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May 13, 2023

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

RE: ED-2022-OCR-0143-0001- 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

Dear Assistant Secretary Lhamon:

AASA, The School Superintendents Association, representing 10,000 school district administrators across the United States, submits this comment on the Department's Title IX Athletics Notice of Proposed Rulemaking. The proposed regulation sets forth a test for sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity.

AASA's mission is to advocate for equitable access for all students to the highest quality public education and to develop and support school system leaders. The guiding principle of AASA's 2023 Legislative Agenda stems from the important role the federal government stands to play in creating equitable learning opportunities for all students. Our legislative agenda adopted annually by our Governing Board and Executive Committee states that AASA supports federal policy that would prohibit discrimination on the basis of sexual orientation and gender identity, including against transgender, intersex, and nonbinary students. As the stated goal of the proposed regulation is to prohibit discrimination, AASA generally supports the proposed regulation.

From the vantage point of school district CEOs, the greatest benefit of having a federal Title IX policy on athletic participation is to provide a clear legal standard to which school districts administrators can point as they navigate state laws tying their hands when considering student eligibility for athletic opportunities on a case-by-case basis. Determining eligibility for our transgender, intersex, and nonbinary student-athletes is neither a new issue nor one that district leaders feel ill-prepared to handle when allowed to work with their students, families, and athletic directors without outside interference.

For years—and without much fanfare—district leaders have utilized a framework similar to what the proposed regulation suggests, considering the age of the student, the level of competition and the sport, and the safety of the student and their competitors. What both sides often fail to recognize in the debate around students' participation in athletics is that district leaders have always had all students' best interests at heart. When left to their own decision-making processes, they are not making arbitrary,

blanket decisions about when and how trans, intersex, and nonbinary students can participate in any activity.

AASA wants to state for the record that of the small number of transgender, intersex, and nonbinary student-athletes in our schools, few have been denied the athletic opportunities they sought. Even fewer have objected to the case-by-case determinations set by districts because most make those decisions in partnership with families and students, as they always strive to do when dealing with complex issues impacting student safety and well-being.

Because we commented on the 2019 Title IX NPRM and the 2022 Title IX NPRM, we believe we must also weigh in on this narrow NRPM that directly impacts school district policy and practices in athletics. As mentioned in our 2019 and 2022 comments on the broader Title IX regulation, we reiterate that if this proposed rule has any chance of implementation success, the Department must commit significant resources to funding and technical assistance at the K-12 level. Specifically, the Department should proactively ensure its regional centers are equipped to provide numerous in-person and virtual training opportunities for district staff and Title IX coordinators. The Department should also develop and disseminate template Title IX athletics model policies, handbooks, and training materials that districts can utilize or reference.

Finally, given that Title IX is almost as regulated as the Individuals with Disabilities Education Act and compliance is becoming a significant unfunded mandate for districts, it seems appropriate that districts receive additional federal funding due to the complexity of the processes set forth in these regulations and the broader Title IX regulations expected this summer. The estimate that compliance with these regulations at the K-12 level would be roughly \$10 million over ten years simply ignores the reality that districts can and should expect significant legal challenges and time-consuming OCR complaints and investigations in response to these standards that will consume tens of millions of dollars a year—not over ten years.

Below are the answers to the Department's directed questions. As always, AASA encourages the Department to seriously weigh the concerns brought by those implementing proposed regulations and we hope that we see the necessary supports for districts of all sizes and capacities to ensure that they are able to follow whatever the final regulation is with fidelity.

Sincerely,



Sasha Pudelski
Director of Advocacy
AASA, The School Superintendents Association

1. *Whether any alternative approaches to the Department's proposed regulation would better align with Title IX's requirement for a recipient to provide equal athletic opportunity regardless of sex in the recipient's athletic program as a whole?*

AASA appreciates that the proposed regulation provides flexibility to districts that choose to apply 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. Several State laws have tied the hands of districts in utilizing case-by-case criteria for determining eligibility for student-athletes. AASA believes such State interference is inappropriate intrusion by the state into local control of athletics programs on what is and always has been an extremely local education issue. We appreciate the federal government's reiteration that the district must adopt specific criteria for determining eligibility. We agree the criteria must consider the sport, level of competition, and grade or education level of the student, as these are fundamental parameters for determining eligibility districts already use to determine athletic participation on a case-by-case basis.

2. *What educational objectives are sufficiently important to justify a recipient imposing sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity and whether those objectives should be specified in the regulatory text?*

AASA objects to the requirement in the proposed regulation that educational institutions identify an "educational objective" to justify imposing sex-related criteria for athletic participation by a district and does not believe the regulation should specify such objectives. Athletics occurs outside of the core instructional day and is an extracurricular rather than compulsory activity for students. The "educational objective" standard is drawn from *United States v. Virginia*, 116 S.Ct. 2264 (1996), a case that involved female students being excluded entirely from the Virginia Military Academy, a military college maintained exclusively for males. To the extent that the Department is insistent on some objectives being identified in the proposed regulation, we recommend removing "educational" from the standard of "important objective." See *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020) (using "important governmental objectives" or "important interest" standard).

AASA recommends that the final rule specify the objectives that OCR would consider sufficiently important to exclude a student based on gender identity. Courts have recognized some interests, and it is clear from the preamble that OCR does not consider some interests sufficiently important. Including that information will not limit schools' flexibility to weigh the factors at play in a specific situation on a case-by-case basis. We cannot understand any benefit to schools by not identifying the objectives they can consider.

For AASA, an even more important question is what will be necessary to show that an important interest is substantially related to the interest. The problem with implementing a litigation standard (heightened scrutiny) in an administrative regulation context is that the record-making that occurs in litigation does not usually occur when a district makes an athletics eligibility determination. AASA is concerned that the risk of administrative challenges to districts will be unduly burdensome without clarity for school leaders on OCR's expectations regarding substantial relation (and the documentation necessary to establish it in an OCR complaint). The Department should clearly explain in the final

regulation what it believes it means for an interest to be substantially related *in this specific context*. It should also explain what specific factors it will use to analyze a complaint alleging that an interest is not substantially related. Schools will still maintain significant flexibility to make case-by-case determinations when they receive requests but will not have to play a guessing game about what they must do to survive an OCR challenge to their decisions.

3. *Whether and how the permissibility of particular sex-related eligibility criteria should differ depending on the sport, level of competition, grade or education level, or other considerations?*

In addition to considering the sport, the level of competition, and the grade/age of the student, it is common practice at the local level to consider the physical safety of students, including the student who is transitioning or who identifies as transgender, intersex, or non-binary, when determining athletic participation. A district's first and foremost responsibility to every student and family is to ensure their child's safety regardless of whether the student is in a classroom or on an athletic field. Districts also have a separate legal duty to exercise reasonable care for all students. That duty encompasses the duty of district athletic trainers and coaches to screen students for injuries, make return-to-play medical decisions, provide adequate training on special safety equipment, and plan for and respond to medical emergencies. If a coach or trainer acts to increase the risks inherent in playing a particular sport, their actions could serve as a basis for potential liability. Therefore, AASA asks that the Department include physical safety for both the student who identifies as transgender, intersex, or non-binary and those competing against the transgender, intersex, or non-binary student as an explicit factor for considering eligibility.

4. *Whether any sex-related eligibility criteria can meet the standard set out in the proposed regulation when applied to students in earlier grades, and, if so, the type of criteria that may meet the proposed standard for those grades;*

We do not believe there should be any sex-based eligibility limitations placed on students in elementary or middle school given the primary goal of athletic participation for students within this age range is to acquire basic skills associated with a particular sport, develop teamwork and leadership skills and increase physical fitness.

5. *How a recipient can minimize harms to students whose eligibility to participate on a male or female athletic team consistent with their gender identity is limited or denied by the recipient's adoption or application of sex-related criteria;*

It is unclear from the proposed rule and the preamble whether the requirement to minimize harm relates to minimizing harm resulting from the evaluation of a student's ability to participate, minimizing the harm a student experiences after they are told they cannot participate, or both. As an initial matter, it is imperative that the Department clarify its expectations regarding this issue.

To the extent the proposed rule would require minimizing harm based on the criteria chosen and the evaluation process, AASA recommends that, rather than a vague requirement to "minimize harm" the Department precisely define the actions that a school can and cannot take when assessing eligibility requirements for transgender, intersex, and non-binary students. For example, the Department could

state that certain documentation is inappropriate to request or consider such as menstrual cycle data, documentation of surgery, hormone reports, or other sensitive medical information. Also, the Department could prohibit districts from conducting or requiring physical examinations or otherwise making students jump through burdensome and invasive hoops to participate in sports. Rather than side-step a discussion through a requirement to “minimize harm” we prefer clarity on what criteria would be appropriate.

To the extent that the proposed rule would require minimizing harm after a student’s exclusion, AASA cautions the Department to be clear and specific that a district is only required to minimize harms for a transgender, intersex, or nonbinary student when their exclusion is *because of* their gender identity. A vague, undefined requirement to “minimize harm” would create the risk that, for example, a transgender student does not make the varsity track team because they are not as fast as other candidates, the student could claim that their school was required to “minimize harms” and file an OCR complaint if the school does not.

Any student who is not eligible for a sport, particularly at the high school level, could experience depression, anger, greater disinterest in academics, or increased disciplinary issues all of which could be construed as harm. Students excluded based on gender identity are also not the only students excluded based on their identity from athletics; students with disabilities, for example, are often legitimately excluded from participating on sports teams without any requirement to minimize harms. The Department should consider perceptions of inequity in defining what it expects schools to do to minimize harm to students excluded based on gender identity.

6. *Whether regulatory text in addition to the text in the proposed regulation is needed to provide recipients with sufficient clarity on how to comply with Title IX’s prohibition on sex discrimination, including gender identity discrimination, in the context of male and female athletic teams, consistent with the principles and concerns identified in the discussion of proposed § 106.41(b)(2)*

AASA believes the proposed regulation does not adequately address the impact the regulation will have on K-12 public schools whose athletic associations have rules that OCR deems out of compliance with the proposed regulation. The preamble suggests that schools will come together and require their athletic associations to abide by the proposed regulation. In some states, defying an athletic association’s rules leads to the effective shut down of a school district’s entire athletics program.

For example, assume a school district in a state with an association rule barring transgender student participation excludes a student based on that rule. The student files an OCR complaint, OCR finds that the association’s rule is not in compliance with Title IX, and OCR demands that the school district enter into a resolution agreement allowing the student to participate in athletics unless it’s decision to exclude the student can meet the test set forth in the proposed regulation. The school district says it cannot do that, because if it does their state association will essentially shut down all sports operations for the district. OCR responds by threatening to remove all of the school district’s federal funds. The school district’s only options are to lose all of its federal funding or sue the athletic association, an often years-long process during which, presumably, no students in the school district would be able to participate in association-authorized athletics.

The Department may just think this is not its problem. But the Department says its mission is to foster educational excellence and ensure equal access. Putting schools in this situation does not further either goal. At minimum, the Department must consider the significant cost to school districts that this situation would create when describing and analyzing the financial impact of its proposed rule.