

VIA ELECTRONIC MAIL

April 14, 2023

The Honorable Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202
Attention: Alejandro Reyes
Email: alejandro.reyes@ed.gov

Re: *Notice of Proposed Rulemaking: 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*
FR Document: 2023-07601
Agency/Docket No.: ED-2022-OCR-0143
RIN: 1870-AA19

Dear Secretary Cardona:

We write on behalf of 19 diverse organizations to request additional time for the public to submit comments on the U.S. Department of Education’s (“Department”) Notice of Proposed Rulemaking entitled “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” (“Athletics NPRM”),¹ published in the Federal Register on April 13, 2023.

The proposed rulemaking currently limits the American people to only 30 days in which to comment on the Athletics NPRM. This brief comment period would deny the Department the benefits of a robust comment period by reducing the volume and analytical breadth of feedback available for the Department’s consideration. Given Title IX’s historical significance to female student athletes and the impact the Athletics NPRM would have on every American school, college, and university that receives federal funding, we believe a significant extension of the comment period is warranted.

¹ 88 Fed. Reg. 22,860 (Apr. 13, 2023); see <https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf> (“Athletics NPRM”).

The Athletics NPRM proposes fundamental revisions that would profoundly undermine Title IX's longstanding commitment to ensuring that America's educational institutions provide equal opportunities for girls and women in competitive school athletics programs. Proposed 34 CFR § 106.41(b)(2) would unlawfully reorient Title IX by replacing sex-based rights with gender identity-based rights, despite the Department's lack of authority to change Title IX's clear, sex-based purpose. The Athletics NPRM would force every school district, college, and university receiving federal funds to review, rewrite, and revise their athletic participation policies and would place an onerous burden of proof on educational institutions should they attempt to prevent the participation on female athletic teams and in competitions of biological males claiming to be females. These are large and highly consequential issues about which the American people and educational institutions are owed a meaningful opportunity to comment.

The Athletics NPRM would effectively nullify state laws and educational institutional policies that currently protect women's sports by forcing the Department's gender identity agenda on those states and institutions, with possible repercussions including loss of federal funding and civil rights lawsuits by the Department and the U.S. Department of Justice. The new rule would dramatically increase the role and power of the Department to intrude at will to investigate reports of non-compliance, particularly by disfavored states (three of which were noted in the NPRM) and resistant educational institutions. Public comments from educational institutions are desperately warranted if the Department seeks to understand the impact of its proposed rulemaking on schools, colleges, and universities.

The Athletics NPRM goes to great lengths to consider and prevent potential impacts to transgender students and even warns schools, colleges, and universities against any effort to inquire if biological students claiming to be female students are, in fact, biological males. In its "Harm Minimization Requirement," it warns that any such inquiry, no matter how well-intentioned, may be "extremely traumatic" and may undermine a transgender student's "social transition."² The Athletics NPRM fails to discuss or otherwise note the potential harm to the rights (including the physical safety) of biological girls and women to compete against other biological girls and women rather than biological boys and men claiming to be girls and women. Public comments from female athletes, parents, coaches, and educational institutions are clearly warranted if the Department seeks to inform its rulemaking more accurately.

The Athletics NPRM warns educational institutions that the use of any "criteria that assume all transgender girls and women [i.e., biological males claiming to be females] possess an unfair physical advantage over cisgender girls and women [i.e., biological girls and women] in every sport, level of competition, and grade or education level would rest on a generalization that would not comply with the Department's proposed regulation."³ By so proposing, the Department has preemptively declared its rejection of the good-faith use by educational institutions of any scientifically based physiological distinctions that institutions might assert in defense of

² Athletics NPRM at 22,877.

³ Athletics NPRM at 22,873.

limitations on transgender (i.e., biological male) participation in women’s sports. Public comments from female athletes, parents, coaches, and educational institutions are clearly warranted if the Department wishes to better inform its rulemaking.

The projected cost of the proposed rule alone provides a compelling reason to extend the comment period. The Athletics NPRM appears to dramatically understate the likely cost imposed by the Department on educational institutions (the Department’s current estimate is \$23.4 to \$24.4 million over 10 years).⁴ Title IX applies to approximately 18,000 local education agencies and over 6,000 postsecondary institutions. We believe that if each school district, college, and university spent only an average of \$10,000 over 10 years (a very low estimate), the cost would be at least \$240 million over 10 years. If the cost to each such educational institution was \$50,000 over 10 years, the costs would be approximately \$1.2 billion, although this projection very likely understates the actual costs. Public comments and candid institutional input are clearly needed if the Department seeks to provide more accurate representations of the estimated costs of its rulemaking.

In response to the Department’s July 2022 NPRM (“Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”)⁵ adding “gender identity” to Title IX’s sex-based protections, more than 240,000 comments were submitted.⁶ For that NPRM, the Department allowed a 60-day comment period. In the Athletics NPRM, the Department challenges similar longstanding Title IX rules which would upend decades of policies and practices by educational institutions across the country. It also strikes at the heart of the right of America’s biological girls and women to engage in athletic competitions against other biological girls and women – a core Title IX protection that has led to demonstrably significant improvements for the equal educational rights of America’s female student athletes.

To afford the public a meaningful opportunity to comment on the highly impactful Athletics NPRM, we believe a 90-day comment period is warranted.⁷ The proposed rulemaking has important consequences for America’s schools, colleges, and universities and would subsume Title IX’s sex-based protections ensuring equal educational opportunities for women to a gender-identity-based agenda that Congress has not authorized. Extending the comment period to 90 days will ensure that the public is able to thoughtfully analyze and constructively respond to the Athletics NPRM, which should benefit the Department’s rulemaking efforts.

We appreciate your timely consideration of this request regarding the Department’s highly consequential Title IX proposed rulemaking.

⁴ Athletics NPRM at 22,886-22,888.

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

⁶ See <https://www.regulations.gov/docket/ED-2021-OCR-0166>.

⁷ Executive Order 13563, “Improving Regulation and Regulatory Review,” states that “each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”

Sincerely,

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