

May 15, 2023

Submitted Electronically

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U.S. Department of Education

400 Maryland Ave. SW

PCP-6125

Washington, DC 20202

**[Docket ID ED-2022-OCR-0143]**

Re: Public comment regarding the 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”<sup>1</sup>

RIN: 1870-AA19

Dear Sir or Madame,

Family Research Council (“FRC”) writes to oppose the U.S. Department of Education’s (“the Department”) above-captioned proposed rulemaking (“NRPM”) regarding sex discrimination. We have many concerns and objections to this policy change, some of which are outlined below. Therefore, we request that you withdraw the NRPM.

We respectfully request that the Department extend the comment period on this NPRM. A 30-day comment period is insufficient time for the public to reasonably and adequately participate. Such a brief comment period also makes it impossible to do a meaningful analysis of potential impacts and costs to the many people and entities affected by this completely new, unjustified, and unprecedented reorientation of Title IX from “on the basis of sex” to a reimagined version based on perceived “gender identity.” A longer comment period would allow more people and organizations the opportunity to meaningfully participate in this rulemaking process and would therefore be more consistent with President Joe Biden’s stated commitment to unifying the country. Because school attendance is compulsory for children in the United States, the Department’s obligation to allow ample time and opportunity for wide-ranging and inclusive public input is significant. An unnecessarily short 30-day comment window lacks generosity and a true spirit of collaboration.

Severing the rulemaking process regarding Title IX also complicates the proposed regulation. By its very nature, the NRPM issued in July of 2022<sup>2</sup> also implicates sex-related eligibility for athletic teams, making the issuance of this NPRM an arbitrary and

capricious addition to an already overreaching, onerous, poorly justified, and confusing rulemaking effort.

The issuance of this NPRM fails to take into account the recent passage of H.R. 734, the Protection of Women and Girls in Sports Act of 2023, by the U.S. House of Representatives.<sup>3</sup> Clearly, while the fact remains that men and women cannot change their biological sex via any process or method, medical or social, the debate around this issue as a popular cultural matter is unsettled. To issue a rule for Title IX that changes the definition of “sex” to reflect a hyper-partisan and postmodern worldview demonstrates a failure to honor basic human dignity and the collaborative nature of educational endeavors that ideally serve to unite us all in the pursuit of learning and a more perfect union.

The sweeping nature of this proposed rule and the Department’s related previous NPRM on Title IX,<sup>5</sup> considered with recent congressional action, indicate a “major questions doctrine” problem for this effort. From *West Virginia v. Environmental Protection Agency* (2022):

As for the major questions doctrine...it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U.S. at 324, 134 S.Ct. 2427 (citing *Brown & Williamson* and *MCI*); *King v. Burwell*, 576 U.S. 473, 486, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).<sup>6</sup>

At the time of Title IX’s passage in 1972, no reasonable person would have predicted or imagined a redefinition of sex away from the sexually dimorphic binary, let alone one that could include an ideological and destabilizing concept such as gender identity that would then require sweeping changes to the understanding of the human person and the practical, logistical, safety, bodily privacy, and fairness issues such a redefinition would unleash. The Department misunderstands its place in our educational system and judicial history to propose such a redefinition.

Given the current political landscape and that many states have passed protections for women’s sports opportunities and bodily privacy and safety,<sup>7</sup> we request the Department offer an exception or exemption for those states and/or schools. Appreciation for the longstanding American tradition of local control of schools and education demands this consideration. The Department has not demonstrated the need

and lacks the authority to establish a system whereby schools and education agencies must ask permission to continue longstanding practices (which may even predate the adoption of Title IX itself) of sex-segregated sports.

The NPRM's insistence on an ideological and postmodern redefinition of sex puts the practical realities of sex and the embodied nature of the human person in conflict with Title IX's original purpose of ensuring equal access to educational opportunities for both sexes. The NPRM completely shifts the burden of proof for team eligibility from the person claiming transgender status to the biological females who want to compete as and with other biological females. The two-pronged test the NPRM seeks to establish advances the interests of students who assert a gender identity over the students who do not. We do not accept the premise upon which this proposal relies: that everyone has a gender identity, and some identities agree with the body, and some do not. Therefore, any test that is used to advance this premise is unworkable.

To "establish a baseline" on pages 22880-82 of the NPRM, the Department summarizes the current "state of play" in sports regulation in the states at the elementary, middle, and high school levels, including regulations promulgated by sports governing bodies at those levels. The NPRM then states:

In the absence of the clarity that the proposed regulation would provide, the Department assumes that States, LEAs, schools, and State athletic associations would continue to implement varying policies for students in elementary and secondary education, with a small subset adopting criteria that would not limit or deny the participation of transgender students on male or female athletic teams consistent with their gender identity and a small subset adopting criteria that would substantially limit or deny transgender students from participating on male or female athletic teams consistent with their gender identity. The Department also assumes that almost all of the remaining States (approximately half) would have policies that establish minimal criteria for the participation of transgender students in high school athletics consistent with their gender identity (e.g., a written statement from the student or someone on their behalf confirming the student's consistent gender identity). The Department seeks specific public comment on the reasonableness of this assumption.

The absence of written policy regarding students participating in sports based on a student's expressed or believed gender identity does not indicate that there is no policy at all, nor should the Department assume that a written policy is needed. It is not

reasonable to assume that a matter as fundamental as human binary sexual identity would need to be stated or affirmed in official policy offerings related to local sports associations, whether independent organizations or related to education agencies. Demanding that students be allowed to participate in sports based on their gender identity is not reasonable. Enforcing this demand as a civil right by overturning the original meaning and intent of Title IX is not reasonable. Neither the July 2022 NPRM nor the April 2023 NPRM clarify the confusion caused by or minimize the harms of the redefinition of sex in Title IX to include gender identity.

The implications for this NPRM's impact on religious liberty are significant. There is simply no way to redress the harm that arises when a religious institution with a policy or, more likely, the longstanding practice of sex-separated sports teams must compete against another institution that allows transgender-identified athletes to compete on a team historically and rightly reserved for biological females. The team that does not share the opinion or belief that mixed-sex sports teams are safe or fair is therefore excluded from opportunities to compete. As a result, those teams' students are denied opportunities to excel and advance in competition. The presence of even one opposite-sex player in a bracket can potentially deny opportunities to entire teams of women and girls.

Other objections to the proposal, in brief:

**In light of the many positive benefits of participation in school athletics discussed above, the Department's proposed regulation 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.**

The Department's assumption in the matter seems based on an ideological belief or unfounded assumption that gender-identified students will not themselves be harmed by participating in sports. The Department only seems to consider the psychological or emotional impact and fails to consider the physical impact that the redefinition of sex within Title IX would open the door for. Given the experimental nature of social and medical interventions regarding so-called gender-affirming treatments, no body of research confirms the physical safety of sports participation for all students – including the transgender-identified student. Can the Department cite any peer-reviewed scientific evidence specific to transgender students that confirms there are no additional or specialized health risks involved in sports participation?

**"The proposed regulation would require that if a recipient adopts or applies 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, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to**

**students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied. The proposed regulation would not affect a recipient's discretion under current § 106.41(b) to offer separate male and female athletic teams when selection is based on competitive skill or the activity involved is a contact sport."**<sup>8</sup>

The Department seems to allow an opportunity for schools to acknowledge the physical and biological reality of the sex binary and its relationship to sport by offering the dual-pronged test. But the test itself is made impossible to meet by statements made later in the proposal:

**The Department notes that a recipient could not satisfy the proposed regulation's requirement that criteria be substantially related to achieving an important educational objective if its objective is communicating or codifying disapproval of a student or a student's gender identity.**<sup>9</sup>

And:

**An asserted purpose also would not satisfy the proposed regulation if, rather than being a genuine educational objective of the recipient, it is a pretext for an impermissible interest in singling out transgender students for disapproval or harm.**<sup>10</sup> This sets up the false assumption that any objection falls into one of these categories.

Further, the Directed Question (How a recipient can minimize harms to students whose eligibility to participate on a male or female athletic team consistent with their gender identity is limited or denied by the recipient's adoption or application of sex-related criteria) is impossible to satisfy based on the statements above. This proposal, like the one offered in July 2022, is not a good faith effort to include opportunities for sex-based sports but rather an arbitrary and capricious standard impossible to satisfy within reason.

**The Department recognizes fairness in competition and prevention of sports-related injury can be important educational objectives. This recognition is consistent with stakeholder feedback, case law, and current § 106.41(b), which permits teams to be separated by sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. Although many schools presently work to ensure fairness in competition and prevention of sports-related injury while allowing all students to participate on male or female teams consistent with their gender identity, the proposed regulation would permit a recipient to take a different approach as long as the criteria used to determine who can participate on a particular male or female athletic team are substantially related to achieving that important educational objective and comply with the proposed regulation's other requirements.**<sup>11</sup>

This is perhaps the most obvious statement of the essential problem with this NPRM. “Fairness in competition” and “prevention of sports related injury” are not just “important educational objectives” but longstanding foundational expectations in and obligations of our society. The proposal is based on the idea or belief that affirming a student’s self-perception or that unseen and unquantifiable perceived or anticipated harms experienced psychologically are more important or supersede obvious and evident physical harms, and present an obligation implicating civil rights law are perhaps the biggest problem with both of the Title IX NPRMs from this administration.

In addition to these few enumerated objections to an overwhelmingly contrived NPRM, Family Research Council believes the cost estimates offered in the NPRM are significantly under-anticipated and underestimated.<sup>12</sup> The timeline for enforcement would be impacted by this, not only because of the significant costs SEAs, LEAs, and individual schools and school districts would incur but also because part of the financial burden imposed on schools due to the long-term impact analysis schools would have to perform to justify these changes and protect the especially minor-aged students in their charge. Due to the abbreviated comment period for this rule, we are unable to attempt such an analysis, and this is yet another justification for an extension of the comment period.

For these and many other reasons, including ones offered in our previous comment,<sup>13</sup> we oppose this proposed regulation and ask you to withdraw this NPRM.

Respectfully submitted,

/s/Meg Kilgannon  
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<sup>1</sup> U.S. Department of Education, 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,” *Federal Register* 88, no. 71 (April 13, 2023): 22860-91, <https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

<sup>2</sup> U.S. Department of Education, Proposed Rule, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” *Federal Register* 87, no. 132 (July 12, 2022): 41390-579, <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

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<sup>3</sup> U.S. Congress, House, Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118<sup>th</sup> Cong., 1st sess., <https://www.gpo.gov/fdsys/pkg/BILLS107hr3162ih/pdf/BILLS-107hr3162ih.pdf>.<https://docs.house.gov/billssthisweek/20230417/BILLS-1181183ih.pdf>.

<sup>5</sup> U.S. Department of Education, Proposed Rule, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.”

<sup>6</sup> *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587, 2609 (2022).

<sup>7</sup> Ben Johnson, “Biden Rule Would Strike Down State Girls’ Sports Protection Laws,” *The Washington Stand*, April 7, 2023, <https://washingtonstand.com/news/biden-rule-would-strike-down-state-girls-sports-protection-laws>.

<sup>8</sup> U.S. Department of Education, 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,” 22871.

<sup>9</sup> *Ibid* at 22872.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* at 22873.

<sup>12</sup> *Ibid* at 22886.

<sup>13</sup> Family Research Council, Public comment regarding the proposed rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” RIN 1870-AA16 (Sept. 12, 2022), <https://downloads.frc.org/EF/EF22I17.pdf>.