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U.S. Department of Education
Office for Civil Rights
400 Maryland Ave, SW
Washington, DC 20202

VIA FEDERAL ERULEMAKING PORTAL

RE: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Docket No. ED-2022-OCR-0143, 88 Fed. Reg. 22,860 (Dep't of Educ. Apr. 13, 2023) (notice of proposed rulemaking)

Assistant Secretary Lhamon:

As the Attorneys General for the states of Kansas, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming, we submit the following comments on your Office's April 13, 2023, notice of proposed rulemaking (NPRM) titled "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. 22,860 (Apr. 13, 2023).

According to the aforementioned NPRM, the Department of Education proposes to amend its regulations implementing Title IX of the Education Amendments of 1972 by adding rules governing a federal funding recipient's "adoption or application of 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."[1]

Title IX declares that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]"[2] The Department's current regulations echo and expand on this declaration:

> The now-longstanding athletics regulation states that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any

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[1] 88 Fed. Reg. at 22,860.

[2] 20 U.S.C. § 1681(a) (2018).

> interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis."[3]

The statute is broadly applicable. It applies to "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education" that receives Federal financial assistance.[4]

The proposed rules would supposedly "clarify Title IX's application to such sex-related criteria and the obligation of schools and other recipients of Federal financial assistance from the Department" in relation to such criteria.[5] What this ultimately means is that the Department seeks to condition receipt of federal financial assistance on a recipient's not preventing biological boys and men from playing on biological girls' and women's athletic teams (and vice versa) unless a recipient does so in accordance with a stringent regulatory standard:

> [T]he Department proposes amending [34 C.F.R.] § 106.41(b) . . . to provide that, if a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity, those criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied. As discussed below, the proposed regulation would not prohibit a recipient's use of sex-related criteria altogether. Instead, the proposed regulation would require that a recipient meet this standard for any sex-related criteria that would limit or deny students' eligibility to participate on a male or female team consistent with their gender identity.

The proposed rule will harm the States. Each of our states has public and private high schools and colleges (among other educational institutions) that have, or in some way participate in, student athletics programs, and many of our States have enacted laws prohibiting biological males from participating in female-designated sports (and vice versa).[6] The NPRM will also, as discussed in greater detail below, harm female student-athletes.

The Department invited comment on six issues including "[w]hether any alternative approaches to the Department's proposed regulation would better align with Title IX's requirement for a recipient to provide equal athletic opportunity regardless of sex in the recipient's athletic

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[3] 88 Fed. Reg. at 22,863 (quoting 34 C.F.R. § 106.41(a) (2022)).

[4] 20 U.S.C. § 1681(c) (2018).

[5] 88 Fed. Reg. at 22,860.

[6] *E.g.*, Fairness in Women's Sports Act, 2023 Kan. Sess. Laws ch. 13; Ind. Code § 20-33-13-4; Ky. Rev. Stat. § 156.070; La. Rev. Stat. § 4:444; Miss. Code Ann. § 37-91-1; S.C. Code § 59-1-500; Tenn. Code Ann. §§ 49-6-310(a), 49-7-180; Tex. Educ. Code § 33.0834; Utah Code Ann. § 53G-6-902; Wyo. S.F. 013, 2023 Wyo. Sess. Laws ch. 191.

program as a whole[.]"[7] We propose the following alternative: re-adopt "the position [your Office took on August 31, 2020,] that when a recipient provides 'separate teams for members of each sex' under . . . § 106.41(b), 'the recipient must separate those teams on the basis of biological sex' and not on the basis of gender identity."[8] We propose this course of action for a range of reasons discussed below.

1. The Meaning of Title IX vs. Title VII of the Civil Rights Act of 1964

The NPRM takes a ham-handed approach to updating regulatory guidance in the wake of *Bostock v. Clayton County*[9] by essentially construing the Title IX term "sex" to include "gender identity."[10] *Bostock* determined that prohibitions on sex discrimination in Title VII of the Civil Rights Act of 1964 included discrimination against those (like homosexuals or transgender individuals) who act or present themselves in a way that does not conform with traditional sex stereotypes. But the NPRM indiscriminately applies that holding to Title IX—a different statute, passed at a different time, in a different context, with different text, and meant to address a different problem—without considering the important reasons that Title IX does not (and has never been interpreted to) simply paste Title VII onto the educational context. Equating the separate prohibitions of sex discrimination in Titles VII and IX is a shallow approach; no unbiased reader of either *Bostock* or those two statutes would recommend that course of action.

The following three things support our position: (a) Title IX's text, (b) Title IX's legislative history, and (c) *Bostock* itself.

a. Title IX's Text

An understanding of inherent sex differences underlies Title IX's text. Unlike Title VII, Title IX explicitly allows distinctions between men and women when such distinctions are based on relevant biological differences. For example, the statute specifically allows schools to maintain separate living facilities (such as dormitories and restrooms) based on sex.[11] Furthermore, the enabling legislation for the NPRM requires "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."[12]

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[7] 88 Fed. Reg. at 22,878.

[8] *Id.* at 22,864 (emphasis added, citation omitted).

[9] 140 S. Ct. 1731 (2020).

[10] There is no explicit definition of "gender identity" in the NPRM. But the use of that term in connection with, for example, the terms "male" and "female," the NPRM's discussion of past statements and actions, and its discussion of certain judicial decisions indicates the Department defines "gender identity" to mean one's internal and subjective sense (or perception) of one's gender or sex.

[11] 20 U.S.C. § 1686 (2018); *accord* 34 C.F.R. § 106.33 (2022).

[12] Education Amendments of 1974 § 844, Pub. L. 93-380, 88 Stat. 484, 612 (1974).

These textual referents are why Title IX has never been understood to require sex-neutral sports teams, or even that schools offer the exact same sports to men and women.[13] Rather, the goal has always been and continues to be—even according to the NPRM—"overall equal athletic opportunity."[14] That is *not* how Title VII is interpreted. Rather, Title VII focuses on specific individuals and essentially requires private entities to behave neutrally with respect to the sex or race of those individuals.[15] Thus, the statutory text, viewed as a whole, shows that Titles VII and IX do not address identical problems and do not provide identical protections.

Furthermore, Title IX's text explicitly references a male-female sex dichotomy.

- Section 901 refers numerous times to "sex."[16] But it never once refers to "gender identity" or even to "gender."[17]
- Section 901 refers to "girls"[18] and "boys"[19] and "women"[20] and "men."[21] "Girls" and "women" clearly refer to the female biological sex. "Boys" and "men" clearly refer to the male biological sex.
- Section 901 refers to "father-son or mother-daughter activities"[22] and says that "if such activities are provided for students of ***one sex***, opportunities for reasonably comparable activities shall be provided for students of ***the other sex***[.]"[23] Mothers and daughters are of one sex: female. Fathers and sons are of the other sex: male. The phrase "one sex" refers to a single sex. The phrase "the other sex" refers to a sex other than the sex to which the phrase "one sex" refers. Thus, taken together, the phrases "one sex" and "the other sex" refer to, and distinguish between, the two sexes.
- Section 901 refers to "sexes" when referring (twice) to "an institution which admits students

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[13] Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413, 71,417–18 (Dep't of Health, Educ. & Welfare Dec. 11, 1979) (policy interpretation).

[14] 88 Fed. Reg. at 22,866.

[15] *Bostock*, 140 S. Ct. at 1740–41.

[16] §§ 1681(a), (a)(2), (a)(5), (a)(6)(B), (a)(8), (a)(9), (b).

[17] *See id.* § 1681.

[18] *Id.* §§ 1681(a)(6)(B), (7)(A), (B)(i).

[19] *Id.* §§ 1681(a)(7)(A), (B)(i).

[20] *Id.* § 1681(a)(6)(B).

[21] *Id.*

[22] *Id.* § 1681(a)(8).

[23] *Id.* (emphasis added).

of ***both*** sexes."[24] The word "both" can be used to mean, or to indicate, "the one as well as the other," which implies two, or just "two."[25] Thus, and in light of the preceding items, "both sexes" refers to the two sexes: male and female.

- Section 907 refers neither to "gender identity" nor "gender."[26] Rather, Section 907 refers to "sexes" in the context of allowing "educational institution[s] receiving [Title IX] funds . . . [to] maintain[] separate living facilities for the different sexes."[27] The phrase "the different sexes" refers to sexes different from each other. In light of Section 901, the Section 907 phrase "the different sexes" must mean the female sex and the male sex.

The NPRM, however, transmutes Title IX's focus on two sexes into the amorphous world of "gender identity," which (as popularly understood) does not fit into the binary description of the sexes that appears in the text of Title IX.[28] Nor can it plausibly be argued that *Bostock* licenses this interpretation. That case did not redefine "sex" as "gender identity." Rather, the Court explicitly "proceed[ed] on the assumption that 'sex' . . . [in Title VII] referr[ed] only to biological distinctions between male and female."[29] In other words, *Bostock did not* hold that "sex" includes "sexual orientation" or "gender identity." Thus, even if "sex" means the same thing in both statutes, the NPRM's proposal is incongruous with the plain text.

b. Title IX's Legislative History

Title IX's legislative history supports the preceding interpretation of Title IX. It contains, for example, statements referring to "girls" and/or "boys," statements referring to "men" and/or "women," expressions of concern for the plight of "girls" and/or "women" (as distinct from "boys" and/or "men"), statements referring to "women's sports," "women's team[s]," or "women's athletics," statements that distinguish "girls," "women," or "female[s]" from "boys," "men," or "male[s]," statements in which the term "sex" is used to refer to one of the two sexes, statements in which the term "sexes" is used to refer to the two sexes, statements in which "sex," "sexes," or "one sex" is used in connection with "coeducational," statements referring to women as (possible) wives and mothers and men as (possible) husbands and fathers, statements linking women to pregnancy and childbirth, etc.[30]

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[24] *Id.* § 1681(a)(2) (emphasis added).

[25] Merriam-Webster, *Both*, https://www.merriam-webster.com/dictionary/both (last visited May 4, 2023) ("both").

[26] *See* § 1686.

[27] *Id.*

[28] 88 Fed. Reg. at 22,865, 22,869 (referring to "nonbinary" students).

[29] 140 S. Ct. at 1739.

[30] *See, e.g., Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. & Labor*, 94th Cong. 20, 34, 36, 38, 40, 41, 42, 196–97, 210–24, 285, 297, 330–31, 333–46, 582–83 (1975); *Discrimination Against Women: Hearings on Section 805 of*

Yet nowhere in Title IX's legislative history is there any reference to "gender identity" or any similar or related concept.[31]

What is more, in Title IX's legislative history there is no mention of, and not even a hint that any member of Congress advocated for or in any way accepted, notions such as the following: that individuals can (or should be able to) identify as a sex other than their biological sex, that individuals can (or should be able to) identify as a gender associated with the sex they themselves are biologically not, that there are (or should be) more than two sexes, that there are (or should be) more than two genders, that sex is a purely social construct, that gender is a purely social construct, that there is no connection between sex and gender, that gender and sex are independent of each other (or vary independently of each other), that gender is (or should be) delinked from or disassociated with biological sex, that the gender binary is oppressive, that there is (or should be) no difference between men and women, that the sexes are (or should be rendered or recognized as) indistinguishable, etc.[32]

What the legislative history *does* do, however, is confirm that the central purpose of Title IX, as far as athletics are concerned, was to *provide a fair arena for **female** athletes.* To demonstrate this purpose, one must first address the genesis of Title IX. That provision started as part of a floor amendment introduced by Senator Birch Bayh in 1972.[33] Given this provenance, Senator Bayh's remarks have been particularly influential in understanding Title IX. As the United States Supreme Court has noted:

> Although the statements of one legislator made during debate may not be controlling, . . . Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction. . . . And, because §§ 901 and 902 originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902.[34]

H.R. 16098 Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, 91st Cong. *passim* (1970); S. Conf. Rep. No. 92-798, at 148-49, 221-22 (1972); H.R. Conf. Rep. No. 92-1085, at 221-22 (1972); H.R. Rep. No. 92-554, at 5, 51-52, 64, 69, 251, (1971), *reprinted in* 1972 U.S.C.C.A.N. 2467; 122 Cong. Rec. 28,134–45 (Aug. 27, 1976); 121 Cong. Rec. 23,845–47 (July 21, 1975); 121 Cong. Rec. 17,300–01 (June 5, 1975); 118 Cong. Rec. 5803–15 (Feb. 28, 1972); 117 Cong. Rec. 39,248–63 (Nov. 4, 1971); 117 Cong. Rec. 38,639–42 (Nov. 1, 1971); 117 Cong. Rec. 30,399–432 (Aug. 6, 1971); 117 Cong. Rec. 30,155–58 (Aug. 5, 1971).

[31] *See* sources cited in the preceding note.

[32] *See* sources cited *supra* note 30.

[33] *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 524 (1982).

[34] *Id.* at 526–27 (citations omitted).

In discussing his amendment, Senator Bayh stated his views on the "Scope of the Problem"[35] and then provided a "Summary of [his] Amendment."[36] In his summary, he discussed the "Prohibition of Sex Discrimination in Federally Funded Education Programs."[37] His use therein of the word "sports" indicates not only that he intended to provide females a fair arena in athletics but also that he intended to allow "differential treatment" only on the basis of "sex":

> Under this amendment, each Federal agency which extends Federal financial assistance is empowered to issue implementing rules and regulations . . . . These regulations would allow enforcing agencies to permit differential treatment ***by sex only***—very unusual cases where ***such treatment is absolutely necessary to the success of the program***—such as . . . in ***sports*** facilities or other instances where personal privacy must be preserved.[38]

Furthermore, about six months earlier, Senator Bayh had remarked on and answered questions about a proposal similar to Section 901 but limited to higher education: Amendment No. 398.[39] That amendment's language was very close to what was eventually adopted as Title IX (the primary difference being not in what was prohibited but to whom the prohibitions applied).[40]

In response to Amendment No. 398, Senator Peter Dominick posed a number of queries to Senator Bayh[41] including the following:

> Mr. DOMINICK. The provisions . . . refer to the fact that no one shall be denied the benefits of any program or activity conducted, et cetera. The words "any program or activity," in what way is the Senator thinking here? Is he thinking in terms of dormitory facilities, is he thinking in terms of ***athletic*** facilities or equipment, or in what terms are we dealing here? Or are we dealing with just educational requirements?[42]

Senator Bayh's response indicated that he sought to provide equal opportunities in athletics for females to the maximum extent practicable, but not that sex-segregated sports end:

> Mr. BAYH. The rulemaking powers referred to earlier, I think, give the Secretary discretion to take care of this particular policy problem. I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is ***provide equal access for***

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[35] 118 Cong. Rec. 5803–06 (Feb. 28, 1972).

[36] *Id.* at 5806–07.

[37] *Id.*

[38] *Id.* at 5807 (emphasis added).

[39] 117 Cong. Rec. 30,399–400, 403–08 (Aug. 6, 1971).

[40] *Id.* at 30,399, 30,404.

[41] *Id.* at 30,406–08.

[42] *Id.* at 30,407 (emphasis added).

> ***women*** and men students to the educational process ***and the extracurricular activities in a school***, where there is not a unique facet such as football involved. ***We are not requiring that intercollegiate football be desegregated***, nor that the men's locker room be desegregated.[43]

Senator Bayh introduced his broader proposal (Amendment No. 874, which became Title IX) just six months later. It is not likely that he intended it to provide any less protection to the female sex.

"'[I]t would require blinders to ignore that the motivation for [Title IX's protection of separate sports]" was to increase opportunities for women and girls in athletics."[44] By allowing biological males to compete against biological females, then, the NPRM's proposed rule contradicts Title IX's purpose and destroys the very promise that Title IX created: i.e., that women and girls would have equal opportunities to compete and succeed in athletics without the unfairness that would result if biological males were permitted to compete in the same athletic events.

c. *Bostock*

If the text and legislative history are not enough to show that Titles VII and IX are different in purpose, surely the Supreme Court can be trusted to provide guidance. It is highly relevant, then, that the *Bostock* Court explicitly limited its holding to Title VII:

> 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."[45]

And while the Courts of Appeals are not universal in their understanding that "sex" under Title IX refers only to biological sex and not some felt "gender identity," the only court to address the issue en banc has forcibly noted not just that "sex" in Title IX means biological sex but that it's not a particularly close question, even under the guidance of *Bostock*.[46]

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[43] *Id.* (emphasis added).

[44] *B.P.J. v. W. Va. State Bd. of Educ.* (*B.P.J. #1*), Civil Action No. 2:21-cv-00316, 2023 WL 111875 at *9 (S.D. W. Va. Jan. 5, 2023) (quoting *Williams v. Sch. Dist.*, 998 F.2d 168, 175 (3d Cir. 1993)).

[45] *Bostock*, 140 S. Ct. at 1753.

[46] *Adams ex rel. Kasper v. Sch. Bd.*, 57 F.4th 791, 812–13 (11th Cir. 2022) (en banc); *accord B.P.J. #1*, 2023 WL 111875 at *9 ("There is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex.").

2. Males Have an Advantage over Females in Athletics

Biological males have many physiological advantages over biological females with respect to athletics.[47] The States are not the only ones to recognize this. For example, female athletes, coaches, sports officials, and parents of female athletes have observed:

> Physical fitness tests and records for youth sports showcase a measurable performance disparity between males and females at every age. The genetic gene expressions that differ between males and females number over 6,000 and are not limited to: height, body mass, skeletal structure, strength, muscle quality, center of gravity, limb length ratios, cardiovascular performance, and, of course, reproductive influence. . . . The effects of any amount of male puberty and androgenization make those early performance differences explode even further.
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> [T]he average age at which male athletes will beat the world records of women is 14–15 years of age. *See* the details of records listed on the Boys v. Women website: https://boysvswomen.com/#/world-record. The use, weight, and design of sports equipment such as bikes, balls, bats, javelins, discs, and suits, as well as playing fields and net heights reflect the biological differences between boys and men and girls and women and are designed to optimize the competition. At every level, . . . less skilled, less determined males beat higher level female athletes because of innate physical difference in the sexes.[48]

It is a telling illustration that Kansas native Jim Ryun (a male track athlete and, later, Congressman) was the first high-school athlete to run a mile in under four minutes back in 1964, when he was seventeen years old. Since then, ten other high-school boys have broken the four-minute mark in the United States alone.[49] To this day, however, no woman of any age or any nationality has run the mile that quickly; the women's world record hasn't even yet reached 4:12.[50]

The NPRM claims that even though "fairness in competition may be an important educational objective," a blanket rule that biological boys compete against biological boys and biological girls compete against biological girls is overbroad because sometimes a boy begins "transitioning" early enough that he doesn't gain the advantages that usually come with puberty.[51] But even setting aside whether hormone treatments and other things are sufficient to eliminate biological males' innate advantages (which we understand are addressed in other comments), this

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[47] *E.g.*, Expert Report of Gregory A. Brown, *B.P.J. #1*, No. 2:21-cv-00316 (S.D. W. Va. Apr. 21, 2022).

[48] Brief of 73 Female Athletes, Coaches, Sports Officials, and Parents of Female Athletes 6–7, *Soule v. Conn. Ass'n of Schs., Inc.*, No. 21-1365 (2d Cir. Mar. 30, 2023) [hereinafter Female Athletes Br.].

[49] LetsRun.com, *Leo Daschback Breaks 4:00 in Mile* (May 23, 2020).

[50] Track & Field News, Women's World Records, https://trackandfieldnews.com/records/womens-world-records/ (last visited May 7, 2023).

[51] 88 Fed. Reg. at 22,874.

logic is refuted by the Department's own regulations. Section 106.41—the very regulation that the NPRM seeks to amend—allows schools to *prohibit entirely* opposite-sex tryouts for contact sports like "boxing, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." And the NPRM does not seek to amend this portion of the rule. Thus, the Department recognizes the necessity of blanket sex-segregation rules while, at the same time, claiming such rules violate Title IX. This demonstrates the arbitrariness of the proposed rule and the capricious, post-hoc nature of its rationale.

3. The Department Cannot Create New, Ambiguous Hurdles for the States

The fact that Title IX is an exercise of Congress' Spending Clause power limits how much the Department can reshape the statute fifty-one years later. "[I]f Congress desires to [place conditions on] the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation."[52] Yet if one thing is unambiguous in Title IX, it is that it applies to discrimination "on the basis of *sex*," not "gender identity."[53] And how could it be otherwise? "Gender identity" is an inconsistent and wholly subjective concept. It cannot possibly be the basis for an unambiguous rule.

The undersigned are not the only ones to recognize that "gender identity," as a defining feature of eligibility to participate in a sport reserved for either males or females, is inherently problematic.[54] That is because there is no objective definition of what it means to be transgender.[55] The sole criteria seems to be whether a person says that he or she is transgender:[56]

> A document called "Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools" was created and widely distributed by several professional organizations including the ACLU and the Human Rights Campaign. This guide instructs schools to permit male students to play on girls' sports teams "without posing additional requirements." It tells schools that "there is no reason to doubt the sincerity" of a male athlete who asserts a transgender identity to compete against females, and they should be allowed to do so with no restrictions at all. It informs

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[52] *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (internal quotes omitted).

[53] *Adams*, 57 F.4th at 812–13.

[54] *E.g.*, Brief of Women's Declaration International USA 4–14, *B.P.J. v. W. Va. State Bd. of Educ.* (*B.P.J. #2*), No. 23-1078 (L) (4th Cir. May 3, 2023); Brief of Women's Liberation Front at 7–10, *West Virginia v. B.P.J.*, No. 22A800 (U.S. Mar. 13, 2023) [hereinafter WoLF Br.].

[55] Am. Academy of Pediatrics, *Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4 at 2 (Oct. 2018) (noting "transgender" is "not [a] diagnos[i]s," but a "personal" and "dynamic way[] of describing one's own gender experience").

[56] *See, e.g.*, *Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, S.J., concurring); *B.P.J. #1*, 2023 WL 111875 at *8; Cal. Health & Safety Code § 103426; Wash. Admin. Code § 246-490-075.

schools that requiring male athletes to take hormones to "participate in [female] sports is inappropriate."[57]

Nor is gender identity static. Notably, a study conducted by Lisa Littman, formerly of the Department of Behavioral and Social Sciences at Brown University's School of Public Health, found a link between what Littman termed "rapid-onset gender dysphoria" (gender dysphoria that appears for the first time during puberty or after its completion) in adolescents and young adults and the influence of peer groups and pro-transition online content on adolescents and young adults.[58] There is also "the issue of gender fluidity in which students may switch between genders with which they identify."[59]

Nor is gender identity limited to a male/female dichotomy. "Depending on whom you ask, [gender identity] covers people who identify with any of the following gender identities: 'boygirl,' 'girlboy,' 'genderqueer,' 'eunuch,' 'bigender,' 'pangender,' 'androgyne,' 'genderless,' 'gender neutral,' 'neutrosis,' 'agender,' 'genderfluid,' . . . 'third gender,' and many others."[60] Indeed, a third of the respondents to the 2015 National Transgender Discrimination Survey (a survey in which all respondents "identif[ied] as transgender") reported their "primary gender identity" as either "part time as one gender, part time as another" or some gender other than male or female.[61] At what point on the "gender spectrum" does a person become "female enough" or "male enough" to participate in sports ordinarily limited to members of the opposite sex?

Such a constantly shifting, ambiguous, internal, subjectively felt identity cannot be the basis

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[57] WoLF Br., *supra* note 54, at 9 (quoting Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K–12 Schools* 24, 28 (2015)).

[58] Lisa Littman, *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, PLoS ONE, v. 13, no. 8, Aug. 16, 2018, e0202330, https://doi.org/10.1371/journal.pone.0202330. Activists were outraged by Littman's findings and bullied the journal that had published them into a post-publication review of Littman's work. But the "correction" the journal later issued changed none of Littman's major results. *See* Lisa Littman, *Correction: Parent Reports of aAolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PLoS ONE, v. 14, no. 3, Mar. 19, 2019, e0214157, https://doi.org/10.1371/journal.pone.0214157.

[59] *Adams*, 57 F.4th at 798.

[60] Brief of Ala. et al., *B.P.J. #2*, No. 23-1078 (4th Cir. May 5, 2023) (quoting World Professional Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Conforming People* 96 (7th ed. 2012); Am Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 862, 862 (2015); Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guidelines*, 102 J. Clinical Endocrinology & Metabolism 3869, 3875 (2017)).

[61] Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 16 (2015).

for the unambiguous standard that the Spending Clause requires. And, what's more, relying on whether a particular person "feels" like a boy or a girl necessarily proceeds from some level of sex-stereotyping[62]—the very thing *Bostock* found to be illegal under Title VII. To elevate these stereotypes to immutable facts turns Title IX on its head and contradicts the NPRM's claim that it is simply codifying *Bostock*'s conclusions.

4. Conclusion

The NPRM acknowledges that "[p]articipation in team sports has been associated with many valuable physical, emotional, academic, and interpersonal benefits for students, and athletic participation has the potential to help students develop skills that benefit them in school and throughout life, including teamwork, discipline, resilience, leadership, confidence, social skills, and physical fitness."[63] Title IX was intended to ensure that females have equal access to participate in team sports and, as a result, obtain the benefits, skills, rewards, and scholarships that can be derived therefrom.

But the NPRM would force Federal funding recipients to allow biological males (who claim, purely on the basis of a subjective sense of "gender identity," to be females) to play on female athletic teams or to compete against females in athletics. Consequently, the NPRM will inevitably deny females the benefits that they would have derived from participating in team sports but for the intrusion of biological males. Indeed, under the NPRM, female athletes are likely to have a terrible experience in athletics.

> It is hard to express the pain, humiliation, frustration, and shame women experience when they are forced to compete against males in sport. It is public shaming and suffering, an exclusion from women's own category. The message to women and girls, 50% of our population, is shared by the parents, teammates, and spectators who watch it unfold. The shame does not disappear after competition is over. It stays forever as a memory of sanctioned public ridicule and a reminder of how women should expect to be treated and set aside for the needs and desires of males.
>
> At every age and every level, a female athlete deserves to know she is worthy of respect and fair competition against other females. She should not have to reach elite status to finally be deemed good enough to play without facing sex discrimination. College women's teams do not play against college men's teams; the high school girls' basketball team does not play against the boys' basketball team. The individual men's and women's state champion in tennis do not play against each other to determine who is the actual champion. The women's Olympic sprint champion does not race the men's champion.
>
> This kind of competition is not allowed because we understand the result would almost always serve to humiliate women. It is not real or fair competition. We know the outcome because the numbers, science, and physical realities predict it

[62] *See Gender*, PFLAG LGBTQ+ Glossary, https://pflag.org/glossary/.

[63] 88 Fed. Reg. at 22,861 (citations omitted).

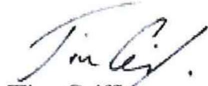
> with concrete assurance. A far less talented and skilled male will soundly beat a female. With this knowledge, we know the contests would merely be a predetermined public display of the physical differences between males and females. Such competition robs women and girls of a place to be held up in equal value to boys and men. In fact, it solidifies and reinforces that they are not worthy of equal opportunity and recognition.[64]

For these reasons we ask the Department to re-adopt "the position [its Office for Civil Rights took on August 31, 2020,] that when a recipient provides 'separate teams for members of each sex' under 34 C.F.R. §106.41(b), 'the recipient must separate those teams on the basis of biological sex' and not on the basis of gender identity."[65]

Thank you for your attention to this matter.

Sincerely,

Kris W. Kobach
Kansas Attorney General



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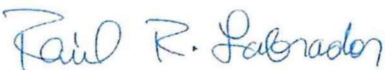

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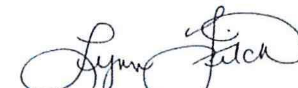

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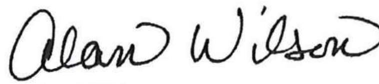

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[64] Female Athletes Br., *supra* note 48, at 4–5.

[65] 88 Fed. Reg. at 22,864 (citation omitted).

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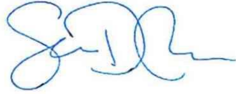

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