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## United States Senate

COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS

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May 15, 2023

### **VIA ELECTRONIC TRANSMISSION**

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

Dear Secretary Cardona:

On April 13, 2023, the U.S. Department of Education (Department) released its Notice of Proposed Rule Making (NPRM) titled “*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*” (Title IX Athletics proposed rule or proposed rule), which ignores physiological differences between the sexes and undoes generations of progress for women’s and girls’ participation in school sports. I write to oppose the proposed rule and ask that you rescind it.

This is a physiological fairness issue. Female athletes should not have their future in athletics hindered because they are forced to compete against biological males who have an unfair physical advantage.

The proposed rule ignores physiological distinctions between men and women that necessitate sex-specific sports leagues. Furthermore, it invokes a dubious legal standard to extend sex discrimination protections to gender identity. And finally, the proposed rule creates confusion by imposing an unclear framework for schools to create policies for transgender students’ participation on athletic teams that do not match their biological sex—even if local laws reach a different conclusion about who should be allowed to compete in women’s sports.

#### *Physiological Differences*

From a medical perspective, enabling male-to-female transgender students that have undergone puberty to indiscriminately compete with biological female students is a disservice to women’s sports. The proposed rule works completely against the spirit of Title IX to ensure equal opportunity for women and girls in school and in sports.

As a medical doctor, there are undeniable physiological differences between men and women.<sup>1</sup> The Title IX Athletics proposed rule even acknowledges the risk that male-to-female transgender students who have “undergone endogenous puberty . . . [have] potentially unfair advantages in size, weight, and strength differences and potentially pos[e] a risk of injury to others.” However, the proposed rule diminishes the significant advantage that biological males on average have over biological females in sports by arguing that there is existing variability among biological female athletes and some of them are bigger, heavier, and stronger than other biological females. The varying athletic availabilities of biological females is not what the Department is seeking to regulate, and thus the comparison is irrelevant.

Americans do not need a medical doctor to explain the differences between men and women: they can trust their own eyes. In 2019, Lia Thomas, then competing against men, completed the 1650-yard freestyle in 14:54:76—faster than the women’s world-record.<sup>23</sup> Two years later, competing as a transgender woman, Thomas broke records by finishing the same event more than 38 seconds ahead of the second-place finisher, a biological woman. Thomas also won the 200-yard freestyle with a time of 1:41.93, winning by an enormous margin of nearly seven seconds. Medical journals confirm what is observable to every individual, “[s]ex is a major factor influencing best performances . . . [and] [r]esults suggest that women will not run, jump, swim or ride as fast as men.”<sup>4</sup> Suffice it to say that it is empirically certain that men are faster than women and have a significant competitive advantage in sports.

Further, these performance differences do not evaporate after receiving hormone therapy post-puberty. Male-to-female transgender people maintain physiological advantages in athletics over biological women, even after a full year of post-puberty hormone therapy.<sup>5</sup> A review from the *British Journal of Sports Medicine* found that “transwomen still had a 9% faster mean run speed after the 1 year period of testosterone suppression.”<sup>6</sup> A separate review found transwomen’s muscle mass remains higher than biological women after transitioning.<sup>7</sup> And an exhaustive data review published in *Sports Medicine* concluded “that superior anthropometric, muscle mass and strength parameters achieved by males at puberty, and underpinning a considerable portion of the male performance advantage over females, are not removed by the current regimen of testosterone suppression permitting participation of transgender women in female sports

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<sup>1</sup> Aditi Bhargava, et.al., Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement, *Endocrine Reviews*, Volume 42, Issue 3, June 2021, Pages 219–258, <https://doi.org/10.1210/endrev/bnaa034>

<sup>2</sup> 2019 Men’s Ivy League Swimming and Diving Day Four Results, [https://ivyleague.com/documents/2019/3/2//Day\\_Four\\_Finals\\_Results.pdf](https://ivyleague.com/documents/2019/3/2//Day_Four_Finals_Results.pdf)

<sup>3</sup> USA records in swimming, United States <https://swiminfo.net/en/records/women/scy/free/1650y?id=8>

<sup>4</sup> Valérie Thibault, et. Al., Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983 *J Sports Sci Med*. 2010 Jun; 9(2): 214–223, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3761733/>

<sup>5</sup> Roberts TA, et.al. Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators. *British Journal of Sports Medicine* 2021;55:577-583.

<sup>6</sup> *Id.*

<sup>7</sup> Harper J, et. Al. How does hormone transition in transgender women change body composition, muscle strength and haemoglobin? Systematic review with a focus on the implications for sport participation. *British Journal of Sports Medicine* 2021;55:865-872.

categories.”<sup>8</sup> Simply, biological differences do not disappear overnight, if they can disappear completely at all.

In light of the medical evidence and observable performance differences detailing transgender women’s superior athletic ability compared to biological women, I am especially concerned by the Department’s apparent failure to consult with medical professionals in the development of the proposed rule. The Department was required to conduct an interagency review process after the proposed rule was sent to the Office of Management and Budget (OMB). According to [reginfo.gov](https://www.reginfo.gov), this proposed rule did not complete the customary 30-day interagency review process. If the Department or OMB consulted with physicians or other medical professionals during the promulgation of the proposed rule, the Department has failed to mention that consultation or describe the input medical professionals had in developing the proposed rule, both in the written preamble to the rule or when verbally describing the proposed rule’s development process.

The Department’s failure to consult medical professionals in the development of this rule should disqualify the administration from moving ahead with this misguided proposal.

### *Legal Standard*

The proposed rule relies on an unfounded legal theory to redefine sex as gender identity and conflates Constitutional Equal Protection with statutory protections. The proposed rule states that “Title IX differs from the scope of the Equal Protection Clause,” and instead “exclusively implement[s] Title IX.” Yet, the Department justifies its interpretation by citing twenty-three times a U.S. District Court case that applied Constitutional Equal Protection.<sup>9</sup> The unsupported legal foundation for the proposed rule blurs the line between Constitutional guarantees of Equal Protection and statutory prohibitions against discrimination on the basis of sex. Neither justify the proposed rule’s reinterpretation of sex to mean gender identity, and it appears the rule is designed to invite legal challenges.

In an effort to find a legal justification to redefine sex as gender identity, the proposed rule relies on a single U.S. District Court opinion throughout, despite the fact that oral arguments have been heard in its appeal.<sup>10</sup> The case the Department relies upon is not settled law. What is settled is that at the time Title IX was enacted, even the outspokenly liberal Justice William J. Brennan adopted the then unquestioned position for the Supreme Court that “sex . . . is an immutable characteristic[.]”<sup>11</sup> The Department’s redefining “sex” to include “gender identity” for Title IX protection purposes represents a novel legal theory that defies decades of fundamentally contrary

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<sup>8</sup> Hilton, E.N., et. Al., T.R. Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage. *Sports Med* 51, 199–214 (2021). <https://doi.org/10.1007/s40279-020-01389-3>

<sup>9</sup> *Hecox v. Little*, 479 F. Supp. 3d 930, 973 (D. Idaho 2020), appeal argued, No. 20-35815 (9th Cir. Nov. 22, 2022) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

<sup>10</sup> *Hecox v. Little*, 479 F. Supp. 3d 930, 943, 988 (D. Idaho 2020), appeal argued, No. 20-35815 (9th Cir. Nov. 22, 2022)

<sup>11</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

regulatory interpretation by the Department. The legal authority supporting the Department's justification for this proposed rule is, at best, flimsy.

### *Unclear Framework to Limit Participation*

The proposed rule creates a narrow and opaque framework for schools to implement policies for transgender athletes to compete on teams that do not match their biological sex. But the Department's justification underpinning the proposed rule of providing greater clarity to schools on how to comply with Title IX is obscured by questions left unanswered.

Under the proposed rule, if a school prevents biological males from competing against biological females, it must justify that policy by describing, for each sport, level of competition, and grade or education level how its policy is: (i) substantially related to an important educational objective, and (ii) minimizes harms to transgender students whose opportunity to compete on a team consistent with their gender identity would be limited or denied.

Critically, the Department fails to identify one concrete example of a policy that meets this newly invented standard leaving schools in the dark about what policies would meet the administration's framework. Some questions that require answers include:

- What is an "important educational objective" in sports?
- How are schools supposed to compete with other schools that adopt conflicting policies?
- What level of competition supports an exclusionary policy?
- Does participation on a junior varsity team that functions as a pipeline to a competitive varsity atmosphere constitute a high enough level of competition to pass the Department's bar?
- Can a middle school ever justify prohibiting transgender students from competing consistent with their gender identity? What if participation on a middle school team functions as a part of the vetting process for higher levels of competition in the same sport at the same school?
- If prevention of sports-related injury is an important educational objective, then how can a school attempt to prevent sports-related injury when its students compete against a school that allows transgender female students to compete against biological females?
- Can the administration provide an example of a satisfactory harm minimization policy?
- Can harms to biological females be considered as part of harm minimization?
- The proposed rule "reflects the understanding that students may be harmed significantly if a school denies them the opportunity to participate in its athletic program consistent with their gender identity." Can a school policy that prevents transgender students from competition on a team consistent with their gender identity ever sufficiently minimize the harms to satisfy the administration's proposed framework?

These questions need answers, especially for schools in states that have enacted laws in direct conflict with the proposed rule. States are protecting female athletics by ensuring their only competition is against other biological females on a level playing field—without having to compete against biological males with well-understood physiological advantages. As of May 1,

2023, Louisiana, Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming have each enacted protections for women's and girls' sports through the democratic process. These state laws provide schools with the certainty this proposed rule would remove.

The opaque framework in this rule acts as a tool of intimidation by forcing states to formalize their policies and only providing direction that they were out of compliance when the federal government threatens to strip them of their funding. Without answers to these questions, I am concerned that the proposed rule's criteria will subject schools to selective, subjective enforcement by the Department's Office of Civil Rights. The Title IX Athletics proposed rule imposes the administration's policy preference onto every state, county, and local education agency—even if their local laws reach a different conclusion about who should be allowed to compete in women's sports. In doing so, the Department injects confusion where states have settled the issue by overriding democratically enacted laws.

### *Conclusion*

The proposed rule ignores physiological distinctions between men and women that necessitate sex-specific sports leagues. As stated, it invokes a dubious legal standard to extend sex discrimination protections to gender identity, and creates confusion by imposing an unclear framework for schools to create policies to limit transgender students' participation on athletic teams that do not match their biological sex.

For these reasons, I ask that you rescind the Title IX Athletics proposed rule and instead work with Congress to protect girls and women's sports from unfair competition.

Sincerely,

A handwritten signature in blue ink that reads "Bill Cassidy, M.D." with a horizontal line underneath the name.

Bill Cassidy, M.D.  
Ranking Member  
Senate HELP Committee