



May 15, 2023

Secretary Miguel A. Cardona
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave., SW
Washington, DC 20202

Docket No: ED-2022-OCR-0143

Re: Comment of Independent Women's Law Center and Independent Women's Forum regarding implications of the Department of Education's proposed Title IX rule.

Dear Secretary Cardona:

More than fifty years ago, Congress enacted the landmark sex equality law Title IX to end unjust sex discrimination in education and to expand educational opportunities for women and girls. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1989) (one of Title IX's principal objectives was "[t]o avoid the use of federal resources to support discriminatory practices"); *McCormick ex. rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286, 295 (2d Cir. 2004) ("Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities"). Congress did *not* pass this landmark protection to force females to compete for resources and playing time against male-bodied athletes, trans-identified or not, who have inherent physical advantages. Yet the Department's proposed rule would require precisely that adverse outcome in almost all circumstances. This is not fair to female athletes. In fact, it is a violation of the very statute the Department purports to enforce. The rule should be withdrawn.

Independent Women's Law Center and Independent Women's Forum

Independent Women's Law Center (IWLC) is a project of Independent Women's Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate on legal, social, and economic policy issues. IWLC supports this mission by advocating—in the courts, before administrative agencies,

in Congress, and in the media—for equal opportunity, individual liberty, and the rights of women and girls.

IWLC and IWF strongly oppose the proposed rules contained in 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*,” set forth at 88 Federal Register 22,860 (“the proposed rule”). IWLC and IWF accordingly submit these comments to request that the Department withdraw the proposed rule.

A. *Bostock* does not require reinterpretation of Title IX with respect to athletics

In proffering this new rule, the Department relies on the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), prohibits an employer from “fir[ing] someone simply for being . . . transgender.” *Id.* at 1737. But the Court’s analysis in *Bostock* is inapplicable to athletics.

To begin with, *Bostock* dealt only with hiring and firing in the employment context under Title VII. As the *Bostock* majority noted, “[a]n individual employee’s sex is not relevant to the selection, evaluation, or compensation of employees.” 140 S. Ct. at 1741 (internal quotation marks omitted). Athletics in education, however, are governed by a different statute: Title IX. And when it comes to athletics, sex is not only relevant: it is often dispositive. *See* Section B, *infra*.

The Supreme Court has made clear that “discrimination” in the legal sense involves treating “similarly situated” people differently. *Bostock*, 140 S. Ct. at 1740. As Title IX recognizes, however, different treatment of the sexes is warranted when it comes to athletics because the two sexes are *not* similarly situated. In fact, the original athletic regulation adopted in 1975 explicitly contemplates separate athletic teams for males and females. *See* Section C, *infra*. *Bostock*’s conclusion that employment discrimination against a trans-identified person “necessarily entails discrimination based on sex” under Title VII, *id.* at 1747, is simply inapplicable to the athletics governed by Title IX, where males and females are not similarly situated. *See Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) (“Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition.”).

This analysis prompts our first request: ***Please clarify how Bostock, a case applying a separate statute that governs the very different context of employment, has any relevance to athletics under Title IX, where the sexes are not similarly situated.***

B. The Male Athletic Advantage

Men and women are not “similarly situated” when it comes to athletics because, on average, males are stronger, faster, and more powerful than females. See Independent Women’s Forum & Independent Women’s Law Center, *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women’s Sports* 17-18 (2021) (providing a detailed overview of the scientific literature on the significant and enduring nature of the male-female athletic gap) [hereinafter *Competition*], <https://tinyurl.com/IWFComp>.¹ In fact, research confirms that, overall, “[t]here is a 10 to 12% difference between male and female athletic performance.” Tim Layden, *Is it fair for Caster Semenya to compete against women at the Rio Olympics?*, Sports Illustrated (Aug. 11, 2016).

Male-female performance gaps are evident not just as to specific athletic skills, but as to overall athletic performance *at all levels of athletic competition and even in individuals who are not athletically trained at all*. Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 *Sports Med.* 199, 204 (2021). So great is the athletic disparity that, in many events, young men outperform the best female athletes in the world thousands of times a year. For example, Duke Law Professors Doriane Lambelet Coleman and Wickliffe Shreve found that, in 2017 alone, men and boys around the world beat the best women’s time in the 400-meter dash more than 15,000 times. The professors put it simply: men and boys beating the world’s best female athletes “is far from the exception. It’s the rule.” Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to the Boys and Men*, Duke Ctr. for Sports L. & Pol’y (Summer 2017), <https://tinyurl.com/ColemanShreve>.

Given what Justice Ruth Bader Ginsburg, writing for the Supreme Court, called the “enduring” “[p]hysical differences between men and women,” *United States v. Virginia*, 518 U.S. 515, 533 (1996), female athletes will not have the same “chance to be champions” if forced to compete against male-bodied athletes. *McCormick*, 370 F.3d at 295.

C. Title IX’s Binary Structure Permits Single Sex Teams

By explicitly referring to “both sexes,” 20 U.S.C. § 1681(a)(2), requiring schools to “provide equal athletic opportunities for members of both sexes,” 34 C.F.R. § 106.41(c), and allowing schools to provide separate athletic teams for males and

¹ The male-female athletic differential is not the result of human variation between top athletes and non-athletes. Nor is it the result of socialization, unequal opportunity, or lack of funding. Rather, the male-female athletic gap is almost entirely the result of biology. See *Competition*, *supra*, at 17.

females, 34 C.F.R. § 106.41(b), Title IX and its regulations play an important role in leveling the proverbial “playing field” and increasing athletic opportunities for females.²

The proposed rule flies in the face of all this by requiring recipients to meet extratextual requirements before applying sex-based criteria. Indeed, under the proposed rules, schools must *presumptively* allow biological males to participate in women’s sports and may only restrict teams by sex to advance an “important educational objective.” 88 Fed Reg. 22,860.

To be sure, the proposed rule “does not specify the objectives that a recipient may assert.” 88 Fed. Reg. 22,872. But the Department asserts throughout the NPRM that funding recipients impose harm on trans-identifying students by restricting teams based on biological sex, 88 Fed. Reg. 22,870; identifies only two important educational objectives that might satisfy the proposed rule (safety and fairness), 88 Fed. Reg. 22,873; and looks down on a third important educational objective: the privacy rights of women and girls. 88 Fed. Reg. 22,874.

These facts lead to our next set of requests:

Please clarify how the proposed rule can be reconciled with the statutory text adopting a binary view of sex.

Please clarify what important educational objectives a funding recipient can assert, in addition to fairness in competition and prevention of sports-related injury.

Please explain why the Department does not believe privacy for girls and women in sex-segregated facilities such as locker rooms is an important educational objective.

Even though Title IX explicitly contemplates single-sex athletic teams, the proposed rule places the burden of defending such teams on individual schools. This prompts our next request:

² The statute likewise refers to “Men’s” and “Women’s” organizations, “the membership of which has traditionally been limited to persons of one sex,” 20 U.S.C. § 1681(a)(6)(B), and requires that, if opportunities “are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of *the other sex*,” *id.* § 1681(a)(8) (emphasis added). Such wording would make no sense if “sex” were being used to describe the range of identifications included within the concept of gender identity.

Please explain why every school in the nation should be forced to prove to the Department of Education the specific value of each and every single-sex team it seeks to offer.

Because the burden of relitigating basic science as to numerous teams places a significant burden on schools with limited budgets and resources, it is likely that many schools will choose the path of least resistance and allow all students to compete on athletic teams consistent with their gender identity. This, of course, places a disproportionate burden on female students, who are far more likely to be displaced by biological males, than on male students, who have little to fear from female bodies seeking opportunities on men's teams.

D. Testosterone Suppression Cannot Eliminate the Male Athletic Advantage

The Department further asserts that recipients may not adopt criteria based on “overbroad generalizations of sex.” 88 Fed. Reg. 22,874. But its discussion of what would constitute such “overbroad” generalization cites district court decisions that rely heavily on the faulty assumption that the male athletic advantage can be sufficiently mitigated by the use of hormonal therapy and puberty blockers. *See e.g., Hecox v. Little*, 479 F. Supp. 3d. 930, 978 (D. Idaho 2020); *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182, at *8 (Utah Dist. Ct. Aug. 19, 2022). In fact, the assumption that the male athletic advantage can be eliminated with hormone therapy is contrary to science.

Indeed, studies make clear that testosterone suppression can never completely eliminate the athletic advantage of males who have experienced puberty. Jennifer C. Braceras, *FACT CHECK: Can Transgender Athletes Eliminate The Male Athletic Advantage By Suppressing Testosterone?* (Jan. 13, 2022), <https://www.iwf.org/2022/01/13/fact-check-can-transgender-athletes-eliminate-the-male-athletic-advantage-by-suppressing-testosterone/>; *see also* Carole Hooven, T: The Story Of Testosterone: The Hormone That Dominates And Divides Us 128 (2021); Hilton & Lundberg, *supra*, at 205. Even after *years* of testosterone suppression, biological males remain stronger and faster than most females. *Competition, supra*, at 29. That is because “many of the changes brought about by increased levels of testosterone during male puberty (such as changes to skeletal architecture) are permanent and unalterable by testosterone reduction later in life. Testosterone suppression will not, for example, make a person shorter or reduce a person’s wingspan.” *Competition, supra*, at 28. In short, **while testosterone suppression will impair male athletic performance, it will not come close to reducing male performance to normal female levels.**

There is also evidence that even biological males who have not experienced male puberty have an athletic advantage over females. Indeed, males experience some degree of heightened exposure to testosterone even prior to puberty—both in the

womb and shortly after birth. Hooven, *supra*, at 116. This could account for the differences in athletic performance between the sexes that have been measured even pre-puberty. For example, one review of fitness data from Australian children reveals that, when compared with 9-year-old females, 9-year-old males were 9.8% faster over short sprints, 16.6% faster over a mile, could jump 9.5% further from a standing start, could complete 33% more push-ups in 30 seconds, and had a 13.8% stronger grip. Hilton & Lundberg, *supra*, at 201. A study of Greek children found “[m]ale advantage of a similar magnitude.” *Id.* (noting that 6-year-old Greek males “completed 16.6% more shuttle runs in a given time and could jump 9.7% further from a standing position”).

In addition, the increased testosterone to which males are exposed in “mini puberty” (which occurs between one to six months of age) “may be correlated with higher growth velocity and an ‘imprinting effect’ on BMI and bodyweight.” *Id.* Thus, unsurprisingly, at least one study of males treated with puberty blockers as young as 12, followed by hormone treatment at 16, found that early intervention did *not* reduce height, lean body mass, or grip strength to age-matched female levels. *Competition, supra*, at 31.

Finally, it is worth noting that **female bodies have athletic disadvantages that biological males cannot create for themselves**. For example, the female pelvis has less joint rotation than a male pelvis, making females slower than biological males. Taryn Knox et al., *Transwomen in Elite Sport: Scientific and Ethical Considerations*, 45 *J. Med. Ethics* 395, 398 (2019). Menstrual cycles and potential pregnancies, factors that *cannot* affect biological males, may also impact training and performance in females. Romuald Lepers et al., *Trends in Triathlon Performance: Effects of Sex & Age*, 43 *Sports Med.* 851, 853 (2013); *see also* Doriane Lambelet Coleman, *Sex in Sport*, 80 *Law and Contemp. Problems* 63, 109–10 (2017). For these and other reasons, even biological males who never experience male puberty are likely to have an athletic advantage over females.

To the extent the proposed rule would require recipients to consider each student’s individual “level of ability,” 88 Fed. Reg. 22,874, the rule would be unworkable and inconsistent with Title IX’s provision for single-sex sports. To be sure, not every biological male who identifies as a woman will outperform every biological female—just as not every cisgender boy or man will do so. Yet Title IX has long allowed schools to categorically exclude male-bodied athletes from competition. The proposed rule’s evisceration of the longstanding recognition of the male athletic advantage will eliminate numerous athletic opportunities for biological women and girls. In the long run, moreover, such a rule undermines the legal justification for maintaining any sex-specific athletic teams whatsoever, threatening the very existence of women’s sports.

All of this leads to our next set of requests:

Please clarify how the Department believes female athletes can ever fairly participate in sports against male competitors given the biologically-based male athletic advantage.

Please explain why the Department has not cited any studies regarding the impact on women of being forced to compete against biological males.

E. The Proposed Rule Violates Title IX's Equal Opportunity Mandate.

Despite all the talk of fairness, Title IX isn't a "fairness in sports" law. It's an equal opportunity law concerned with making sure that females have opportunities previously denied them. Thus, even if there were a way to ensure a level playing field when biological men participate in women's sports—and there is not—the proposed rule would not only exceed the statutory mandate, but contradict it.

The world of competitive sport is a zero-sum game in which some athletes make the team and others do not. On teams with limited roster spots, allowing a biological male to join the team takes a roster spot from a female athlete. Allowing a biological male to compete in a women's swim meet means that one less female will compete in that race. Allowing a biological male to take the field in a women's soccer game, means that a female athlete loses playing time. In each instance, the coach and the school that have allowed this to occur have denied a female student an athletic opportunity. And in each instance, ***the school is authorizing sex discrimination that violates Title IX.***

F. Conflicting Legal Obligations on Schools

Should this proposed rule become final, schools will be broadly required to allow athletes who were born male to compete on female teams. And yet, Title IX and its athletic regulations still require that schools provide equal athletic opportunities for "both sexes." 34 C.F.R. § 106.41(c).

This brings us to our final request:

Please explain how schools with limited budgets, roster spots, and scholarship money can possibly provide equal athletic opportunities for male and female athletes while also allowing biological males to compete on women's teams.

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IWF and IWLC respectfully request that the Department withdraw the proposed rule, which harms female athletes.

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