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May 15, 2023

Catherine Lhamon, Assistant Secretary, Office for Civil Rights
U.S. Department of Education
400 Maryland Ave. SW, PCP-6125
Washington, DC 20202
Via <http://www.regulations.gov>

Re: 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

RIN: 1870-AA19

Federal Register: 2023-07601

Dear Assistant Secretary Lhamon:

The National School Boards Association (NSBA) is pleased to offer comments on the Department of Education’s proposed rule on sex-related eligibility criteria for male and female athletic teams. Through its member state associations that represent locally elected school board officials serving millions of public school students, NSBA advocates for equity and excellence in public education through school board leadership. We believe that public education is a civil right necessary to the dignity and freedom of the American people and that each child deserves equitable access to an education that maximizes their individual potential. NSBA also believes that no person should experience sex discrimination, sex-based harassment, or sexual violence in education. NSBA is dedicated to assisting school districts as they develop and implement policies to address discrimination and to promote student rights.¹

¹Among many belief statements expressing its commitment to safe, supportive learning environments, and preventing discrimination against all students, NSBA’s Delegate Assembly has adopted the following:

Beliefs, Art. II, § 3.2: NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, gender identity, age, pregnancy, disability, or sexual orientation.

Beliefs, Art. II, § 3.6: School board members, as community leaders, should encourage and promote productive dialogue about diversity including but not limited to socio-economic status, culture, gender, race, sexual orientation, gender identity, age, physical and mental abilities, religious beliefs, and political beliefs in their communities, model and encourage inclusive thinking and behavior, and provide credible and balanced information on issues of socio-economic status, culture, gender, race, sexual orientation, gender identity, age, physical and mental abilities, religious beliefs, and political beliefs, ultimately creating positive change.

The leading advocate for public education

NSBA shares the Department’s concern for protecting students from all forms of discrimination in our nation’s schools, including students who may wish to participate in their public school district’s extracurricular athletics program. NSBA is committed to helping school districts develop and implement policies to address discrimination against students, to create a school climate of inclusion in all educational programs offered by public schools, including extracurricular athletics, and to bring awareness to the health, educational, and social benefits to be gained by students as a result of participation in extracurricular athletics at school.²

With this shared concern for student well-being in mind, and on behalf of our member state school boards associations, school boards, and school attorneys, we urge the Department to consider the following as it finalizes the rule.

I. State Law Conflicts, Implementation Period

The text of the proposed rule reflects the Department’s 2021 Notice of Interpretation, in which it stated that it “interprets Title IX’s prohibition on sex discrimination to encompass

Beliefs, Art. II, § 3.9: NSBA believes that all students deserve to learn in an environment that is safe, affirming, and free of bias and discrimination. NSBA denounces the use of words or images that harass and directly attack individuals or groups based on race, ethnicity, religion, national origin, sexual orientation, gender or gender expression, disability, or any other aspect of identity.

Beliefs, Art. IV, § 2.9: NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior includes, but is not limited to, physical violence, “bullying” by any means, disrespect of fellow students and school personnel, and other forms of harassment.

Beliefs, Art. IV, § 2.12: NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. ...

² Beliefs & Policies, Art. IV, § 1.3: Public schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of factors such as race, gender, gender identity, sexual orientation, ethnic background, English proficiency, immigration status, socioeconomic status, or disability.

Beliefs & Policies, Art. IV, § 3.22: NSBA supports locally determined school policies and programs that promote lifelong physical activity and healthy eating habits as necessary strategies for improving student achievement and preventing health problems. NSBA believes that local school boards should: (a) provide adequate opportunities for students to participate in physical education classes and related activities;

Beliefs & Policies, Art. IV, § 4.5: ... NSBA believes that before and after-school, as well as weekend and summer programs, particularly when they engage diverse community resources, are effective strategies for improving academic achievement, enhancing student wellness, reducing chronic absenteeism, preventing juvenile crime, and fostering 21st Century Skills while building and strengthening positive relationships between schools and communities.

discrimination based on sexual orientation and gender identity.”³ The proposed rule would be added to the Title IX regulations at section 106.41(b)(2):

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.

The proposed rule sets out federal law in a legal landscape fraught with conflicting laws and regulations at the state level. NSBA urges the Department to clarify its enforcement approach for public schools in states with conflicting state laws, as further explained below, and to provide a period of delayed enforcement to give school boards in such states time to review and revise policies after consulting with their state education agencies, athletic associations, attorneys, and communities.

Currently, twenty-one states have passed statutes in some way requiring that elementary or secondary students in public schools participate in athletics based on biological sex.⁴ Most of these statutes have been passed since 2021, and many have similar text, with common provisions.

Many such state statutes contain findings and declarations related to sex-based physical characteristics. For example, Alabama’s statute reads, in part:

- (1) Physical differences between biological males and biological females have long made separate and sex-specific sports teams important so that female athletes can have equal opportunities to compete in sports.
- (2) Physical advantages for biological males relevant to sports include, on average, a larger body size with more skeletal muscle mass, a lower percentage of body fat, and greater maximal delivery of anaerobic and aerobic energy than biological females.
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- (5) Because of the physical differences between biological males and biological females, having separate athletic teams based on the athletes' biological sex reduces the chance of injury to biological female athletes and promotes sex equality. It provides opportunities for biological female athletes to compete against their peers rather than against biological male athletes, and allows biological female athletes to compete on a fair playing field for scholarships and other athletic accomplishments.

³ *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021).

⁴ *Bans on Transgender Youth Participation in Sports*, Movement Advancement Project, <https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf>. The twenty-one states with such restrictions are: Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.

AL ST §16-1-52.

These state statutes all require that students' participation on teams designated male or female be based on "biological sex," or sex identified close to birth. For example, Alabama's statute says:

(b)(1) Except as provided in subsection (c) [athletic events at which both biological males and females may participate], a public K-12 school may not participate in, sponsor, or provide coaching staff for interscholastic athletic events within this state that are either scheduled by or conducted under the authority of any athletic association of the state that permits or allows participation in athletic events within the state conducted exclusively for males by any individual who is not a biological male or participation in athletic events within the state conducted exclusively for females by any individual who is not a biological female.

(2) A public K-12 school may not allow a biological female to participate on a male team if there is a female team in a sport. A public K-12 school may not allow a biological male to participate on a female team.

AL ST §16-1-52.⁵ Nearly all the statutes limit the restriction to male teams, allowing them to be open to female students, but not permitting female teams to be open to male students.⁶ Some phrase the restriction in terms of an individual's participation rather than a team being open or closed. For example, Indiana's statute says, "A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology, may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport." IN ST 20-33-13-4(b).

Most of these state statutes offer some protection for schools by prohibiting any government entity, licensing organization, or athletic association from entertaining a complaint, investigating, or taking adverse action against a school for maintaining separate athletics teams "for students of the female sex."⁷ Many say that a school is not subject to liability for good faith compliance,⁸ but provide for a cause of action against a school or athletic association if a student is deprived of an opportunity or suffers direct or indirect harm as a result of a school's violation of the statute, or is retaliated against for reporting a violation.⁹

⁵ See also ID ST §33-6203(1); IA ST §2611.2; LA R.S. 4:444 (A.); MS ST § 37-97-1(1); MT ST 20-7-1306; OK ST T. 70 § 27-106(C.); SC ST § 59-1-500; SD ST § 13-67-1; TX EDUC § 33.0834; UT ST § 53G-6-902(1)(a) and (b); WV ST § 18-2-25d.

⁶ AZ ST §15-120.02(B) and (C); AR ST § 6-1-107(c)(2); FL ST § 1006.205(3)(b) and (c); ID ST § 33-6203(2); LA R.S. 4:444 (C.); MS ST § 37-97-1(2); OK ST T. 70 § 27-106 (E.)(1.); UT ST § 53G-6-902(1)(b).

⁷ E.g., AZ ST §15-120.02 D; AR ST § 6-1-107(d); FL ST § 1006.205(4); ID ST §33-6204; LA R.S. 4:445(A.); OK ST T. 70 § 27-106(F.)(1.); SD ST § 13-67-2; UT ST § 53G-6-902(1)(c) .

⁸ See IN ST 20 -33-13-8; IA ST §2611.2(4) and (5); and LA R.S. 4:445(B).

⁹ See AR ST § 6-1-107(e)(2); ID ST §33-6205; IN ST 20-33-13-6; IA ST §2611.2(2.)(b.); LA R.S. 4:446; MT ST 20-7-1307; OK ST T. 70 § 27-106(E.)(3.); SC ST § 59-1-500(C)(1) and (2); SD ST § 13-67-2

In Indiana, for example, the statute allows a student “deprived of an athletic opportunity” or “otherwise directly or indirectly injured” by a school district’s, school’s, or association’s violation of the law, to bring a civil action against the school district, school, or association. IN ST 20-33-13-6. Iowa’s statute specifies the type of relief students may seek if they are directly or indirectly harmed by an alleged violation of the statute: “injunctive, mandamus, damages, and declaratory relief against the entity.” IA ST § 261I.2. *See also* MT ST 20-7-1307 (specifying that a student who suffers direct or indirect harm, or is retaliated against, may sue for “injunctive relief, damages, and any other relief available under law against the school ...”).

Despite the limited protections for schools in the statutes, school districts have been sued in federal courts by individual students challenging such statutes’ application to them.¹⁰

Because the proposed rule would conflict directly with these state laws, school districts in such states will have to analyze and possibly re-develop their policies in consultation with their attorneys, keeping in mind the potential liability they face for violations of their state laws. The Department estimates that an initial review to determine whether the regulation applies will take an education administrator approximately half an hour to complete. It also estimates that in about 60 percent of states, one education administrator per Local Education Agency (LEA) would spend four hours on policy revisions, while a management analyst would spend twenty hours, and an attorney twelve hours. 88 Fed. Reg. at 22886. The Department speculates that time to develop training on the new policies would be spent by state athletic associations.

NSBA urges the Department to estimate and account for more time to be spent by LEA administrative staff and attorneys in developing and conducting training for staff, especially in states that now ban student participation in extracurricular athletics based on gender identity. School personnel will need more time to consult with their school attorneys, engage their communities through meetings and input periods, draft proposed policies with comment periods, finalize policies, and train staff. In some states, this process will happen through the athletics association or conference in which the school participates, and in consultation with the state education agency. Although state athletic associations may take the lead in some circumstances, many school districts will craft unique policies responsive to their own student and community needs and will need to train staff on the particularities of those policies. The Department should call for additional study by the Office for Management and Budget or other offices on the costs to schools not only to develop and implement new policies, but also to field questions and complaints about those policies, up to and including litigation. NSBA asks that the Department specify in the final rule that it will delay enforcement in states with conflicting laws for a sufficient period of time to let this process take place, at least one year.

As the Department notes, it lacks data on the economic impact of the proposed rule, including the impact of discrimination on students, whether particular recipients offer athletic

¹⁰ *See, Doe et al. v. Home et al.*, No. 4:23-cv-00185-JGZ (D. Ariz., filed April 17, 2023); *Hecox v. Little*, 479 F.Supp.3d 930 (D. Idaho 2020), *affirmed* No. 20-35813, 20-35815, 2023 WL 1097255 (9th Cir. 2023); *A.M. by E.M. v. Indianapolis Public Schools*, 617 F.Supp.3d 950 (S.D. Ind. 2022), appeal dismissed 2023 WL 371646 (7th Cir. Jan. 19, 2023); *B.P.J. v. West Virginia State Board of Education*, ___ F.Supp.3d ___, 2023 WL 111875 (S.D. W.V. Jan. 5, 2023), *stay pending appeal denied*, 2023 WL 1805883 (S.D. W.V. Feb. 7, 2023), *injunction pending appeal granted*, 20-23 WL 2803113 (4th Cir. Feb. 22, 2023), *application denied*, ___ U.S. ___, 143 S.Ct. 889 (April 6, 2023).

teams, and whether particular recipients will be revising their policies. During the delayed implementation period, we ask that the Department gather data that will inform its enforcement and assist school districts considering policy changes based on the final rule. NSBA is concerned that without a period of considered policy development, schools will be forced to adopt policies without sufficient time to consult with their communities and state agencies, creating even more vulnerability to litigation. School districts in states with conflicting statutes are subject to the very real risk of drawing claims including litigation if they implement the federal rule without sufficient time to inform and consult with these stakeholders.

II. Alternative Approaches to Achieve Equal Athletic Opportunity Regardless of Sex in the Recipient’s Athletic Program as a Whole

Because the proposed rule retains the longstanding language regarding “boys” and “girls” teams, it appears to limit the scope of its coverage. It is not clear whether the text of the proposed rule applies only when a school designates teams as “boys” and “girls.” Some schools operate, and some are considering, co-ed teams.¹¹ Many state statutes refer to “co-ed teams” as well. NSBA asks that the Department clarify how the rule will apply if a school offers co-ed teams or designates slots for boys and girls on such teams.

NSBA also asks that the Department clarify the rule’s application in situations where nonbinary students wish to participate in athletics. In most sports at most levels, there will not be a team that corresponds with a nonbinary student’s gender identity. The Department notes that schools may need to determine whether sex-related criteria, when applied to nonbinary students, limit or deny the student’s eligibility to participate on a male or female team consistent with their gender identity. If a school answers that question in the negative, does that mean that the student may be required to join a team based on biological sex in that case? We ask that the Department clarify how schools can address participation in such situations through policy.

III. Safety and Fairness as “Important” Educational Interests

The proposed rule would require any criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity criteria to “be substantially related to the achievement of an important educational objective” for “each sport, level of competition, and grade or education level.” This language ties the rule to the intermediate scrutiny standard applied by courts to sex-based classifications challenged under constitutional theories of equal protection. Although this language is familiar to attorneys and courts, its use in a regulation creates implementation challenges for school districts.

First, the legal meaning of substantially related/important educational interest may be difficult to discern and challenging to apply. The intermediate scrutiny standard is less defined through case law than the higher “strict scrutiny” or lower “rational basis” standards applicable in other contexts. Courts have not interpreted “substantially related” consistently or clearly in the

¹¹ See *Brooks v. State College Area Schools District*, ___ F.Supp.3d ___, 2022 WL 17366397 (M.D. Penn. 2022)(In a case where female players alleged a school district committed a Title IX violation when it failed to provide effective accommodation to female athletes by rostering a second co-ed middle school ice hockey team, the court found, “Merely allowing female athletes to show up for co-ed tryouts is not enough to satisfy Title IX,” and granted a preliminary injunction.)

context of school policies addressing restroom and locker room use. In *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied* 141 S.Ct. 2878, U.S., June 28, 2021, the Fourth Circuit determined that a school board policy restricting transgender students from using restrooms consistent with their gender identity *was not* substantially related to the stated interest of protecting the bodily privacy of cisgender students, because that bodily privacy did not increase when the transgender student was banned from those restrooms. The Eleventh Circuit, however, determined that a school board policy restricting student bathroom use to biological sex *was* substantially related to the important governmental objective of protecting students' privacy in school bathrooms because student use was not always confined to individual stall. *Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022). It will be difficult for attorneys advising school districts to draw analogies from intermediate scrutiny caselaw to this context.

Second, further complicating the analysis is the “important educational objective” component of the proposed rule. The Department explains that to impose criteria that would limit or deny students' ability to participate based on gender identity, schools will have to provide:

“...reasoned analysis rather than... mechanical application of traditional, often inaccurate, assumptions.” If a school can achieve its objective using means that would not limit or deny a student's participation consistent with their gender identity, its use of sex-related criteria may be pretextual rather than substantially related to achievement of that important educational objective. Thus, under proposed § 106.41(b)(2), whether the objective could be accomplished through alternative criteria that would not limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity would be relevant to the analysis.

School districts will seek to include “important educational objectives” in their board policy, but need clarity about how the Department defines educational objectives in the specific context of extra-curricular activities. The Department identifies “ensuring fairness in competition” and “preventing sports-related injury” as examples that could be important educational objectives. Beyond ensuring fairness and preventing injuries, what other factors may school districts consider in determining what constitutes an educational objective that meets the requirements of the rule, and what methodology, if any, school districts use to support those determinations? Further, it is unclear how schools will be permitted to use these objectives to formulate policy. To show that a rule ensures fairness, must schools show that, in order to provide equal opportunities for female athletes, they must exclude male students from a team so that they will not displace female athletes? If so, must the analysis rise to the level of data provided in *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (recognizing the importance of “providing equal opportunities for women” athletes and agreeing with the Arizona Interscholastic Association that male students would displace female students in volleyball “to a substantial extent” if not excluded from competition)? Could schools cite competitive advantage as an educational goal because winning provides success experiences for students?

The Department also should clarify whether and to what extent the interests already stated in state law may constitute an “important educational interest” for a school district considering eligibility criteria contemplated by the rule. As noted above, the Alabama statute includes findings and declarations saying that “having separate athletic teams based on the athletes' biological sex reduces the chance of injury to biological female athletes and promotes sex equality.” AL ST §16-1-52(5). Similarly, the Idaho statute cites caselaw and studies on male-female physical differences and

states, “Having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams accomplish this by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors.” ID ST § 33-6202(12). NSBA asks the Department to clarify whether such statements of findings and purpose in existing state law will be sufficient educational interests on which school districts may base sex-based eligibility criteria they may be considering.

Other concerns arise out of the how the phrase “sports-related injury” is to be understood by schools and how it will be defined by Department. For instance, if a school cites the educational objective of preventing sports-related injury, will emotional injury be sufficient? If a school is concerned about physical safety of athletes, could that concern outweigh concerns about emotional harm to other students? What if the risk of physical harm to other participants is low and the risk of emotional harm is high based on considerations of the individual whose participation would be limited or denied? How should schools weigh these varying factors in arriving at a policy, and to what extent will the Department consider the resolution of these tensions in determining whether a policy violates the proposed regulation?

Given these concerns, NSBA asks that the Department clarify how it will evaluate a school’s stated interest in applying any athletic eligibility criteria that might limit or deny a student’s ability to participate on a team consistent with their gender identity. NSBA urges the Department to provide other examples that it will consider satisfactory to meet the substantially related/important educational interest standard.

IV. Meeting the Proposed Rule’s Requirements for Each Sport, Level of Competition, and Grade or Education Level

As proposed, the rule requires recipients, including LEAs, imposing any athletic eligibility requirement that might limit or deny a student’s ability to participate on an athletic team according to gender identity to analyze each such requirement according to “sport, level of competition, and age/level” to determine whether it serves an important educational objective and minimizes harm. The current language invites multiple interpretations across multiple sports and athletic levels, all of which may be subject to challenge and eventually litigation. For example, lacrosse is a sport typically offered in terms of separate boys’ and girls’ separate teams because the game and style of play is significantly different. “Boys” teams use a stick with a pocket so that the ball is not easily dislodged without force; significant physical contact occurs and is encouraged. “Boys” team players also wear substantial padding. “Girls” teams use a stick with a much flatter ball net, requiring finesse to keep the ball cradled as the player moves. Less physical contact is allowed in the “girls” lacrosse game, and participants wear far less padding. Depending on the athletic association’s rules, School District A could have a set of lacrosse eligibility rules for students identified as male at birth to play on the girls’ lacrosse team while School District B could have a different standard, based on separate assessments of the needs of the sport at that age level. Differences between districts could cause school shopping or impede the ability of a student to transfer easily during their athletic career. Could a student denied eligibility at one school to which they transfer claim a Title IX violation if they were allowed to play at District A but denied at District B? Whether the Department answers yes or no, District B is likely to draw a lawsuit from an excluded student. We ask that the Department clarify whether and how such an analysis can take place through formation of policy rather than at an individual level.

V. Athletic Associations

Many school districts do not set their own rules on athletic eligibility regarding interscholastic competition but are bound by agreements with athletic associations to follow the latter's eligibility and participation rules. Athletic associations are key links to secondary and post-secondary educational avenues for students participating in athletics they regulate. State athletic associations already have developed policies and procedures related to determining eligibility rules for transgender students.¹² At the same time, not all athletic associations will be considered recipients of federal funds.

A school that follows a federal requirement in conflict with those of an athletic conference could be forced to choose between violating federal law and limiting athletic and post-secondary academic opportunities for many students. Schools should have an opportunity to transition to new athletic conferences (if they are available) that allow compliance with federal requirements but should not be penalized where the only choice is complete withdrawal from varsity athletic opportunities for students.

NSBA encourages the Department to clarify whether and how athletic associations will be considered recipients of federal funds covered by the final rule. It would be helpful to most school districts if state-wide athletic associations have state-wide standards for each sport, level of competition, and grade level so that individual districts and schools can defer to that standard without having to dive into the complex analysis for each.

VI. Minimizing Harm Component

Finally, NSBA asks that the Department consider removing the “minimize harm” requirement as currently written in the proposed rule. The Department explains, “Title IX generally prohibits a recipient from excluding students from an education program or activity on the basis of sex when the exclusion causes more than de minimis harm.” 88 Fed. Reg. 22876. It also states that under the Department’s July 2022 proposed amendments to its Title IX regulations on sex-based discrimination, “[A] policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than de minimis harm on the basis of sex.” 88 Fed. Reg. 22877. Although “the Department’s Title IX regulations have taken a different approach in the athletics context, permitting a recipient to offer male and female athletic teams to promote equal opportunity for all athletes, even though some harm may be caused when a recipient offers sex-separate athletic teams,” the proposed rule discussed here would appear to *presume* harm upon exclusion. The Department says “[W]hen sex-related criteria do limit or deny a student’s eligibility to participate on a male or female athletic team consistent with their gender identity, the student is subjected to harms based on sex that are distinct from the harms otherwise permitted under the Department’s longstanding athletics regulation.” 88 Fed. Reg. 22877. Schools will be expected to recognize and design any sex-based criteria to minimize the potential harms on affected students. *Id.*

¹² See, e.g., Michigan High School Athletic Association, *Eligibility of Transgender Student-Athletes*, <https://cdn.factcheck.org/UploadedFiles/TransgenderPolicy.pdf>.

Given the Department’s explanation, the “harm” component of the proposed rule appears to be all-inclusive and require a degree of forecasting. If any application of sex-based eligibility criteria that limits or denies participation will be deemed to be harmful, how will a school be able to show it chose a less harmful alternative? Will the Department consider emotional harm? If so, how does the Department suggest that schools anticipate and weigh emotional harm in developing a policy that complies with the proposed rule? How should school officials understand the proposed rule vis-à-vis Title IX’s historic commitment to support equal opportunity for all athletes through male and female athletic teams, “even though some harm may be caused when a recipient offers sex-separate athletic teams”? As currently phrased, the rule does not seem to allow for a balancing analysis based on what might be deemed a lesser harm.

Simply put, the harm analysis appears to require schools to engage in a limited, unworkable analysis where any limitation/deprivation will necessarily cause harm—the harm of exclusion, and any attempt to minimize harm can be deemed speculative even if based in available data. NSBA urges the Department to revisit this portion of the proposed rule and to develop a more flexible framework that allows a school district to consider and weigh competing harms informed by their own experiences, data, and educational objectives. Such a framework would provide schools with clarity and greater certainty that they are complying with the regulation’s requirements.

VII. Conclusion

NSBA appreciates this opportunity through regulatory Notice and Comment to reiterate our common purpose to keep schools free from discrimination based on sex and to promote equal opportunities for student participation in athletics. The proposed Title IX Rule presents some unintended legal, fiscal, and practical challenges, many of which could be remedied through thoughtful and concerted discussion.

We continue to be available to the Office of Civil Rights and the Department to provide the perspective of school boards and their counsel. NSBA stands ready to work in partnership with OCR on these and other issues of importance to our members, and to the nation’s public school children.

Sincerely,

Francisco M. Negrón, Jr.
Chief Legal Officer
National School Boards Association