DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

Manny Diaz, Jr.
Commissioner
Florida Department of Education
325 West Gaines Street, Suite 1514
Tallahassee, Florida 32399

Ray Rodrigues
Chancellor
State University of Florida
200 West College Avenue
Tallahassee, Florida 32301

May 15, 2023

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

Attn: Docket ID No. ED-2022-OCR-0143

Dear Secretary Cardona:

Florida is committed to maintaining an arena where women and girls can strive, compete, and be champions in sport. We encourage "female athletes to demonstrate their strength, skills, and athletic abilities," and we want "to provide them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that result from participating and competing in athletic endeavors."[1] However, the notice of proposed rulemaking issued by the U.S. Department of Education last month, if adopted, will erase years of hard-fought opportunities for women in athletics. And it would demoralize our rising generation of female athletes who would, because of this rule, face the insurmountable obstacle of competing with males who identify as female. We write to request the proposed rule be withdrawn.

On April 13, 2023, the U.S. Department of Education issued a notice of proposed rulemaking to amend 34 CFR § 106.41(b).[2] The Department seeks to offer "clarity" on how "recipients can ensure that students have equal opportunity to participate on male and female athletic teams as required by Title IX."[3] The changes would require that if a school

---

[1] § 1006.205, Fla. Stat. (2021).

[2] 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, 88 Fed. Reg. 22860, 22860 (to be codified at 34 CFR pt. 106 [Docket ID ED–2022–OCR–0143] (Apr. 13, 2023)).

[3] *Id.*

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

adopts "sex-related criteria that would limit or deny a student's eligibility to participate"[4] on a team consistent with his or her gender identity, that 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."[5]

Not only is this new regulation logically incoherent and inconsistent with the reasoning supposedly offered to support it, but it also does not give schools a meaningful ability to prevent biological boys from competing on girls' teams. As detailed further below, the proposed regulation contradicts the intent of Title IX, the plain language of its regulation, and current law.

The Proposed Rule Is a Functional Ban.

The proposed regulation is a functional ban on states wishing to prevent biological males from competing on women's sport teams. While the Department insists that the purpose of this rule is to provide clarity to schools on applying sex-based criteria when it comes to transgender students in sports, in application, the actual parameters of what the Department would deem inconsistent with its regulation are so constrained that it is a *de facto* prohibition on using sex-based criteria to determine eligibility at all. The Department evinces this *de facto* ban for elementary aged students by stating: the "Department currently believes that there would be few, if any, sex-related eligibility criteria applicable to students in elementary school that could comply with the proposed regulation . . . ."[6]

The Department sets out limitations that, in Florida, would be impossible to comply with. Specifically, a school's criteria cannot be based on "overly broad generalizations about . . . capacities."[7] The Department takes the position that "criteria that assume all transgender girls and women possess an unfair physical advantage over cisgender girls and women in every sport, level of competition, and grade or education level . . . rest on a generalization that would not comply with the Department's proposed regulation."[8] But the fact that biological males have physical advantages over biological females is not an "overly broad generalization." Indeed, it is the very generalization that underlies the current and proposed versions of 34 CFR § 106.41(b). In other words, the Department currently admits that sex is relevant in sports, and it would still admit as much if the rule were to be amended as

---

[4] *Id.*

[5] *Id.*

[6] *Id.* at 22875.

[7] *Id.* at 22873.

[8] *Id.*

proposed. This fact—that males, on average, enjoy substantial physical advantages over females—forms the basis for the justification for our state's current law on fairness in women's sports.[9] This is born out in scientific research and lay observations.

For example, in 2022 the International Journal of Environmental Research and Public Health published a study that observed that "[t]estosterone drives much of the enhanced athletic performance of males through *in utero*, early life, and adult exposure. Many anatomical sex differences driven by testosterone are not reversible."[10] Likewise, in a study comparing male and female athletes in *relative* strength and power performances, "women had lower maximal strength values when compared to men at bench press (−59.2%), squat (−57.2%), deadlift (−56.3%), and mid-shin pull (MSP, −53.2%). In addition, lower levels of power were detected in females in both the upper (−61.2%) and the lower body (−44.2%)."[11] The Journal of Sports Medicine, recently published a study that specifically looked at if testosterone suppression made a difference in leveling the playing field for biological males and biological females.

> [T]he data show[ed] that strength, lean body mass, muscle size and bone density [in biological males] are only trivially affected. The reductions observed in muscle mass, size, and strength are very small compared to the baseline differences between males and females in these variables, and thus, there are major performance and safety implications in sports where these attributes are competitively significant. These data significantly undermine the delivery of fairness and safety presumed by the criteria set out in transgender inclusion policies, particularly given the stated prioritization of fairness as an overriding objective (for the IOC). If those policies are intended to preserve fairness, inclusion and the safety of biologically female athletes, sporting organizations may need to reassess their policies regarding inclusion of transgender women.[12]

---

[9] See e.g. Staff Analysis HB 1475, p. 4 (2021). https://www.flsenate.gov/Session/Bill/2021/1475/Analyses/h1475a.SEC.PDF

[10] Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*. Int. J. Environ Res. Public Health (July 26, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9331831/.

[11] Sandro Bartolomei. et al., *A Comparison between Male and Female Athletes in Relative Strength and Power Performances*, J Funct Morphol Kinesiol. (Feb. 9, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7930971/.

[12] Hilton EN, Lundberg TR. *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, Sports Med. (Dec. 8, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7846503/.

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

Anecdotally, consider "the queen of track and field, Allyson Felix. The 11-time Olympic medalist's best 400-meter time ever is 49.26 [seconds]. In just the 2022 season, that would have put her 689th on the boys' high-school performance list."[13] Take Lia Thomas: he was ranked 554th in the 220-yard freestyle when competing in the male division, but two years later he ranked 5th competing in the women's division.[14] Lia Thomas ranked 65th in the country in the 500-yard freestyle when he competed with his own sex; competing as a female, he ranked 1st.[15]

These are just two high-profile examples, along with a handful of studies, but these demonstrate what is not an over generalization or an inaccurate assumption: males have athletic advantages over females. Courts have long recognized that males and females are physiologically different and that, if males were permitted to compete against females, females would quickly be excluded from most athletic competition.[16]

The Department seeks to diminish this well-established truth by characterizing it as an overly broad generalization and discouraging schools from using sex as a criteria to determine who can play on which teams. However, the reality is, these physical differences between the sexes are a perfectly justified means by which to separate sports teams. Forcing schools to offer more specific justifications for using sex to separate sports teams is an attempt to institute a *de facto* ban on schools using sex to separate sports teams.

The Proposed Rule Contradicts the Intent and Plain Meaning of Title IX.

---

[13] Steve Magness, *There's Good Reason for Sports to Be Separated by Sex*, The Atlantic (Sept. 29, 2022), https://www.theatlantic.com/culture/archive/2022/09/why-elite-sports-should-remain-separated-by-sex/671594/.

[14] Samarveer Singh, *What Rank Did Lia Thomas Stand at While Competing in the Men's Swimming Division*, Essentially Sports (Mar. 22, 2022), https://www.essentiallysports.com/us-sports-ncaa-news-what-rank-did-lia-thomas-stand-at-while-competing-in-the-mens-swimming-division/.

[15] *Id*.

[16] *See*, *e.g.*, *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."); *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("The record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team."); *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657–58 (6th Cir. 1981) ("[O]ne team at each age level might result in male dominance of all teams and cause a return to pre-Title IX conditions . . . ."); *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) ("It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement.").

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

Additionally, this proposed regulation contradicts the intent of Title IX. The proposed rule claims to promote equal athletic opportunity, but in application, by preventing sex-based criteria, it will be easier for biological males to play against females and undermine the ability of girls and women to "demonstrate their skill, strength, and athletic abilities."[17] A review of the legislation leading up to the passage of Title IX demonstrates the intent was to give girls and women a level playing field in the areas of athletics in education.

In 1970, Congress held hearings on discrimination against women, which were considered a "major legislative step toward the eventual enactment of Title IX."[18] One member of Congress noted in leading up to those hearings that, "[w]omen have been discriminated against in many areas of life, of which the university is but one."[19] Thereafter, a series of federal bills were filed and considered related to equality for women's rights.[20] It was against this backdrop that Title IX passed in the Educational Amendments Act of 1972. Notably, forty years after the passage of Title IX, the U.S. Department of Justice recognized that "Congress passed Title IX in response to the marked educational inequalities women faced prior to the 1970s."[21]

Up until recently, the intent and purpose of Title IX was not in dispute. Now, Title IX's reference to "sex" is being called into question and the Department is construing "sex" to include gender identity. But as the Eleventh Circuit Court of Appeals recently noted, in *Adams v. School Board of St. Johns County,* at the time Title IX was passed, at least six reputable dictionaries "show[ed] that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females."[22] "[Title IX's] purpose, as derived from its text, is to prohibit *sex* discrimination in education."[23] Further, in a recent comment from Florida which opposed the Department's July 2022 Title IX proposed rule, we stated:

[17] 88 Fed. Reg. at 22873 (quoting *Hecox v. Little*, 479 F. Supp. 3d 930, 978 (D. Idaho 2020)

[18] Library of Congress, *Legislative Path to Title IX*, Library of Congress Research Guides (last accessed May 1, 2023), https://guides.loc.gov/title-IX-law-library-resources/legislative-path.

[19] *Id.*

[20] *Id.*

[21] U.S. Department of Justice, *Equal Access to Education, Forty Years of Title IX* at 2 (June 23, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf.

[22] *Adams v. Sch. Bd. of St. Johns Cnty*., 57 F.4th 791, 812 (11th Cir. 2022).

[23] *Id.*

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

> Twice in the past decade, Congress has considered legislation to amend Title IX to apply to gender identity. *See, e.g.*, H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). Yet "Congress has not amended the law to state as much," and "it is questionable," to put it mildly, "whether the Secretary can alter the term 'sex' by administrative fiat."[24]

Thus, Congressional intent did not contemplate "sex" to include "gender identity" in Title IX, and the Department's adoption of that interpretation and subsequent application to the proposed rule amendment, opens opportunities for biological males at the expense of females, limiting athletic opportunities for girls and directly contravening the purpose of the law. Furthermore, to permit biological males to compete in female sports would invariably exclude females from participation and deny females the benefits of athletic participation, in flat contradiction to Title IX's animating purpose. Because it threatens to exclude females from athletics, the Department's proposed regulation that allows males to compete with females is "completely at variance" with Title IX,[25] which Congress enacted in part "to determine the nature of equality for men and women in contexts in which their differences are particularly relevant."[26] "Affirming . . . that the meaning of sex in Title IX includes gender identity would open the door to eroding Title IX's beneficial legacy for girls and women in sports. And removing distinctions based on biological sex from sports . . . harms not only girls' and women's prospects in sports, but also hinders their development and opportunities beyond the realm of sports—a significant harm to society as a whole."[27]

<u>The Proposed Rule Is Inconsistent with Current Law</u>

As briefly mentioned above, the Department's proposed rule unlawfully expands the current regulation. Section 106.41 expressly refers to male and female in the context of two biological sexes: "male and female teams"; "each sex"; "both sexes." The Office of Civil Rights of the U.S. Department of Education has previously agreed with this plain reading and has stated: "if a recipient chooses to provide 'separate teams for members of each sex' under 34 C.F.R. 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status or sexual orientation, to comply with Title IX."[28] Yet, the Department is now abandoning that well-reasoned interpretation in favor of one that is at odds with itself, the plain text of Title IX, and the rest of section 106.41.

---

[24] Florida Title IX Letter to Hon. Miguel Cardona, U.S. Department of Education, September 12, 2022 (on file with Florida Department of Education).

[25] *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 658 (6th Cir. 1981)

[26] *Id*. at 657 (quoting Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 Yale L.J. 1254, 1263 (1979))

[27] *Adams*, 57 F.4th at 821 (Lagoa, J., specially concurring) (internal marks omitted)).

[28] 88 Fed. Reg. at 22864.

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

Next, the Department claims that this rule is justified in part based on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In *Bostock*, the Court held, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."[29] Putting aside the Court's tortured reading of the phrase "based on sex," which required the phrase be rent asunder of its context, *Bostock* involved employment discrimination, which is governed by a different statute. Further, and more to the point, the *Bostock* Court "expressly refused to 'prejudge any . . . question' about what 'other federal or state laws' addressing 'sex discrimination' require."[30] Finally, *Bostock* addressed whether "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."[31] The issue here, as in the Eleventh Circuit's decision in *Adams*, "centers on the converse of that statement—whether discrimination based on biological sex necessarily entails discrimination based on transgender status."[32] Thus, the Department's reliance on *Bostock* is misplaced.

Even if *Bostock* did apply to Title IX, the Department's rule would violate it. The central holding of *Bostock* is that discrimination based on gender identity is discrimination based on sex.[33] But the Department's rule would require discrimination based on gender identity unless the educational institution can show that separating teams based on sex is "substantially related to the achievement of an important educational objective" and "minimize[s] harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."[34] In other words, it puts transgender students in a special class to be treated differently than similarly situated non-transgender students. Under the Department's proposed rule, a school can prevent a boy who identifies as a boy from playing in girls' sports where selection for the sport is based on competitive skill or the sport is a contact sport.[35] However, if that same boy identifies as a girl, then the school may nevertheless be required to permit the boy to play on the girls' team. The rule thus discriminates on the basis of gender identity, and under the Department's own reading of *Bostock*, such discrimination is impermissible discrimination on the basis of sex.

---

[29] *Bostock v. Clayton County*, 140 S.Ct. 1731, 1747 (2020).

[30] Florida Title IX Letter to Hon. Miguel Cardona, U.S. Department of Education, September 12, 2022 (on file with Florida Department of Education) (quoting *Tennessee v. United States Dep't of Educ.*, 615 F.Supp.3d 807, 817 (E.D. Tenn. 2022)).

[31] *Adams*, 57 F.4th at 808–09 (quoting *Bostock*, 140 S. Ct. at 1747).

[32] *Id.* at 809.

[33] *Bostock*, 140 S.Ct. at 1747.

[34] 88 Fed. Reg. at 22891.

[35] 34 CFR § 106.41(b).

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

The Department's proposed rule also appears to run afoul of the major question doctrine. The Supreme Court recently described the major question doctrine in this way:

> Precedent teaches that there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. [citations omitted]. Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims.[36]

Here, the Department is continuing to encroach on an area of "political significance," by revising its regulations to support the President's Executive Orders 14021 and 13988[37] and doing so in a way that is not expressly authorized by Congress. The Department cannot point to clear Congressional authority to extend Title IX protections to gender identity because there is none. As the Court in *Adams* stated, "[w]hether Title IX should be amended to equate 'gender identity' and 'transgender status' with 'sex' should be left to Congress—not the courts."[38] This amending of the statute is likewise not left to the executive branch. It follows then that the Department should withdraw its proposed rule as it amounts to an attempt to legislate via "administrative fiat."

Moreover, because Congress enacted Title IX under the Spending Clause,[39] Title IX cannot impose conditions that Congress did not unambiguously express.[40] In other words, Spending Clause legislation must provide fair notice that enables fund recipients "to exercise their choice knowingly, cognizant of the consequences of their participation."[41] Similarly, a federal law such as Title IX does not preempt a state law in a domain traditionally regulated by States unless preemption was Congress' "clear and manifest purpose."[42] Because Title IX does not unambiguously condition the acceptance of federal funds on the use of gender identity to assign students to athletic teams—or reveal a clear and manifest purpose to

---

[36] *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2595 (2022).

[37] 88 Fed. Reg. at 22878.

[38] *Adams*, 57 F.4th at 817.

[39] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

[40] *Id*. at 649–50.

[41] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

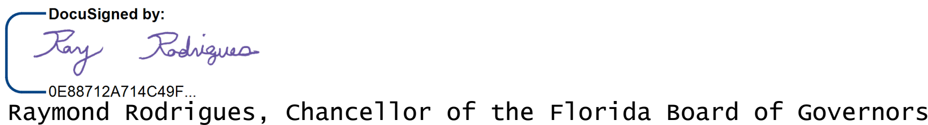
[42] *Gallardo v. Dudek*, 963 F.3d 1167, 1175 (11th Cir. 2020) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

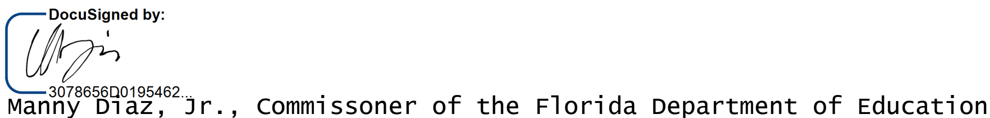
preempt state statutes that assign students to athletic teams without regard to gender identity—the Department's proposed regulation strikes out.

Finally, the proposed rule should be withdrawn as it is contrary to Florida law and a growing number of laws in sister-states across the country, whose legislatures have passed laws that protect women's sports. As cited above, Florida enacted the Fairness in Women's Sports Act based on the legislative finding "that requiring the designation of separate sex-specific athletic teams or sports is necessary to maintain fairness for women's athletic opportunities."[43] The Act provides that "athletic teams or sports designated for females, women, or girls may not be open to students of the male sex."[44] Twenty-one other states, to date, have passed laws that limit women's sports to biological females.[45] These laws reflect the will of the people from across the country to protect fairness and opportunity by ensuring that women's sports are for women.

We recognize that all children, teens, and young adults are fearfully and wonderfully made,[46] and we strive daily to create and maintain educational systems where all students can thrive. Our systems proudly offer robust educational and competitive athletic opportunities for all our students. For these reasons, we cannot stand idly by when a proposed rule threatens the athletic opportunities enjoyed by girls and women in our state. We request this proposed rule be withdrawn.



Raymond Rodrigues, Chancellor of the Florida Board of Governors



Manny Diaz, Jr., Commissoner of the Florida Department of Education

Ben Gibson, Chair of the Florida State Board of Education

---

[43] § 1006.205(2)(b), Fla. Stat. (2021).

[44] § 1006.205(3)(c), Fla. Stat. (2021).

[45] Natalie Allen, *Here's How Our Laws Can Protect Fairness in Women's Sports*, Alliance Defending Freedom (Feb. 25, 2022) (rev. Apr. 13, 2023), https://adflegal.org/article/protecting-fairness-womens-sports-demands-comprehensive-legislation.

[46] Psalm 139:13-14.

DocuSign Envelope ID: C2D724DA-D95C-409D-98A5-2263A54B8CB7

DocuSigned by:

Jacob Oliva, Arkansas Secretary of Department of Education

A6E5664EA81147E...

Jacob Oliva, Arkansas Secretary of Department of Education

DocuSigned by:

972337BBCC384D9...

Catherine Truitt, North Carolina Superintendent of Public Instruction

DocuSigned by:

89690E9E104C4C9...

Megan Degenfelder, Superintendent of Public Instruction for Wyoming