

United States Senate

May 15, 2023

VIA Federal eRulemaking Portal

The Honorable Miguel Cardona
Attn: Title IX Rulemaking
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

RE: Comments on 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, 88 Fed. Reg. 22860 (April 13, 2023), (RIN): 1870-AA19, Document Number 2023-07601

Secretary Cardona,

We write to express our grave concern with the intent and implications of the U.S. Department 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*, 88 Fed. Reg. 22860 (April 13, 2023), (RIN): 1870-AA19 (Proposed Rule), and urge the Administration to immediately withdraw it.

Congress enacted Title IX 50 years ago to provide men and women with equal opportunities in educational programs and activities, including in athletics. The Proposed Rule's ambiguous language that would cause confusion and restrict school policies that promote the protection of men's and women's athletic programs runs afoul of the clear parameters of the Title IX statute, as well as Congressional intent. In fact, if finalized, it would actually have the opposite effect of the law's intent and further erode women's equality, privacy and safety in athletics.

As Members of Congress, we have a constitutional obligation to weigh in to ensure that any rulemaking issued by agencies is consistent with the underlying statute, which this proposal certainly is not. Further, we have a significant and unique interest in representing the well-being and safety of our constituents, particularly women and children, who would be at a minimum disadvantaged, but likely also put at risk of harm, by the Proposed Rule.

1. The Proposed Rule is inconsistent with the law, and is the latest attempt to erode the Congressional intent and statutory text of Title IX.

On June 23, 1972, after in-depth Congressional consideration and subsequent agreement, President Richard Nixon signed Title IX into law to prohibit discrimination on the basis of sex in any educational program or activity that receives either direct or indirect federal funding. Among other things, Title IX ensures women and girls are given the same athletic opportunities in schools that are afforded to men and boys. Unfortunately, over the past decade, two Administrations have attempted to undercut the statutory purpose of the law and to use it as a way to promote progressive gender ideology.

Since taking office, President Biden has worked to erode protections for women and girls under Title IX. On his first day in office he issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.¹ Contrary to the protections Congress afforded to women and girls under

¹ E.O. 13988 of Jan 20, 2021

Title IX, this Executive Order unfairly called for the elimination of equal opportunity for girls in sports and dangerously suggested that children in schools should not have access to sex-specific bathrooms, locker rooms and other private spaces.

Last year, the Department of Education proposed a rule titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” which it claimed was silent on the application of its policies to athletics. If finalized, this arbitrary and capacious Proposed Rule governing Title IX, which contain policies that have already impacted equality for women and girls in athletics, would radically redefine discrimination on the basis of sex to include sexual orientation and gender identity, sex stereotypes, and sex characteristics.² Now, this Proposed Rule related to athletics under Title IX, builds off of the misguided understanding of sex in the Title IX Proposed Rule, which has still not been finalized, making this Proposed Rule all the more confusing.

While the Proposed Rule attempts to find its footing in the holding of *Bostock v. Clayton County, Georgia*, the Supreme Court’s decision in that case is based on the reality that sex refers “only to biological distinctions between male and female.”³

It’s clear that regardless of Title IX’s statutory text and the requirements of the rulemaking process, the Department of Education is punishing students by pushing schools to apply Title IX’s prohibition on sex discrimination to sexual orientation and gender identity, by providing no clear or legitimate off-ramp to protect women’s sports other than vague options that will necessarily result in blanket policies promoting gender ideology. This is antithetical to the statutory text and Congressional intent of Title IX and should not be finalized.

2. The Proposed Rule is overly burdensome and will cause confusion.

The proposed regulatory standard under the Proposed Rule would require educational institutions to evaluate three criteria during each instance of sex-specific athletics policy creating an onerous process by which inconsistent decisions will surely occur or schools will opt for an easier option that results in the disadvantaging of women and girls.

The Proposed Rule requires educational institutions to evaluate sex-specific policies based on sport, level of competition, and the grade or education level⁴. With a “one-size-fits-all approach” that “categorically exclude[s] all transgender girls and women from participating on any female athletic teams”⁵ explicitly considered unacceptable by the Department, educational institutions will necessarily be made to adopt innumerable athletic policies to satisfy the Department’s requirements. However, the Proposed Rule goes on to say that there are “few, if any, sex-related eligibility criteria applicable to students in elementary school,” implying that a single standard for eligibility is only acceptable if in elementary school, every district denies that sex has a biological, binary, and immutable quality. Parents of elementary children are not allowed to disagree; they can only withdraw their children from elementary athletics.

Though the Department claims to issue the Proposed Rule to provide “greater clarity about the standard a recipient must meet if it adopts or applies 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,”⁶ the Proposed Rule would instead serve to create varying eligibility requirements depending on the three outlined criteria. Confusion will

² 87 FR at 41531 - 41534

³*Bostock v. Clayton County*, 590 U. S. ____ (2020) “We proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.”

⁴ 88 FR at 22878

⁵ *Id.* at 22873

⁶ *Id.* at 22879

surely result without a standard policy and thus incentivizes a blanket standard that denies sex as biological and binary.

Further, before finalizing the Title IX Proposed Rule, the Department issued this Proposed Rule that purports to address and clarify how Title IX regulations address students' eligibility to participate on a particular male or female athletics team.⁷ This Proposed Rule does not clarify the confusion caused by the Title IX Proposed Rule, which explicitly stated that a "recipient's education program or activity would also include all of its academic and other classes, extracurricular activities, *athletics programs* (emphasis added), and other aspects of the recipient's education program or activity."⁸

This erodes the integrity of athletics, and this athletic-specific NPRM causes further confusion by proposing vague, case-by-case standards that purport to minimize harm but instead would further harm toward athletes, specifically female athletes, who would be put at a disadvantage by being required to compete with and against biological men.

3. The Department acknowledges biological differences between men and women, by issuing a separate Title IX rule on athletics.

Sex is biological and binary. People are either male or female as demonstrated by their DNA, reproductive biology and other immutable characteristics. The Proposed Rule essentially acknowledges this when it allows for athletic competition to be specific to biological sex when it would "be substantially related to the achievement of an important educational objective."⁹ The Department goes on to say that it, "expects that 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" may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition.¹⁰

The Department is saying that sex-specific sports create fairness in competition, but that some students, women and girls specifically, will be required to sacrifice that fairness to "minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."¹¹ That is disadvantaging women. That is treating them differently than men. That is the very type of sex discrimination that Title IX sought to eliminate.

In an attempt to satisfy concerns about fairness in athletic competition and potential physical harm to female athletes, the Department has outlined an unclear framework for how educational institutions can navigate participation policies for sex-specific athletic programs. The Proposed Rule continually emphasizes the importance of prioritizing the "achievement of an important educational objective" when setting any parameters around the criteria for students joining a female- or male-specific sports team. The Department acknowledges that participation in sports is in and of itself a valuable educational objective, using that logic to justify the inclusion of biological males who identify as females in female sports teams.

Even when an educational institution determines that the right of a biological female to compete safely and fairly in athletic competitions is an "important educational objective," that institution would still be subjected to scrutiny by the Department and potential withholding of federal funds. However, by even creating a pathway for institutions to establish a plan or policy for athletic programs that respects the biological differences between

⁷ *Id.* at 22860

⁸ 87 FR at 41401

⁹ 88 FR at 22891

¹⁰ *Id.* at 22872

¹¹ *Id.* at 22891

boys and girls, the Department acknowledges that those biological differences do in fact exist and are relevant to athletics— completely undermining the integrity and rationale of the proposed rule.

To cause further confusion, the Proposed Rule suggests that biological sex grows in importance and meaning as students get older. The Proposed Rule states, “students of varying grades or education levels are not necessarily similarly situated with respect to the purposes of team participation, the harms resulting from exclusion from participation, their athletic skills development, other developmental factors, or their legal status as a minor or adult.”¹²

The implications of this are summarized well in the Department’s Fact Sheet: “taking those considerations into account, the Department expects that, under its proposed regulation, elementary school students would generally be able to participate on school sports teams consistent with their gender identity and that *it would be particularly difficult for a school to justify excluding students immediately following elementary school from participating consistent with their gender identity,*”¹³ (emphasis added). Here, the Department is making the assertion that fairness and safety in sports is irrelevant for elementary-aged children, with no substantial evidence as to why that might be the case. The Department is essentially telling parents, “if you have a problem with a biological male on your 3rd grade daughter’s team and in their locker room, you have to pull your child out of the sport. Your view doesn’t count.” That is not what Title IX was enacted to do.

The Department goes on to say that “for older students, especially at the high school and college level, the Department expects that *sex-related criteria that limit participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition,* and meet the proposed regulation’s other requirements,”¹⁴ (emphasis added). While we agree that puberty and development have incredibly evident effects on athletic ability and skill as children develop, here, the Department is demonstrating that biological difference directly contribute to fairness in competition. Yet, policies that are based on biological differences would be considered discriminatory under the Department’s guidelines. How are schools ever going to be able to comply with that? How will that not punish girls athletic opportunities? In the Proposed Rule, the Department provides no answers.

4. The Proposed Rule will harm women’s and girls’ by limiting their educational and athletic opportunities.

In addition to its dissonance with the law, the Proposed Rule will disadvantage and harm women and girls, as we have already seen a number of times where similar policies have been in place. The Proposed Rule will quickly erode the integrity of athletics by requiring biological males to compete on girls and women’s teams. By doing this, the Department is putting women at a disadvantage. Both the law and public opinion are clear; women and girls should be afforded equal opportunities to men and boys, and should not be forced to compete against males in athletics.

The effects of the Proposed Rule will eliminate most women’s athletics by prioritizing the participation of individuals based on undefined gender identity. Despite 50 years of progress toward achieving equal opportunities for women and girls in education, this Proposed Rule will force women to sacrifice, by allowing men to take, athletic opportunities, team participation, trophies, awards, scholarships and more on the altar of progressive gender ideology.

This is already happening. For example, high school girl track athletes were disadvantaged in Connecticut after the state’s unfair, gender identity policies permitted two biological males to compete in, and subsequently win a

¹² *Id.* at 22874

¹³ <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams#:~:text=The%20proposed%20rule%20builds%20upon,for%20students%20regardless%20of%20sex.>

¹⁴ *Id.*

combined fifteen girl's track championship titles previously held by nine women.¹⁵ One of these participants set a first-place record for the girl's track event. The males' participating and success prevented the girls from advancing to regional meets, taking away an opportunity for the girls to compete in front of college scouts.

Men and women are biologically and physiologically different, which is why, to comply with Title IX as written by Congress, there are different men's and women's sports in the first place. It is self-evident and a scientific fact.

It is not discriminatory to acknowledge the difference between men and women. Disregarding it in many instances, such as athletics and physical capability, would actually result in discrimination and would subject women to unfair standards that limit their ability to fully participate in educational opportunities. The Department has an obligation to ensure that any policy it puts forward, including this Proposed Rule, does not discriminate against women. This Proposed Rule completely misses that mark.

5. The Proposed Rule purports to preempt state law.

Of additional concern due to the underlying policies, the Proposed Rule broadly defines any program or activity under Title IX to mean all of the operations of (1) A department, agency, special purpose district, or other instrumentality of a State or local government; or (II) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.¹⁶

Further "recipient" is defined to mean, among other things, "any State or political subdivision thereof."¹⁷

Nevertheless, numerous states have already enacted laws to protect the participation of female athletes. Similar legislation has also been proposed on the Federal level and has already passed the U.S. House of Representatives.¹⁸

Title IX does not give the Department the authority to compel states to disregard their own laws related to protecting children from harmful gender ideology and ensuring equal opportunities for women.

The Proposed Rule should make clear that no part of the regulation would preempt state laws that are contrary to the far-reaching and unsubstantiated attempts of the Proposed Rule to indoctrinate students.

The Proposed Rule should explicitly acknowledge that no schools, students, teachers, parents, or states would be subjected to unfair or discriminatory practices or actions by the Department on the basis that such individual or entity understands sex to be binary and based in biology, and upholds equality for women in sports by ensuring that biological males are not allowed to compete against women and girls in female athletics.

6. Conclusion

The Proposed Rule seeks to unilaterally expand the scope of the law contrary to the text of Title IX and Congressional intent. The proposal would harm and disadvantage students, particularly women and girls. The

¹⁵ Lucas, Fred (2020, February 12) 'Frustrating and Disheartening': 3 Girls, Losing to Biological Males in Track, Announce Lawsuit *The Daily Signal*. <https://www.dailysignal.com/2020/02/12/frustrating-and-disheartening-3-girls-losing-to-biological-males-in-track-announce-lawsuit/>

¹⁶ 87 FR at 41568

¹⁷ *Id.*

¹⁸ Protection of Women and Girls in Sports Act, S. 613/ H.R. 734, 118th Congress, (2023) <https://www.congress.gov/bill/118th-congress/house-bill/734/text?s=3&r=1>

Department of Education should promptly withdraw the rule and instead focus on upholding existing regulations consistent with our law.

Sincerely,

A handwritten signature in black ink, appearing to read "James Lankford".

James Lankford
United States Senator

A handwritten signature in blue ink, appearing to read "Marco Rubio".

Marco Rubio
United States Senator

