

February 21, 2023

The Honorable Dr. Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: U.S. Department of Education's Anticipated Title IX Rulemaking Forcing America's Schools, Colleges, and Universities to Permit Males to Compete in Women's Sports

Dear Secretary Cardona:

We write on behalf of 28 diverse organizations alarmed by the U.S. Department of Education's ("Department") announcement in its Fall 2022 Unified Regulatory Agenda¹ (published on January 4, 2023) that it will soon propose a new regulatory scheme to supplant the Department's longstanding regulations permitting sex-separated athletic competitions (*i.e.*, women's sports) with the Biden administration's gender identity-related policies ("anticipated rulemaking"). The Department's Unified Agenda notice indicated its intent had been to publish the new rulemaking in December 2022.

The Department's anticipated rulemaking would likely fill in the specific details of the Biden administration's asserted policy, announced previously in the context of litigation² and in a July

¹ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1870-AA19> and the Department's July 2022 announcement revealing its rulemaking agenda to upend current regulations regarding women's sports in schools, colleges, and universities that receive federal funding. See 87 Fed. Reg. 41,390, 41,537 (Jul. 12, 2022) ("SECTION 106.41 ATHLETICS [] Proposed Regulations: None. The Department does not propose any particular changes to § 106.41 at this time. The Department instead plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend § 106.41 in the context of sex-separate athletics, pursuant to the special authority Congress has conferred upon the Secretary to promulgate reasonable regulations with respect to the unique circumstances of particular sports. Specifically, the Department plans to address by separate notice of proposed rulemaking the question of what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team.").

² In a Statement of Interest it filed in a federal court case (considering a state law that limits participation to women's scholastic athletic competitions to biological women), the Biden administration advised the court of its "significant interest in ensuring that all students, including

2022 NPRM,³ interpreting Title IX to require schools, colleges, and universities to permit sports participation based on gender identity rather than biological sex.

Implementation of the anticipated regulations would directly undermine Title IX’s important statutory protection⁴ of equal rights for female students by arbitrarily subordinating those rights to the Department’s novel gender identity policy preferences.⁵ Such rulemaking would conjure out of thin air a legal right for biologically male students who identify as females to compete against biologically female students where Congress has clearly provided no such right—directly encroaching on Title IX’s protections for female student athletes. Failure by an educational institution to comply with the anticipated regulations would certainly result in investigations and possible enforcement actions by the Department and the U.S. Department of Justice.

We strongly oppose the Department’s planned issuance of additional rulemaking or further guidance that would force schools, colleges, and universities to implement the Biden administration’s illegal, unfair, and imprudent approach to Title IX, athletics, and gender identity. Such rulemaking would cause enormous harm to female student athletes and reverse decades of progress that have ensured equal athletic opportunities for women and girls attending educational institutions across the United States.

The undersigned urge the Department to reconsider and set aside its planned regulatory action on this issue. Failure to do so would devastate women’s sports throughout the country.

The Department’s radical interpretation of Title IX reveals its rulemaking intentions

The Department’s current Title IX rulemaking removes any doubt about its radical and legally unsupportable views on sex-separated athletics programs. In its Notice of Proposed Rulemaking (“NPRM”) published on July 12, 2022, the Department’s Office for Civil Rights (“OCR”) seeks “to provide greater clarity regarding the scope of sex discrimination, including recipients’ obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”⁶

The NPRM proposes a fundamental alteration of Title IX’s meaning and purpose by redefining the binary, biological meaning of “sex” to extend Title IX’s protections to include gender identity, a characteristic never envisioned by Congress when it enacted Title IX in 1972. The Department

students who are transgender, can participate” in federally funded education programs and activities including athletic opportunities. *B.P.J. v. W. Va. St. Bd. of Educ.*, No. 2:21-cv-00316, at 2 (S.D. W. Va. Jun. 17, 2021).

³ 87 Fed. Reg. 41,390 (Jul. 12, 2022).

⁴ Education Amendments of 1972, §§ 901–907, 20 U.S.C. §§ 1681–1688 (1976).

⁵ 86 Fed. Reg. 32,637 (Jun. 22, 2021) (preliminarily enjoined from implementation by federal court order in *State of Tenn., et al., v. U.S. Dep’t of Educ.*, No. 3:21-cv-308 (E.D. Tenn. Jul. 15, 2022)).

⁶ 87 Fed. Reg. 41,390 (Jul. 12, 2022).

purports to act under Title IX’s statutory authority, although Title IX unambiguously prohibits discrimination on the basis of sex—not gender identity—in educational programs receiving federal financial aid.⁷

Unsurprisingly, the NPRM generated massive public interest and comments.⁸ Notwithstanding these voluminous public submissions, as demonstrated by its NPRM and its Notice of Interpretation (“NOI”) published on June 22, 2021, the Department has clearly already decided that a student’s chosen gender identity shall replace his or her biological sex in determining the programs—including athletic competitions—in which the student may participate.

Title IX, by its express terms, is limited to the prohibition of sex-based discrimination involving “any education program or activity receiving Federal financial assistance”⁹ and does not include gender identity. Given the Department’s defiance of Title IX’s text, purpose, and history in the NPRM and the NOI, we anticipate that the coming rulemaking on athletics will similarly conflate gender identity with Title IX’s sex-based protections and degrade those very protections. We call on the Department to set aside its anticipated rulemaking on athletics and choose a lawful, sensible path that does not defy Congress, exceed the agency’s rulemaking authority, trample the rule of law, and result in unfair athletic competition for women and girls.

The Department’s anticipated rulemaking would lack clear congressional authorization

The Department does not have the legal authority to issue regulations that would subvert rather than fulfill the requirements of Title IX by permitting or requiring biological males who identify as females to compete in sex-separated women’s sports and to use the intimate facilities and shared spaces of female students. The Department’s rulemaking authority is constrained according to the specific delegations codified in laws enacted by Congress,¹⁰ and, as the United States Supreme Court held in *West Virginia v. EPA*¹¹ on June 30, 2022, a federal agency may not implement sweeping expansions of regulatory authority, relying on novel interpretations of long-extant statutes, without clear congressional authorization.¹² Here, the Department would do precisely that which the *West Virginia* Court prohibited.

⁷ Education Amendments of 1972, §§ 901–907, 20 U.S.C. §§ 1681–1686 (1976).

⁸ Kelsey Koberg, “Biden’s proposed Title IX rewrite was bombarded with public comments: What comes next?” FOX NEWS (Oct. 2, 2022), <https://www.foxnews.com/media/bidens-proposed-title-ix-rewrite-bombarded-public-comments-comes-next>.

⁹ 20 U.S.C. § 1681(a).

¹⁰ 5 U.S.C. § 551(4) defines a “rule” as “an agency statement of general or particular applicability and future effect designed to *implement, interpret, or prescribe law or policy* or describing the organization, procedure, or practice requirements of an agency” (emphasis added).

¹¹ *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022).

¹² In its July 2022 NPRM, the Department failed to discuss or even mention *West Virginia*, despite its issuance prior to the proposed rule’s publication and clear relevance to the proposed rulemaking. In so doing, it deprived the American people of their statutory right to understand and comment on the Department’s views of the ruling’s impact on its authority to issue the NPRM.

The *West Virginia* Court noted that “[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”¹³ Title IX’s core prohibition against sex-based discrimination (excepting certain expressly permissible sex-based separations) remains unchanged by Congress since it became law in 1972:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance¹⁴

In enacting Title IX, Congress provided federal agencies clear congressional authorization to implement regulations to prohibit sex-based discrimination. Nothing in the text or legislative history of Title IX indicates that Congress intended to grant the Department the authority to issue regulations expanding the scope of the statute to include gender identity. This clear lack of regulatory authority should deter the Department from its anticipated rulemaking.

The Department does not possess the power to transform Title IX’s long-accepted meaning of “sex” to include gender identity. That power belongs exclusively to Congress. The anticipated rulemaking would unlawfully do the same and, in so doing, would devastate equal rights in athletic competition for female student athletes.

Congress has not delegated to the Department the power to redefine the meaning of “sex” and, therefore, redefine Title IX’s clear protections intended to ensure equal athletic opportunities for America’s female students. Nor has Congress at any point provided the Department the authority to effect a “‘fundamental revision of the statute, changing it from [one sort of] . . . regulation’ into an entirely different kind.”¹⁵ Congress meant what it enacted, and it did not provide the Department the authority to transform the plain protections offered by Title IX’s express terms. By forcing schools to allow biological males who identify as females to compete with biological females in sex-separated athletic programs, the Department would clearly and impermissibly engage in fundamental revisions of Title IX’s sex-based protections for American’s female students, in radical defiance of clear statutory constraints imposed by Congress.

Departmental rulemaking should occur only to put into effect the express purposes of Title IX—not to contrive a regulatory scheme to transform Title IX so that it fits the political agenda of the President and his political allies. The Constitution grants only Congress the power to legislate; the Department simply has no power to upend and repurpose laws such as Title IX according to the

¹³ *West Virginia*, slip op. at 22, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

¹⁴ 20 U.S.C. § 1681(a).

¹⁵ *West Virginia*, slip op. at 24, quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994).

social engineering priorities of the Biden administration, its political allies, and the Department's current political leadership. The statute is unambiguous on this issue.

Forcing America's schools, colleges, and universities to admit males who identify as females into sex-separated athletic programs in which only biological females participate would impermissibly transform express congressional intent and, by so doing, far exceed the Department's rulemaking authority.

If the Department proceeds with its anticipated rulemaking, it must address its authority to do so in light of the Court's ruling in *West Virginia* and permit the public to comment on the Department's views. The Department must fully reveal what authority enables it to ignore *West Virginia* and to turn the plain meaning of Title IX upside down in order to achieve its political goals.

Recent federal court decisions support our contentions. On December 30, 2022, the United States Court of Appeals for the Eleventh Circuit determined that a Florida school board did not violate the rights of a student who claims to be transgender by separating school bathrooms based on the biological sex of students and concluded that a policy based on biological sex (not gender identity) did not discriminate against the student who claims to be transgender.¹⁶ The court determined that the school board's bathroom policy does not violate Title IX because that statute's prohibition of discrimination "on the basis of sex" unambiguously applies only to discrimination between males and females:

If sex were ambiguous, it is difficult to fathom why the drafters of Title IX went through the trouble of providing an express carve-out for sex-separated facilities, as part of the overall statutory scheme. For this reason alone, reading in ambiguity to the term "sex" ignores the overall statutory scheme and purpose of Title IX, along with the vast majority of dictionaries defining "sex" based on biology and reproductive function.¹⁷

In her concurring opinion, Judge Barbara Lagoa praised Title IX's momentous results for female student athletes:

To understand why such a judicially-imposed proposition would be deleterious, one need not look further than the neighborhood park or local college campus to see the remarkable impact Title IX has had on girls and women in sports. At nearly every park in the country, young girls chase each other up and down soccer fields, volley back and forth on tennis courts, and shoot balls into hoops. And at colleges, it is now commonplace to see young women training in state-of-the-art athletic

¹⁶ *Adams v. School Board of St. Johns County*, No. 18-13592 (11th Cir. 2022).

¹⁷ *Id.* at 40.

facilities, from swimming pools to basketball arenas, with the records of their accolades hung from the rafters.¹⁸

Declaring that altering the definition of “sex” to include gender identity, should it occur, is a decision solely reserved to Congress, Judge Lagoa cautioned that “removing distinctions based on biological sex from sports, particularly for girls in middle school and high school, harms not only girls’ and women’s prospects in sports, but also hinders their development and opportunities beyond the realm of sports – a significant harm to society as a whole.”¹⁹

Similarly, a federal district court in West Virginia recently granted summary judgment²⁰ in favor of the state’s “Save Women’s Sports” law,²¹ which provides that biological males who claim to be females may not participate in female athletic competitions in West Virginia’s public schools. Judge Joseph Goodwin upheld the West Virginia legislature’s “important government interest of providing equal athletic opportunities for females”²² while noting that Title IX’s purpose was to promote equality between the sexes and that “[t]here is no serious debate that Title IX’s endorsement of sex separation in sports refers to biological sex.”²³

In July 2022, the United States District Court for the Eastern District of Tennessee preliminarily enjoined²⁴ the Department from implementing its attempted expansion of the meaning of sex through its issuance of the NOI that sought to “clarify”²⁵ that Title IX statutory provisions prohibit discrimination on the basis of gender identity.²⁶ In his order, Judge Charles Atchley, Jr., noted that the Department’s efforts amounted to “creat[ing] rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX,” or existing regulations.²⁷

We urge the Department to heed these judicial warning signs and set aside its anticipated rulemaking to extend Title IX in excess of its statutory authority under Title IX.

¹⁸ *Id.* at 2–3 (Lagoa, J., concurring).

¹⁹ *Id.* at 9 (Lagoa, J., concurring).

²⁰ *B.P.J. v. W. Va. State Bd. Of Ed.*, 2:21-cv-00316-JRG (S.D. W. V. 2022).

²¹ W. Va. Code R. § 18-2-25d (2021).

²² *B.P.J.* at 19–20.

²³ *Id.* at 21–22.

²⁴ *Tennessee v. United States Dep’t of Educ.*, No 3:21-CV-308, 2022 WL 2791450, at *24 (E.D. Tenn. July 15, 2022).

²⁵ 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. 32,637 (Jun. 22, 2021).

²⁶ U.S. Dep’t of Justice & U.S. Dep’t of Educ., Confronting Anti-LGBTQI+ Harassment in Schools (Jun. 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

²⁷ *Tennessee* at *21.

Abrogating sex-separated athletics would unfairly disadvantage women and girls

Beyond the many legal constraints presented by the Department’s anticipated rulemaking, there are undeniable biological differences between males and females that give biologically male student athletes competitive advantages in particular contests against biologically female student athletes. Those advantages do not disappear because the male athlete wishes to participate in an athletic event as a female.

Discussing the comparative physiology of the University of Pennsylvania swimmer Lia Thomas—a biological male identifying as a female student and allowed by the National Collegiate Athletic Association (“NCAA”) to compete in women’s swimming competitions—Dr. Michael J. Joyner²⁸ of the Mayo Clinic observed that “[t]here are social aspects to sport, but physiology and biology underpin it. Testosterone is the 800-pound gorilla.”²⁹ Indeed, Thomas’s biologically based competitive advantage undoubtedly resulted in his March 2022 victory in the NCAA Division I women’s 500-yard freestyle event.³⁰

Showing great courage in the face of widespread criticism, female Virginia Tech Olympian swimmer Reka Gyorgy attributed her lost opportunity to compete in the women’s 500-yard freestyle event to Thomas’s participation and spoke passionately against the NCAA’s “decision to let someone who is not a biological female compete”³¹ Parents of student female athletes have also courageously demanded a level playing field where males who identify as females are not allowed to degrade fair competitions with unfair physical advantages.³²

Tennis great and LGBT activist Martina Navratilova³³ noted the threat to women’s sports created by permitting men to compete in women’s athletic competitions: “Imagine being a biological female going up against Lia. . . . A top woman swimmer has to literally be unbelievable to beat an average male swimmer who identifies as female. The hormone suppression therapy doesn’t

²⁸ See <https://www.mayo.edu/research/faculty/joyner-michael-j-m-d/bio-00078027>.

²⁹ Jennifer Smith, “Doctors confirm trans swimmer Lia Thomas DOES have an unfair advantage even after taking testosterone suppressants,” DAILY MAIL UK (May 30, 2022), <https://www.dailymail.co.uk/news/article-10868453/Mayo-Clinic-doctor-confirms-trans-swimmer-Lia-Thomas-given-unfair-advantage.html>.

³⁰ Katie Barnes, “Amid protests, Penn swimmer Lia Thomas becomes first known transgender athlete to win Division I national championship,” ESPN (Mar. 17, 2022), https://www.espn.com/college-sports/story/_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship.

³¹ See <https://twitter.com/MaryMargOlohan/status/1505608396564832268>.

³² Nick Geddes, “Mothers Assemble For Female Athletes’ Rights Amid Lia Thomas Controversy,” OUTKICK (Apr. 2022), <https://www.outkick.com/mothers-assemble-for-female-athletes-rights-amid-lia-thomas-controversy/>.

³³ See <https://www.martina-navratilova.com/biography>.

mitigate the advantage they have over biological women.”³⁴ And yet the Department’s anticipated rulemaking would unfairly and unjustly penalize America’s greatest female student athletes before they even begin training to compete, in violation of Title IX’s guarantee of equal opportunities for female athletes.

The Department’s anticipated rulemaking would create unfair competitive disadvantages for female students in every elementary and secondary school in America’s smallest towns and largest cities. It would force every college and university receiving federal funds to undermine women’s sports by admitting biological males identifying as females to women’s sporting events—devastating the equality of opportunity achieved by America’s female athletes due to Title IX.

Setting aside the fatal legal issues presented by the anticipated rulemaking, the unfair advantages that would accrue to biological males competing in women’s sports are reason enough for the Department to abandon its plan to force educational institutions to admit biologically male athletes into biologically female athletic programs and related, sex-separated intimate facilities. For over fifty years, Title IX has provided objectively ascertainable equality of opportunity for female student athletes. The Department’s efforts should be devoted to continuing that record of success—not undermining it by forcing institutions to allow males to compete in women’s and girls’ athletic competitions and to use their locker rooms and other private facilities.

The Department’s stubborn desire to undermine Title IX’s successes is made even more inexplicable by your recent acknowledgement of Title IX’s historical importance for female student athletes: “[I]n 1972, there were only 300,000 girls competing in high school athletics; today that number is 3.4 million. In college it was similar, the number went up, I think 30,000 to now 150,000 women athletes in college.”³⁵ In fact, nearly 230,000 women now compete in college sports,³⁶ up from almost 30,000 in 1972—revealing the dramatically positive impact of Title IX on athletic opportunities for America’s female students and the number of female athletes who would be directly harmed by the Department’s grafting of its gender identity policies onto Title IX’s clear sex-based protections.

³⁴ Dana Kennedy, “Moms fight for female athletes amid Lia Thomas controversy,” NEW YORK POST (Apr. 2, 2022), <https://nypost.com/2022/04/02/moms-fight-for-female-athletes-amid-lia-thomas-controversy/>.

³⁵ Paula Lavigne, “Education Secretary Miguel Cardona on Title IX compliance: ‘It shouldn’t be that the federal government has to watch – it’s everyone’s job,’” ESPN (Jun. 15, 2022), https://www.espn.com/college-sports/story/_/id/34084273/education-secretary-miguel-cardona-title-ix-compliance-the-federal-government-watch-everyone-job.

³⁶ NCAA Demographics Database, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Dec. 2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf.

Conclusion

We support the tremendous strides in equal opportunity for America's female student athletes since 1972, when Title IX became the law of the land. We strongly urge you to abandon and reject any proposed regulatory scheme that would require educational institutions to permit biologically male students who identify as females to compete against biologically female students in women's athletic programs and to use their locker rooms, restrooms, and other intimate facilities.

The Department must enforce the protections that Title IX provides to women's athletic programs at educational institutions in a manner that accords with clear congressional authority, the Department's longstanding interpretation of Title IX, and basic notions of fair play in athletic competitions. Schools, colleges, and universities that receive federal funding should not be required to undermine Title IX's protections, which have, for over 50 years, provided equality of opportunity in athletics.

We urge the Department not to propose these regulations.

Sincerely,

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