

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF CIVIL RIGHTS

**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,**

Notice of Proposed Rulemaking
Docket RIN 1870-AA19

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COMMENTS OF WOMEN'S LIBERATION FRONT

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Table of Contents

Table of Contents	2
I. Introduction and WoLF's Interests	3
II. Background and Summary	4
A. Introduction to the Proposed Rule	4
B. Terminology	5
C. Gender Identity and the Law	6
D. Judicial Scrutiny of Anti-Discrimination Laws	8
III. Proposed regulation benefits male students to the detriment of female students.	9
A. The proposed rule disparately impacts women and girls based on their sex, providing benefits only to men and boys.	9
1. Benefits to male student-athletes come at the direct expense of female student-athletes.	9
2. Decreased access to sports and athletic participation levels for girls at all levels of competition via limits on sex-based criteria	10
3. Physical safety and fairness for female student-athletes in athletics as an important educational objectives can be disregarded.	14
B. Proposed rule provides disparate treatment by requiring that school policies minimize harm of any kind to a class of male students with no requirement to minimize harm to any female students impacted by the policies it regulates.	16
IV. Proposed regulation enshrines undefined gender identity belief system into Title IX	17
V. Proposed regulation would encourage, incentivize, and normalize off-label use of sterilizing drugs, exogenous cross-sex hormones, and surgical removal of healthy body tissue and organs in children and teens.	18
VI. Proposed regulation threatens all athletic set-asides in education for women and girls.	21
Conclusion	21

I. Introduction and WoLF's Interests

WoLF is a non-profit radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving female-only spaces, and abolishing sex discrimination as well as discrimination based on gender (when “gender,” to the extent not used synonymously with “sex,” is understood to refer to stereotypical roles or expectations imposed on members of each sex). Support for WoLF and its mission has increased significantly since 2020, as measured by members, donors, subscribers, and engagement; participation in WoLF's advocacy efforts such as targeted actions and petition-signings has skyrocketed. The vast majority of these supporters live, work, attend school, or participate in other education programs and activities in the United States.

As a core part of its mission, WoLF works to defend and promote legal recognition and respect for females as a distinct sex class, maintain intermediate judicial scrutiny over laws that govern sex discrimination, and protect the constitutional rights to freedom of belief and equal protection under the law. This proposed rule attacks or abandons each of these principles.

For much of history, regressive stereotypes about women and men have resulted in social and legal burdens on women and girls by reason of their membership in the female sex class. Equality for women and girls, in many circumstances, necessitates treating all persons the same, as individuals, making no distinction between people based on sex. For example, unless a particular job requires *bona fide* occupational qualifications based on sex, the selection and termination of employees should be made without regard to a person's sex in order to ensure that women have employment opportunities equal to those of men.

However, due not to sexist stereotypes but to real differences between the male and female members of the human species, some critical circumstances advise or even require differentiating between women and men because, in such circumstances, treating males and females “the same” necessarily disadvantages women and girls, depriving them of the dignity, autonomy, and opportunities enjoyed by men and boys. For example, due to the biologically-driven physical differences between males and females, often the only way to ensure equal opportunity for women and girls in competitive or contact sports is to provide single-sex sports teams and competitions. Similarly, physical, biological differences between males and females counsel that the safety and dignity of women and girls is not adequately protected without providing single-sex, comparable intimate facilities for members of each sex.

The Department is pursuing its goals in a separate NPRM (Docket RIN 1870-AA16) by challenging the definition of the word ‘sex’ to no longer refer to the distinction between men and women. Here, the Department takes a different, but equally sexist strategy: first, it acknowledges there are material, objective characteristics that define women and girls which are significant enough to justify a class of athletics for them alone; second, it agrees that this class should be (nominally) maintained and upheld under the law. The Department then takes a left turn and threatens to withhold federal funding from schools that try to follow that very mandate, requiring that they justify every step they take to preserve athletic equality for women and girls. At the same time, it places no requirement that female student-athletes are even *represented* in the sports that bear their name.

II. Background and Summary

A. Introduction to the Proposed Rule

From the Notice of Proposed Rulemaking (NPRM): “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 harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”

For forty years, the facts now at the Department's disposal were enough to say that women and girls could have athletics that excludes all male competitors. The facts about safety, fairness, and opportunity have not changed (if anything, the knowledge has deepened over the decades), but now the Department - same facts in hand - says that every limitation a school places on male participation in sports for women and girls might risk their federal funding.

Last year's NPRM largely left the framework of Title IX intact, and focused on fracturing and rebuilding the definitions of things so that male participation in female sports was consistent with Title IX regulations as written. This proposed rule is a circular challenge on Title IX's athletic set-aside for female athletes, opening the door to a complete revisiting of Title IX case law.

The problems are many, but the biggest are discussed below:

- The physical, mental, and financial harm to women and girls in losing single-sex sports.
- Violating the Equal Protection Clause through disparate treatment and disparate impact.
- Violating freedom of belief by enshrining the subjective gender identity belief system into Title IX.
- Encouraging and normalizing child “gender transition”
- Moving toward a strict scrutiny standard for Title IX which will harm women and girls outside the scope of athletics.

This proposed rule is impossible to consider in isolation, and it supplements the current battle between the federal and state by targeting individual “recipients” (i.e. schools). Whether a school adopts a policy to protect girls’ sports in a state with no protections, or whether a state simply implements state law protections, this proposed rule is there to undermine it.

It acts as a backup plan to 2022’s self-ID NPRM, or a backdoor way around state laws to protect sports for women and girls. It’s a way in, regardless of how much a state, city, community, or school wants to protect athletic opportunities for their female students. The effect of this rule will be that schools who want to have *any* policy other than a full open door to the girls’ locker room, have to wonder whether they will lose their federal funding, and whether they can afford to try.

B. Terminology

The word “**sex**” in these comments refers to the fundamental distinction, found in most species of animals and plants, based on the type of gametes each individual’s body is organized to produce. In humans, these fundamental sex differences divide people into two sexual reproductive categories: Females are those whose bodies are organized to support the production of ova and the creation of offspring through sexual reproduction; Males are those whose bodies are organized to support the production of sperm.

Sex in humans remains fixed throughout all life stages, regardless of individual life experiences such as aging, illness, or infertility, and regardless of whether the individual has a “difference (or disorder) of sexual development” (DSD), sometimes incorrectly labeled “intersex.”

The word “**woman**” in these comments refers to adult human females, and the word “**girl**” refers to minor human females. The word “**men**” in these comments refers to adult human males and the word “**boy**” refers to minor human males.

C. Gender Identity and the Law

Unlike sex, the belief of “gender identity” lacks an observable, material, objective definition. Because gender identity is founded on subjective beliefs, it has no material effect on one’s sex. There exists no scientific evidence of feelings, thoughts, or social preferences that are categorically unique to one sex or incongruent with one sex.¹

As with “transgender,” the term “cisgender” is an artifice employed in the “gender identity” belief system. “Cisgender” is commonly defined as, “of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth.”² Since it depends on the poorly-defined and unverifiable concept of “gender identity,” it is equally inaccurate, and serves only to promote the idea that humans fall into the imagined “cisgender/transgender” categories. Referring to individuals as “cisgender” perpetuates the idea that all people have a gender identity, and anyone who does not consider him or herself “transgender” identifies with all the sex-stereotypes and gender roles that are associated with his or her sex. There is no evidence to support these sexist ideas.

Unlike sex, there are no objective diagnostic tools to detect, measure, or classify an individual’s “gender identity.” Therefore, as the concept is used in the NPRM, “gender identity” can mean virtually anything that any given person perceives it to mean. Indeed, “gender identity” is not limited to “identifying as” male or female, but rather is believed to encompass a theoretically unlimited number of idiosyncratic identities. One influential group defines “gender identity” as “[a] person’s intrinsic sense of being male (a boy or a man), female (a girl or woman), or an *alternative gender* (e.g., boygirl, girlboy, transgender, genderqueer, *eunuch*).”³ (emphasis added; citations omitted).⁴

¹ Cordelia Fine, *TESTOSTERONE REX* (W.W. Norton & Co., 2017); Cordelia Fine, *DELUSIONS OF GENDER: THE REAL SCIENCE BEHIND SEX DIFFERENCES* (Icon Books 2010).

² Merriam-Webster, “Cisgender,” MERRIAM-WEBSTER online, <https://www.merriam-webster.com/dictionary/cisgender>. See also, e.g., American Psychological Assoc., *A glossary: Defining transgender terms*, APA online (Sept. 2018), <https://www.apa.org/monitor/2018/09/ce-corner-glossary>.

³ World Professional Association for Transgender Health, (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (2012), available at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf? t=1613669341

⁴ In anticipation of protestations claiming that this viewpoint is a fringe one, we note that WPATH is taken seriously enough that it is cited as a credible and authoritative source of information and policy advice by federal agencies. For example, in a 2016 report by the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, https://nces.ed.gov/FCSM/pdf/Evaluations_of_SOGI_Questions_20160923.pdf, and by Admiral Levine, the HHS Assistant Secretary for Health, in remarks to the April 2022 “Out for Health” conference,

It is worth pausing to note that this description of “gender identity” beliefs is fully consistent with descriptions of that concept by entities who claim to have authoritative knowledge of “gender issues,” with the exception of a single point of disagreement: proponents of “gender identity” claim (without evidence) that it is an “*intrinsic* sense of being male. . . or female,” or something else. *Id.* Setting aside the dubious notion that any subjective, mutable “sense” can ever accurately be described as “intrinsic,” this confirms that “gender identity” is defined even by its most ardent and respected proponents as an internal, mental, psychological, emotional “*sense of being*,” not an objectively verifiable state of being.

If a person can self-identify his “sex” in a way that conflicts with material reality, then a person would be justified in demanding the right to self-identify *any* legally-relevant vital characteristic in such a manner. An atheist who renounced all faith-based beliefs and traditions could “identify as” Catholic based on self-declaration alone, and lodge successful religious discrimination claims on that basis. People with no discernable disabilities could “identify as” disabled based on self-declaration and file discrimination claims on that basis. People reliably documented as having been born outside of the U.S. could “identify as” U.S. citizens based on self-declaration and claim national origin discrimination on that basis. Under the same rationale employed by the Department to justify its “gender identity” proposals, an agency or court would be barred from rejecting whatever “identity” the claimant asserts.

The closest conceptual relative to “gender identity” in U.S. legal jurisprudence is the First Amendment prohibition against laws restricting the free exercise of religious belief. Religious belief is personal, mutable, and subjective, and the possession of religious belief from a legal standpoint is largely a matter of self-declaration. However, unlike “gender identity,” claims of religious discrimination are subject to testing for verifiability and sincerity, because specific religious beliefs are relatively well-defined. For example, Mormonism prescribes specific foundational concepts and practices that differ substantially from those prescribed under Islam.

In contrast, believing oneself to be transgender has no specific or objective definition. Whatever feelings or preferences a person subjectively believes to be in conflict with their sex is what purportedly makes that person “transgender”—even thought billions of other people of both sexes can and do have the same feelings and preferences. Thus a male can claim that he identifies as transgender based on his possession of a submissive or nurturing personality, which he subjectively characterizes as feminine, even though countless females defy those stereotypical expectations, and countless males embrace them.

<https://www.hhs.gov/about/news/2022/04/30/remarks-by-hhs-assistant-secretary-for-health-adm-rachel-levine-for-the-2022-out-for-health-conference.html>.

A claim to hold a particular status can only be dismissed as spurious if the status itself has a definition that enables a neutral arbiter to distinguish objectively between spurious and non-spurious claims. But a claim of discrimination on the basis of “gender identity” is always based on actions that violate ordinary standards of behavior and make unusual demands of others. Other people may be required to remember and use inaccurate pronouns, to falsify records, or to make false statements. Institutions that wish to provide single-sex spaces or services specifically for females may be required to grant access to males, and the women and girls who seek such services may have no legal recourse to challenge their loss of safety, privacy, and dignity.

D. Judicial Scrutiny of Anti-Discrimination Laws

Judicial scrutiny refers to the level of review a court can apply to a law or government action, which depends on the right that is implicated. For discrimination, the top level is strict scrutiny, which applies to “suspect classes” (race, religion, and national origin) and to “fundamental rights” such as marriage or voting. Under strict scrutiny, the government has the burden of proof to show that there is a “compelling state interest” behind the policy and that the policy is “narrowly tailored” to achieve the result. This is an extremely high bar to pass.

In the lowest standard of review, rational basis, a government action must be rationally related to a legitimate state interest that has been identified. This review is used when there are no fundamental rights implicated nor any “suspect” or “quasi-suspect” classes impacted. Sex is considered a ‘quasi-suspect’ class, and this means that, where sex is legislated or regulated as also including “gender identity,” then that is “quasi-suspect” as well, which is one of many reasons why this would be a problematic legal framework by which to protect “gender identity” as a characteristic (even if it was a characteristic that required or merited legal protection). With rational basis review, the burden of proof is on the person or entity challenging the law.

In the middle, intermediate scrutiny (sometimes called ‘heightened’ or ‘elevated’ scrutiny) strikes a balance between the two. As with strict scrutiny, the burden of proof is on the government, but here they only need to prove that there is an “important government objective” and that the law or policy is “substantially related” to achieving that objective.

Laws governing sex discrimination have long been subject to intermediate scrutiny. The proposed rule asks schools to use this standard when adopting policies that limit male participation in female sports. This is a regulatory embrace of intermediate scrutiny for this characteristic (and a nod to schools as to how the Department hopes to see their policy interpreted at the judicial level).

III. Proposed regulation benefits male students to the detriment of female students.

A. The proposed rule disparately impacts women and girls based on their sex, providing benefits only to men and boys.

1. Benefits to male student-athletes come at the direct expense of female student-athletes.

The proposed rule would have significant adverse impact on women and girls, physically, mentally, and financially, while providing no reciprocal benefits and no similar adverse impact on male students. By allowing students to participate in sports based solely on thier “gender identity,” it is plainly obvious that this benefit, in reality, only applies to male students. Female students, including those who identify as boys or men (or “nonbinary”), gain no benefit from the option to participate on male athletic teams because they are 1) unlikely to succeed on these teams due to the biological differences between males and females, and 2) would be wildly unsafe on these teams.

The proposed rule effectively reallocates spaces and opportunities that were originally intended for female student-athletes. This reallocation directly results in women and girls being forced to give up athletic opportunities to men and boys, including the educational and financial benefits, without receiving any bidirectional benefits.

It is important to note that the proposed rule does not even purport to benefit female student-athletes. Rather, it exclusively favors men and boys with a “gender identity,” creating an imbalance that undermines the progress made in promoting women's equality in athletics via Title IX. This is plainly clear in the discussion of fairness and safety surrounding the proposed rule, since female athletes pose almost no physical threat to male althetes in either regard.

The proposed rule would also increase existing financial disparities that Title IX aims to solve, particularly in terms of scholarships and professional athletic opportunities. Title IX has played a pivotal role in promoting equal financial opportunity by ensuring equal access to athletic scholarships, which are crucial for many female student-athletes to pursue higher education. However, if the proposed rule were to be enacted, the reallocation of athletic spaces and opportunities from women and girls to male athletes could result in a disproportionate reduction in the

number of scholarships available to female student-athletes. This disparity in scholarship availability would further exacerbate existing financial barriers, limiting the ability of women and girls to pursue their academic and athletic aspirations. Additionally, by diminishing the visibility and recognition of female athletes at the professional level, the proposed regulation could adversely impact the potential for women and girls to secure lucrative professional athletic opportunities, sponsorships, and endorsements. Such disparities in financial support and career prospects would not only perpetuate inequality between the sexes but also undermine the economic empowerment and future prospects of women and girls in the field of athletics. It is imperative that any regulatory changes prioritize maintaining a level playing field for female student-athletes and uphold the financial opportunities that Title IX has worked to establish.

2. Decreased access to sports and athletic participation levels for girls at all levels of competition via limits on sex-based criteria

The Department clarifies in supplementary material that there would be “few, if any, sex-related eligibility criteria applicable to students in elementary school that could comply with the proposed regulation” (NPRM at par. 121) and that “no-cut” sports teams which are not highly selective and are “designed to encourage broad participation” (NPRM at par. 123) would likely also be forced to be mixed-sex under the new proposed regulation.

The Department ignores the safety concerns that can arise from mixed-sex sports at any level of competition, including heightened risk of physical injury (even at non-competitive levels of sport), as well as heightened risk of assault and harassment when participating in sports with males. Although there is a dearth of academic research into the outcomes of mixed-sex sports for women, there is no shortage of direct testimony from female athletes about the dangers of these activities. A 2018 Op-Ed for sports magazine *Deadspin* by Catherine LeClair describes the phenomenon clearly via first-person experience:

The stakes always feel higher for the men on the field. Their anger is more palpable, their physicality overly aggressive. They often get verbally pushy with the refs or other players.

‘They just take it so seriously,’ Verrier told me. ‘They get angry. They fight with one another. They knock me over and then try to put their hand out.’

‘A bunch of our women kept getting thrown around like rag dolls,’ said Amanda Giobbi of her former ZogSports

basketball team in New York, which she used to co-captain.

‘It’s mostly the men that are out of hand,” my male colleague Alex Mason said of his Brooklyn softball teams with both ZogSports and NYC Social. Then, he corrected himself: “I’ve actually only ever seen the men lose their shit.’

The women interviewed by LeClair described specific instances of injuries caused by men in mixed-sex leagues and resulting in them losing out on further opportunities:

Verrier was tackled twice in her game, by two different men. ‘One really knocked me to the ground and really hurt my knee. And I was like, well thank god that hit me at the front of the knee, not the side.’ After that, Erin hung up her boots. ‘I’m not going to risk fucking my body up. It’s sad because I’m probably never going to play soccer again.’

Kelley Quinn broke her foot playing basketball, when a man she was guarding bowled her over while going for a layup. And it wasn’t even an official game. ‘It was just a scrimmage to determine whether you were in the A league or the B league,’ she said. ‘I couldn’t play all season.’⁵

In addition to sports injury concerns, women and girls forced to participate in mix-sex athletics are exposed to a higher risk of sexual harassment and assault. Female athletes are already at great risk of assault from male coaches, who are allowed nearly unfettered access and power over vulnerable young female athletes.⁶

The proposed regulation would allow men and boys to gain increased access to female athletes simply claiming to have a non-male “gender identity.” The outcomes of such policies are already felt by female athletes in states where such policies are in place.⁷

⁵ C, LeClair, *Why Co-Ed Sports Leagues Are Never Really Co-Ed*, DEADSPIN online (July 25, 2018), <https://deadspin.com/why-co-ed-sports-leagues-are-never-really-co-ed-1827699592>.

⁶ See Ex. A, Peterson, *Abuse in women’s pro soccer league was systemic, report says*, AP NEWS online (October 3, 2022), <https://apnews.com/article/womens-soccer-sports-coaching-sexual-misconduct-6c3f2aca19e55cf18ad7be0a5137b309>

⁷ See Ex. J, Griffin, *Lia Thomas Competitor Says She Felt ‘Extreme Discomfort’ Sharing Locker Room*, NEW YORK POST online (July 27, 2022) (“So not only were we forced to race against a male, we

While the Department acknowledges the valid fairness and safety concerns with allowing older boys and men to participate on female teams, the Department's proposition is that this is only relevant to higher levels of competition. However, according to the NIH, girls on average begin puberty 2 years prior to boys, beginning between the ages of 10 - 14 (versus 12 - 16 in boys).⁸ By limiting the ability of Title IX recipients to create single-sex sports throughout the first half of grade school, the Department ignores the biological reality of female students — especially those who will experience puberty in elementary school.

Even if there were no safety concerns in allowing men and boys to participate in female athletic competitions based solely on a claimed “gender identity,” the reality remains that single-sex teams at every level serve an important educational objective: to increase women and girl’s participation in athletics and gain the associated lifelong physical, social, and mental health outcomes.

Although the NPRM claims that there is no purpose for sex-based criteria at lower levels of competition, this is not supported by evidence. Even in the U.S., despite ostensible legal equality between the sexes, there are still significant disadvantages to being born female, including many barriers to women’s participation in sports.⁹ Christina Cauterucci described for *Slate* in 2018 the reasons that mixed-sex sports, even for young children, end up failing girls:

Coed sports teams can harbor many of the same sexist dynamics advocates want them to combat. The Tucker Center report cites research showing that physical education teachers and children’s coaches sometimes bring their prejudices onto the field. They give girls extra points and head starts, use gendered language to compliment girls (e.g., “She plays like a boy”), and offer boys more playing time. Even if kids don’t yet have conscious gender biases, the adults running their programs do. And a kid’s unconscious biases can still have a discouraging effect. One 1999 study of mixed-gender teams of 6- and 7-year-old soccer players found that the girls could name all the boys on their teams, but no boys could name all of the girls. Another research review noted that girls in coed physical education classes are “actively marginalized.” In its 2015 report, the London-based

were forced to change in the locker room with one,” and “That’s not something we were forewarned about [by NCAA officials], which I don’t think is right in any means, changing in a locker room with someone who has different parts.”).

⁸ NIH, *Puberty*, MEDLINEPLUS, NATIONAL LIBRARY OF MEDICINE online (December 27, 2016), <https://medlineplus.gov/puberty.html>.

⁹ Women’s Sport and Fitness Foundation, *Barriers to sports participation for women and girls*, (2008), <https://www.lrsport.org/uploads/barriers-to-sports-participationfor-women-girls-17.pdf>.

Women's Sport and Fitness Foundation summarized findings from a series of focus groups that asked girls what discouraged them from sports. 'Boys were commonly cited by girls of all ages as a reason for why sport and physical activity is not perceived to be fun,' the report said, because girls 'perceive some boys as being over-competitive, inconsiderate and arrogant.'¹⁰

This disparate treatment of female athletes on mixed-sex teams persists even into adult club sports. LeClare writes:

My college friend and former teammate Ruth Bartlett currently plays indoor soccer in San Diego at Let's Play, a chain of 25 sports complexes around the country. In her co-ed league a goal scored by a woman counts for two points. And 'women have unlimited touches on the ball and men get only three,' she told me. 'Apparently they made the rules that way because boys weren't passing to girls enough and were being ball hogs.' ...

Co-ed social sports leagues aren't really co-ed. They're men's leagues, where women are required to be present for the game to happen. I'm not surprised that women stop showing up.

If the Department wishes to address the "harm" experienced by students who claim a "gender identity," the burden should not be placed on women and girls to give up athletic and education opportunities supposedly to "treat" male students' mental health needs.

Actually, WPATH standards have previously recommended therapeutic techniques focused on building resilience as a means of reducing depression and anxiety. The American Psychological Association defines resilience as "the process of adapting well in the face of adversity... or significant sources of stress" and further states that "resilience involves behavior, thoughts, and actions that anyone can learn and develop."¹¹ Single-sex sports exist for a reason and are critical to women's equality in athletics. If athletes have distress due to the legally permissible sex-segregation in sports, then the appropriate treatment path would be to learn

¹⁰ C, Cauterucci, *How 9-Year-Old Me Learned the Folly of Coed Sports*, SLATE online (June 1, 2018), <https://slate.com/human-interest/2018/06/an-argument-for-the-value-of-single-sex-sports-rather-than-coed-leagues.html>.

¹¹ American Psychological Association, *Building Your Resilience*, (2012), <https://www.apa.org/topics/resilience>

coping skills and seek social support to manage these feelings rather than to disadvantage all female athletes by forcing them to play along with their classmate’s “gender identity.” This is not their burden to bear, and placing it on them is a violation of the very spirit of Title IX.

For these reasons, allowing male athletes to participate in teams and leagues designated for women and girls is a threat to the female athletes’ safety at any level of competition — including in elementary grades, “no-cut” teams, and “non-competitive” leagues. The Department should amend its proposed regulation to accurately reflect this consideration.

3. Physical safety and fairness for female student-athletes in athletics as an important educational objectives can be disregarded.

Title IX regulations permit different treatment or separation on the basis of sex in athletics under 34 CFR § 106.41, stating that “[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors. . . [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes,” and so on.

The Department remains aware of the differences in human males versus females which impact the fairness and safety of athletic competitions, specifically stating:

Prevention of sports-related injury is an important educational objective in recipients' athletic programs and that—as courts have long recognized in cases involving sex-separate athletic teams—fairness in competition may be particularly important for recipients in some sports, grade and education levels, and levels of competition. The Department anticipates that some uses of sex-related eligibility criteria would satisfy the standard in the proposed regulation in some sports, grade and education levels, and levels of competition. (NPRM at par. 14)

Yet the proposed regulation does not address the disparate treatment of female athletes in states across the country — particularly, in states that have instituted “self-ID” policies, such as those the Department suggested with its prior, unresolved, NPRM in July 2022 (Docket RIN 1870-AA16). In states like Connecticut, female athletes are given no consideration as to the safety or fairness of being forced to compete with men and boys. This has resulted in a loss of

educational opportunities for these athletes at the hands of male athletes who “identified” as women or girls.

For example, two male high school athletes in Connecticut started out producing relatively unremarkable results when competing on boys’ teams, yet were allowed to switch at will to the girls’ team on the basis of their “gender identity.” They were suddenly able to overtake elite records, taking 15 statewide titles and depriving numerous individual girls of opportunities and formal recognition. As the Department correctly recognized in August 2020, the policy allowing these boys to compete against girls “denied girls opportunities to compete, including in state and regional meets, and to receive public recognition critical to college recruiting and scholarship opportunities.”¹²

In another high-profile case, male swimmer Lia Thomas did not distinguish himself when he competed on the men’s swimming team at Penn for several years. Beginning last year, he was allowed to compete in women’s competitions, enabling him to smash numerous elite women’s records.¹³ In a hearing hosted by the Kansas Senate Public Health and Welfare Committee earlier this year, Riley Gaines, a nationally ranked female swimmer, testified about her experience being forced to compete against Thomas, stating:

Thomas was allowed to compete in the women’s division after competing as a member of University of Pennsylvania’s men’s swim team for three years where at best was ranked 462nd in the men’s category. We watched in dismay as Thomas swam to a national title in the 500 freestyle, beating out the most impressive and accomplished female swimmers in the country, including Olympians and American record holders.¹⁴

Despite the Department’s repeated recognition that allowing males to compete on teams designated for women and girls poses safety risks as well as hindrances to their educational opportunities and the successful implementation of Title IX, the current NPRM still fails to hold states accountable for permitting the elimination of female athletics via “gender identity” policies. This creates severe disadvantages for girls who happen to be born in states with such policies, who are therefore even less likely to matriculate successfully through athletic success.

¹² Revised Letter Of Impending Enforcement Action, OCR Case No. 01–19–4025, CIAC, et al. (Aug. 31, 2020)

¹³ See Ex. N, Lohn, *A Look At the Numbers and Times: No Denying the Advantages of Lia Thomas*, SWIMMING WORLD online (April 5, 2022), <https://www.swimmingworldmagazine.com/news/a-look-at-the-numbers-and-times-no-denying-the-advantages-of-lia-thomas/>.

¹⁴ KS Legislature, “Senate Judiciary Committee - May 12, 2023,” YouTube video, 2:35:17, May 12, 2023, https://www.youtube.com/watch?v=bpv0vcmrCO4&ab_channel=KS Legislature.

For this reason, the Department should clarify that Title IX recipients are expected to provide single-sex athletic opportunities, regardless of any state-wide gender-identity policy, to ensure equal educational access for women and girls.

B. Proposed rule provides disparate treatment by requiring that school policies minimize harm of any kind to a class of male students with no requirement to minimize harm to any female students impacted by the policies it regulates.

This proposed rule would require schools to make boys “feel” safe by physically and financially damaging girls in the form of unsafe play and loss of athletic opportunities. In requiring schools to “minimize harm” to those who are prevented based on sex (men and boys) from participating on women and girl’s sports, while requiring no assessment for their level of access, the proposed rule intentionally places all of the risk burden for myriad harms of all nature on female student-athletes in order to maximize happiness and satisfaction for some male student-athletes.

Harm as conceptualized in this proposed rule has almost no meaning, and yet the directive to minimize harm to excluded males posits that it is self-evident that material harm exists. But harm - what Merriam-Webster calls “physical or mental damage or injury” - is not just a word. Harm can also be financial, but even as a legal concept it is still based on a material negative impact. But there is no special harm that befalls a boy who identifies as a girl but is only permitted to play on the boy’s basketball team. He is not physically injured. Sometimes it is argued that the boy could have gender dysphoria and suffer psychiatric symptoms, but usually the harm is an offense, a moral slight, stigma. Schools must minimize this harm to these boys and men, but the Department permits them to ignore broken bones and lost scholarships.

Even if it were true that the Department only were referring to dysphoric symptoms: the incidental exacerbation of the symptoms of psychiatric illness in one student is not a valid reason to deny other students existing civil rights protections. Although the Department references the clinical symptoms of gender dysphoria as a type of “harm” to be minimized, it does not assert that it is the only harm. However, a belief in a gender identity is not the same thing as clinically significant distress, and the Department doesn’t even assert any material mental damage or injury is done to male student athletes without gender dysphoria when their eligibility is limited to male teams.

Conversely, many people with gender dysphoria don’t believe in gender identity or don’t believe they have one, and don’t view themselves as the opposite

sex (nor as both sexes, nor as having no sex). If the Department's goal is for schools to protect against this distress, then the proposed rule also fails by excluding sufferers who don't believe in human sex change.

The other type of harm that might be implicated is the material financial harm (in the form of athletic opportunities). This is more abstract and long term but still significant, especially given that financial discrimination is still one of the most commonly reported title IX violations with respect to athletics. An otherwise qualified male student-athlete who can compete on a boys' basketball team but prefers to play on the girls' team because of his self-perception as a girl suffers no lost financial opportunity from being ineligible on the basis of sex. However, the female student-athlete displaced by him cannot simply join the boys' team to recapture the opportunity to compete.

IV. Proposed regulation enshrines undefined gender identity belief system into Title IX

As discussed above, human sex differences are dictated by material reality and mammalian biology that has primordial roots, and those differences carry important practical implications for the lives of women and girls. The material repercussions of human sex differences persist regardless of any individual's subjective beliefs and opinions about them. In contrast, the proposals on "gender identity" are grounded in a subjective belief system wherein it is considered hostile and discriminatory simply to acknowledge the objective reality of an individual's sex, or to apply ordinary permissible sex-based rules, if the individual claims to have some form of "gender identity." By interposing "gender identity" in Title IX, the Department is attempting to prescribe an official orthodoxy in matters of opinion about sex and "gender identity."

This is fundamentally unlawful and exceeds the Department's remit. Be it under Title IX or any other context, **there is no legitimate governmental purpose in imposing one person's subjective beliefs upon others.** A man who is unambiguously male may believe that his feelings and self-image are categorically feminine, and he may adopt a belief system that tells him those feelings mean he is a "transgender woman." The First Amendment of the Constitution guarantees that he is free to hold and express these beliefs, regardless of their wisdom or factual validity. But federal agencies cannot conscript everyone else to validate or facilitate a man's beliefs about himself, by mandating that we undertake supportive words or actions in the realm of material reality. The government lacks a legitimate purpose in attempting to impose such a belief system

upon others, and the First Amendment explicitly bars the Department from doing so.

V. Proposed regulation would encourage, incentivize, and normalize off-label use of sterilizing drugs, exogenous cross-sex hormones, and surgical removal of healthy body tissue and organs in children and teens.

The concept of “gender identity” goes hand in hand with the concept of “gender transition.” *See* 2016 Dear Colleague Letter on Title IX and Transgender Students at 2 (cited in the NPRM at par. 102). “Gender transition” may entail social interventions, such as the adoption of a name, clothing fashion, and hairstyle stereotypically associated with the opposite sex or with androgyny. It may also entail medical interventions, such as the use of puberty-blocking drugs, cross-sex hormones, or cosmetic surgery aimed at imitating secondary sex characteristics (like hair or breasts) associated with the opposite sex or with androgyny.

Ostensibly, “gender transition” is aimed at alleviating feelings of gender dysphoria, a psychological disorder defined by the American Psychiatric Association (APA) as “psychological distress that results from an incongruence between one’s sex assigned [sic] at birth and one’s gender identity.”¹⁵ However, there is a growing body of evidence that interventions aimed at “social transition” inappropriately funnel children toward medically-unnecessary, experimental, and/or off-label pharmaceutical or surgical interventions, while distracting their parents and medical caregivers from addressing serious underlying psychological problems that contributed to the child’s development of dysphoria, hardening rather than alleviating a child’s subjective sense that there is something wrong with her healthy body.

From 2007 to 2022, there was a 500% increase in the number of gender clinics in North America; these estimates are conservative, and the increase may be

¹⁵ APA, What is Gender Dysphoria? APA online, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>, (discussing diagnostic criteria in the APA’s Diagnostic and Statistical Manual of Mental Health Disorders: DSM-5TM, 5th ed. (2013))

even greater than 500%.¹⁶ The now-closed Gender Identity Development Service (GIDS) at the Tavistock and Portman NHS Trust published data showing that 98% of youth who were prescribed pubertal suppressants go on to receive exogenous hormones.¹⁷ In the UK, data show that in clinical practice, pubertal suppressants are used not as a “pause,” but as a gateway to full medical “transition.” There is limited data for the United States to track the number of children who receive exogenous hormones after being prescribed pubertal suppressants. It is urgent for researchers to examine the long-term impact of people undergoing a wide variety of interventions, including puberty blockers; a recent study found that patients who underwent “sex reassignment” procedures experienced higher risk for suicide attempts and higher levels of psychiatric inpatient care.¹⁸

These concerns are especially grave for adolescent girls, given evidence of a sharp and disproportionate increase in the presentation of adolescent girls identifying as “transgender” (including variations like “nonbinary,” etc.), and seeking treatment for gender-related mental health distress. According to one international review:

The findings in many studies that [natal females] have poorer mental wellbeing, along with the very rapid increase in [natal females] presenting for treatment (see paper 1, ref), is notable and requires careful monitoring. The aetiology [*i.e.*, the cause, set of causes, or manner of causation] of [gender dysphoria] is not fully understood, and the implications of this demographic change are important. Most papers attribute the increase in young people presenting for treatment to cultural shifts in acceptance of gender fluidity and greater availability of services. Whilst these factors are no doubt important, this alone probably does not explain the dramatic increase in [natal female] presentations: there remains the possibility, not apparently explored in this literature, that modern sociocultural pressures associated with womanhood / femininity are influencing this generation’s propensity to seek treatment.¹⁹

¹⁶ The Gender Mapping Project, online, (2022), <https://www.gendermapper.org/>.

¹⁷ M, van der Loos, et al., *Continuation of gender-affirming hormones in transgender people starting puberty suppression in adolescence: a cohort study in the Netherlands*, THE LANCET online (October 20, 2018), [https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642\(22\)00254-1/fulltext#%20](https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(22)00254-1/fulltext#%20).

¹⁸ C, Dhejne, et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS ONE online (February 22, 2011), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885>.

¹⁹ Thompson, et al., *A PRISMA systematic review of adolescent gender dysphoria literature: 1) Epidemiology*, PLOS GLOBAL PUBLIC HEALTH (March 2022), <https://doi.org/10.1371/journal.pgph.0000245>; “Aetiology,” variation of “etiology,” MILLER-KEANE

So serious is the growing concern over the lack of evidence to support both “transition”, that NHS England has just announced it is shutting down the Gender Identity Development Service (GIDS) at the Tavistock and Portman Trust in London in order to help address the concerns raised in the Cass Review.²⁰ Alarmed by the same evidence of harm, Sweden and Finland have dramatically altered their approach to “gender transition” as well.²¹

Numerous citizen groups have raised concerns to the Department of Education about the lack of scientific integrity behind the push for “gender transition” and its danger to children and adolescents, including in an in-person meeting in June 2017 between the Department’s Office of Civil Rights, WoLF, Alliance Defending Freedom, and several high school students and their parents. At that meeting, WoLF elaborated on the reasons for its lawsuit challenging the Department’s 2016 joint “Dear Colleague” letter, including our concern that vulnerable children are being encouraged toward unhealthy mind-body alienation under the mantle of gender identity.

The Department has ignored these concerns entirely while forging ahead with its proposal, effectively instructing public schools and other Title IX institutions to facilitate social “gender transition,” a serious psychosocial and medical intervention.

By focusing the application of sex-related criteria on the limited issues of “fairness” and “safety,” and stating that male students who “transition at the onset of puberty ... never gaining any potential advantages that the increased production of testosterone during male puberty may create,” (NPRM at par. 110) the Department encourages students who claim a gender identity and wish to participate in opposite-sex sports to engage in sterilizing medical interventions such so-called puberty blockers” as early as possible to receive the maximum benefit under the proposed regulation.

Encouraging highly contested and potentially dangerous medical interventions for minors goes well beyond the Department’s remit. Furthermore, because it has ignored and failed to address serious, known concerns about this aspect of the proposed rules, the Department’s proposal is arbitrary and capricious and falls short of the minimum requirements for rulemaking under the Administrative Procedure Act.

ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), <https://medical-dictionary.thefreedictionary.com/etiology>.

²⁰ See Andersson, et al., *NHS to Close Tavistock Child Gender Identity Clinic*, BBC NEWS online (July 28, 2022), <https://www.bbc.com/news/uk-62335665>; Kirkup, *Why the Tavistock Clinic Had To Be Shut Down*, THE SPECTATOR.COM (July 28, 2022), <https://www.spectator.co.uk/article/why-the-tavistock-clinic-had-to-be-shut-down>

²¹ Davis, *The Beginning of the End of “Gender-Affirming Care?”*, COMMONSENSENEWS.COM, (July 30, 2022), <https://www.commonsense.news/p/the-beginning-of-the-end-of-gender>.

VI. Proposed regulation threatens all athletic set-asides in education for women and girls.

The NPRM presents a concerning shift away from the established intermediate scrutiny framework, moving towards a strict scrutiny standard. This proposed change raises serious concerns about the future of athletic set-asides designed to protect and promote opportunities for female student-athletes.

Under the current intermediate scrutiny standard, educational institutions have been able to implement policies that address the inherent physiological advantages that male athletes often possess due to their biological differences. These policies have allowed for the creation of athletic set-asides, ensuring fair competition and safeguarding opportunities for female student-athletes.²² This common-sense approach to fairness between the sexes has not gone unchallenged; The Department is fully aware of the significant body of case law stemming from male student-athletes challenging their exclusion from Title IX athletic resources (including single-sex teams) for female student-athletes.

The courts have continuously upheld that the purpose of Title IX was to curtail persistent patterns of discrimination against women and girls in the academic world.²³ However, the proposed shift towards a strict scrutiny standard disregards this established doctrine and would allow men and boys to win claims of ‘discrimination’ that would have never held muster before, simply because the male athlete now claims a ‘gender identity.’

Conclusion

This proposed rule bears little resemblance to the original Title IX regulation in practice, and mandates actions that contradict the original purpose by narrowing instead of expanding athletic opportunities for female student-athletes.

The Department cannot limit the rights of women and girls by cloaking itself in very civil rights laws and regulations originally designed, intended, and for nearly fifty years applied, to protect them from sex-based discrimination, ensure

²² Women’s Liberation Front, *How Intermediate Scrutiny Protects Women And Girls*,” (March 15, 2021), <https://womensliberationfront.org/era/how-intermediate-scrutiny-protects-women-and-girls>.

²³ 118 Cong. Rec. 5,804 (1972) (statement of Sen. Bayh)

their equal access to education, and promote equal opportunities for them to succeed.

WoLF opposes the proposed rules for the reason discussed above. If there are any questions or if the Department wishes to discuss these comments, please contact WoLF at legal@womensliberationfront.org.

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