



May 15, 2023

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[SUBMITTED ELECTRONICALLY]

To Whom It May Concern,

We write to you today to address grave concerns regarding the newly 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” (RIN 1870-AA19; Docket ID ED-2022-OCR-0143; “Proposed Rule”) released by the U.S. Department of Education (“the Department”) on April 13, 2023, and ask for a full rescission. Family Policy Alliance is a network of hundreds of thousands of families—many of which have children in competitive sports or were a part of sports themselves—from across the country as well as a network of organizations that seek to preserve families’ and individuals’ First Amendment freedoms.

The said purpose of this rule is to amend Title IX of the Education Amendments of 1972 to “set out a standard that would govern a recipient's adoption or application of 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.”<sup>1</sup> While the proposal is intended to provide supposed clarity to “recipients,” i.e. schools that receive Title IX funding, we argue that this is an overly broad rule that will only further confuse schools and states seeking to implement this rule in the context of athletics if finalized as is, regardless of that state’s current laws. This Proposed Rule undercuts states that are protecting female athletes from ongoing discrimination and leaves women without protection when male students are allowed to join their teams. Unfortunately, the Department allowed for only 30 days of an open comment portal unlike the prior Title IX rule released in 2022. This will inevitably limit the depth and quantity of comments that the Department receives.

### **The Proposed Rule is Overly Broad and Confusing**

In this rule, the Department attempts to lay out a set of standards for schools to abide by when deciding which students should be allowed to play on the team opposite of their sex, yet the standard is actually overly vague in what is required of those schools’ athletic programs. Schools must, according to the Proposed Rule, take into account “each sport,

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<sup>1</sup> 88 FR 22860 (2023).



level of competition, and grade or education level” and “the achievement of an important educational objective” when creating the standards and criteria for knowing which students should be allowed to play on which teams. This must be done all with the objective of “minimizing harm” to students seeking to play on the team of the opposite sex rather than to support the women athletes. Here the administration unfortunately seems to place the onus of proving harm on women athletes, rather than on the males seeking to play in women’s sports teams. This is a complete disregard for the welfare of the women on that team.

Schools and states are left to wonder which of the “sex-related distinctions in sports are permissible” as the Proposed Rule requires. Essentially, schools would be forced into the difficult position of deciding when an athlete seeking to play on the team of the opposite sex might have a legitimate reason to do so. This confusing scheme concerningly includes athletes that are growing, young children. For instance, the rule mentions that elementary students and immediately following elementary school will have few sex characteristics, if any, that limit or deny their ability to play on the team of their choosing, but these characteristics would certainly be of more concern as the student grows, i.e. a biological male harming a female athlete due to his strength and size. Schools are left to wonder how other athletes and that athlete will be impacted if those “sex-related distinctions” gradually apply. By rejecting the schools’ ability to create a uniform standard, the Department is only further creating confusion.

This would also open up schools to endless lawsuits when drawing lines on who can or cannot perform on certain athletic teams. The associated costs to schools to implement such a complicated and confusing rubric will be cumbersome, and, in the end, we argue will only hurt the athletics programs of schools in their entirety due to increased time and costs in addition to the harms inflicted on women as stated below. The Department even admits that they “cannot fully quantify the economic impact of the proposed regulation.”<sup>2</sup> Yet the proposed rule continues to argue, without citing any evidence, that the benefits outweigh the costs. The women speaking out about the harms of biological males performing in women’s sports are living proof there is real harm to women’s athletics that is often irreversible.

### **The Proposed Rule Undercuts State Laws**

In determining a student’s eligibility for their chosen sport, the Department has effectively overstepped their normal role and chosen sides in a politically-motivated fight against the original intent of Title IX—the protection of sex-separated, namely women’s sports. By doing so, this completely undermines a state’s authority to protect women and their ability to compete.

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<sup>2</sup> 88 FR 22860 (2023).

So far, twenty-one states have passed legislation that would protect women and their opportunities in athletics: Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Wyoming, and West Virginia. And just last week, Missouri passed a similar law that is awaiting the Governor's signature. These states have witnessed the harm to women and taken decisive action to protect women and girls in sports. Passing these state laws affords protection for female athletes and the opportunities their hard work deserves, as opposed to the uncertainty that would be created by the rule. In addition to nearly half of the states passing laws to save girls' sports, over 60 percent of American adults agree that women's sports at all levels should be for women only and not permit biological males into women's sports.<sup>3</sup>

Congress too recently and rightfully passed the Protection of Women in Sports Act, H.R. 734. H.R. 734 states that: "It shall be a violation of subsection (a) for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls."<sup>4</sup> The House Resolution also defines "sex...based solely on a person's reproductive biology and genetics at birth."<sup>5</sup> This Proposed Rule contradicts this most recent action by Congress to protect women's sports and Title IX.

### **Protecting Women's Rights**

Women deserve a fair shot in sports, but when males are allowed to compete in female sports contests, that fair shot disappears. Males have an undeniable biological advantage over female athletes no matter the amount of testosterone suppression that is given— but the administration will allow males to compete with females anyway if this rule is finalized. When this happens, girls and women lose out on championships, scholarships, and other opportunities *meant just for them*.

The Proposed Rule states that if schools apply "a one-size-fits-all approach, they rely on overbroad generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they

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<sup>3</sup> KFF/Washington Post. "KFF/Washington Post Trans Survey." 5 May 2023, <https://www.washingtonpost.com/documents/dfa015fb-e64f-4eb2-9cfd-048d9e9dc108.pdf>.

<sup>4</sup> "Text - H.R.734 - 118th Congress (2023-2024): Protection of Women and Girls in Sports Act of 2023." *Congress.gov*, Library of Congress, 25 April 2023, <https://www.congress.gov/bill/118th-congress/house-bill/734/text>.

<sup>5</sup> "Text - H.R.734 - 118th Congress (2023-2024): Protection of Women and Girls in Sports Act of 2023." *Congress.gov*, Library of Congress, 25 April 2023, <https://www.congress.gov/bill/118th-congress/house-bill/734/text>.

apply.”<sup>6</sup> Those schools that apply a general rule for all sports levels would thus not be in compliance with the rule as proposed. This leaves the door open to dramatically confuse schools and states on what qualifies as legitimate reasons, such as physical harm at all grades, to keep women’s sports for biological women only and limits opportunities for girls to thrive in sports.

The Department has effectively pitted women and girls against male athletes seeking membership in women’s sports. This is dangerous, unfair and unsafe for women. It also completely undermines the original purpose of establishing sex-separated sports as established in Title IX. For example, athletes like Riley Gaines – a 12-time All-American swimmer who competed against the biological male swimmer Lia Thomas – have been discriminated against and even attacked by activists during speaking engagements the harm that has been committed against them. Biological girls and women should have a place to compete without fear of having to defend their rights as women to do so and without having to prove why they are harmed in their specific situation by allowing males into their spaces.

### **30-Day Comment Period**

We would also like to bring to your attention a concern with the 30-day comment period. The Proposed Rule was released on April 13, 2023, and all comments must be made by May 15, 2023. While we appreciate any opportunity to weigh in on such important issues, rules often have a 60-day comment period, making it possible for more Americans to weigh in on major, pressing issues of the day. We would prefer and strongly advocate for the Department to issue rules, including this rule, that have at least a 60-day comment period and to re-open this portal for comments prior to finalization.

A request to extend the deadline was denied on at least two separate occasions. Family Policy Alliance was among 20 individuals and organizations that requested an extension to this comment period and was denied. Additionally, 22 state attorneys general were also denied in their request to extend the deadline. The response from the Department said that this rule is narrower and shorter than the 2022 Title IX rule, however the implications of this new rule are no less detrimental to the girls, women, schools, and states impacted by the far-reaching rule. The prior rule had over 240,000 comments during a 60-day period. We would suspect that this rule would receive just as many if it were to remain open for 60 days.

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<sup>6</sup> 88 FR 22860 (2023).

## Concerns with Prior Title IX Rule Release

In 2022, the Education Department released the following rule: “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” RIN 1870-AA16.<sup>7</sup> Family Policy Alliance also submitted a comment letter on behalf of its constituency. Being that there are overlapping concerns, the 2023 Proposed Rule should be considered in light of the larger 2022 rule, especially because the concerns expressed in that larger rule continue to remain strong concerns.

The 2023 Proposed Rule has only further deepened the concerns listed and unravels the fight to ensure students are protected. In the prior public comment letter, FPA noted the concerns that the 2022 Proposed Rule will unconstitutionally redefine “sex,” undermine Title IX’s original meaning, misinterpret SCOTUS’ *Bostock* decision, step on Americans’ and states’ strongly held beliefs, endanger girls and women and their participation in sports, needlessly end more lives of the unborn, and undermine the rights of parents to instruct and raise their child.

As pointed out in the 2022 comment letter, “[w]e would like to specifically address the implications of the Department’s proposal to redefine “sex” in Title IX. By redefining “sex” in Title IX, the Department would force schools across the country to face an impossible situation: comply with a lawless reinterpretation of Title IX and put the safety and privacy of their students at risk, or protect their students and risk losing hundreds of millions of dollars in federal funding... Redefining federal law through the regulatory process bypasses the legislative process and ignores the original legislative intent.”

Both the 2022 and 2023 Proposed Rule misinterpret the Supreme Court decision *Bostock v. Clayton County* as opening the door to reinterpreting the application of Title IX, yet that decision specifically addressed the jurisdiction of Title VII, not Title IX.<sup>8</sup> Regardless, the Department states that *Bostock* and the Department’s prior, yet misguided, interpretation of this ruling is the “backdrop” to amending Title IX. The administration has here twisted a Supreme Court decision for its own political gain and at risk of seriously harming women’s rights and women’s safety.

In fact, the Court explicitly stated in *Bostock* that: “*The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And under Title VII itself, they say sex-segregated bathrooms, locker*

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<sup>7</sup> 87 FR 41390 (2022).

<sup>8</sup> *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

*rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”<sup>9</sup>*

## **Conclusion**

Family Policy Alliance is calling on the Biden Administration to stop putting ideology and politics over girls and women. At a time when it seems that simply defining what a woman is is controversial and unanswerable by the administration, we would strongly urge you to protect the institutions designed to protect women at schools, rather than harming and undermining them. This Proposed Rule is overly broad, undercuts states’ laws and harms women from being able to perform and compete at their highest potential. Please rescind this Proposed Rule and make it clear for schools that women’s sports are for biological women only, as Title IX originally intended.

Sincerely,  
Ruth Ward  
Director, Government Affairs  
Family Policy Alliance

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<sup>9</sup> *Id.* at 31.