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May 17, 2023

Office of Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Notice of Proposed Rulemaking: 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

On behalf of the American Psychological Association (APA), I respectfully submit this response to the Department of Education (the Department) notice of proposed rulemaking (NPRM) -- [*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*](#).¹ APA is the nation's largest scientific and professional nonprofit organization representing the discipline and profession of psychology, with a membership of more than 146,000 clinicians, researchers, educators, consultants, and students. Psychological science and expertise are uniquely positioned to address the consequences of excluding transgender, non-binary, and intersex students from school athletics, and the APA welcomes the opportunity to comment on this proposed rule.

Our comments focus on the following four areas for the Department's consideration as it works to finalize the rule and ensure equal access to educational programs and activities for students of diverse sexual orientations and gender identity.

1. Need for updated regulations.
2. Rejection of blanket transgender sports inclusion bans.
3. Reliance on psychological science and research.
4. Further clarity on criteria for developing sex-eligibility characteristics.

1. APA supports the Department's efforts to update regulations concerning the civil rights of LGBTQ+ students.

Clarifying school districts' obligations to ensure safe, supportive, and non-discriminatory environments is more vital now than ever. Bias, stigma, and misunderstanding of gender diversity are fueling a wave of discriminatory policies and legislation across the nation. To-date, 21 states have introduced and enacted laws that forbid transgender students from participating in sports consistent with their gender identity² mostly in K-12 schools. This spring, the U.S. House of Representatives passed a bill that would prohibit recipients of federal financial assistance who operate athletic activities from allowing transgender women and girls from participating on female sports

¹ 88 FR 22860

² Movement Advancement Project. *Bans on transgender youth participation in sports*. https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans

teams. Data show that such policies³ lead to considerable risk of depression and suicidality. Federal protections are critical to the civil rights, safety, and educational opportunity of LGBTQ+ students, including those identifying as transgender, non-binary, and intersex. Policies, at all levels of government, must uphold the right of students not to be singled out, excluded and/or bullied based on sexual orientation or gender identity, in all educational settings, including athletics.

2. APA supports clarification that blanket transgender exclusion sport bans are not lawful.

The Department proposes amending Title IX regulations to articulate a standard that would govern federal financial assistance recipients' adoption or application of sex-related criteria, limiting or potentially denying a student's eligibility to participate on male or female athletic teams consistent with their gender identity. In 2022, APA joined civil and human rights organizations in calling on the Department to expeditiously release a Title IX athletics rule for public comment that would address transgender, non-binary, and intersex students' full and equal participation in school sports.⁴ APA supports the NPRM's provisions that, if adopted as a final rule, would ensure that state laws categorically banning transgender, non-binary, and intersex students from participating in sports consistent with their gender identity are unlawful.

3. APA urges continued reliance on psychological science, research and data when developing education and civil rights policy.

Psychologists understand that gender is a nonbinary construct that allows for a range of gender identities and that a person's gender identity may not align with sex assigned at birth.⁵ A 2020 joint policy statement adopted by APA and the National Association of School Psychologists recommends "safer environments for gender diverse, transgender, and intersex."⁶ Clearer and stronger protections for LGBTQ+ student athletes are needed now more than ever. In 2022 nearly 82% of LGBTQ+ students ages 13-21 reported feeling unsafe while at school last year, and 68% said they felt unsafe specifically because of their sexual orientation and gender identity or expression.⁷ In the same survey, LGBTQ+ students reported experiencing discriminatory policies or practices at school, with 11% reporting that school staff or coaches had prevented or discouraged them from playing sports because they identified as LGBTQ+.⁸ This NPRM comes at a particularly troubling time for our nation's LGBTQ+ students. Nationally representative CDC Youth Risk Behavioral Survey (YRBS) data show that lesbian, gay and bisexual youth are more likely to have experienced all forms of violence and worse mental health outcomes than their heterosexual peers.⁹ Because the 2021 national YRBS did not have a question assessing gender identity, the report does not highlight data specifically on students who identify as transgender. Often transgender data is not available because federal surveys have not determined methodologies to integrate gender identity questions. Because strategies to bolster academic achievement and improve adolescent health should be inclusive of all students who identify as LGBTQ+, the full acronym is used below when highlighting recommended actions.

4. APA recommends greater clarity on sex-eligibility criteria.

As the Department finalizes this proposed rule, it should be strengthened by clarifying the exact criteria schools must use to determine which, if any, cases allow for the restriction of transgender, non-binary, and intersex student

³ The Trevor Project. (2020). The Trevor Project Research Brief: LGBTQ & Gender-Affirming Spaces. Retrieved from: https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Affirming-Spaces_-December-2020.pdf.

⁴ Leadership Conference on Human and Civil Rights. (2022). In support of full inclusion for transgender and all LGBTQI+ youth: and open letter from the civil and human rights community. <https://civilrights.org/resource/open-letter-supporting-the-full-inclusion-of-transgender-and-all-lgbtqi-youth/>

⁵ American Psychological Association. (2015). Guidelines for psychological practice with transgender and gender nonconforming people. *American Psychologist*, 70(9), 832–864. <https://www.apa.org/practice/guidelines/transgender.pdf>

⁶ American Psychological Association. (2020). *APA Resolution on Supporting Sexual/Gender Diverse Children and Adolescents in Schools*. <https://www.apa.org/about/policy/resolution-supporting-gender-diverse-children.pdf>

⁷ GLSEN's 2021 National School Climate Study

⁸ GLSEN. (2022). Climate Survey. https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Executive_Summary-EN.pdf

⁹ Centers for Disease Control and Prevention. (2023.). *The Youth Risk Behavior Survey Data Summary & Trends Report: 2011–2021*. https://www.cdc.gov/healthyyouth/data/yrbs/yrbs_data_summary_and_trends.htm.

participation on sports teams consistent with their gender identity. This must include additional examples of the types of restrictions that would not meet the rule's standards for exclusion. Eliminating ambiguity in these criteria would make it harder for school to discriminate, particularly in states aggressively pursuing policies antithetical to LGBTQ+ students' civil rights, bodily autonomy, and well-being. Without clearer guidance, language in the proposed rule leaves the door open for discrimination and sex stereotyping when restrictions on sports participation are claimed to be "related to achievement of an important educational interest" and/or to "minimize harms to students."¹⁰ In addition, more guidance, training, and resources are needed for schools and local educational authorities to bolster compliance with the new requirements once the proposed rule is adopted. This includes consultation with education, mental health and civil rights experts, state/local education agencies, school boards and district leadership.

Finally, APA urges the Department to swiftly finalize its broader Title IX rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*,¹¹ which for the first time would explicitly extend Title IX protections against discrimination based on sexual orientation and gender identity. This rule, along with the current NPRM, are both critical to ensuring the physical and psychological safety and well-being of LGBTQ+ students in all educational settings. APA Services, Inc. submitted comments on the proposed rule last fall.¹²

In conclusion, federal regulations with new standards for Title IX compliance are critical to protecting students from being singled out and/or excluded based on sexual orientation, gender identity or sex characteristics. The proposed rule affirms that Title IX includes the right of transgender, non-binary, and intersex students to play school sports free from discrimination but allows local school districts to enact policies that limit athletic participation based on a set of sex-related eligibility criteria. Therefore, APA urges swift action toward adoption of a final rule.

Thank you again for the opportunity to comment on this proposed rule. Please contact Leo Rennie, Senior Director for Congressional and Federal Relations at lrennie@apa.org if you have any questions or need additional assistance.

Sincerely,



Arthur C. Evans, Jr., PhD
Chief Executive Officer and Executive Vice President

¹⁰ See 88 FR 22860, p. 22891. The following is the full text of the proposed rule: If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

¹¹ 87 FR 41390

¹² https://votervoice.s3.amazonaws.com/groups/apaadvocacy/attachments/APA%20Comments_RE%20NPRM%20Title%20IX%202022_ED-2021-OCR-0166-0001.pdf