



September 12, 2022

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

Docket No: ED-2021-OCR-0166

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 on women's sports.

Dear Secretary Cardona:

The Department of Education's proposed Title IX rule does not explicitly address the application of Title IX to women's sports. But because the proposed rule requires schools to allow students to participate in school programs and activities consistent with their gender identity, 87 Fed. Reg. at 41,571 (proposed § 106.31(a)), there is no doubt that the rule would require schools to allow male-bodied athletes who identify as women to compete on women's sports teams. 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 The rule should be withdrawn or, at the very least, clarified to exempt athletics.

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 rule contained in the notice of proposed rulemaking entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” set forth at 87 Federal Register 41,390 (“the proposed rule”). IWLC and IWF accordingly submit these comments to request that the Department withdraw the rule, or at the very least **explicitly exempt athletics from the rule’s coverage**.

Title IX’s Binary Concept of Athletics

One of the major problems posed by the proposed rule is the danger that it may be read to govern schools’ treatment of athletics. Title IX and its accompanying regulations adopt a biological and binary definition of sex. *See* 20 U.S.C. § 1681(a); Doriane Lambelet Coleman, *Sex in Sport*, 80 Law and Contemp. Problems 63, 69 n.29 (2017). Indeed, immediately after prohibiting discrimination “on the basis of sex,” the statute goes on to refer to “both sexes,” 20 U.S.C. § 1681(a)(2), a phrase that would make no sense if the term “sex” were being used to describe the range of identifications included within the concept of gender identity.¹

The regulations governing sport explicitly require institutions to “provide equal athletic opportunity for members of *both* sexes,” 34 C.F.R. § 106.41(c); allow schools to provide separate teams for males *and* females, *id.* § 106.41(b); and refer to members of “*the* excluded sex,” singular, *id.* (emphasis added). There can be no question, therefore, that a school that offers separate men’s and women’s athletic teams and limits participation on those teams to members of one biological sex is in compliance with Title IX, so long as the school provides equal athletic opportunities to both male and female students.

¹ 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).

A. The Male Athletic Advantage

The premise behind sex-specific sport, adopted by Title IX and its athletic regulation, is the simple scientific reality that, on average, males are stronger, faster, and more powerful than females. See *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports*, Indep. Women's Forum & Indep. Women's L. Ctr., 17-18 (2021) <https://tinyurl.com/IWFComp> (providing a detailed overview of the scientific literature on the significant and enduring nature of the male-female athletic gap). 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). Studies also make clear that testosterone suppression cannot completely eliminate the male athletic advantage. Jennifer C. Braceras, *Fact Check: Can Transgender Athletes Eliminate The Male Athletic Advantage By Suppressing Testosterone?*, Indep. Women's Forum (Jan. 13, 2022), <https://www.iwf.org/2022/01/13/fact-check-can-transgender-athletes-eliminate-the-male-athletic-advantage-by-suppressing-testosterone/>.

On teams with limited roster spots, the inclusion of even one biological male takes away an opportunity from a female athlete. But even on no-cut teams, female athletes lose out when coaching resources and playing time that would otherwise be devoted to them are directed toward males. Thus, a rule prohibiting institutions from taking biological sex into account when structuring athletic programs reduces 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.

Given 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”² if forced to compete against male-bodied athletes. Title IX and its regulations thus play an important role in leveling the proverbial “playing field” by adopting a binary approach to athletics that explicitly contemplates separate teams for males and females.

² *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004).

All of this leads to our first request: ***Please clarify how the Department believes female athletes can safely and fairly participate in sports against male competitors.***

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

In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court 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.

The Court’s analysis in *Bostock* is inapplicable to athletics because it dealt with an entirely different statute. *Bostock* establishes that “[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). But when it comes to athletics, sex is relevant. *In fact, it is often dispositive.*

As the Supreme Court has held, “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. *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 second request: ***Please clarify how Bostock, a case applying a separate statute that governs the very different context of employment, has any relevance to athletics, where the sexes are not similarly situated.***

C. Conflicting Legal Obligations on Schools

Should this proposed rule become final, schools will be required to allow athletes who were born male to compete on female teams without restriction or exception. 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). How can schools with limited budgets, roster spots, and scholarship money possibly satisfy both obligations? The answer is that they cannot.

Nor can the Department of Education enforce Title IX in a way that both ensures equal athletic opportunity for females and the inclusion of trans-identified, male-bodied athletes. For example, the Department’s Office for Civil Rights opened an investigation into whether Connecticut’s policy allowing athletes born male to participate in women’s track discriminates against biological female athletes. *See* Associated Press, *Civil rights probe opened into transgender athlete policy*, NBC News (Aug. 9, 2019), <https://tinyurl.com/mr2fkxua>. It cannot possibly be the case that Title IX both requires that athletic associations provide equal athletic opportunities for males and females *and* that it prohibits athletic associations from excluding male-bodied athletes from female teams and competitions. The statute can do one or the other, not both.

We therefore request: ***Please clarify how a school can guarantee equal athletic opportunities for females while allowing male-bodied athletes to compete in women’s sports.***

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IWF and IWLC respectfully request that the Department withdraw the proposed rule, which harms female athletes, or at the very least explicitly exempt athletics from the final rule.

Jennifer C. Braceras
INDEPENDENT WOMEN’S LAW CENTER
1802 Vernon Street NW, Suite 1027
Washington, DC 20009
Telephone: (202) 807-9986
jennifer.braceras@iwf.org

Carrie Lukas
INDEPENDENT WOMEN'S FORUM
4 Weems Lane #312
Winchester, VA 22601
202-807-9986
clukas@iwf.org

Kathryn E. Tarbert
Annika M. Boone
Gene C. Schaerr
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
ktarbert@schaerr-jaffe.com