

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

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

regulation what it believes it means for an interest to be substantially related . 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.

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-

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.

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.