



September 9, 2022  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

**VIA ELECTRONIC SUBMISSION**

**Re: ED-2021-OCR-0166 - Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance**

SPARK Reproductive Justice NOW!, Inc. is writing to express our support of and suggestions for the Department of Education’s Proposed Rule entitled Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, which was published in the Federal Register on July 12, 2022.<sup>1</sup> We strongly support the Department of Education’s decision to expand and restore protections for students from sex-based discrimination, sexual harassment, and sexual violence in education under Title IX of the Education Amendments of 1972 (hereinafter “Title IX”). Specifically, SPARK overwhelmingly supports:

- I. The clarification that Title IX prohibits all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or pregnancy related conditions, sexual orientation, and gender identity.<sup>2</sup>
- II. The clarification that Title IX requires recipients of Federal financial assistance to protect students and employees from discrimination on the basis of pregnancy or related conditions, including lactation.<sup>3</sup>
- III. The expansion of Title IX to prohibit recipients of Federal financial assistance from separating or treating any person differently based on sex in a manner that subjects that person to more than de minimis harm, including prohibiting policies and practices that prevent a student from participating in a recipient’s education program or activity consistent with their gender identity.<sup>4</sup>

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<sup>1</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41 (proposed July 12, 2022) (to be codified at 34 CFR § 106).

<sup>2</sup> *Id.* (to be codified at 34 CFR § 106.10).

<sup>3</sup> *Id.* (to be codified at 34 CFR §§ 106.2, 106.21(c), 106.40, 106.57).

<sup>4</sup> *Id.* (to be codified at 34 CFR §§ 106.10, 106.31(a)(2), 106.41(b)(2)).

We additionally strongly propose that the Department of Education considers immediately implementing coherent guidelines that protect student athletes from sex-based discrimination by allowing students to play on and participate in sports teams that best align with the students' gender identity.

Since 2007, SPARK Reproductive Justice NOW! (“SPARK”) has worked to build and strengthen the power of our communities and a reproductive justice movement that centers Black Women, Women of Color, and Queer & Trans Young People of Color in Georgia and the South. Based in Atlanta, Georgia, SPARK advocates for policies that allow all young people to survive and thrive in educational environments - especially the most marginalized among us. We know that queer, trans, gender diverse, and intersex students deserve all of the same opportunities as their cisgender, heterosexual peers, and we strongly support the explicit protection of these students in the proposed rule.

### **I. SPARK supports the expansion of Title IX to prohibit all forms of sex discrimination.**

SPARK supports the clarification of the scope of Title IX to prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or pregnancy related conditions, sexual orientation, and gender identity.<sup>5</sup> We further support explicitly defining “sex discrimination” under Title IX to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or pregnancy related conditions, sexual orientation, and gender identity.

We agree with the Department of Education that the current text of Title IX is at odds with the rule's purpose and the reasoning of the Supreme Court in *Bostock v. Clayton County*.<sup>6</sup> The goal of Title IX is to ensure that no person experiences sex discrimination, sex-based harassment, or sexual violence in education. To further this goal, it is imperative that Title IX is expanded to explicitly protect against discrimination and harassment faced by queer, trans, and gender diverse students based on gender identity and sexual orientation. The inclusion of protection from discrimination on the basis of sex characteristics is additionally imperative, as stated by the Department of Education, to protect intersex students from discrimination, harassment, and violence in education.<sup>7</sup>

Thus, we support the clarification that Title IX bars all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.<sup>8</sup>

### **II. SPARK supports clarifying Title IX's protections on the basis of pregnancy or related conditions.**

SPARK supports clarification that Title IX requires recipients of Federal financial assistance to protect students and employees from discrimination on the basis of pregnancy or related conditions. This includes support for the introduction of a clear and coherent definition of “pregnancy and related conditions,” as

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<sup>5</sup> *Id.* (to be codified at 34 CFR § 106.10).

<sup>6</sup> *Id.* at 520.

<sup>7</sup> *Id.* at 523.

<sup>8</sup> *Id.* at 520.

well as the clarification that discrimination based on lactation is covered by Title IX's prohibition on discrimination based on pregnancy-related conditions.<sup>9</sup> We strongly support the Department of Education's decision to expand Title IX to:

- provide students with the option of individualized modifications to school policies, practices, or procedures to accommodate a student's pregnancy or related conditions;
- allow students a voluntary leave of absence due to pregnancy or related conditions, as well as reinstate the student to their previous academic and extracurricular status; and
- require education institutions to provide students with a clean, private lactation space (other than a bathroom) for expressing breast milk or breastfeeding as needed.<sup>10</sup>

We also support the Department of Education's proposed requirement that employees of education institutions are provided reasonable breaks and clean, private spaces for lactation.<sup>11</sup>

As a Reproductive Justice organization, SPARK advocates for the ability that all people, especially Black women, women of color, and queer and trans young people of color, have the resources and power to make sustainable and liberatory decisions about their bodies, genders, sexualities, and lives. This includes the ability to make decisions regarding bodily autonomy, having children, not having children, and raising children.

For all people to have the power to make these decisions, it is crucial that all people who are pregnant and who can get pregnant are fully protected from discrimination on the basis of pregnancy and related conditions. Allowing modifications to school policies and the opportunity for a leave of absence gives pregnant students the power and resources to make more autonomous and informed decisions about their bodies and pregnancies. Additionally, requiring that students are provided clean and private spaces for lactation protects students from discrimination on the basis of pregnancy while also allowing students to make informed and empowered decisions about whether or not to breastfeed following pregnancy. SPARK supports this expansion of Title IX as a necessary step towards achieving reproductive justice for all students.

### **III. SPARK supports the prohibition of separating or treating any person differently based on sex, including policies and practices that prevent a student from participating in programs or activities consistent with their gender identity.**

SPARK supports the expansion of Title IX to prohibit recipients of Federal financial assistance from separating or treating any person differently based on sex in a manner that subjects that person to more than de minimis harm, including prohibiting policies and practices that prevent a student from participating in an education program or activity consistent with their gender identity.<sup>12</sup> This expansion is crucial for protecting trans and gender diverse students from discrimination and harm within education. As trans and gender diverse youth are increasingly subject to mistreatment, discrimination, and violence

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<sup>9</sup> *Id.* (to be codified at 34 CFR § 106.2).

<sup>10</sup> *Id.* (to be codified at 34 CFR § 106.40(b)(3)).

<sup>11</sup> *Id.* (to be codified at 34 CFR § 106.57(e)(1)-(2)).

<sup>12</sup> *Id.* (to be codified at 34 CFR §§ 106.10, 106.31(a)(2), 106.41(b)(2)).

within their schools, communities, and across the current country's political landscape, it is necessary that trans and gender diverse youth are protected from harm while at school.

As the Department of Education has identified, excluding trans and gender diverse youth from education programs and activities consistent with their gender identities imposes significant emotional, physical, and dignitary harms, as well as isolates trans and gender diverse students from their peers.<sup>13</sup> We also agree that any transphobic claims that isolating trans and gender diverse students is necessary to protect cisgender students cannot be considered a legitimate basis for denying trans and gender diverse students protection in education.<sup>14</sup> Trans and gender diverse students do not provide any unique risk of harm towards cisgender students. In fact, the opposite has been shown: trans and gender diverse students are more likely to experience violence and victimization on school property than their cisgender peers.<sup>15</sup> Trans and gender diverse students are not a threat to the safety or privacy of their peers. There is no logical reason, outside of virulent transphobia, to deny trans and gender diverse students the same protections in education as cisgender students.

Thus, we strongly support the Department of Education in expanding Title IX to prohibit separating or treating any person differently based on sex in a manner that subjects that person to more than de minimis harm. We further support the Department of Education in clarifying that preventing any person from participating in an education program or activity consistent with their gender identity subjects a student to more than de minimis harm, and is thus prohibited under Title IX.<sup>16</sup>

**IV. SPARK proposes that the Department of Education immediately expand Title IX regulations to protect trans and gender diverse athletes by allowing students to play on and participate in sports teams that best align with the students' gender identity.**

The Department of Education has stated that it does not propose any changes to current regulations under § 106.41 regarding athletics teams separated by sex assigned at birth.<sup>17</sup> The Department of Education has further stated that it intends to issue a future separate notice of proposed rulemaking to address whether and how § 106.41 should be amended.<sup>18</sup>

The Department of Education has indicated that the reason for this decision lies in Congressional authorization to approach athletics in a manner distinct from other areas of education under the Javits Amendment.<sup>19</sup> Currently, so long as regulations are "reasonable," separation in sports teams on the basis

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<sup>13</sup> *Id.* at 534.

<sup>14</sup> *Id.* at 535.

<sup>15</sup> Madeleine Roberts, *New CDC Data Shows LGBTQ Youth are More Likely to be Bullied Than Straight Cisgender Youth*, HRC (Aug. 26, 2020), [https://www.cdc.gov/healthyyouth/data/yrbs/reports\\_factsheet\\_publications.htm](https://www.cdc.gov/healthyyouth/data/yrbs/reports_factsheet_publications.htm) (finding that transgender students were more likely than cisgender students to have been threatened with a weapon, injured with a weapon, and bullied on school grounds).

<sup>16</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41, 534 (proposed July 12, 2022) (to be codified at 34 CFR § 106.31(a)(2)).

<sup>17</sup> *Id.* at 541 (to be codified at 34 CFR § 106.41).

<sup>18</sup> *Id.*

<sup>19</sup> Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

of sex assigned at birth in athletics is permissible when selection for an athletic team is based upon competitive skill or when the activity involved is a contact sport.<sup>20</sup> The Department of Education has, however, acknowledged that excluding trans and gender diverse students from sports teams based on a student's sex assigned at birth can cause students more than "de minimis harm."<sup>21</sup>

SPARK strongly urges the Department of Education to reconsider the decision to issue a future notice of proposed rulemaking to address whether and how § 106.41 should be amended. As of September 9, 2022, 18 states across the country have laws in effect banning trans students from participating in sports teams consistent with their gender identities.<sup>22</sup> Temporary injunctions are currently blocking the enforcement of these laws in four states.<sup>23</sup> Nine of these laws were passed in 2022 alone; the number of states with laws banning trans students from sports consistent with their gender identities doubled in one year.<sup>24</sup> The amount of anti-trans policies that are introduced into state legislatures and passed into law will only increase as trans athletes remain the target of transphobic legislative attacks.

Currently, school-aged trans and gender diverse athletes across the country are experiencing heightened discrimination and public scrutiny due to discriminatory athletics rules and regulations. Many of these regulations are inconsistent between states, creating areas of the country (most notably the southern United States and areas of the western United States) in which trans and gender diverse student athletes are subjected to heightened levels of discrimination and mistreatment based on their gender identities and trans status.

SPARK urges the Department of Education to consider immediately implementing coherent guidelines, whether in these proposed regulations or in another set of regulations that is released with utmost expediency, that protect student athletes from sex-based discrimination by explicitly allowing students to play on and participate in sports teams that best align with the students' gender identity.

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For the aforementioned reasons, we strongly support the proposed rule. We additionally strongly encourage that the Department of Education considers immediately implementing coherent guidelines that protect student athletes from sex-based discrimination by allowing students to play on and participate in sports teams that best align with the students' gender identity.

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<sup>20</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41, 544 (proposed July 12, 2022).

<sup>21</sup> Madeleine Roberts, *New CDC Data Shows LGBTQ Youth are More Likely to be Bullied Than Straight Cisgender Youth*, HRC (Aug. 26, 2020).

<sup>22</sup> See *Bans on Transgender Youth Participation in Sports*, Movement Advancement Project (accessed Sep. 6, 2022), [https://www.lgbtmap.org/equality-maps/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/sports_participation_bans).

<sup>23</sup> *Id.*

<sup>24</sup> See, Miles J. Herszenhorn, *Conservative Lawmakers Say Banning Trans Youth From Sports Will Keep the Competition Fair. Some Harvard D1 Athletes Disagree.*, The Harvard Crimson (June 28, 2022), <https://www.thecrimson.com/article/2022/6/28/pride-month-trans-athletes/>.

If you require any additional information about the issues raised in this letter, please contact Executive Director, Dr. Krystal Redman DrPH, MHA at [Krystal@sparkrj.org](mailto:Krystal@sparkrj.org) or Elias Schmidt, If/When/How RJ State Fellow, at [Elias@sparkrj.org](mailto:Elias@sparkrj.org).

Signed,  
SPARK Reproductive Justice NOW!