



May 12, 2023

The Honorable Miguel A. Cardona, Ed. D
Secretary of Education
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Subject: Joint Governors' Comment to Document ID No. ED-2022-OCR-0143-0001 – Proposed Rule on 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 Secretary Cardona,

We write to submit a joint comment in opposition to the U.S. Department of Education's proposed new regulation 34 C.F.R. § 106.41(b)(2) and respectfully request that it be withdrawn or delayed until the U.S. Supreme Court can address the questions raised in several pending cases that are challenging this administration's expanded reading of Title IX.

The proposed rule could prevent states from enforcing our duly-enacted statutes protecting fairness in women's and girls' sports. If not withdrawn, we are gravely concerned about the impact that the Department's wholesale reinvention of Title IX's terms would have on states' ability to enforce their laws and policies as written. Indeed, under threat of denying essential school funding, the Department's proposed regulation would attempt to coerce compliance with an uncertain, fluid, and completely subjective standard that is based on a highly politicized gender ideology. Most troubling, the proposed regulation would turn the purpose of Title IX on its head and threaten the many achievements of women in athletics.

The proposed regulation lacks foundation in established law. It includes terms not found in Title IX in an attempt to expand Title IX's clear language beyond Congress' intent. As with this administration's previous attempts, the Department perpetuates its erroneous application of *Bostock v. Clayton County*, violating the plain language of the case. *See* 140 S.Ct. 1731, 1753 (2020). The Supreme Court, well aware of the dangers of an expansive reading of *Bostock*, expressly cautioned that its opinion analyzing Title VII's application to employment decisions did not "purport to address bathrooms, locker rooms, or anything else of the kind" under Title VII, let alone the application of other federal or state laws such as Title IX. *Id.*

The proposed rule also lacks any Congressional authority. The plain language used in Title IX does not allow the sweeping rewrites of Title IX that the Department persists in seeking. It is undisputed that Title IX prohibits discrimination “on the basis of *sex*.” 20 U.S.C. § 1681(a) (emphasis added). The regulation the Department attempts to rewrite clearly provides protection based solely on sex. 34 C.F.R. § 106.41 (“no person shall, on the basis of *sex*, be excluded from participation in . . . athletics offered by a recipient . . .” (emphasis added)). Gender identity is not mentioned anywhere in Title IX. Federal courts have held that to interpret “‘sex’ within the meaning of Title IX, . . . look to the ordinary meaning of the word when it was enacted in 1972.” *Adams v. School Bd of St. Johns Cty*, 57 F.4th 791, 812, 815 (11th Cir. 2022) (“sex” in Title IX means “biological sex”). Indeed the Supreme Court recognized that biological sex is an “immutable characteristic” determined at birth. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“sex . . . is an immutable characteristic determined solely by the accident of birth.”)

Undeterred by plain English, the Department invents new categories solely based on a student’s “gender identity”—a term not used in Title IX. This overreaching interpretation exceeds the Department’s Congressionally granted authority. Not only does the Department lack the authority to unilaterally re-write Title IX, such a regulation would disrupt states and schools and eviscerate the lived experience and achievements of generations of courageous women. Indeed, and contrary to the Department’s claim, this regulation will not provide “clarity” but create confusion. The American Psychology Association asserts that “gender identity is internal.”¹ And the American Academy of Pediatrics states that “gender identity can be fluid, shifting in different contexts.”² Compelling a subjective, athlete-by-athlete analysis controlled by a student’s self-identified “gender identity” enforced under threat of Department retribution affords no clarity. It does the opposite. This “fluid” subjective standard ensures chaos and confusion in schools and will no doubt result in protracted and disruptive litigation.

Finally, defending the many hard-fought, athletic achievements over the last half century is far more than a matter of safety for female athletes. It also protects essential fairness. As courts (and common sense) have long recognized, “[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete” against each other. *Clark v. Ariz. Inter. Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) *cert. denied* 464 U.S. 818 (1983). That then diminishes “athletic opportunities for women.” *Id.* This administration apparently sees no irony that its policies validate an average male athlete stealing the recognition from a truly remarkable female athlete whose lifelong athletic discipline and achievements are discarded based on a deliberate misreading of a law whose very purpose was to protect, preserve, and encourage women’s athletics. The scandal of 1970’s and 1980’s East German women athletes pales in comparison to the logical result of this administration’s relentless pursuit of draconian enforcement of its gender ideology.

Leaving aside the Department’s utter lack of authority to promulgate such a regulation, neither states nor schools should be subjected to such a fluid and uncertain standard. Nor, most importantly, should the historic advancements and achievements of our sisters, mothers, and daughters be erased.

¹ Am. Psych. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 862 (Dec. 2015), available at <https://www.apa.org/practice/guidelines/transgender.pdf>.

² Jason Rafferty, *Policy Statement, Am. Academy of Pediatrics, Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4 at 2 (Oct. 2018), available at <https://perma.cc/EE6U-PN66>.

Because of the Department's lack of authority, the unambiguous limitations of Title IX's text, and the policy and safety risks posed to women, we request that this proposed regulation be withdrawn and for your Administration to restore the protection of fairness in women's and girls' sports.

Sincerely,



Governor Tate Reeves
State of Mississippi



Governor Kay Ivey
State of Alabama



Governor Mike Dunleavy
State of Alaska



Governor Sarah Sanders
State of Arkansas



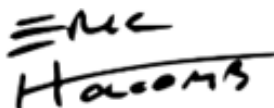
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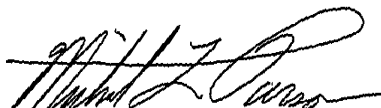
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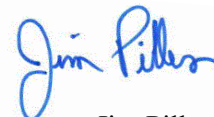
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