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May 15, 2023

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

Dear Secretary Cardona:

We respectfully submit these comments in response to a Notice of Proposed Rulemaking (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," which was published in the *Federal Register* on April 13, 2023.¹ As Members of the U.S. House of Representatives Committee on Education and the Workforce, we write to express our strong objections to the proposed rule.

This NPRM continues in the radical direction the Biden administration has taken since its earliest days, advancing an anti-science gender ideology that is undermining women's and girls' safety, well-being, and equal access to educational opportunities. It will also leave schools and institutions confused and will leave protections for girls' and women's athletic opportunities to the whims of the Secretary.

Redefinition of "Sex"

This rule is only necessary because of the Department's continued unwillingness to interpret correctly and apply the plain meaning of "sex" under Title IX. Last year, the Department issued a proposed rule to redefine "sex" under Title IX.² This NPRM continues the Department's ongoing threats against nearly every school in America, from kindergarten to college, if those communities refuse to accept the Left's anti-science understanding of sex. The Left's blatant and deliberate attempts to redefine our sons' and daughters' identities by questioning biology itself

¹ <https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

² <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

has already done significant harm to our children and society, and it will do even more harm if this NPRM is finalized.

The Department's interpretation also continues to be legally flawed. The NPRM justifies the Department's interpretation by citing *Bostock v. Clayton County (Bostock)*. However, the NPRM ignores the Supreme Court's explicit warning against interpreting its *Bostock* opinion as applying to Title IX or other civil rights laws prohibiting sex discrimination. In that case, the Court stated, "But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."³

Making Women's Athletic Opportunities Dependent on One Man

While you have argued that this NPRM represents a sensible middle ground, it in fact imposes an extreme position which defies the will of the people. This rule will upend the laws 21 states have on the books protecting women's sports.⁴ In addition, the rule provides no meaningful guidelines as to what will be an acceptable level of protection for female athletes; instead, decisions will presumably be made on a case by case basis by the Secretary. In a turn of cruel irony, this administration apparently believes one man should get to decide whether or not women athletes are guaranteed equal access, fairness, and safety in athletics. The question is clear: does the Department believe women's athletic opportunities should be protected or not? This proposed rule gives us a clear answer: this administration has no interest in protecting women's sports.

Impact on Women and Girls in Sports

Since Title IX was enacted 50 years ago, female participation in sports has increased 1,057 percent at the high school level and 614 percent at the postsecondary level.⁵ Title IX was designed to combat discrimination against women, and it has succeeded. The proposed rule will force women's sports to accept the participation of men, cruelly using a groundbreaking antidiscrimination statute to discriminate against the very people it was designed to protect.

Female athletes have spoken out against the damage that has already been done and that will accelerate under this rule. Olympic swimmer Reka Gyorgy missed out on the opportunity to compete in the collegiate women's 500-yard freestyle swimming final last March due to the presence of a biological male in the competition. She has since urged the National Collegiate Athletic Association (NCAA) to implement rules to protect the integrity of women's sports.⁶ Similarly, college track and field athlete Linnea Saltz has called out athletics administrators for depriving women of competitive honors, scholarships, and the opportunities that come with those achievements.⁷ Unfortunately, the pleas of these athletes and other female athletes have gone unheeded by the NCAA, other governing bodies, and now the Biden administration.

³ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)

⁴ <https://adflegal.org/article/protecting-fairness-womens-sports-demands-comprehensive-legislation>

⁵ [Impact of Title IX on Women's Sports | Billie Jean King](#)

⁶ <https://www.swimmingworldmagazine.com/news/reka-gyorgy-virginia-tech-swimmer-bumped-out-of-b-final-in-500-free-writes-critical-letter-to-ncaa/>

⁷ <https://www.foxnews.com/opinion/ncaa-girls-women-compete-level-playing-field-linnea-saltz>

These changes are not supported by science. The NPRM seems to suggest that men can be permitted to participate in women's sports without tilting the playing field, but this assumption is unfounded. As Dr. Michael Joyner, a physiologist with the Mayo Clinic, stated, "There are social aspects to sport, but physiology and biology underpin it. Testosterone is the 800-pound gorilla."⁸ Another physiologist, Dr. Ross Tucker, reports that testosterone reductions do not reverse the physical advantages biological males have in athletic competitions.⁹ Women should not be forced to compete with men, and no amount of intervention can make such competition equal, safe, or fair.

Concern about athletic opportunities for women in sports should not be a partisan issue. Most Americans understand the threat to women's sports posed by this NPRM and the radical ideologies underlying them. A recent Washington Post-KFF poll conducted last year found that more than six in 10 Americans support protecting the integrity of women's sports.¹⁰

Sporting organizations are finally beginning to recognize these obvious realities. Last year, the International Swimming Federation (FINA) approved a new policy to ensure participation in sanctioned events is primarily based on sex, with 71.5 percent of the international body's member federations approving of the policy.¹¹ The FINA president stated, "We have to protect the rights of our athletes to compete, but we also have to protect competitive fairness at our events, especially the women's category at FINA competitions." The international governing body for track and field recently took similar steps.¹² We hope this administration similarly can recognize the objective facts of the case: women's rights to equal athletic opportunities, which we have fought so hard to protect, are threatened by inclusion of biological males in women's sports.

Mr. Secretary, we urge you to withdraw this NPRM. Last month, the House passed H.R. 734, the *Protection of Women and Girls in Sports Act of 2023*. This bill amends Title IX to protect the law's intent and the integrity of women's athletics. We urge the Biden administration to join Republicans in protecting women from discrimination and securing the progress women have made over the last five decades.

Sincerely,



Virginia Foxx
Chairwoman
U.S. House Committee on Education and the Workforce



Glenn "GT" Thompson
Member of Congress

⁸ <https://www.dailymail.co.uk/news/article-10868453/Mayo-Clinic-doctor-confirms-trans-swimmer-Lia-Thomas-given-unfair-advantage.html>

⁹ Id.

¹⁰ <https://www.washingtonpost.com/education/2023/05/05/trans-poll-gop-politics-laws/>

¹¹ <https://www.cnn.com/2022/06/19/us/fina-vote-transgender-athletes#:~:text=The%20new%20gender%20inclusion%20policy,on%20the%20puberty%20Tanner%20Scale>

¹² <https://www.nbcnews.com/nbc-out/out-news/track-governing-body-bans-transgender-women-athletes-rcna76432>

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