

CONCERNED
WOMEN *for* AMERICA

May 15, 2023

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

Dear Secretary Cardona,
RE: Docket ID ED-2022-OCR-0143

The Biden Administration's quest to weaponize Title IX to deny the female dignity and status of women and girl athletes is reprehensible. Concerned Women for America (CWA) strongly objects to the U.S. Department of Education's (ED) illegal rewrite of Section 106.41 Athletics under the proposed Rule: 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, Docket ID ED-2022-OCR-0143 (Rule).

Let's be crystal clear about what this Rule proposes: Under threat of losing federal funds, no school or university can maintain a fundamental anti-discrimination policy that ensures all female athletes are protected from discrimination on the basis of sex. This Rule demolishes what Title IX affirmed: that female sports teams in every sport offered at every age and level of competition are for female athletes only. Women's sports as we know them today are banned under this radical Rule that rejects the fundamental purpose of Title IX to uphold equal opportunity for women. ED oversteps its authority and indeed acts contrary to clear congressional intent with this proposal.

Title IX was meant to erase discrimination against women in athletics. Under this Rule, Title IX would erase women's sports and what it means to be a woman.

Women, and men, of all ages and political viewpoints are disgusted by what ED proposes in this Rule. Poll after poll shows 70 percent or more of Americans across demographic groups oppose promoting males who say they are women in women's sports under a false banner of "fairness."

Title IX was never about "fairness;" it's about sex discrimination. It is a legal mandate for equal opportunity in educational programs, including athletics, on the basis of male and female sex. Until Title IX was enacted women did not have equal opportunities in academics or in athletics. This Rule imposes a counterproductive requirement that males must be eligible to participate in women's sports based on their self-perceived and asserted "gender identity."

On April 19, 2023, CWA received this insightful email through our online contact form from a self-described "trans woman" who attests to the counterproductive nature of this Rule:

THE SOLUTION TO THE PROBLEM OF TRANS WOMEN IN WOMEN'S SPORTS

The solution to the problem of trans women and girls in women's sports has an appallingly simple solution.

I am a retired attorney and a trans woman. I realized the solution to this problem some time ago, and I can't believe no one else is making the argument. Perhaps it's because no one grasps the underlying fundamentals.

The heart of the problem is the conflation of gender dysphoria, which is a verifiable condition, with "being transgender," which is an unverifiable belief. People like me who are afflicted with gender dysphoria frequently believe we are women -- not because we're crazy, but because it gives meaning to our suffering. That's what beliefs do; that's why people have them.

But, in a free society, personal beliefs are not a proper basis for law, public policy or civil rights. To make them such would be like doing the same with a tenet of Islam or Roman Catholicism.

And because womanhood status is an unverifiable belief, there is no basis for requiring inclusion of trans women in women's sports.

We agree. This is the reason why so many today are struggling with the simple task of defining what is a woman. You cannot protect what you cannot define. Turning your back on the truth about sex as the only consistent and legitimate standard for sports participation on male and female teams is the nonsensical fight you are waging in this Rule. Your approach achieves a deeply harmful discriminatory result: obliterating the category of female sports and telling female athletes their rights can be trampled by males who self-declare "I'm a woman."

We urge ED to withdraw this proposed Rule and reinstate the fundamental principle behind women's athletics requiring a student's sex, not the amorphous, subjective claim of "gender identity," to be the only basis for eligibility on female sports teams. Anything less is an automatic violation of discrimination on the basis of sex that disproportionately affects women and the equal opportunity required under long-standing, uncontested Title IX meaning of sex for eligibility on women's sports teams.

I. The Rule fails any test of statutory authority and betrays the most basic principles of federalism

Precisely on what settled, statutory and/or legal basis does ED rest its authority to promulgate a rule amending Title IX, which will deny female students the right to equality of opportunity in athletics in order for a male who perceives himself as a woman to participate on a female team in any sport at any age or level of competition? Your rogue interpretation of "gender identity" as "sex-related criteria" for the women's category of sport is nowhere to be found in statute or legislative history of Title IX. In fact, it has been renounced by action in Congress, the courts, and 21 state legislatures to date, and is rejected by the American people by wide margins.

The Department is doing nothing less than legislative rulemaking in violation of the constitutional separation of powers. Passage of the Protection of Women and Girls in Sports Act (H.R. 734) by the U.S. House of Representatives on April 20, 2023, is an act of Congress with direct application to this Rule and renders it entirely illegitimate. H.R. 734 specifically amends Title IX to clarify the meaning of sex for eligibility on athletic programs or activities designated for women or girls:

"Section 901 of the Education Amendments of 1972 ([20 U.S.C. 1681](#)) is amended by adding at the end the following:

"(d) (1) It shall be a violation of subsection (a) for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.

"It shall be a violation of subsection (a) for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.

"(2) For the purposes of this subsection, sex shall be recognized based solely on a person's reproductive biology and genetics at birth."

The U.S. House of Representatives has acted in direct response to ED's threatened legislative power grab in its attempt to re-write Title IX and the impact of current policies and practices discriminating against female athletes in women's sports.

To date, twenty-two states have legislated decisively to enact laws protecting women's sports eligibility based on sex fully rejecting the presumptive requirements of this proposed Rule. Collectively, these state laws reflect the position of the overwhelming majority of Americans. Federalism demands the Department heed these results, not retaliate with an unconstitutional imposition of a political agenda at the expense of female athletes.

II. The Department fails to provide legitimate legal justification

In 2003, Jocelyn Samuels wrote an extensive legal analysis of Title IX in the *Marquette Sports Law Review* (<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1404&context=sportslaw>) showing: "The Legislative History of Title IX Shows that the Athletics Regulations and Policies Properly Implement Congressional Intent."

Ms. Samuels offers a resounding, unequivocal endorsement of current Title IX regulations. She concludes:

"Congress, the courts, and the Department of Education have all repeatedly and uniformly upheld the Title IX athletics regulations and policies, including the three-part test for measuring equal opportunity in athletic participation. As set forth above, wrestlers, football coaches, and other advocates for men's sports have all repeatedly attacked Title IX over the years, tried to persuade Congress to amend it, and tried to

convince courts to invalidate it. Each attempt has failed. Congress has clearly and consistently expressed that Title IX's current regulations and policies – in place for over two decades – accurately reflect its intent and the remedial purpose of the statute. The judiciary has consistently affirmed that expression and has uniformly rejected challenges to the law as currently written and applied. Each Department of Education, through both Republican and Democratic administrations, has similarly defended and maintained the present law. It is time to permanently end attacks on the Title IX athletics regulations and policies and to move forward with the unfinished work of the law: ensuring equal opportunity for women and girls throughout their education, including in athletics. We hope and expect that the Department will now focus on strong enforcement of the law - on educating schools about their legal obligations and on ensuring that those obligations are met, through imposition of sanctions, if necessary- so that women and girls can finally achieve the equal opportunity promised them more than thirty years ago."

Samuels' analysis is unassailable. President Biden has even designated her Vice Chair of the Equal Employment Opportunity Commission. But with this Rule, the Department rejects Samuels' sound defense of Title IX at the expense of women's rights. It is unpersuasive that regulations in place for decades and declared consistent with legislative history and congressional intent suddenly become hopelessly flawed and in need of radical quasi-legislative action.

This is why most Americans believe the Biden Administration is simply trying to advance by administrative decree an ideological and political agenda that it knows it cannot implement through proper legislative channels. Neither can it lay claim to any legal consensus in the courts. There is simply no foundation for the seismic disruption of universally understood application of Section 106.41.

As a matter of law, policy, and civil rights governing sex discrimination, Title IX affords no student making a claim to participation in athletics on the basis of "gender identity" the right to overrule the equal opportunity rights and requirements for both sexes prescribed in 106.41 9 (c).

Further, this Rule is a separate rulemaking from Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. The prior rule, which is not final, specifically states it does not amend Section 106. 41 Athletics. It, therefore, cannot import any justification, including an erroneous application of *Bostock v. Clayton County*, 590 U.S. ____ (2020), 140 S. Ct. 1731. The Supreme Court explicitly limited its ruling to Title VII, not Title IX. Nevertheless, the Biden Administration has claimed *Bostock* as "reasoning" to advance its own ideological agenda. Citing it in the preamble to this Rule is as misleading as it is erroneous because buried in Footnote 6 is this disclaimer: "*This Athletics NPRM is not based on the 2021 Bostock Notice of Interpretation.*"

In other words, *Bostock* provides no legal basis for this Athletics NPRM, and the 2022 proposed rule lends no defense, only a conflicting interpretation. Title IX is a singular statute. Neither of these rules can exist apart from each other, nor can they co-exist in the contradictions each imposes upon the other. It is fundamentally unjust, arbitrary, and capricious to put the burden on recipients to interpret these rules. It is the job of the Department to bring clarity, consistency and coherence to any new burdens imposed on recipients. The legal liability this Rule imposes in forcing them to deny the truth about and immutability of binary sex and its application to athletics is massive.

III. Claims of "benefit" are erroneous, regressive, and false

The Department identifies two "benefits" of this proposed Rule that are as farfetched as they are unsupportable: *"(i) providing a standard to clarify Title IX obligations for recipients that adopt or apply sex-related eligibility criteria," and "(ii) protecting students' equal opportunity to participate on male and female teams consistent with Title IX."*

As discussed above, there is no coherent "standard" that clarifies obligations. Nothing objective or measurable as required for a "standard" to be valid or equitably applied. No obligation that can be enforced uniformly without clear definitions or rules for accommodation. The only thing universal to this Rule is confusion, conflict, and utter chaos. That is not a "benefit."

Requiring schools to accommodate "gender identity" on male and female athletic teams denies, not benefits, female athletes' equal opportunity. Discriminating against female athletes on account of sex denies them equal opportunity. This, again, is no "benefit," it is a grave injustice and most definitely not "consistent with Title IX."

By twisting eligibility for sex-based teams to be determined by "sex-related criteria" not male and female sex, the Rule unconstitutionally defies the 14th Amendment's assurance for equal protection. It brazenly repeals the framework that ushered in decades of progress toward equal opportunity for female athletes and women's sports teams.

We've seen the impact, and it goes one-way. CWA has documented hundreds of female athletes who have faced sex discrimination competing against trans-identifying males in women's sports at every level. Three NCAA championships have been awarded to males in women's sports. None to women in men's sports. These athletes have faced humiliation, injury, intimidation, retaliation, sexual harassment, and indecent exposure against their consent at the hands of coaches and school administrators allowing trans-identifying males on female sports teams. All of this is publicly documented. But instead of addressing the serious issues of sexual harassment in women's sports, ED sweeps these incidents under the rug and throws women under the bus.

ED has shifted the burden of proof to female athletes and any school seeking to protect women's rights. In this Rule, female athletes are told they must prove that limiting or denying a male who identifies as a woman from participation in their sport is "unfair" before they can regain the right to their own sports. They are told that their own merit and immutable design isn't good enough - some other "educational objective" is required and must be proven to keep girls sports for girls only:

"In particular, the Department proposes amending § 106.41(b) of its Title IX regulations to provide that, if a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity, those criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."

If there is any clarity to this Rule, it is this: The Rule conflates a subjective and totally undefined concept of a person's "gender identity" with the objective, immutable, scientific reality of a person's sex. It mandates every recipient accommodate a person's "gender identity" as the basis for participation on male or female teams. The Rule eradicates the premise of male and female teams thereby effectively erasing the women's category of sport based on competitive advantage. A "female sports team" that must accept athletes who are not female is not a female team – it is a coed team – and women's sports are no longer defined by the merit of immutable equals. This Rule capriciously eradicates the fundamental principle and eligibility criteria for women's sports that is undeniably based in the science and social imperative of male and female human development, physiology, and psychology.

"Fairness" is not and never was the rule for eligibility on a male or female team under Title IX. That concept is entirely subjective, arbitrary, and capricious as a standard. Equality of opportunity based on sex is the rule. Allowing a male on a female team in any sport, at any age or level of competition directly denies equal opportunity for women.

The only fair, consistent, and defensible standard is for no male, regardless of "gender identity," to be eligible to participate on female sports teams in any sport at any age or level of competition. Without this category, champions in women's sports will increasingly be relegated to the best male who identifies as a woman.

IV. The proposed Rule is universally criticized

The Department has achieved zero consensus on this activist-driven Rule upending fifty years of settled Title IX law. It fails to prove any legitimacy by being universally criticized and is certain to achieve nothing but universal condemnation, confusion, national chaos, and endless litigation.

Drawing criticism from every side does not give license to claim "middle ground." Multiple comments state: "All transgender students at every age and in every sport should be presumed eligible to participate in sports consistent with their gender identity."

Presumption favoring a trans-identifying athlete over the rights of female athletes is exactly what this Rule requires. It is no middle ground or compromise for women's sports. School recipients or individual female competitors in every sport for every age and level of competition must plead a case to protect female athletes in their own sports. The policy standard is no longer sex, it is "gender identity," and any departure must "prove an educational objective" to limit otherwise. Once again, women are the ones who must bear the burden of justifying their existence. Could anything be more regressive than this?

Any limit to full inclusion based on "gender identity" is the demand of the other side. In seeking to placate their demands, the Department has turned Title IX on its head, elevating "gender identity" protections over sex and forcing female students to fight for the right to women's sports they won fifty years ago. This Rule's assault on the fundamental purpose of Title IX as the backstop for ensuring women have equal participation and representation in athletics is a crass rejection of women's rights and a sorry display of how far the Biden Administration is willing to promote men as the new women.

V. Questions the Department fails to address that must be answered

Without setting clear, objective standards, this Rule cannot clear the basic requirements of rulemaking. It fails on an entirely arbitrary and capricious framework that is impossible to objectively enforce. The Department legitimately cannot finalize a rule that fails to respond to these questions:

1. What exactly is the requirement for students who seek to play on teams incongruent with their natural sex?
 - a. What are the criteria for determining if "gender identity" is a valid claim for participation on a male or female team? Is it a diagnosis of gender dysphoria? Does it require a psychological assessment? Medical treatment or surgeries to feminize or masculinize the body? Use of cross-sex hormones?
 - b. What are the rules against doping and how are they to be enforced?
 - c. How is a requirement to "minimize harm" for persons claiming identities not consistent with their sex to be determined? What are the measures? According to what objective criteria?
 - d. How does a recipient develop a policy to satisfy a requirement that is not uniformly applied? How does a recipient's policy interact with that of another jurisdiction? If teams are competing against each other, whose policy reigns and who makes that determination?
 - e. What is the test to determine if a male's participation on female teams for any sport at every age, level of competition will not deny female athletes' equal opportunity in athletics as prescribed in Section 106.41 (c)?

2. Section 106.41(d) establishes an adjustment period. Is this the adjustment period for this Rule? If not, why not? The sweeping and monumental changes proposed in this Rule will require every recipient for every age group, every sport, and every level of competition to establish new policies, seek legal counsel to untangle the many burdens and lack of clarity, communicate those requirements to stakeholders, adjust all manner of programming, and train personnel – all while facing an anticipated avalanche of lawsuits. At the least, the existing adjustment period is essential.

3. Section 106.41(c) requires that "a recipient which operations or sponsors ... athletics shall provide equal athletic opportunity for members of both sexes."

This long-standing regulation is not a suggestion. It is at the heart of Title IX intent and underscores the strictly binary standard for Title IX compliance. Male and female athletic programs are basis for determining Title IX compliance with equal opportunity.

The proposed Rule, however, imposes a radical new requirement in Section 106.41 (b)(2), which contradicts the fundamental sex basis for athletic programs by asserting that "gender identity," be the basis for eligibility on a male or female team, with limited exceptions.

Part (c) requires equality for members of both sexes not multiple "gender identities". To confront the obvious contradiction and endless confusion of the Rule, the Department must clarify the following:

- a. Is the Department upholding or overruling the plain meaning of "both sexes" being the plain meaning of male and female sex as the requirement for equal opportunity under (c)?
 - b. In calculating equal opportunity under (c), should a recipient count a male whose "gender identity" is not male as a male or as a female? How about a female whose "gender identity" is not female?
 - c. Is the Department unleashing recipients to determine their own rules for classifying members according to sex?
 - d. How does this Rule square with the Office for Civil Rights resources Equal Opportunity in School Athletics Programs and related school-level documents released on February 17, 2023? That guidance reaffirms the foundational separation by male and female teams and the long-standing three-part test for equality in male and female athletic programs. It makes zero mention of any obligations related to "gender identity" proposed in this Rule. Such conflicting and onerous obligations undermine any legitimacy for this Rule.
4. What is the Regulatory Impact Analysis calculating the burden and the cost to states that have passed laws in direct conflict with this proposed Rule? What is the regulatory impact to recipients who must obey state law and are threatened with loss of federal funding through this conflicting Rule?
5. Is the NCAA and related sports conferences subject to Title IX requirements under this Rule? Why or why not?
6. If the NCAA sets policy for participation and eligibility on the basis of "gender identity" that the Department defers to as meeting the requirements under (b)(2), does that coordination bind the NCAA to Title IX? Why or Why not?
7. Who is the highest power for determining male and female team eligibility rules for postsecondary institutions? Congress? the state? The Department of Education? the NCAA?
8. How can the Department justify the legitimacy of this Rule unending the very foundation of women's sports without any studies addressing the emotional and physical impact to female athletes when male athletes are given access to their locker rooms and sports teams on the basis of their "gender identity"? Exactly how does the Department justify the impact of this Rule on female athletes?
9. Considering the undeniable impacts on female athletes (which you have failed to consider) why is a female-only policy for female teams that is the best defense to protect the physical and mental health of female athletes and minimize harm to women and girls not a reasonable and sufficient basis for all female teams?

VI. Responses to directed questions

ED's invitation for public comment on numerous fundamental questions admits sweeping deficiencies in the Rule. The imposition of chaos leading to endless legal challenges blows the roof off the paltry estimated costs which are certain to far exceed regulatory requirements. Responses to several questions (identified by italics) are addressed here:

1. *Does the proposed regulation contain technical terms or other wording that interferes with their clarity?*

Yes. "Gender identity" is a subjective and amorphous term based entirely on perception. It has no standard meaning beyond self-identification according to a person's perception and has no standard of permanence. It is not sex nor should be confused with sex. Apparently, the Department cannot define this term or it would. How, therefore, can any recipient be obligated under the terms of this Rule when what you impose has no standard meaning?

"Minimize harm" has no definition, foundation, measure, or professional consensus. Who decides? Is it merely a claim of hurt feelings? a threat of suicide? What truth of intent must be required for a trans-identifying male to participate on a female team? What about a "gender fluid" person?

2. *Whether any alternative approaches to the Department's proposed regulation would better align with Title IX's requirement for a recipient to provide equal athletic opportunity.*

The alternative approach should be the existing, long-standing, and undeniable intent of Title IX legislative history: Sex -based teams are based on actual, biological, immutable sex as male and female – and every recipient must abide by the standard of equal opportunity on the basis of sex as required under Section 106.41(c). The plain meaning of sex is male and female. Nothing in Title IX law has changed, and doing anything to change otherwise is an illegitimate act of executive fiat.

3. *What educational objectives are sufficiently important to justify a recipient imposing sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity and whether those objectives should be specified in the regulatory text.*

In addition to obvious safety and fairness issues, all these educational objectives and more are substantially and sufficiently important to justify maintaining male and female sex as the sole criteria for participation on a male or female team. The dignity of persons and status under law must not be cheaply and carelessly denied:

- The educational objective that there are, undeniably, two sexes which are scientifically factual, immutable, and foundational to society. Any disorder of sexual development does not change that fact.
- The educational objective that the sex binary develops and differentiates men and women in significant and impactful ways, physically, psychologically, and emotionally that has a direct impact on sports participation and achievement.
- The educational objective that differences of body type and expression make a person no less male or female.
- The educational objective that competitive sports participation among individuals of the same sex are important to the development and well-being of each sex. This is

evident from a young age and continues as minds and bodies naturally develop and differentiate.

- The educational objective that leadership, teamwork, success, failure, and support is shared in ways that are dignifying to our sex.

- The educational objective that equal opportunity in athletics enables merit and achievement on an equal playing field and requires male and female athletes participating in their own sports categories. Every girl should be granted the opportunity to excel to her fullest potential throughout her sports career without being sidelined or displaced by males in women's sports.

-The educational objective that males whose "gender identity" is not male do not make better women and do not have the right to make better female athletes.

4. *Whether and how the permissibility of particular sex-related eligibility criteria should differ depending on the sport, level of competition, grade or education level, or other considerations.*

It should not differ. Male and female teams are for male and female athletes who have not been physically altered to suppress a body's natural development or function, including through surgeries or use of hormone suppressing or enhancing drugs in violation of doping rules.

The Rule denies basic realities of physiology and human development.

5. *Whether any sex-related eligibility criteria can meet the standard set out in the proposed regulation when applied to students in earlier grades, and if so, the type of criteria that may meet the proposed standard for those grades.*

First, where is the authority under Title IX to establish "sex-related eligibility criteria" that is anything other than sex? Title IX regulations allow for separate teams based on sex and require that recipients operating or sponsoring interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of "both sexes." That means two sexes.

Second, the proposed regulation that effectively prohibits male and female-only sports teams in earlier grades displays ignorance about human development. Differentiation of the sexes begins in the womb. Mini puberties occur in utero and infancy triggering sex-relevant changes physiologically and cognitively. By the time girls and boys are in school they also socially relate and differentiate, and physical education/sport is part of that experience. Even in earlier grades, sex matters:

Mini-puberty initiates significant differentiation of the sexes in the first six months of life in boys and the first two years in girls (see <https://www.karger.com/Article/Pdf/508329>).

Puberty covers a vast spectrum of stages of development that begins in early grades. (<https://www.pubertytoosoon.com/about-cpp/normal-puberty-development>).

6. *How a recipient can minimize harms to students whose eligibility to participate on a male or female athletic team consistent with their gender identity is limited or denied by the recipient's adoption or application of sex-related criteria.*

A recipient can minimize harm by applying consistent rules. A rule to "minimize harm" to advantage a certain group over others is the definition of discrimination. As written, this Rule imposes a new form of discrimination because it seeks to "minimize harm" only to students who assert an identity that is not their biological sex.

In sports, not every student gets to play on the team of his or her choice. Athletes try out; many get cut. Males try out and compete for male teams, females for female teams. Students pursue sports that align with their biological sex. If students have a "gender identity" that differs from their sex they have the option to play on the team consistent with their sex, or on coed teams offered by the school. Recipients can offer more coed teams to add participation options as necessary or desirable. Why does ED insist on advancing the cause of trans-identifying athletes at the expense of the advances women have made over decades? Why must women lose for others to advance? The fundamental unfairness and disparate impact of this policy is inescapable.

7. *Whether regulatory text in addition to the text in the proposed regulation is needed to provide recipients with sufficient clarity on how to comply with Title IX's prohibition on sex discrimination, including gender identity discrimination, in the context of male and female athletic teams, consistent with the principles and concerns identified in the discussion of proposed § 106.41(b)(2).*

Achieving "sufficient clarity on how to comply" with either this Rule or its companion is a shell game. No recipient can survive under an obligation to accommodate a student's so-called "gender identity" when that claim has no factual basis beyond a personal identification or feeling, no requirement for veracity or permanence, and no standard of evaluation, diagnosis, or status beyond personal preference. What exactly is "gender identity," and how can a recipient accommodate that without committing sex discrimination against another? What are its limitations and on what basis? Does this Rule give a student an unlimited right to change identities? If not, why not? How is ED's arbitrary and capricious requirement not an impossible and costly burden? What authority is granted to recipients to overrule a person's claim?

Here is regulatory text that should be added to current Title IX regulations to provide sufficient clarity and stop the erosion of women's rights under Title IX:

-A requirement that the right of female athletes to play against females only on female teams is inherent to Title IX and may not be overruled.

-A requirement that no recipient may create a hostile environment for female athletes, deprive them of female-only facilities and teams, or deny them equal opportunity for female teams in all athletic programs.

Conclusion:

Under this Rule, the Department is laying claim to becoming the National Enforcer of an arbitrary and capricious construction of eligibility for school-based athletic teams across every state, school, sport, and age level in the country that proposes a hostile framework of sex discrimination against female athletes.

Because the impact will fall on the shoulders of female athletes, this Rule is patently unfair and discriminatory. The disparate impact on the achievements of female athletes and further forcing them to prove harm under the false rubric of an "educational objective" denies female students as a class the status and dignity of innate immutable sex, destroys the incentive of hard work and reward of merit-based success in sport, and imposes a result that violates both the letter and the clear intent of Title IX.

Fairness to anyone claiming an identity was never the standard for Title IX. Equal opportunity based on sex is. There is no equal opportunity on female teams if male athletes identifying as women are participating on female teams. Every male in female competition displaces a female athlete in women's sports. No woman should be forced to consent to males undressing in their locker rooms regardless of their "gender identity."

What this Rule proposes is to obliterate women's sports for women and girls. If men are competing on women's teams, the sport is coed, not female. Female-only teams are erased under this Rule. The Department has imposed an unprecedented form of sex discrimination against females. No one is fooled.

To say that sex differentiation is irrelevant for purposes of sports in elementary school ignores scientific facts about human development and the preeminence of the human body in sports. To comply with the capricious, inconsistent, arbitrary, and incoherent directive of this Rule, recipients will be encouraged to undertake a shell game and eradicate sports programming as we know it to follow the path of least resistance. Whatever that looks like, it will inevitably damage an entire class of athletes on female teams. All of which turns Title IX on its head.

We urge you to stop the assault on women— our daughters and granddaughters— and withdraw this Rule which in effect obliterates our hard-fought protections under Title IX.

Sincerely,

Penny Young Nance
CEO and President
Concerned Women for America