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## **Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance**

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Concerned Women for America (CWA) is the largest public policy women's organization in America with an over 40-year history. We are here today on behalf of the hundreds of thousands of women and girls we represent in every state across this nation to stand for reality about the sexes. No government authority can change the truth about what a woman is. The fundamental fact of being male and female is a fact, and it should not be overruled under Title IX as a matter of "inclusion" for those who perceive themselves differently.

We oppose the premise of this proposed rule to send 50 years of Title IX protections for female students and athletes to the ash heap of history.

While not our primary focus, we question entirely the proposed rewrite of the final rule issued in May 2020. Where is the evidence that the 2020 rule is not working? The impact of directing federal agencies to spend countless hours of time and resources without cause and throwing school policy into chaos is economically and administratively significant. The Office for Civil Rights (OCR) has an obligation to justify the legitimacy, the impact, and the costs of proceeding with this rule.

We assert that neither the legitimacy nor the costs can be justified. The 2020 Rule was finalized after a rigorous process accounting for well over 100,000 public comments. OCR should be spending time and resources fully implementing and enforcing this rule, not rewriting it.

Most certainly, OCR should not be reimagining the very foundation of Title IX by adding "gender identity," thus stripping women of vital protections under the law on the basis of sex. Being male and female is an unchangeable fact of the natural world that differentiates human beings from conception. Any physical anomaly is a rare defect that does not change the binary differentiation of the sexes. This rule hinges discrimination not on biological sex, but on an impossible standard of perception or desire to be the opposite sex.

Forcing a new interpretation of sex under Title IX is a direct threat to every woman and girl in America. What this proposed rule does in practice is nothing less than erase our status and protections as female. There is an inherent conflict in these policies already playing out across the country today: female students are being assaulted in school restrooms; female athletes are losing their rightful opportunities in WOMEN's sports. Have you quantified those costs?

Let's be clear: "gender identity" does not equal sex. Therefore, it should not be used to undermine Title IX protections for women. "On the basis of sex" as stated in Title IX should be based solely on the immutable genetic fact of being male or female – not on gender perceptions.

A person's subjective claim to being the opposite sex does not, and will never, make that person the opposite sex. Gender dysphoria is a real condition, and its treatment deserves compassion – but the answer is not to affirm a lie and require everyone else to comply.

Biology is not bigotry. As women, we expect that the sex discrimination protections of Title IX passed into law 50 years ago will continue to protect our safety, privacy, and opportunities based on our objective female status - as intended. Whatever objective you have for "inclusion" must not be accomplished on the backs of women and girls.

OCR states this rule is not "economically significant." How is it not? Threats to physical security, assault and rape, loss of athletic opportunity all have SERIOUS mental, physical, and economic impacts on women, and by extension federal, state, and local agencies and schools. It cannot be denied that the impact and trauma are greater for women. The law enforcement response this demands as female students are faced with new physical threats, the loss of equal opportunity and benefits based on immutable sex, and the further legal chaos this will cause all have costs. Biological men identifying as women are already claiming women's trophies, records, scholarships and "female firsts;" girls are facing the mental and physical wounds of being assaulted by boys given free access to women's spaces, and the emotional trauma of facing blatantly unfair competition in women's sports.

We are here today to share the voices of the women and girls who are being ignored by this Administration. Here are a few of their stories:

"I have a niece who is 13 years old. She wants to try out for sports but doesn't want to anymore because there are several trans girls on several sports teams. She's afraid to speak out about the disadvantage."

"To say that my high school daughter, as well as the other female athletes, were humiliated and had a sense of defeatism is an understatement. In the words of my daughter, 'What's the point, Mom, we can't win.'"

"My dream for the past three years has been to wrestle in college and then go on to fight MMA, hopefully, UFC. However, I am now reconsidering this dream because I worry about having to fight against natural born males (again). I look at fighters like Fallon Fox, who self-identify as female and have seriously injured other female fighters. Yes, I am putting myself at risk just fighting other females, but the risk is extremely amplified should I have to face natural born males. It is heartbreaking that I may not ever get to fulfill my dreams because of the fear associated with being forced to fight natural born males."

These testimonies are heartbreaking. These are victims of “gender identity” ideology - promising female athletes ready to drop out of their sports. They are defeated before they even get started. What is the disparate impact on their lives when young girls don’t pursue sports anymore?

Sports Illustrated ran [a story about women lawmakers](#) who attributed their success to sports. A survey of senior female executives found that “94% of women in the C-suite played sports, including 52% at the university level. And three-quarters (74%) said that a background in sports can help to accelerate a woman’s career.” (Report: [Why Female Athletes Make Winning Entrepreneurs](#))

Nothing in congressional statute or statutory interpretation by the Supreme Court has changed the meaning of sex under Title IX. The Department of Education has no legitimate authority to rewrite this federal civil rights law to redefine the immutable characteristic of sex to mean “gender identity” and thus force women to comply with allowing males who declare themselves women or girls to have access to sex-separated schools, facilities, or sports programs designated for women or girls.

Justice Ruth Bader Ginsburg wrote the opinion in a landmark women’s equality case declaring that sex-based classifications are sometimes permissible because certain “differences between men and women” are “enduring” (*United States v. Virginia*, 518 U.S. 515, 533 (1996)). Justice Ginsburg understood the innate, physiological differences between being men and women and declared them “enduring.”

The Department’s Notice of Interpretation of June 2021 erroneously adds sexual orientation and “gender identity” to Title IX under *Bostock* “reasoning.” That reinterpretation, like this rule, is in direct conflict with the Ginsburg standard in *U.S. v. Virginia*. OCR is rejecting the enduring physical differences between men and women.

Justice Ginsburg even pursued the Title IX question during oral arguments in *Harris/Bostock* and the answer was Title IX is a completely different statute with different standards. *Bostock* gives no green light to confuse sex with “gender identity” under Title IX. Using its “reasoning” is illegitimate.

What happened in NCAA Division I women’s swimming this year is the latest reason for why this proposed rule reinterpreting sex should be stopped in its tracks.

Concerned Women for America is hearing from parents, coaches, and swimmers who felt helpless and hopeless. We are representing their voices. That’s why we took formal action in a civil rights complaint against the University of Pennsylvania (UPenn) for sex discrimination against female athletes as we have against other universities.

To quote a parent of a Upenn swimmer who contacted us last year:

“I am just writing to make you aware of what is happening in women’s college swimming. Lia Thomas, of the University of Pennsylvania, who competed for three seasons as a man, is now competing as a woman. Not only is Lia dominating the competition with times among the fastest in the country, Lia is taking a travel squad roster spot from a biological female as well as spots on relays. Title IX was meant to create opportunities for women, not for men who were average athletes to become dominant athletes.”

This from a college coach:

“I am an NCAA Division I female swim coach that was on deck in Atlanta last week for Women’s NCAA Championship with my team. I cannot begin to thank your organization enough for standing up and speaking out for us. We have been silenced. ... [we] had to witness things that we have yet to process. We heard comments from their coaches that were beyond disrespectful and hurtful towards cisgender women. Not only is this a Title IX violation, this is also a failure to drug test for PED's on both of them just because they are transitioning ... Not to mention if our women felt uncomfortable because there were male parts in their locker room; they can find somewhere else to change - yet again accommodating to the 1 vs. 319. We have a female on our team that has never seen male genital parts before.”

Just last week I talked with a mom who has an Ivy League daughter who faced Thomas in swimming and has a high school daughter in track facing a runner who was on the boy’s team last fall then declared a new “gender identity” to switch to the girl’s team this spring – two daughters being denied protection in women’s sports and suffering the anxiety, intimidation, loss of opportunity, and emotional abuse imposed by institutions that are failing them. This is what WE are hearing. Are you listening? What this proposed rule would force upon women’s athletics and locker rooms would hamstring any institution that wants to do the right thing by our girls.

For the record, CWA is not suggesting that male athletes identifying as women or girls should be denied the opportunity to play sports. To the contrary, any athlete should be able to pursue sports in the sex-based category that aligns with his or her natural, biological sex. Teams or competitions that are mixed sex can also be formed. What must stop is allowing males identifying as women in the women’s category of sport – at any level.

It’s not just about elite athletic competition. The advantages of male bodies in women’s sports happens at all levels because you cannot erase the natural development of the major athletic performance indicators that are sex determinant.

I have uploaded an expert discussion on non-malleable sex-based parameters that affect athletic performance at all ages and stages of human development. In part, Dr. Greg West explains:

“The most important indicator of performance in endurance athletes is  $\dot{V}O_2\text{max}$ .  $\dot{V}O_2\text{max}$  is the measurement of maximum oxygen consumption during physical activity. It is a factor of cardiac output, lung vital capacity, hemoglobin content and the efficiency of muscle oxidative metabolism. ... Differences in  $\dot{V}O_2\text{max}$  account for the fact that world records are 10-12% better for men than for women in the same events.

“Cardiac size and lung vital capacity do not change after puberty, and are not expected to be altered by androgen blockers, estrogens or sex reassignment surgery. Hemoglobin does not appear to climb to male levels in females with exercise related amenorrhea. The effect of feminizing hormones on hemoglobin levels in trans-male athletes is not known, but even if chemical feminization reduces genetic male hemoglobin levels to that of genetic females it cannot offset the influence on  $\dot{V}O_2\text{max}$  contributed by increased C[ardiac] O[utput] and V[ital] C[apacity].”

As you just heard from this expert, science cannot be disregarded when talking about advantage, fairness, and safety in women's sports and our self-defense. Even if you're not a scientist or medical expert, OCR must be able to prove how this rule would not harm biological women and girls.

Women today are being told by this Administration that anyone who feels like a woman can be a woman – that our sex is irrelevant. Progressivism is not progress if the result is to turn back the clock on women's rights, forcing us to be sidelined in our own sports, assaulted in our private spaces, and told that our futures don't matter anymore. Unfortunately, this is what's happening today – we hear about these incidents every day.

What this rule really proposes is tragic: forcing a new form and future of sex discrimination against women and girls – every human female – in America. Under this rule, our daughters are losing their rights to their natural-born identity. What we ask is that you stop this madness and reaffirm the plain meaning of sex under Title IX as the fact of being biologically, genetically male or female.