



Michael V. Drake, MD  
President

May 9, 2023

Office of the President  
1111 Franklin St.  
Oakland, CA 94607

universityofcalifornia.edu

CAMPUSES

- Berkeley
- Davis
- Irvine
- UCLA
- Merced
- Riverside
- San Diego
- San Francisco
- Santa Barbara
- Santa Cruz

MEDICAL CENTERS

- Davis
- Irvine
- UCLA
- San Diego
- San Francisco

NATIONAL LABORATORIES

- Lawrence Berkeley
- Lawrence Livermore
- Los Alamos

DIVISION OF AGRICULTURE AND NATURAL RESOURCES

Via Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov))

Mr. Alejandro Reyes  
U.S. Department of Education  
400 Maryland Ave., SW  
PCP-6125  
Washington, DC 20202

Re: Docket ID ED-2022-OCR-0143, RIN 1870-AA19, 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 Mr. Reyes:

**INTRODUCTION**

Thank you for the opportunity to comment on the U.S. Department of Education’s (Department’s) proposed regulations implementing Title IX of the Education Amendments of 1972 (Title IX) regarding Sex-Related Eligibility Criteria for Male and Female Athletic Teams, as published in the Federal Register on April 13, 2023. We are pleased to submit this response on behalf of the University of California (UC).

The University of California benefits the nation through world-class educational opportunities, groundbreaking research, top-rated health care, and agricultural expertise. The UC system includes 10 campuses, six academic medical centers, three national laboratories, and has more than 290,000 students, 240,000 faculty and staff, and 2 million alumni living and working around the world.

Athletic programs at the University of California serve as a standard of excellence across the country. The University has athletes that compete at every level. UC athletes brought home 37 medals (17 gold, 12 silver and 8 bronze) from the last Olympic Games in Tokyo. All but one of our undergraduate campuses compete in the NCAA, with one campus competing as a member of the NAIA. UC athletes also actively participate in recreational sports, club sports, and intramural sports. The vast majority of student-athletes at the University excel at both academics and athletics, graduate on time, and serve as leaders on their campuses. The University acknowledges that the opportunity to participate in sports from a recreational to an elite level in college is a vital component of the college experience; thus, the Department’s proposed rule prohibiting categorical bans on transgender students from participating on sports teams consistent with their gender identity is a priority for the University of California.

Providing equal athletic opportunities for students regardless of sex is a cornerstone of Title IX. The University has committed significant time, expertise, and resources to fulfill

Title IX's promise to ensure all students have equal opportunity to enjoy the benefits of team sports participation. The University and its campuses are committed to diversity, equity, and inclusion of all individuals and groups. UC campuses work to provide safety, privacy, and dignity for transgender and nonbinary student-athletes, as well as their teammates, while preserving the integrity of competition.

The University of California's comments in support of the proposed regulation are discussed in further detail in Section One, below. Additional feedback and requests for clarification or revision are set forth in Section Two.

### **I. Comments in support of the proposed regulation.**

The University of California appreciates the Department's recognition that participation in sports has intrinsic value and is an important part of educational programs and activities. The University recognizes that participation in sports fosters important character traits such as work ethic, commitment, and interpersonal skills. The benefits of participating in athletics are wide-ranging and include physiological, social, and emotional benefits.

The University of California is pleased the proposed rule would prohibit any categorical ban on transgender student participation on sports teams consistent with their gender identity. Gender identity is fundamentally personal, and the University continues to fully embrace diversity to build a stronger, more vibrant society. The University recognizes transgender student participation on sports teams is an important step in ensuring equal opportunity in athletics for all students. The University also recognizes the importance of respecting each athlete's health, safety, and dignity while ensuring the credibility of competitive sport.

We recognize the Department is regulating during a time when changes are ongoing in this area and commend the Department for crafting a proposed rule that allows education institutions to review whether sex-related criteria might be appropriate based on sport, level of competition, and grade or educational level. The importance of institutional discretion and autonomy to assess the soundness of sex-related criteria established by national and international athletic associations and regulatory bodies is critical.

The University of California supports the educational objectives set forth in the preamble to the proposed rule, fairness in competition, and preventing sports-related injury. As participating members of the NCAA, our undergraduate campuses have committed to following the NCAA eligibility requirements. The NCAA eligibility requirements follow the criteria for transgender students' participation in college sports set by national bodies governing individual sports and emphasize the importance of safety and fairness. While the University looks forward to additional progress in the development of eligibility requirements that better align with emerging science in the area of fairness in competition, it recognizes the current benefits all students enjoy through participation in college sports.

The University of California appreciates the Department's recognition that whenever a student's opportunity to participate in athletics is limited or denied as a result of sex-related criteria, even if the criteria serve an important educational objective, the student may nevertheless experience harm. The University applauds the requirement that if any sex-related criteria are applied by the institution such that a student's opportunity to participate on a male or female team consistent with their gender identity is limited or denied, the recipient must minimize any harms.

The University of California supports the Department’s rule as it sets a high bar for any institution to exclude trans athletes from participating based on gender identity and narrows the justification for gender-based criteria that might limit or deny eligibility to only those that are substantially related to an important educational objective, by sport, at the most elite level of competition, and when the criteria are developed in a way that minimizes harm to excluded persons.

## **II. Concerns, feedback, and recommendations.**

The University of California agrees with the Secretary of Education that “[e]very student should be able to have the full experience of attending school in America, including participating in athletics, free from discrimination.” The University also recognizes that many of UC’s student-athletes competing at the most elite level might not have had the opportunity to attend college without receiving part of the \$3.7 billion in athletics scholarships NCAA Division I and II schools provide annually to nearly 190,000 student-athletes. The University’s primary concerns with the proposed regulation center on whether the Department is willing to provide a safe harbor for education institutions complying with external policies governing their athletic programs.

The University of California seeks additional clarity as to whether compliance with NCAA policy, or any national governing board policy to which a campus is beholden, would meet the requirements set forth in the proposed rule. If the Department is not willing to create a safe harbor for our campuses during a time of calibration on this critical issue, the University requests that the Department consider delaying regulation of any exceptions beyond the categorical ban to give educational institutions, athletic associations, and regulatory bodies an opportunity to reconcile themselves with emerging science in this area.

The proposed rule raises questions about what benchmarks an institution that substantiates sex-related eligibility criteria will be held to with respect to minimizing the harm to the students who have been limited or denied athletic eligibility because of their gender identity. The University of California requests additional clarity as to the indicators the Department will look to for minimizing harm to the excluded student-athlete and whether the institution will be required to modify the rules of the sport, mitigate the harm experienced by the individual student through supportive measures, expand other athletic opportunities in the same sport and different competitive levels, and/or appeal athletic association findings on behalf of the excluded student.

In addition, the University of California requests further clarification on whether or how institutions will be held accountable, under Title IX<sup>1</sup>, to minimize harm to trans athletes who must travel out of state to compete at institutions that have adopted less inclusive policies or to states that prohibit trans athlete participation. As the University works to affirm trans athletes to improve their physical and mental health outcomes, we are concerned that harmful policies sweeping through state legislatures across our country could cause trans athletes to be targeted, shamed, and dehumanized by those who perpetuate sexist stereotypes even when these athletes are offered an opportunity to compete with the team that aligns with their gender identity. We look forward to working with the Department to identify ways in which we can protect our trans athletes from being harmed.

---

<sup>1</sup> With this request, UC presumes implementation of the Department’s 2022 proposed rules under Title IX without any changes, which would include expansion of the definition of “sex” to include gender identity.

Further, if the Department finalizes the rule to permit sex-related criteria under certain circumstances, the University of California requests clarification and guidance as to which standards the Department will require recipients to adhere to when substantiating important educational objectives. The University specifically requests clarification regarding how recipients will be able to safeguard the medical and health information of trans student athletes throughout the eligibility process and in any subsequent regulatory or legal proceedings. The University appreciates the Department's acknowledgment that one of the potential harms facing trans athletes affected by their school's adoption of sex-related criteria is the "risk of invasion of privacy or disclosure of confidential information." NCAA policies and other governing bodies' policies often require trans student athletes to submit highly sensitive health information, or otherwise forfeit the chance to compete in their chosen sport. The University is deeply concerned that such information may later become subject to disclosure at a time when the legal risks of getting, or helping someone get, gender-affirming care is fraught. The University of California urges the Department to clarify what documentation, if any, schools must retain to show compliance with the proposed regulation. The University is concerned about placing students in the position of revealing a deeply personal part of their identity on someone else's terms.

**CLOSING STATEMENT**

If you would like to discuss any of the issues raised by the University of California, please do not hesitate to contact the co-author of this letter, Systemwide Title IX Director Julie Lewis. She can be reached at Julie.Lewis@ucop.edu or (510) 987-9314. Thank you for your consideration.

Sincerely,



Michael V. Drake, MD  
President



Julie Lewis  
Systemwide Title IX Director

cc: UC Chancellors  
UC Provost and Executive Vice President, Katherine Newman  
UC Chief of Staff, Jenny Kao  
UC Federal Government Relations Associate Vice President, Chris Harrington  
UC Title IX Officers  
U.S. Secretary of Education, Miguel Cardona  
U.S. Assistant Secretary for Civil Rights, Catherine Lhamon  
U.S. Assistant Secretary for Strategic Operations and Outreach, Suzanne Goldberg