



May 8, 2023

Submitted via www.regulations.gov¹

Office for Civil Rights, DOE
ATTN: 88 FR 22860
Dept. of Education (DOE)
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: DOCKET ID ED-2022-OCR-0143, RIN 1870-AA19, 34 CFR 106, 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

I am writing on behalf of Equitas Health, which is headquartered in Columbus, Ohio, to express comments and concerns with the rule proposed by the DOE in regard to the rights of transgender, non-binary, gender expansive and intersex students to compete in school athletics. As such, Equitas Health is pleased to submit these comments in response to the Dept. of Education’s proposed rule – 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.

Equitas Health is a federally qualified health center look-alike (FQHC look-alike) and one of the largest LGBTQ+ and HIV/AIDS serving healthcare organizations in the country. Each year, we serve tens of thousands of patients in Ohio, Texas, Kentucky, and West Virginia, and since 1984, we have been working to advance “care for all.” Our mission is to be the gateway to good health for those at risk of or affected by HIV; for the lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ+) community; and for those seeking a welcoming healthcare home. In doing so, we offer primary and specialized medical care, pharmacy services, dentistry, mental health and recovery services, HIV/STI prevention and treatment services, Ryan White HIV case management, overall care navigation, and a number of community health initiatives.² Regarding this public comment, our agency, our patients, and our broader community are both

¹ Document prepared by Rhea Debussy, Ph.D. (she/her), Director of External Affairs with assistance from Oliver Licking (they/them), Gender Equity Policy Manager. Document reviewed by Sam Brinker (he/him), General Counsel; Adrianna Udinwe (she/her), Associate General Counsel; and Sarah Green (they/she), Administrative Assistant – Advancement.

² <https://equitashealth.com/about-us/>

interested and concerned about this proposed rule. As such, we urge the Dept. of Education to ensure that this final rule fully protects the rights of transgender, non-binary, gender expansive, and intersex student-athletes in schools and educational facilities across the country.

Recommendation 1: We strongly recommend that the DOE approves a final rule that prohibits states and educational facilities from categorically banning transgender, non-binary, gender expansive, and intersex youth and young adults in school athletics.

In its current form, this proposed rule would prohibit categorical bans that seek to stop transgender, non-binary, gender expansive, and intersex students from competing in school athletics, and our agency greatly appreciates the DOE’s emphasis on this important feature of the proposed rule. Given the increasing number of states that have enacted such categorical bans and/or other such limitations, this is an important element of this rule, as it would restore the rights of transgender, non-binary, gender expansive, and intersex youth and young adults in numerous states across the country.³

In reflecting upon the importance of prohibiting such categorical bans, Oliver Licking (they/them), who is the Gender Equity Policy Manager for Equitas Health, notes that:

“All children deserve to exist in their childhoods within the confines of everyday existence without having to define and defend their rights to simply engage with and play sports. We wish the DOE to strive for creating policy that allows our county’s transgender, non-binary, gender expansive and intersex youth to focus on their coursework, friendships, and ability to build community and healthy lifestyles while engaging in athletics programs without setting them up to be mired in their existence within youth athletics as a political act. Children benefit when they can build friendships, community, and healthy lifestyles when they can engage in youth athletics, and any actions on the part of the DOE should be to allow all students –especially transgender, non-binary, gender expansive, and intersex students – to do so without the weight of their presence in those athletic spaces being up for debate.”⁴

As such, we strongly recommend the that the DOE approves a final rule that prohibits states and educational facilities from categorically banning transgender, non-binary, gender expansive, and intersex youth and young adults in school athletics, given the importance of unequivocally supporting our youth and young adults.

³ For a comprehensive list of states that enact categorical bans that prohibit and/or limit the participation of transgender, non-binary, gender expansive, and/or intersex youth and young adults in school sports, see this policy map from GLSEN and Trans Athlete: <https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation>

⁴ Quotation provided on May 4, 2023.

Recommendation 2: We strongly recommend that the DOE – in pursuit of fairness and equity – implements stronger safeguards that close loopholes in the proposed rule, as such loopholes would allow transgender, non-binary, gender expansive, and intersex youth and young adults to be prohibited from school athletics due to misleading claims about promoting “fairness in competition” or “preventing sports-related injury.”

While we understand that the DOE is attempting to strike a balance in this proposed rule, we remain deeply concerned with the proposed rule’s language about allowing gender-specific prohibitions that are claimed in pursuit of “fairness in competition” or “preventing sports-related injury.” While we appreciate the need to craft a rule that retains flexibility across situations, the language being proposed here is not something that our agency supports.

Specifically, our agency is concerned that states and educational facilities across the country may still seek to prohibit the participation of transgender, non-binary, gender expansive, and intersex youth and young adults under faulty logic that claims to be about “fairness” and/or “safety.” Such claims have often already been employed in the creation of numerous categorical bans across the country, and this so-called “logic” relies upon misinformation about gender expansive and intersex athletes, while also specifically perpetuating transmisogyny. By allowing for such an exemption, the DOE’s proposed rule could pave the way for federally sanctioned discrimination against transgender, non-binary, gender expansive, and intersex youth and young adults, which is deeply alarming.

As noted in a recent opposition testimony to HB 6 (an anti-trans sports ban) at the Ohio Statehouse, Dr. Rhea Debussy (she/her), who is the Director of External Affairs at Equitas Health, noted that:

“There has also been an evolving body of research about gender expansive and intersex athletes. The bulk of this research demonstrates that gender expansive and intersex athletes do not have an advantage over cisgender and non-intersex athletes,⁵ while also noting the intense discrimination that many of these athletes face.⁶ For instance, 2015 research from the *Journal of Sporting Cultures and Identities* – which focused on race times specifically – shows that transgender women do not have a competitive advantage over cisgender women.⁷ Additionally, 2018 research from the academic journal, *Endocrine Reviews*, demonstrates that a testosterone – when suppressed to the standardized range of cisgender women – does not provide an inherent advantage for trans-feminine and intersex athletes.⁸ Similarly 2019 research from *The Lancet* notes

⁵ <https://www.science.org/content/article/scientist-racing-discover-how-gender-transitions-alter-athletic-performance-including>

⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5357259/>

⁷ https://www.researchgate.net/publication/307766116_Race_Times_for_Transgender_Athletes

⁸ <https://academic.oup.com/edrv/article/39/5/803/5052770>

that the notion of ‘biological sex’ is often incorrectly used to exclude these athletes,⁹ and this is often done with pseudo-scientific presumptions about hormones and secondary sex characteristics. In short, the scientific literature clearly demonstrates that there is no problem to fix; instead, legislation, like HB 6, simply targets gender expansive and intersex youth with discrimination.”¹⁰

As such, we strongly recommend that the DOE – in pursuit of fairness and equity – implements stronger safeguards that close loopholes in the proposed rule, as such loopholes would allow transgender, non-binary, gender expansive, and intersex youth and young adults to be prohibited from school athletics due to misleading claims about promoting “fairness in competition” or “preventing sports-related injury.”

Recommendation 3: We strongly recommend that the DOE does not overly rely on the National Collegiate Athletic Association’s (NCAA’s) sports-specific approach for eligibility criteria for transgender, non-binary, gender expansive, and intersex student-athletes, given the numerous concerns from leading experts on this topic.

Although it may seem useful to rely upon the sports-specific approach developed by the NCAA, leading LGBTQ+ organizations – including Athlete Ally among several others – and national leaders who focus on trans-equity in sport have actively critiqued the NCAA’s sports-specific approach.¹¹ Rather, our agency – in uplifting the voices of national partners like Athlete Ally and national experts – would recommend that the DOE utilizes the International Olympic Committee’s (IOC’s) updated framework for transgender, non-binary, gender expansive, and intersex inclusion instead, as that IOC framework emphasizes a human rights approach, stakeholder input, and evidence-based decision making.¹²

In recalling an important point from the IOC’s updated framework, we would like to specifically note that this policy begins with the following: “Everyone, regardless of their gender identity, expression and/or sex variations should be able to participate in sport safely and without prejudice.”¹³ However, it is important to recognize that the DOE’s proposed rule does not clearly and unequivocally note such protections for transgender, non-binary, gender expansive, and intersex students, and by relying upon the NCAA’s sports-specific approach for eligibility

⁹ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)32764-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32764-3/fulltext)

¹⁰ <https://www.legislature.ohio.gov/legislation/135/hb6/committee>

¹¹ See <https://www.athleteally.org/athlete-ally-responds-to-ncaa-transgender-athlete-policy-update/>;
<https://www.athleteally.org/athlete-ally-mosier-respond-ncaa-new-trans-policy/>;
<https://www.athleteally.org/ncaa-facilitator-resigns-in-protest-over-trans-policy/>

¹² <https://bjsm.bmj.com/content/57/1/26>; see also https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sports-and-entertainment-law/recent-ioc-changes-should-guide-ncaa/; <https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework>

¹³ *Supra* note 12.

criteria, the DOE's proposed rule creates a dangerous path for discrimination against these students.

Because of this, we strongly recommend that the Agency utilizes the IOC's updated framework to inform their finalized rule, rather than relying upon the NCAA's sports-specific approach, and of course, our agency hopes that the DOE will ultimately create a stronger rule that will unabashedly affirm the rights of our transgender, non-binary, gender expansive, and intersex youth and young adults.

Concluding Remarks: To conclude, we strongly recommend that the Dept. of Education does the following:

- 1) approves a final rule that prohibits states and educational facilities from categorically banning transgender, non-binary, gender expansive, and intersex youth and young adults in school athletics;
- 2) implements stronger safeguards that close loopholes in the proposed rule, as such loopholes would allow transgender, non-binary, gender expansive, and intersex youth and young adults to be prohibited from school athletics due to misleading claims about promoting "fairness in competition" or "preventing sports-related injury"; and
- 3) does not overly rely on the National Collegiate Athletic Association's (NCAA's) sports-specific approach for eligibility criteria for transgender, non-binary, gender expansive, and intersex student-athletes, given the numerous concerns from leading experts on this topic.

Equitas Health would like to thank you for this opportunity to present comments and concerns on the proposed rule. Should you have any questions about our comments, please feel free to contact Dr. Rhea Debussy (she/her), Director of External Affairs at Equitas Health.