, they would present a significant enforcement challenge for the Department. There are over 13,000 public school districts in the United States, and it cannot be gainsaid that certain jurisdictions will go out of their way to harm transgender students. Investigating and prosecuting all violations of the Rule will be time-consuming and expensive for the Department—though absolutely essential.

Moreover, the risk of intentionally erroneous implementation will also present substantial burdens on transgender athletes. If the limitations on transgender athletes vary from district to district, or from state to state, transgender athletes will continue to face undue uncertainty and risk when travelling for competition. In the absence of an unconditional guarantee of full equality for transgender students, the Department must be prepared to exhaustively enforce the Proposed Rule to ensure that school districts are not using the Rule’s language as a pretext for plainly unlawful discrimination.

b. The Department Must Diligently Scrutinize Recipients Who Claim That “Fairness in Competition” and “Prevention of Sports-Related Injury” Support a Restriction

In the Rule’s preamble, the Department notes that “fairness in competition and prevention of sports-related injury can be important educational objectives,” which can potentially support limiting transgender students’ athletic opportunities. The Department rightfully notes that there are exceedingly narrow circumstances in which these objectives will, in fact, support limits on access to athletics. For example, the Department states that competitive fairness and injury prevention cannot be used as a pretext for “singling out transgender students for disapproval or harm.” “Nor may a recipient adopt sex-related criteria to” inter alia, “require adherence to sex stereotypes.” Moreover, the Department correctly notes that sex related eligibility criteria cannot be based on “overbroad generalizations based on sex,” including generalizations about strength or athletic ability.

Still, the purported objectives of “fairness in competition” and “prevention of sports-related injury” carry special risks of overbroad generalization and stereotyping.³ The Department must therefore diligently scrutinize funding recipients that provide these rationales for imposing sex-related criteria. Absent exacting scrutiny and diligent enforcement, these exceptions could illegally swallow Title IX’s broad rule of equality.

³ As Joshua D Safer, Executive Director of the Mount Sinai Center for Transgender Medicine and Surgery in New York, explains, “A person’s genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance.” Chase Strangio, *Four myths about trans athletes, debunked*, ACLU (Apr. 30, 2020), <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked>. For a transgender woman athlete who meets NCAA standards, “there is no inherent reason why her physiological characteristics related to athletic performance should be treated differently from the physiological characteristics of a non-transgender woman.” *Id.*

III. The Proposed Rule May Leave Nonbinary and Intersex Students in Limbo

Like transgender student athletes, nonbinary and intersex students regularly suffer denials of equal athletic opportunity. They likewise may be subject to mentally and physically intrusive examinations to “prove” they are eligible to play in a certain sport.⁴ These restrictions and examinations are not only unnecessary, but they are also harmful. They can further hinder a student’s interest in athletics and other social programs from a young age.

Though the Rule’s preamble mentions its application to intersex and non-binary students, the Department must develop further guidance concerning such applications. This is particularly important given the Department’s position that “Courts have not addressed Title IX’s application to intersex or nonbinary student-athletes.” Accordingly, should the Department implement the Proposed Rule, any subsequent guidance should more fully articulate the way in which the Rule ensures that nonbinary and intersex students enjoy the equal athletic opportunities guaranteed by Title IX.

IV. Conclusion

Sanford Heisler Sharp supports the Department of Education’s efforts to ensure equal opportunity and inclusion in educational programs for all students, regardless of sex. We strongly encourage the Department to continue making every effort to guarantee that Title IX’s mandate for equality fully applies to transgender, nonbinary, and intersex students. We thank the Department for its consideration of this comment.

Sincerely,

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⁴ Frankie De La Cretaz, *Living Nonbinary in a Binary Sports World*, Sports Illustrated (Apr. 16, 2021), <https://www.si.com/wnba/2021/04/16/nonbinary-athletes-transgender-layshia-clarendon-quinn-rach-mcbride-daily-cover>.

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