Comments in response to "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/April 6, 2023 by the Department of Education.

Secretary Cardona: the following comments are submitted in opposition to the proposed rule 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" published in the *Federal Register* on April 6, 2023 by the Department of Education.

I. Introduction.

As duly elected members of the Senate who have served in a variety of educational and athletic roles and institutions, we strongly oppose the proposed rule 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" ("proposed rule"). The fact that a rulemaking governing the participation of biological males in female sports is even being promulgated undermines the Department's own definition of "sex" under Title IX of the Education Amendments Act of 1972 ("Title IX").

The U.S. Constitution vests all legislative powers in the United States Congress.[1] On July 12, 2022, the Department of Education (Department) published a proposed rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," which stated that "Title IX authorizes and directs the Department of Education, as well as other agencies to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."[2] This authority, however, does not permit the Department to inconsistently apply regulations to suit a particular class of people based on a political agenda, especially if such application is contrary to the science, spirit, and intent of the statute upon which it is based.

Congress made clear that its intention in passing Title IX was to prohibit discrimination against women participating fully in all aspects of athletic and academic opportunity at institutions that received federal financial assistance. This proposed rule uses weakly-associated case law and polarizing social concepts to broaden the definition of women and girls to include individuals who identify as women, and in so doing, the intent of the law is destroyed and women are marginalized yet again.

The two Title IX rules proposed by this administration are both inherently incorrect in interpretation and application of statute and will create confusion for educational institutions

[1] U.S. Const., art. 1, § 1.
[2] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Funding Assistance, 87 Fed. Reg. 41,390, 41,393 (July 12, 2022) (to be codified at 34 CFR pt. 106).

across the country. Given the vague and arbitrary application of the proposed regulations, educational institutions will be forced into lawsuits they are ill-suited to defend.

This proposed rule is a monumental setback for the generations of women who have benefited from Title IX's enactment over the last fifty years. The Department should not move forward with this proposed rule, but should instead work with Congress on legislative action meant to strengthen the protections afforded to women in the original statute. Any interpretation of Title IX that permits biological males to participate in female athletics does irreparable harm to women as a protected class under the law. Contrary to the Department's assertion throughout the proposed rule text, such harm far outweighs any contrived and speculative benefits the Department and this administration hope to achieve with this action.

II. The proposed rule expands the definition of Title IX beyond congressional intent and is contrary to current law.

In 1972, Congress passed landmark legislation establishing that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[3] Colloquially referred to as "Title IX," this law guaranteed women and girls opportunities that were previously afforded only to men. This guarantee paved the way for defined educational programs and activities for women that previously did not exist. During a floor speech on the importance of the passage of Title IX, then Senator Birch Bayh, the lead sponsor of the legislation, stated that "one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women."[4]

Title IX provided women and girls the long-denied platform that had always been afforded to men and boys. It ensured women had the same access to funding, facilities, and scholarships as their male counterparts. As the proposed rule references, and as Senator Bayh went on to say, eliminating sex discrimination rooted in stereotypical perceptions of women's abilities, competence, and worthiness to participate in education programs was fundamental to Title IX.[5] Senator Bayh's statement leaves no room for interpretation regarding the designated beneficiaries of this legislation. The intent of Title IX is as clear today as it was fifty years ago: Title IX's nondiscrimination mandate is based upon "sex" as the dividing line between men and women.

For generations, biological differences between men and women have led to the marginalization of women and both their rights and abilities to achieve at an equal level as their male counterparts. These biological differences led to numerous misconceptions and misunderstandings that women could not equally contribute to society. We now know how preposterous those assumptions have been, and great strides have been made on this front, even in the last fifty years. By arbitrarily expanding the population of "women" to include

[3] Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-88.
[4] 118 Cong. Rec. (Bound) - Index to the Proceedings - Congressional Record (Bound Edition), Volume 118 (1972), https://www.govinfo.gov/app/details/GPO-CRECB-1972-pt29/GPO-CRECB-1972-pt29-1/summary.
[5] Ibid.

biological males who identify as such, the Department undermines the solution provided by Title IX, which aims to address a very real bias experienced by women across this country. While Title IX and its protections were intended to be applied to all aspects of educational opportunity, the biological differences between men and women are most readily apparent in the field of athletics.

Unfortunately, the Department inappropriately relies on the Supreme Court's ruling in *Bostock v. Clayton County* as the justification for the proposed rule's expansion of Title IX's discrimination on the basis of sex prohibition to include sexual orientation and gender identity. In *Bostock*, the Court held that "an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'" Notably, the opinion in *Bostock* explicitly stated that it applies only to hiring and firing decisions under Title VII, leaving other issues and other laws for another day. To haphazardly apply this narrow holding to other statutes based on a political agenda would be a significant and intentional misinterpretation of case law by the Department.

Therefore, it is illogical to apply such a decision to Title IX, a statute wholly unrelated to employment matters. In fact, the Department itself came to a similar conclusion. A January 8, 2021 memorandum from the Department's Office for Civil Rights ("OCR") confirms that the ruling in *Bostock* does not extend to Title IX, stating that "the Court decided the case narrowly, specifically refusing to extend its holding to Title IX and other differently drafted statutes" and that "the Department does not have the authority to enforce Title VII."[6] This recent proposed interpretation will entirely upend women's athletics, leaving women at a complete disadvantage in activities specifically meant for them. The Department's effort to include "gender identity" as an expansion of "sex" under Title IX is entirely unfounded, both as a matter of science and sound public policy and cannot be defended by applicable caselaw. For these reasons, the proposed rule is unsubstantiated and should be withdrawn.

III. By issuing a new proposed rulemaking focusing only on athletics, the Department undermines its own definition of "sex" under the law.

The July 2022 Title IX proposed rule indicated that the Department planned to address, through a separate rulemaking, the question of what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team. The strategy of splitting up these regulations into separate rulemakings inherently acknowledges that there are biological differences in women and men. The Department issued its first proposed rule in July 2022 expanding Title IX's definition of "women" to include those biological males who identify as women, aiming to protect both biological women and self-identifiers under statute. Then the Department issued its most recent proposed separate rule that offers a different definition of "women" under the same

[6] Office of the General Counsel, United States Department of Education. Memorandum for Kimberly M. Ruchey Acting Assistant Secretary of the Office for Civil Rights (2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf.

statute. The most recent rule essentially states that while Title IX exists to protect women's rights, a "woman" can be a biological male who identifies as a woman, but in certain athletic scenarios, that same biological male might not actually be a "woman" in order to ensure fairness in competition. In order to push a political agenda, the Department both undermines its own regulations and makes a mockery of the rulemaking process.

Despite the stark inconsistency in the definition of "women" between the two rules, the Biden administration had already made its intentions clear on how they believe Title IX should be interpreted, even before these proposed rules were published. In June 2021, the Department of Justice submitted a statement of interest in *B.P.J. v. W. Va. State Bd. of Educ.*, a case in which a K-12 transgender athlete challenged the state of West Virginia for prohibiting transgender girls from competing in sports designated for girls.[7] The statement of interest sets forth several arguments, including that a "state law that limits or denies a particular class of people's ability to participate in public, federally funded educational programs and activities solely because their gender identity does not match their sex assigned at birth violates both Title IX and the Equal Protection Clause…Any argument that B.P.J. has not been excluded because she could join the boys' team is untenable. B.P.J. is a girl, not a boy. She describes herself as a girl."[8] The administration's position on their interpretation of Title IX has been made absolutely clear.

In an attempt to satisfy concerns about fairness in athletic competition and potential physical harm to female athletes, the Department has outlined a hazy framework for how educational institutions can navigate the inclusion of biological males in female athletic programs. The proposed rule continually emphasizes the importance of prioritizing the "achievement of an important educational objective" when setting any parameters around the criteria for students joining a female or male sports team. The Department acknowledges that participation in sports is in and of itself a valuable educational objective, using that logic to justify inclusion of biological male participation in female sports teams.

Should an educational institution determine that the right of a biological female to compete fairly and win an athletic competition safely is also an "important educational objective," that institution would subject itself to scrutiny by the Department and potential withholding of federal funds. However, by even creating a pathway for institutions to establish a plan for athletic programs that respects the biological differences between boys and girls, the Department acknowledges that those biological differences do in fact exist—completely undermining the integrity and rationale of the rule.

IV. The proposed rule's cost estimate does not reflect the true costs of implementation.

The Department indicated that providing a separate rulemaking on athletics would enable greater clarification for educational institutions. After reviewing the proposed rule, it is apparent that the Department has no concept of what the word "clarity" actually means.

[7] B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316 (2021), https://s3.documentcloud.org/documents/20951164/west-virginia.pdf.
[8] Ibid.

What the rule does offer is a picture of how incredibly complicated compliance will be for educational institutions under these regulations.

The current proposed rule estimates that compliance with the Department's new standards would cost educational and athletic institutions around $24 million over the next 10 years.[9] However, despite stating that it is unable to quantify the supposed benefits of the proposed rule, the proposed rule states that "[t]he Department believes that the benefits associated with the proposed regulation . . . far outweigh the costs."[10] The Department's dubious "belief" is an absurd basis for such a proposition, as it directly ignores the financial realities of the substantial costs to educational institutions this proposed rule would impose.

First, the Department must consider the costs of increased litigation activity for educational institutions. By expanding the definition of "sex" under Title IX, the actual pool of potential litigants is automatically expanded. These legal battles will be drawn out in the courts for years, and those costs will add up. In a prior similar lawsuit, a school system was forced to pay $4 million to a transgender student after a jury determined the school prohibited the student from using the boys' bathroom and locker room.[11] In another legal action, a school district paid $300,000 to a transgender student to settle complaints regarding a prohibition against use of the boys' locker room and bathroom.[12] Legal fees, settlement fines, and damage awards such as these will cripple school systems. While the proposed rule itself may not mandate the construction of new facilities to ensure the comfort and protection of a wider category of individuals, educational institutions will likely attempt to overcompensate for any potential Title IX violations. With vital Federal funding streams at risk, many educational institutions will take such measures independent of mandates, and those costs must be taken into account.

In addition to expanding the pool of potential litigants, the Department's vague guidance instructing institutions to consider the "achievement of an important educational objective" muddies the waters of compliance burden for all parties involved. Any school that wishes to protect the integrity of their girls' sports teams immediately risks investigation by the Department. That risk is not one that many schools can afford to take, especially in the face of the overwhelming challenges schools are currently facing in the wake of COVID lockdowns, learning loss, and widespread teacher and administrative staff shortages.

Schools must balance the desire to protect the integrity of women's athletics programs with the burden of Department scrutiny, which is difficult enough for many institutions. In addition, however, they must navigate compliance with conflicting local and

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[9] 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, 88 Fed. Reg. 22,860, 22,879 (April 15, 2023) (to be codified at 34 C.F.R. pt. 106).
[10] Ibid. at 22,861.
[11] *Jury awards $4 million to Missouri transgender student*, NBC News (Dec. 15, 2021), https://www.nbcnews.com/nbc-out/out-news/jury-awards-4-million-missouri-transgender-student-rcna8867.
[12] *Transgender Student Awarded $300K Settlement In Discrimination Lawsuit Against Anoka-Hennepin School District*, CBS News Minnesota (March 23, 2021), https://www.cbsnews.com/minnesota/news/major-settlement-to-be-announced-in-discrimination-lawsuit-against-anoka-hennepin-school-district/.

state law.[13] Multiple states have passed legislation on this topic, and, historically, most of our country's education infrastructure has been housed at the local and state levels. The Department's new proposed rules place schools in a no-win situation. It is both lazy and embarrassing for the Department to officially conclude that the only cost of implementing the proposed regulation is simply the time it would take for administrators and lawyers to review current athletic program rules at a local level.

Additionally, the Department must consider the resulting real-life inherent costs—the cost of lost opportunities for girls in academic settings. By expanding the pool of protected individuals and creating mass uncertainty at each individual school and school district, it stands to reason that biological girls will ultimately lose scholarship and athletic opportunities designated for them under the original intent of Title IX. The Department cannot pretend it does not understand the headache and chaos it has created for every single school in the country. And the Department cannot ignore how many biological girls would choose to not even apply for or participate in opportunities once they recognize the severe disadvantage of competing against biological males.

V. Congress should strengthen Title IX.

Rather than expanding the definition of Title IX to fit the current progressive agenda, the administration should support Congress in strengthening its congressional intent and reinforce the protections Title IX afforded women and girls when it was first enacted in 1972. The Protection of Women and Girls in Sports Act of 2023, S. 613, ensures that the definition of "sex" in Title IX is based solely on a person's reproductive biology and genetics at birth.[14] The House companion version of this legislation, H.R. 734, was passed by the House of Representative on April 20, 2023 and is now under consideration in the Senate.[15] Maintaining the spirit and letter of the law will have a long-lasting, beneficial significance for women and girls for generations to come, and it is an irresponsible, reckless, and egregious act of administrative overreach for the Department to unilaterally upend the congressional process and intent in this way.

VI. Conclusion.

The Department's misguided proposed rule erroneously purports to align Title IX with statute and case law. Title IX was enacted to protect women from discrimination and establish an equal playing field in athletics and education. By pushing a political agenda which completely ignores science and extending these protections to biological males, the Department is intentionally erasing opportunities and progress made by women in the last fifty years. In its analysis, the Department failed to consider the harm these changes will have on women participating in educational programs and athletic activities specifically designated and designed for them to compete and succeed.

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[13] *See Bans on Transgender Youth Participating in Sports*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans.
[14] Protection of Women and Girls in Sports Act of 2023, S. 613, 118th Congress.
[15] Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Congress.

The intent of Title IX has always been clear: the statute exists to protect the rights of women and girls to access fair, quality educational opportunities. By acknowledging via this separate rulemaking that there are, in fact, inherent physical differences between biological females and biological males who identify as female, the Department itself exceeds its authority and destroys the protections of the very group Title IX was designed to safeguard.

This proposed rule reverts the playing field to a time before Title IX's enactment and will cause irreparable harm to women entering academia and athletics. We urge the Department to immediately withdraw this proposed rule and work with Congress on strengthening the statute that made it all possible for women to have equal rights in education.

Sincerely,

Tommy Tuberville U.S. Senator	Marsha Blackburn U.S. Senator
Kevin Cramer U.S. Senator	Mike Braun U.S. Senator
Roger Marshall U.S. Senator	Rick Scott U.S. Senator
Joni Ernst U.S. Senator	Mike Lee U.S. Senator
Pete Ricketts U.S. Senator	Mike Crapo U.S. Senator
Cindy Hyde-Smith U.S. Senator	Markwayne Mullin U.S. Senator

James Risch U.S. Senator	Cynthia Lummis U.S. Senator
Steve Daines U.S. Senator	Ron Johnson U.S. Senator
Ted Budd U.S. Senator	John Barrasso U.S. Senator
Roger Wicker U.S. Senator	Bill Cassidy U.S. Senator