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HEALTH, EDUCATION, LABOR, AND PENSIONS

VETERANS' AFFAIRS

September 8, 2022

Comments in response to "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" RIN 1870-AA16/July 12, 2022 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" published in the *Federal Register* on July 12, 2022 by the Department of Education.

I. Introduction

As a duly elected member of Congress who served as an educator and athletic coach for over 40 years, I strongly oppose the proposed rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" (proposed rule). Simply put, the proposed rule's broad interpretation of "sex" in Title IX of the Education Amendments of 1972 (Title IX) expands well beyond the intent of Congress. I am also concerned about a forthcoming separate rulemaking effort specific to the definition of "sex" as applied to athletic programs.

The U.S. Constitution vests all legislative powers in the United States Congress.[1] The proposed rule states that "Title IX authorizes and directs the Department of Education (the Department), 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 the regulations to suit a particular class of people based on a political agenda, especially if such application is contrary to the spirit and intent of the statute upon which it is based. Congress made clear its intention to establish Title IX as a prohibition on discrimination against women at institutions that received Federal financial assistance. By broadening the definition of "sex" based on weakly-associated case law and polarizing social concepts adopted by the progressive left, the intent of the law is destroyed, and women are marginalized yet again.

Further, the proposed rule mentions a second rulemaking effort that is intended to address how the application of Title IX in the proposed rule shall be applied to athletic

[1] U.S. Const., Art. 1.
[2] Office for Civil Rights, United States Department of Education, Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 CFR Part 106 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf.

programs, specifically those designed to support male and female athletics. While the proposed rule states that it would "make clear that preventing any person from participating in an education program or activity consistent with their gender identity would subject them to more than de minimis harm on the basis of sex…" and would therefore be in violation of Title IX, the Department still somehow believes a second rulemaking action is required.[3] Both of these efforts, which are inherently incorrect in interpretation and application, will create confusion for educational institutions across the country. Given the vague and arbitrary application of the proposed regulation, these institutions will be forced into lawsuits they are ill-suited to defend. If the Department has so clearly defined who is protected under the nondiscrimination mandate of Title IX in its proposed rule, then a second rulemaking effort is completely unnecessary.

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 instead, work with Congress on legislative action meant to strengthen the protections afforded women in the original statute. Any interpretation of Title IX that expands the definition of "sex" does irreparable harm to women as a protected class under the law. Such harm far outweighs any 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…"[4] 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, 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."[5] 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 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.[6] Senator Bayh's statement leaves no room to misinterpret the designated beneficiaries of this legislation. The intent of Title IX is as clear today as it was

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[3] https://www.federalregister.gov/d/2022-13734/p-1220
[4] Title IX, Education Amendments of 1972, 20 U.S.C. §§1681 - 1688 (2018), https://www.law.cornell.edu/uscode/text/20/1681.
[5] 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.
[6] Ibid.

fifty years ago: Title IX's nondiscrimination mandate is based upon "sex" as the dividing line between men and women.

The American Psychological Association (APA) states that the term "gender" is used to refer to the "attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Gender is a social construct and social identity."[7] The APA also confirms that the term "sex" refers to "biological sex assignment."[8] Unfortunately, the Department 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 nondiscrimination mandate to include both sexual orientation and gender identity under the definition of "sex." In *Bostock*, the Court ruled that terminating an individual's employment based on his or her sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin.[9] It is clear from reading the majority opinion that the ruling in *Bostock* is limited to Title VII only, as all of the cases in question involve employment disputes. To haphazardly apply this narrow holding to other statutes based on a political agenda would be a significant overreach by the Department.

Notably, Justice Neil Gorsuch, writing for the majority in *Bostock*, acknowledges that the term "sex" in 1964 referred to the biological distinctions between male and female.[10] Therefore, it is illogical to apply such a decision to Title IX, a statute wholly unrelated to employment matters. In fact, the Department itself has come to a similar conclusion. A January 8, 2021 memorandum from the Department's Office for Civil Rights (OCR) confirms that *Bostock* does not construe 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."[11] Aside from the fact that this 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 and cannot be defended by applicable caselaw. For these reasons, the proposed rule is unsubstantiated and should be withdrawn.

III. The proposed rule arbitrarily removes athletic programs from the new Title IX interpretation for later consideration in a subsequent rulemaking effort.

The proposed rule claims that the Department plans to address, through a separate notice of proposed 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

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[7] American Psychological Association, "Gender" (2022), https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/gender.
[8] Ibid.
[9] Bostock v. Clayton, No. 17-1618, 17-1623 and 18-107 (2020), https://www.law.cornell.edu/supremecourt/text/17-1618#writing-17-1618_OPINION_3.
[10] Ibid.
[11] 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.

athletics team. The proposed rule goes on to say that comments on how Title IX under the proposed changes should be applied to athletics programs should be made in response to that rulemaking. The proposed rule, however, makes numerous references to the clarity it provides educational institutions which require guidance on how to properly implement the new Title IX expansion. The fact sheet distributed by the Department about the proposed rule states: "the [proposed regulation] would make clear that preventing someone from participating in school programs and activities consistent with their gender identity would cause harm in violation of Title IX."[12] If this statement is accepted as true, then a second rulemaking effort is unnecessary, as the Department has clearly laid out criteria for educational programs and activities to follow.

In fact, the Biden administration has already made its intentions clear on how they believe Title IX should be interpreted, even before the proposed rule was 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. 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."[13] The administration's position on their interpretation of Title IX has been made absolutely clear.

The proposed rule takes deliberate care to delineate the process for reporting sex discrimination complaints outside of athletics in educational institutions. To implement these new regulations in the absence of a hypothetical future rulemaking specific to athletics, educators will have no choice but to apply these same steps to athletics, lest they risk being subject to violation of federal rules and regulations. Without clear guidance on how to apply the new regulations to athletics, the Department intentionally sets up educational institutions for unlimited lawsuits, while schools struggle to determine how best to adhere to the new regulation and maintain fairness in sports.

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

As mentioned above, the Department's intention to issue a separate athletics-related notice of proposed rulemaking places an undue burden on school and university administrators. Schools will be forced to comply with the current proposed rule while at the same time, anticipating a future, potentially conflicting, rulemaking specifically related to athletic programs. This paradox leaves schools to operate in the dark, and it creates a great deal of uncertainty as they attempt to navigate any perceived future violations that could lead to the elimination of critical federal funding.

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[12] United States Department of Education, Fact Sheet: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations (2022), https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf

[13] BPJ v W. Va Stated Board of education, No. 2:21-cv-00316 (2021), https://s3.documentcloud.org/documents/20951164/west-virginia.pdf.

The current proposed rule makes vague mention of a cost estimate. That "cost estimate," however, includes no concrete figures and makes no real attempt to identify the actual financial burden this rulemaking would place on educational institutions. The proposed rule simply states that "the Department believes that these benefits are substantial and would significantly outweigh the estimated costs of the proposed regulations."[14] 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.[15] 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.[16] 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, such steps will be taken at many educational institutions across the nation, and those costs must be taken into account.

Additionally, we must consider the real-life resulting inherent costs – the cost of lost opportunities for girls in academic settings. By expanding the pool of protected individuals, 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 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 when it was first enacted in 1972. The Protection of Women and Girls in Sports Act of 2021, S.251, ensures that the definition of "sex" in Title IX is based solely on a person's reproductive biology and genetics at birth.[17]

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[14] https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf

[15] https://www.nbcnews.com/nbc-out/out-news/jury-awards-4-million-missouri-transgender-student-rcna8867

[16] https://www.cbsnews.com/minnesota/news/major-settlement-to-be-announced-in-discrimination-lawsuit-against-anoka-hennepin-school-district/

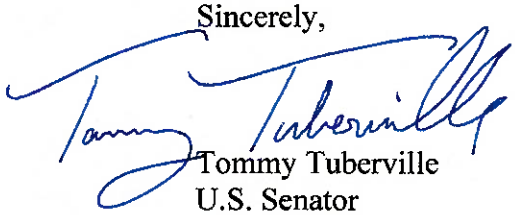
[17] Protection of Women and Girls in Sports Act of 2021, S.251, 117th Congress (2021), https://www.congress.gov/bill/117th-congress/senate-bill/251?q=%7B%22search%22%3A%22s.251%22%7D.

Maintaining the spirit and letter of the law will have a long-lasting, beneficial significance for women and girls for generations to come.

VI. Conclusion

The Department's misguided proposed rule erroneously purports to align Title IX with statute and case law establishing that Title IX protects students from all forms of sex discrimination, including discrimination based on gender identity.[18] What the Department did not consider in its analysis is the harm these changes will have on women participating in educational programs and activities specifically designated for women. For fifty years, women have enjoyed equal access to activities as their male counterparts, opening up opportunities in academia not otherwise available to them. This proposed rule reverts the playing field to a time before Title IX's enactment and will cause irreparable harm to women entering academia in the future. I urge the Department to withdraw this proposed rule and work with Congress on strengthening the statute that made it all possible for women's rights in education.

Sincerely,



Tommy Tuberville
U.S. Senator

[18] Office for Civil Rights, United States Department of Education, Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 CFR Part 106 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf.