May 15, 2023

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

Docket Number: ED-2022-OCR-0143

Re: Notice of Proposed Rulemaking (NPRM) – 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

Submitted electronically

Dear Secretary Cardona:

The Association of Christian Schools International (ACSI) is the largest Protestant school association and serves 2,250 member schools in the United States alone with a total of some 5,000 member schools around the globe. Through extended services and resources beyond formal membership, ACSI has the privilege of serving and influencing over 25,000 Christian schools all over the world. ACSI exists to strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ.

The Christian faith teaches the dignity of each human person, each of whom is made in the image of God, male and female, and thus deserving of respect. As Genesis 1:27 (ESV) famously puts it: *"So God created man in his own image, in the image of God he created him; male and female he created them."*

This imperative of love and respect for every human person inspired Christians to rescue foundlings in pagan Rome, found hospitals, promote education, serve the poor, and promote liberty of conscience. Thus, Christian schools stand for and promote human dignity. The Christian faith does not permit the mistreatment of individuals made in God's image. It is why Christians do all they can to minister those who suffer.

Christian schools therefore teach, and Christian individuals do their best to live out, these timeless, proven truths which, in fact, promote *individual*, personal flourishing in ways that a real and loving God intended. Naturally, individual flourishing in community also promotes the *common* good and contributes in positive ways to a thriving society.

These Christian standards are part and parcel of a Christian faith and practice that reflects the Good News of the Gospel of Jesus Christ: a loving God has created an understandable order designed to benefit His special creation, each human person. He provided a Redeemer who took the punishment each individual deserves for his sin precisely so each person may enjoy God's free offer of forgiveness. God offers each human person a clear conscience simply upon our asking and our

turning away from sin and toward what He intends for our good. Proverbs 13 promises that "he who confesses and forsakes them [i.e., his transgressions] will find compassion." Proverbs chapter three summarizes: "Fear the Lord and turn away from evil. It will be healing to your body and refreshment to your bones" (NASB).

In this regard, the federal Constitution guarantees freedom of conscience in the First Amendment which forbids the federal government from establishing an official religion and compels the federal government to respect the free exercise of religion. The *first* line of the *first* item in the Bill of Rights is "Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof." Christians, like all others, have a lawful, inherent right to expect the full freedom to live out their faith and, as a practical example in just one area of concern, to be treated equally – not as second-class citizens – in government programs of general applicability. The Supreme Court has made this non-religious-discrimination requirement clear in cases such as *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

As federal actors, the U.S. Department of Education (USDE) has an obligation to ensure that those rights are respected.

On this basis, ACSI would like to make the following observations of the NPRM referenced above:

Protecting faith-based schools. The NPRM does not indicate how it will protect the rights of religious schools which may be subject to Title IX. The religious exemption gives such schools more freedom to respect both our male and female athletes and may avoid the worst effects of an NPRM that in effect privileges one group of people (those who seek to present as the opposite sex) over another (those who live joyfully as male or female). Further, some faith-based schools that are not recipients of federal financial assistance (FFA) will also play sports with those that do. The NPRM is silent with respect to how it will respect those institutions who disagree with the beliefs inherent in the NPRM. This seems a significant omission. The NPRM would thus impose massive demands on faith-based schools (both recipients of FFA and otherwise) that seek to respect every student based on their biological sex and to assist those who seek our help. Nearly 80% of parents who choose private education will choose a faith-based school, including Christian schools, for their children. They are seeking the best for their children and schools have ministered to those in distress over sexuality issues for many years.

We remain concerned about the privacy rights of our athletes, but here again, those are not considered despite the inevitable impact. If both biological sexes are required by the NPRM to share private spaces, it would be a very serious matter for faith-based schools. There is no clear statement – and there should be – that private spaces for each of the two biological sexes will be safeguarded. Certainly, faith-based schools will not want to be a part of attempts to disrespect the rights of our athletes in this way.

Congress has not amended Title IX. *Bostock* does not apply. The athletic NPRM is a deeply confusing document. It acts as if the Title IX statute has changed when Congress has taken no such action. It bases its claim on a Supreme Court decision that had nothing to do with Title IX and that explicitly states it applies only to Title VII, namely *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020). In addition, the Department acknowledges that its attempts to distort the law *pre-date* the Supreme Court's 2020 decision in *Bostock,* so its attempt to rely on the decision seems that much more suspect.

To wit, the NPRM states: "Although the Department's Title IX regulations *have never explicitly addressed* the criteria, if any, a recipient may use to determine a student's eligibility to participate on a male or female athletic team, OCR has previously articulated various interpretations of current Sec. 106.41(b) as applied to transgender students…" (*Federal Register*, Vol. 88, No. 71, Thursday, April 13, 2023, p. 22863 [Emphasis added]) beginning only in 2016 – some 44 years after Title IX became law – and then merely by means of a joint Dear Colleague Letter by the Department's Office of Civil Rights (OCR) and the Department of Justice's (DOJ) Civil Rights Division.

An unlawful Dear Colleague Letter is not self-authorizing. Further, the NPRM looks to federal lower court decisions for legitimacy in this constantly shifting area of debate. The NPRM refers to a court that found its 2016 Dear Colleague Letter "reasonable" by giving "controlling weight to the 'Department's interpretation of its own regulation…" (*Ibid.*, p. 22863). Courts claim to be bound by this rule; courts give "controlling weight" to federal departments and their interpretations. It is hard to see how such a 2016 ruling legitimates a 2016 Dear Colleague letter that conflicts with the Department's previous 44 years of policy.

This is very confusing to the public. How can the NPRM rely for its authority on a 2016 Dear Colleague letter that contradicts the previous 44 years of legal standards? How can a court's reliance on the new interpretation that same year provide any *additional* authority? Worse yet: the NPRM is forced to admit that yet another federal court – that same year – found it "did not undergo the notice-and comment process … and was contrary to law."

So what is the public to think? Is the 2016 Dear Colleague contrary to law or is it to be relied on as "controlling weight"? The fact that the Department engaged in this process does not look like evidence that the Department is legitimately basing the current NPRM on lawful authority.

Further, in part because the courts found the 2016 Dear Colleague "was contrary to law", the two agencies *withdrew* the joint letter in February 2017. Its putative authority did not last even a year.

The Department didn't – and then did – apply *Bostock* to Title IX. The NPRM skips ahead to 2020 and the decision in *Bostock.* At first, the Department respected the decision and did not attempt to apply it to Title IX. The Department relied upon biological sex as the ongoing standard for Title IX as it had done since 1972. The NPRM describes this in a Connecticut case and in the Department's January 2021 General Counsel's Memorandum (see *Ibid.*, p. 22864). Then, with a new Administration, the Department's regulations began to change, only now claiming authority from a flurry of executive orders which themselves are politically motivated and misapply the Supreme Court's Title VII employment decision in *Bostock*.

This attempt to rely on *Bostock* to give the NPRM legitimacy fails in addition since the "original" 2016 Dear Colleague obviously did not and could not rely on the 2020 decision. The 2016 Dear Colleague was in effect made up out of thin air and four years later a case came along which the Department desperately – and erroneously – applies to give the NPRM and, by inference, its earlier failed action, some measure of legality / legitimacy.

State laws that rely on 50+ years of precedent are not confusing. Finally, the NPRM only adds to the confusion created by the misapplication of the Title VII court decision in employment to Title IX regulations about athletics. The NPRM asserts, oddly, that state laws which protect women's sports based on biological sex in accord with nearly the entire history of Title IX *themselves* "have created additional uncertainty for stakeholders regarding what Title IX permits and requires with respect to

male and female teams." Title IX enforcement has focused on biological sex from 1972 until, as the NPRM notes, the 2016 Dear Colleague that was found unlawful and withdrawn within mere months of its issuance. The non-biological approach to enforcement did not reappear until February 2021, only one month after the Department had reasserted its return to its historically legitimate and legal reliance on biological sex for enforcement purposes.

In short, in the last 51 years of Title IX, the Department has relied on what it calls "sexual orientation and gender identity" in its attempts at regulation for a few weeks in 2016 – 2017, and now again in an overarching regulation that has not yet been finalized. This athletics NPRM confuses the issue by failing clearly to show on what legitimate basis it is changing its athletics-related Title IX regulations now. **Congress still has not changed the law. It has not redefined the term "sex" in Title IX to include gender identity. The Supreme Court has not redefined the term "sex" in Title IX to included gender identity.** Claims in various executive orders, Dear Colleague letters, or proposed regulations do not themselves change that fact. The NPRM looks merely like politics masquerading as law since no Administration has been able to persuade Congress to change Title IX to its politically preferred definition of "sex" in Title IX. This is not the clarity that the NPRM claims is its purpose.

Congress *has* acted: to *protect* women's sports. It is also very striking to note that Congress *has* acted on the question of women's athletics in precisely the *opposite* direction of the NPRM. On April 20, 2023, the U.S. House of Representatives decisively passed the Protection of Women and Girls in Sports Act of 2023 (H.R. 734) by a vote of 219 – 203. The legislation simply states that it is a *violation* of Title IX if a recipient of federal financial assistance allows a person who is male to participate in an athletic program or activity that is designated for women or girls. The House of Representatives agrees with the obvious and unchanged definition of "sex" in Title IX. The House of Representatives has, in effect, voted against the NPRM. While not yet law, it ought to give the Department pause to reconsider its NPRM: the only time Congress has acted on this Title IX issue, it has done so to protect women's sports against the approach found in the NPRM.

Misapplication of *Bostock.* We feel it would be wise to reiterate and expand upon our observations in previous public comment (June 2021, September 2022) regarding application of *Bostock* to laws it explicitly stated were not referenced.

Because the NPRM's own history shows that the proposed regulation of Title IX as to athletics is a radical shift away from the Department's historical practice, it is useful to remember the circumstances of the NPRM's erroneous attempt to apply the Supreme Court's decision in *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020) to the wholly unrelated law in Title IX of the Education Amendments of 1972. The decision itself is clearly limited to employment issues specific to Title VII of the Civil Rights Act:

> *The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."* Bostock v. Clayton County, *140 S. Ct. 1731 (2020) at 1753.*

Not only did the Court make clear that its ruling applied *only* to Title VII, but it also emphasized that: "Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these." *Ibid.*

It is also noteworthy that the dissents in *Bostock* made much of this fact and predicted that politicians would do precisely what the Department is doing in its several Title IX NPRMs. In their dissent Justices Samuel Alito and Clarence Thomas observed that "There is only one word for what the Court has done today: legislation" and that "A more brazen abuse of our authority to interpret statutes is hard to recall." In other words, the Court's decision as applied to Title VII itself is not likely to last: They noted that "The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning". That is exactly what has happened ever since. Justice Kavanaugh's separate dissent was prescient: "…many Americans will not buy the novel interpretation unearthed and advanced by the Court today. Many will no doubt believe that the Court has unilaterally rewritten American vocabulary and American law."

As the dissent in *Bostock* notes, the decision is highly controversial and is itself unclear. An NPRM that relies upon the decision as this one does cannot make itself *more* clear. What *does* seem to be clear is that the attempt the NPRM says it wants to make to provide clarity has not done so.

Girls and women left without options. The regulations focus entirely on gender identity but do not take into consideration the impact on female athletes. By ensuring that male athletes must be permitted to participate on women's sports teams, the NPRM effectively eliminates biological sports for women. By definition, when a male joins a female athletic program, it is no longer female. Title IX was written specifically to address the concern that men's sports seemed to take priority over women's sports: there were simply not opportunities for women athletes to compete. The NPRM returns to a pre-Title IX world where biological men appear to be privileged. The NPRM privileges biological males over biological females. This does little to provide clarity. How will the NPRM be able to ensure that women have athletic opportunities to compete when it is privileging biological males?

Substantially related to an important educational objective. The NPRM seeks to establish that sex-related policies governing sports are substantially related to achieving an important educational objective, but it goes to great lengths to deny women consideration in those objectives. One wonders how any recipient could find an educational objective that would meet the NPRM's demands in the first place or how it would be able to assert that its objectives are "substantially related" to its policies that promote women's sports in a way that overcomes the NPRM's privileging of biological male athletes over biological female athletes.

For example, the NPRM (*Ibid.,* p. 22873) states that "criteria that assume all [biological males] possess an unfair physical advantage over [biological females] in every sport, level of competition, and grade or education level would rest on a generalization that would not comply with the Department's proposed regulation." Would a rule that evaluated every sport, level of competition and grade or educational level and found that, indeed, at each level of competition biological males *do* have an unfair physical advantage over biological females be able to pass muster? The NPRM assumes – and does argue based on selected court cases – that no rule that covered all those categories would stand. Would it genuinely approve each individual rule for each sport, each level of competition, and each grade that reached a similar conclusion no matter how many scientific studies each rule cites? This is a recipe for confusion. Clarity in the NPRM is surely necessary to show how the proposed rule's attempt to privilege biological males seeking to join female athletic programs does not harm biological females.

The NPRM additionally says (*Ibid.,* p. 22874) that "if a school can achieve its objective using means that would not limit or deny a student's participation consistent with their [sic] gender identity, its use of sex-related criteria may be pretextual rather than substantially related to achievement of that important educational objective." That sounds very much like there will be no allowance for any policy that seeks to protect athletic programs for biological females from engagement by biological males seeking access to them. Is there *any* policy that a recipient could implement that would limit a biological male from eliminating an athletic program for biological females by his participation when a program for males is available to him?

Lower grade levels. The NPRM does not successfully present a case for application of its rule at the elementary or middle school grade levels. Rather than requiring recipients of federal funds to prove their policies meet the complex standards that already privilege biological males seeking to present as females, the NPRM would add a great deal more clarity by eliminating all attempts to regulate any grade level below secondary school. To be clear, we are not in any way withdrawing our observation that the entire NPRM is illegitimate and without authority. We mean only to spare K-8 institutions of the NPRM's worst effects and expense, and to preserve their ability to operate programs that respect Title IX which was created to promote athletics for girls rather than otherwise as the NPRM appears likely to do.

Harm minimization. It is striking, as noted above, that the NPRM's focus is entirely on harm to biological males and females who wish to present as the opposite sex. There is no balancing – let alone recognition – of the potential harms faced by biological males and biological females by the NPRMs privileging of the first group. *De minimis* harm*,* in addition, appears to mean "any policy at all" that does not privilege those who seek to present as the opposite sex. Biological females and biological males each have a right to their individual, unique athletics programs; the harm to them is more than *de minimis.* There really is no clarity here in the NPRM. How and in what way could a recipient protect and promote women's sports when the NPRM says that disallowing biological males from women's athletics appears automatically to be more than *de minimis* harm?

This confusion in the NPRM is inherent in its wrongful redefinition of the term "sex" as something more than biological sex contrary to the text of Title IX. A biological male still has access to men's sports even if he seeks to present as a female outside the arena. A biological female still has access to women's sports even if she seeks to present as a male outside the arena.

Costs. The NPRM's review of the costs of its regulation is baffling and should be clarified. For example, "The Department believes that the proposed regulation would provide numerous important benefits but also recognizes that it is not able to quantify these benefits at this time." (*Ibid.,* p. 22879). Is the public really expected to accept the Department's "belief" that it is doing a good thing at face value? Likewise, the NPRM asserts without evidence that "…it is the Department's current view that the benefits are substantial and far outweigh the estimated costs of the proposed regulation." The numbers that the NPRM does end up with raise real questions. Every educational institution that receives federal financial assistance and has an athletics program will have to evaluate every sport, level of competition, and grade or education level for compliance with the NPRM. They will be sued by one side or the other because the NPRM has no legal basis. The NPRM violates the purpose of Title IX to promote women's sports by privileging biological males and so itself is not likely to last. The cost of all of this will surely be more than the $24 million over ten years that the NPRM claims. It is worth noting that the NPRM itself is found on pages 22,860 through 22,891 of a section of the *Federal Register.* That is fully 31 pages in three columns of text each. For clarity's sake, perhaps starting with an

evaluation of how much an attorney will charge an LEA (local education agency) to read the NPRM (which many have *already* had to do in order to comment), review every athletics policy for every grade level and competition level, and then to recommend changes which must then be implemented. It frankly sounds like more than the $2.4 million per year for 10 years the NPRM estimates.

The NPRM is fundamentally a confusing and contradictory document that does not meet its purported goal of providing more clarity. Further, a public comment period of only 30 days is far from sufficient given the level of confusion involved in an Executive Branch attempt to legislate a statutory term such as "sex" in Title IX. The NPRM should be withdrawn and await Congressional action. The confusion it and its illegitimate predecessor documents have caused pales in comparison to the first 50 years of Title IX regulatory guidance in athletics.

Thank you for your consideration.

Respectfully submitted,

/s/

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