



May 15, 2023

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

Submitted to: regulations.gov; Document ID ED-2022-OCR-0143-0001

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;” RIN: 1870-AA19

Dear Secretary Cardona:

We are pleased to submit these public comments on behalf of the American Association of Christian Schools (AACCS) regarding the Department of Education’s (Department) proposed rule 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” (Athletics NPRM). The AACCS is a national organization, comprised of seven hundred member elementary and secondary schools and Christian colleges across the country, serving over 100,000 students.

Like other faith-based institutions, the mission of our schools leads us to provide students with high-quality educational services that include strong academics and Christian teachings that inculcate the values and tenets of our faith into our students’ lives. As an organization that partners with local churches, educational institutions, families, and students, we believe that Christian schools and colleges are uniquely equipped to pursue educational excellence and must be allowed to maintain their religious identity and practice as they instruct students. As such, the religious freedom guaranteed under the First Amendment to the U.S. Constitution is vital to our religious mission of providing a holistic education for our students.

AACCS is very concerned about the impact that the Department’s proposed rule would have on its members, if promulgated. Specifically, in this comment we discuss the confusion the proposal creates regarding Title IX requirements in athletics; how this proposal directly conflicts with First Amendment protections for the free exercise of religion; negative impacts the proposal would have on Christian schools and the children who attend them; the lack of statutory authority for the proposal; and the Department’s failure to provide adequate time for the proposal to receive the full-breadth of considered comments that a rule of this significance and impact deserves.

I. The Proposed Rule Introduces Significant Confusion and Ambiguity Regarding How Title IX Operates in Athletics

In the preamble to its proposal the Department claims the Athletics NPRM would “provide needed clarity . . . on how recipients can ensure that students have equal opportunity to participate on male and

female athletic teams as required by Title IX.”¹ Such “clarity” would be established through two major criteria by which institutions of higher education that accept federal funds must determine eligibility for members of sports teams. Colleges that “limit or deny a student’s eligibility to participate on a male or female athletic team consistent with their gender identity” would be required to ensure such limitations are (1) “substantially related to the achievement of an important educational objective” and (2) “minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”² This two-part “test” the proposed regulations adopt is ambiguous and would result in wide-spread confusion for public schools regulated by Title IX as well as Christian schools, like those AACCS represents—most of which would technically be exempt from the regulations but compete against regulated-schools.

Although AACCS members generally are exempt from direct regulation under Title IX, many of our schools compete against regulated schools that would be forced to understand and implement these ambiguous regulations. Unfortunately, the preamble to the Athletics NPRM provides no objective guidance on how to interpret and implement the proposed rule. Only schools that openly, clearly, and without limitation allow for students to play on the male or female team consistent with their gender identity could be certain that they are meeting the Department’s new legal standard and unlikely to face legal action. Once a school imposes any limits whatsoever in their school policies on participation of transgender athletes, the school would enter a world of uncertainty in which the Department and/or a court is the final arbiter of whether the policy is appropriate. Schools and colleges, like any regulated institution, need clear rules to follow to ensure they are complying with the law.

Given the ambiguity of the proposed regulation, the AACCS and the religious schools and colleges it represents are very concerned about the indirect power the Department would have over the policies and practices of the Christian schools we represent regarding their athletic programs.

II. The Athletics NPRM Infringes on the Religious Protections the First Amendment Guarantees

The proposed rule illegally fails to consider its effect on religious schools. Alarming, the proposal only references religion two times in the 32-page document. Both references come in the beginning of the preamble when the Department begins to explain the history of Title IX and acknowledges that religious schools, like the ones AACCS represents, are exempt from it. But that is not enough. As this comment explains, the proposed rule would directly impact Christian schools across the country. And the Administrative Procedure Act requires the Department to consider those impacts.

Throughout the proposal, the Department makes values-based judgments weighted heavily in favor of participation by transgender athletes in school sports, which is antithetical to the faith of the AACCS and its members schools.

To the religious schools and colleges AACCS represents, these judgments are not determined by the federal government or even the leadership of a religious college, but by the good design and order of creation found in Scripture. Genesis 1:27 states, “So God created man in his own image, in the image of God created he him; male and female created he them.” Matthew 19:4 declares, “Have ye not read, that he which made them at the beginning made them male and female.” Furthermore Mark 10:6 reads,

¹ 88 Fed. Reg. 22,860.

² Proposed §106.41 (b)(2)(i) and (ii), 88 Fed. Reg. at 22,891.

“But from the beginning of the creation God made them male and female.” God’s design in creating human beings as male and female creates human flourishing and provides the most basic building blocks for stable homes and peaceful societies. Departing from God’s created order denies those individuals who struggle to reconcile their perceived gender identity with their biological reality the opportunity to flourish fully as humans made in God’s image.

These values based on Scripture are integrated throughout the policies and teachings of the Christian schools and colleges AACS represents. Most, if not all our schools and colleges have policies that prohibit school teams from competing against a team with transgender athletes. Many of our teams compete against regulated schools covered by Title IX. This is particularly true at the end of the season when teams compete in state championships. Playing in the state championships is a goal of virtually every student athletic team. As a result, this proposal infringes upon the religious freedom the First Amendment grants to all Americans by forcing Christian schools and colleges to either adopt policies for their athletic teams that are antithetical to their Christian beliefs or deny their athletes the opportunity to compete against Title IX schools.

Our colleges strive to show Christ’s love to all students by providing them an excellent education that teaches them how to reach their God-given potential, by living a productive and fulfilling life fully embracing their design and serving their communities and their calling in Christ. To continue the mission to advance Christian education with excellence, it is imperative that colleges remain free to educate without government interference in the most basic understandings of belief.

III. The Proposed Rule Would Negatively Impact Christian Schools and Their Students

Christian schools and particularly the girls and women who attend them will be most harmed by this rule.

As previously noted, most, if not all of AACS members have policies in place that would prevent their athletic teams from competing against teams with transgender athletes. Given the strong presumption the proposed rule has for requiring Title IX schools to allow students to play on the team based on their gender identity rather than biological sex, Christian schools would have significantly fewer opportunities to compete against public schools. Consequently, such schools may see fewer students with promising athletic futures attending their schools.

AACS members are also concerned that if the Athletics NPRM is finalized its members would be subject to a flood of litigation. We are already seeing religious schools, that are exempt from Title IX, being forced into court to defend their exemption.³ If the proposed rule were to take effect, it is more likely than not that Christian schools (with policies that disallow their athletic teams from competing against teams with transgender athletes) would be forced to defend those policies in court. In addition to the significant monetary costs to AACS schools resulting from increased litigation is the reputational harm they would face every time a Christian school refuses to compete against a school with a transgender athlete. A quick internet search already proves this reality as evidenced by the hundreds of articles that

³ *Buettner-Hartsoe v. Baltimore Lutheran High School Association*, No. RDB-20-3229 (D. Md. Jun. 23, 2021) and *E.H. v. Valley Christian Acad.*, 2:21-cv-07574-MEMF (GJSx) (C.D. Cal. Jul. 25, 2022).

appear when one performs a Google search of “Mid Vermont Christian School.” Pages and pages of articles appear reporting on its decision not to play against a team with a transgender athlete.⁴

Moreover, if the regulation is promulgated, the children attending Christian schools would suffer the most because they would be denied opportunities to compete against many schools. Regardless of their talent, these students may be denied the opportunity to participate in any state competitions. As previously referenced, earlier this year, Mid Vermont Christian School’s women’s basketball team in Hartford, Vermont, was banned from playing in future tournaments of a state athletic association. The Vermont Principals Association imposed the ban after Mid Vermont’s women’s basketball team refused to play a school with a transgender athlete in the girls’ state basketball playoffs.⁵ Among other things, this reduced competition would likely also result in fewer athletic scholarships for students attending Christian schools.

Finally, women and girls attending AACS schools or Title IX schools likely would suffer most under the Athletics NPRM, which makes it virtually impossible for a college to legitimately craft and enforce policies for sports based on sex as Title IX intended. The proposal, along with the Department’s Title IX rule, sharply departs from the intended purpose of Title IX by denigrating and ignoring biology in favor of gender identity. Despite the Department’s rhetoric, sex and gender identity are not synonymous, and protecting gender identity at the expense of sex results in substantial harms to women and girls who are forced to unfairly compete against men who have a biological advantage over them.⁶ This biological advantage is both physical and cognitive.⁷

And, in many sports, women playing against biological males risk significant injury.⁸ Although the Department claims to recognize that “schools have an interest in the prevention of sports-related injury,”⁹ it immediately follows that supposed “recognition” by stating, “ensuring fair completion and prevention of sports-related injury does not necessarily require schools to adopt or apply sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity.”¹⁰

Whether it is a ban from being able to compete or a lawsuit alleging discrimination, the proposed rule will have a significant negative impact on Christian schools and their students across the country.

⁴ Michelle Watson, CNN, [“Girls’ high school deemed ineligible to play in future activities and tournaments after forfeiting basketball game against team with transgender student-athlete,”](#) (March 14, 2023).

⁵ Nina Golgowski, [“Vermont School Barred From Sports Matches After Refusing Game With Trans Athlete,”](#) yahoo/finance (March 15, 2023).

⁶ Angie Kirk, [“Biological Gender in Fair Competitive Sports Policy,”](#) Inside Higher Ed (Jan. 26, 2022), quoting David Epstein, Sports Illustrated senior writer and author of “The Sports Gene: Inside the Science of Extraordinary Athletic Performance,” “Thanks in large part to testosterone, men are generally heavier and taller than women. They have longer limbs relative to their height, bigger hearts and lungs, less fat, denser bones, more oxygen-carrying red blood cells, heavier skeletons that support more muscle – 80 percent more in the upper body, on average ... and narrower hips that make for more efficient running and decrease the chance of injury.”

⁷ Id., quoting Larry Cahill, University of California, Irvine, professor of neurobiology and behavior, “The neuroscience literature shows that the human brain is a sex-typed organ with distinct anatomical differences in neural structures and accompanying physiological differences in function.”

⁸ Holt Hackney, [“Professor Maintains that Trans Athletes Causing Serious Injuries to Girls,”](#) Sports Law Expert (Dec. 12, 2022),

⁹ 88 Fed. Reg. 22,872.

¹⁰ Id.

IV. The Proposed Rule Is Not Authorized by the Plain Text of Title IX and Congress' Approval of 1975 Rule Implementing the Statute

As the Department recounts in the preamble to the proposed rule, “[i]n 1974 Congress enacted the Javits Amendment in response to concerns that Title IX would disrupt existing practices in intercollegiate athletics.”¹¹ The Department’s predecessor—“the Department of Health, Education, and Welfare”—promulgated its regulations implementing the Javits Amendment in 1975. Those regulations, among other things, authorized Title IX schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”¹² Importantly, at the time the implementing regulations were adopted, the law required Congress to review regulations. Congress was given 45 days to comment or edit the regulations through a Joint Resolution. If Congress took no action the regulations automatically took effect.

As Jocelyn Samuels and Kristen Galles detail in their *Marquette Sports Law Review* article entitled, “*In Defense of Title IX; Why Current Policies Are Required to Ensure Equality of Opportunity*,” Congress took its responsibility to review and comment on the regulations implementing the Javits Amendment very seriously by, among other things, holding “extensive hearings on the regulations, for which many interest groups provided testimony and comment.”¹³ Despite efforts to weaken the regulations, Congress let them stand and “the prime sponsors of Title IX and others made clear that the challenged regulations correctly interpreted Congress’ intent with regard to athletics.”¹⁴ In light of this legislative history, AACS believes that only Congress can change the law to require Title IX schools to allow a student to participate on a male or female consistent with his/her gender identity.

Moreover, contrary to the Department’s assertions otherwise, the Supreme Court’s decision in *Bostock v. Clayton County* does not provide the legal basis for this proposed regulation. As many commenters have pointed out, in that decision the Supreme Court held that discrimination based on sexual orientation or gender identity in the employment context violates Title VII.¹⁵ As the Alliance Defending Freedom articulated in its September 11, 2022 comment on the Department’s July 12, 2022 proposed rule to amend Title IX regulations, “*Bostock* recognized that ‘sex,’ ‘gender identity,’ and ‘sexual orientation’ are ‘distinct concepts.’”¹⁶ Importantly, even the Supreme Court stated that its *Bostock* decision was limited to the Title VII employment context.¹⁷

AACS also shares the concerns of other commenters that the Department did not do the full textual analysis required to justify a rule under the Administrative Procedure Act. While the July 2022 proposed rule provides a legal analysis for revisions to Title IX regulations relating to everything but sports, the Athletics NPRM provides no legal analysis whatsoever.

¹¹ Id. at 22,862.

¹² 45 C.F.R. § 86.41(b).

¹³ Jocelyn Samuels and Kristen Galles, “[In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity](#),” *Marquette Sports Law Review*, Volume 14, 1, Article 21 (2003), 19-24.

¹⁴ Id. at 21.

¹⁵ *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

¹⁶ Julie Marie Blake, Comments of Alliance Defending Freedom in Docket ID ED-2021-OCR-01666,

“Nondiscrimination on the Basis of Sex in Education Programs of Activities Receiving Federal Financial Assistance.”

¹⁷ *Bostock* at 1753.

Consequently, the Department of Education rejects the idea that the Court's decision in *Bostock* has any application to Title IX or can in any way be applied in an educational context, including in college athletic programs. The Department should maintain the biological definition of sex that has succeeded in protecting the rights of male and female students since Title IX became law, leaving fundamental changes to Title IX to the people's representatives in Congress.

V. The Department's Short Comment Period for the Proposed Rule Inappropriately Reduces the Quality Analysis Required for Such a Significant Rulemaking

The Department's proposal represents a sea change in how Title IX applies to athletics. Yet, because of the extremely short, 30-day comment period for this proposed rulemaking, AACS and other impacted organizations across the country did not have the time needed to robustly study and comment on the many potential ways the Athletics NPRM would affect them. AACS believes the 30-day comment period was unreasonable and stifled valuable information gathering that could have helped inform the Department on how this rule impacts our nation's schools and the children they serve.

VI. Conclusion

Through the Athletics NPRM the Department is attempting to thread the needle between advancing the administration's LGBT agenda and answering accusations of unfairness in women's sports programs that allow transgender competition. It would put every athletics decision a college makes, including the Christian schools we represent, under a microscope.

AACS submits the proposed rule provides no discernable legal standard for what policies would be deemed legal or illegal; illegally fails to consider the impact it would have on Christian and other religious schools, and would impose significant harms and costs to the Christian schools we represent and the children who attend them.

We request that the Department of Education withdraw this proposed rule.

Sincerely,



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President



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