KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 15, 2023

SUBMITTED BY EMAIL AND ELECTRONICALLY
VIA REGULATIONS.GOV

Miguel A. Cardona, Ed.D.
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

Re: Doc. No. ED-2022-OCR-0143 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

Dear Secretary Cardona:

The States of Texas, Arkansas, Indiana, Kentucky, Mississippi, Nebraska, South Carolina, South Dakota, and Utah, provide federally subsidized public education to their residents. Because of this, these States have a compelling interest in the Department of Education ("Department") issuing clear and well-reasoned regulatory guidance regarding its obligations under Title IX of the Education Amendments of 1972.[1] *See* 20 U.S.C. § 1681 *et seq.* To that end, the Office of the Attorney General of Texas ("Texas OAG") has carefully reviewed and must oppose the Department's Proposed Rule, "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" ("the Proposed Rule"), published in the Federal Register on April 13, 2023. *See* 88 Fed. Reg. 22860.[2]

The Proposed Rule transforms Title IX and turns its implementing regulations on their head, it requires States to risk violating the Fourteenth Amendment's Equal Protection Clause, and it places our residents and their children in unnecessarily dangerous situations. First, the Proposed

[1] *See*, e.g., Tex. Educ. Agency, 2022 *Comprehensive Biennial Report on Texas Public Schools* at 231 (Dec 2022) (reporting that Texas received $6.6 billion dollars for K-12 education, which represented 19.8 percent of the total funds Texas spent in FY 2021), https://tea.texas.gov/sites/default/files/comp-annual-biennial-2022.pdf.

[2] The signatory States are aware of (and have often signed) other letters submitted by States raising many of the same issues discussed herein. This letter is meant as a supplement to, not substitute for those letters. Unless expressly noted, the signatory States incorporate those comments by reference herein.

Rule radically expands the definition of the word "sex" in the context of Title IX to include "gender identity," effectively eliminating any meaningful distinction between men's and women's sports. Second, by requiring States to permit biological men to compete against women in women's sports, the Proposed Rule forces States to create an unequal opportunity favoring men over women with respect to athletic scholarships and athletic achievement and thereby to risk liability under the Fourteenth Amendment.[3] And third, because of the Proposed Rule, women and girls will increasingly be at risk of severe physical injury as men who are less competitive in men's sports shift to women's sports.[4]

Ultimately, the Department's efforts to redefine "sex" are an irrational and purely political social experiment under the pretense of "equality." Nevertheless, it is clear from the well-publicized reality of the transgender athlete phenomenon, the Department's own language in the Proposed Rule, and the cases the Proposed Rule cites, that the burden of accommodating trans-identifying or nonbinary athletes goes primarily one way: it forces States to allow biological men to compete in women's sports.[5] This will calcify a still poorly understood and developing social situation with the mantle of federal regulation. It will disproportionately place the burden on women and girl athletes to deal with the consequences that will foreseeably result from allowing the members of one biological sex to compete on teams of the other. And the "exceptions" that the Department suggests it *might* allow will be an ineffective prophylactic against the harms generated by this Proposed Rule. Should the Department proceed with the Proposed Rule, women's sports as we know them will become a thing of the past.

I. In Title IX "sex" means "biological sex."

Title IX requires 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...." 20 U.S.C. § 1681(a). Fundamentally, what this means is that the statute prohibits discrimination against biological women and biological men in education, not "gender identity" discrimination. *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022).

Understanding the common-sensical and scientifically supported conclusion that men and women are biologically different and that, on average, men have an athletic competitive advantage over women, Title IX and its implementing regulations carved out special biological sex-based exceptions to Title IX's general prohibition against sex-based discrimination. For one example,

[3] John Lohn, *NCAA Title For Lia Thomas Was Joke With Biological Women As Punchline, And Hardly a Laughing Matter*, Swimming World Magazine (Mar. 17, 2022), https://www.swimmingworldmagazine.com/news/ncaa-title-for-lia-thomas-is-joke-with-biological-women-as-punchline-hardly-a-laughing-matter/.

[4] *See*, *e.g.*, Paulina Dedaj, *High school volleyball player says she suffered concussion after being injured by trans athlete, calls for ban*, Fox News (Apr. 21, 2023) (https://www.foxnews.com/sports/high-school-volleyball-player-says-suffered-concussion-being-injured-trans-athlete-calls-ban).

[5] In drafting of these comments, Texas searched for injuries in men's sports caused by biological women who identify as men. It found none.

Title IX explicitly distinguishes between the two sexes with respect to living facilities: "nothing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686.

Because Title IX does not expressly define "sex," the ordinary meaning, as understood at the time the statute was passed, prevails. *See, e.g.*, *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("[O]ur job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute"); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning"). And when Title IX was passed in 1972, virtually every dictionary definition of "sex" referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. *See, e.g.*, *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609–12 (1987) (consulting 19th century dictionaries to determine the meaning of "race" in a case arising under 42 U.S.C. § 1981, which became law in 1866); *see also Sex*, *American Heritage Dictionary of the English Language* (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); *Sex*, *American Heritage Dictionary of the English Language* (1979) (same); *Sex, Female, Male, Oxford English Dictionary* (re-issue ed. 1978) (defining "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female respectively," "female" as "[b]elonging to the sex which bears offspring," and "male" as "[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation"); *Sex*, *Webster's New World Dictionary* (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."); *Sex*, *Female*, *Male*, *Webster's Seventh New Collegiate Dictionary* (1969) (defining "sex" as "either of two divisions of organisms distinguished respectively as male or female," "female" as "an individual that bears young or produces eggs as distinguished from one that begets young," and "male" as "of, relating to, or being the sex that begets young by performing the fertilizing function"); *Sex*, *Random House College Dictionary* (rev ed. 1980) ("[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions."); *Female*, *American College Dictionary* (1970) ("[A] human being of the sex which conceives and brings forth young; a woman or girl."); *Male*, *American College Dictionary* (1970) ("[B]elonging to the sex which begets young, or any division or group corresponding to it.").

By contrast, "gender" and "gender identity" have been understood to be distinctive terms and concepts from "sex" since shortly before the enactment of Title IX. The UCLA psychoanalyst who introduced the term "gender identity," wrote in 1968 that "gender" had "psychological or cultural rather than biological connotations." Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968). Similarly, Virginia Prince, who is credited with coining the term "transgender," echoed the view that "sex" and "gender" are distinct: "I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former." *The Federal Government on Autopilot*, 114th Cong. 13 (Heriot statement) (quoting Virginia Prince, *Change of Sex or Gender*, 10 TRANSVESTIA 53, 60 (1969)). And in the 1970s, feminist scholars joined the chorus differentiating "biological sex" from "socially assigned gender." *Id.* Title IX, the federal government's landmark law against sex discrimination in education was passed against this backdrop.

II. Title IX's implementing regulations confirm that the statute has never been understood to delegate the power to define the word "sex."

Unsurprisingly, every other administration since Title IX was enacted has understood "sex" to mean biological sex. For example, Title IX's implementing regulations allow federally subsidized schools to "provide separate housing on the basis of sex," where such housing is "[p]roportionate in quantity to the number of students of that sex applying for such housing" and "[c]omparable in quality and cost to the student," 34 C.F.R. § 106.32(b). The regulations also permit "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex [are] comparable to such facilities provided for students of the other sex." *Id.* § 106.33.

And Title IX's implementing regulations further emphasize that "sex" means "biological sex" when it carves out an exception for athletics:

> However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

34 C.F.R. § 106.41(b). In other words, Title IX allows for either (1) athletics programs where both sexes are allowed to freely play and compete with each other under its general prohibition against sex discrimination, or (2) sex-specific athletics programs that give equal opportunity to both men and women to obtain equal access to athletics, scholarships, and athletic honors on a fair playing field.

The Department should not reverse course now and depart from this well-established understanding of the term "sex" or its well-established regime for ensuring equal opportunities for men and women in athletics for at least three reasons.

First, agencies are prohibited under the Administrative Procedures Act (APA) from issuing rules contrary to the unambiguous intent of Congress. *See, e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"). A statutory term is not per se ambiguous because the statute does not explicitly define it. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). And Title IX's text, structure, and history all demonstrate Congress intended to prohibit "sex" discrimination, not "gender" or "gender identity" discrimination. *Adams*, 57 F.4th at 811-12.

After all, "gender identity" is a wholly different concept from "sex"—not a subset or reasonable interpretation of the term "sex." The meaning of the terms "sex" on the one hand and "gender identity" on the other, both now and at the time Title IX was enacted, forecloses alternate constructions. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (explaining that an

agency interpretation must be consistent with the given meaning of a term when official action was taken). If "sex" were ambiguous enough to include "gender identity," then the existing exceptions for athletics, as well as the various other exceptions listed above, would be meaningless. For example, if Title IX's use of the term "sex" were ambiguous, then why did Title IX's drafters except from its general prohibition sex-separated living facilities? Men who identify as women would be free to live both in living facilities associated with their biological sex and living facilities associated with their gender identity. *See Adams*, 57 F.4th at 813. The ability of an individual to pass freely from one sex-selective group to another negates the purpose of the sex-selective exceptions altogether.

Second, the Department should adopt a "highly consequential" rule only after examining whether "Congress could reasonably be understood" to have authorized the Department to have done so. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). For the reasons discussed above (among others), Congress in 1972 could not "reasonably be understood" to have enshrined gender theory in its statute and thus have forced States to let biological men play on an otherwise non-coed biological women's sports team. After all, the term "gender identity" already existed when the 92nd Congress enacted Title IX, yet "gender identity" appears nowhere in the text of Title IX, *Adams*, 57 F.4th at 815-16. And numerous Congresses have convened since Title IX was first understood to refer to biological sex, and Congress has never expressed any disagreement with it.

Congress has also expressly affirmed that "sex" and "gender identity" are two distinct and entirely separate concepts. In 2010, President Obama signed into law hate crime legislation, 18 U.S.C. § 249, which applies to, *inter alia*, "gender identity." *Id.* § 249(a)(2). The 2013 reauthorization of the Violence Against Women Act (VAWA) also prohibited recipients of certain federal grants from discriminating on the basis of both "sex" and "gender identity." 42 U.S.C. § 13925(b)(13)(A). With regard to Title IX, Congress considered amending the law on several occasions to cover "gender identity," it did not. *See* H.R. 1652, 113th Cong. (2013); S.439, 114th Cong. (2015). Yet, in other civil rights statutes, Congress made the opposite policy choice and extended protection to individuals based on both "sex" and "gender identity." *See* 18 U.S.C. § 249; 42 U.S.C. § 13925(b)(13)(A).

As a result of Congress's deliberate choice, the statutory term "sex" remains as clear and unambiguous as it was when Title IX was enacted. Under the APA, *see, e.g.*, *Chevron*, 467 U.S. at 843 n.9, the Department cannot rewrite these laws simply because it does not agree with Congress's policy choices. *Central Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016) ("Disagreeing with Congress's expressly codified policy choices isn't a luxury that administrative agencies enjoy").

Third, the Department relies on inapposite developments in Supreme Court precedent to justify its break in well-established regulatory understanding. Specifically, the Department of Education seeks to redefine the implied statutory definition of "sex" to include biological men who say that they are women based on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *See* 88 Fed. Reg. 22860, 22862, 22864-65. But *Bostock* was interpreting what constituted discrimination "on the basis of sex" in the context of Title VII—not redefining what "sex" meant in the context of Title VII, let alone redefining the word "sex" for other laws aimed at solving historical inequalities between biological men and biological women in education.

While *Bostock* might warrant an update to some federal employment regulations, the Supreme Court's reading of Title VII does not justify upending the interpretation of another unrelated statute that was enacted nearly a decade later pursuant to a different constitutional power. One of the purposes of Title IX and its implementing regulations is to ensure that sex-segregated athletic competition categories provide an equal opportunity for women to benefit from athletics programs and achieve similar honors and opportunities that men traditionally accessed without barriers. *See, e.g.*, *Cohen v. Brown Univ.*, 101 F.3d 155, 176–77 (1st Cir. 1996); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175–76 (3d Cir. 1993). In the athletics context—in contrast to the employment contexts—biological sex is a highly relevant characteristic. *See Cohen*, 101 F.3d at 178. Courts have long recognized that female competitors are at a physical disadvantage when required to compete against their male counterparts. *See Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

Bostock does not require—or even suggest—that policymakers should blindly extrapolate its holding to reinterpret "sex" in Title IX and thereby effectively nullify the statute and its long-established implementing regulations. The Court in fact stipulated as such in *Bostock*, stating that its holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," such as Title IX. And its holding did not address other issues not before the Court such as "sex-segregated bathrooms, locker rooms, and dress codes," or athletics. 140 S. Ct. at 1753; *see also Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

In other words, Title IX and its implementing regulations—unlike *Bostock's* Title VII—expressly differentiates between the sexes with respect to sports, dormitories, bathrooms, and other such things. Therefore, if to "provide separate toilet . . . facilities on the basis of sex" means providing them on the basis of biological sex, which it and every other similar exception does, then the Proposed Rule directly contradicts the meaning of the statute and is outside the agency's authority. 34 C.F.R. § 106.33; *see also Adams*, 57 F.4th at 811-812.

III. The Proposed Rule would force Texas and other States to risk violating their students' Fourteenth Amendment rights.

The Proposed Rule, if finalized, will also force Texas and other States into an impossible choice: risk liability under the Constitution's Equal Protection Clause or lose federal funds. If the States comply with the Proposed Rule, they will have to discriminate in favor of biological men who assert that they are "women" by permitting those men access to women's athletics, women's athletic honors, and women's athletic scholarships. Because of the natural biological differences between men and women, the effects of this Proposed Rule will only advantage men and deny women access to those athletic opportunities, honors, and scholarships.[6] This may expose State officers and employees to suits under 42 U.S.C. § 1983. If, however, States and their schools refuse to discriminate in favor of men, they stand to lose federal funding conditioned on the acceptance

[6] "[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." 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.].

and implementation of Title IX and its implementing regulations. 20 U.S.C. § 1681.

The Equal Protection Clause says that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This is "a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). And with respect to women, the Supreme Court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women … equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). Thus, classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534. But denying women "equal opportunity to aspire [and] achieve" is precisely what the Department's Proposed Rule requires States to do by mandating opportunities for biological men to enter women's sports so that they may take spots on their teams, place among the top rankings of women's sports, and set records impossible for women to break.[7]

The Proposed Rule assumes that a period of testosterone suppression will eliminate male physical advantages over women, 88 Fed. Reg. at 22870, 22883; however, scientific studies dispute that assumption and recognize the ongoing physical advantage biological males have over biological females following testosterone suppression.[8] To the extent that biological men and boys retain a physical advantage over biological women and girls, permitting them to compete in women's sports disadvantages biological women. Allowing such competition *per se* denies women athletic opportunities equal to their biological men counterparts, contrary to their rights under the Equal Protection Clause, Title IX, and decades of regulations. And that disadvantage is based on sex, in particular the physiological differences between sexes, which the Proposed Rule ignores for women's sports. In such circumstances, if the States were to implement the Proposed Rule, a court would have a basis to conclude that requiring a State to allow a biological woman to compete against a biological man identifying as a woman in a women's athletic competition discriminates against the biological woman on the basis of sex and potentially violates the woman's rights to equal protection of the laws.

This concern, about men seizing opportunities from women is not prophecy or prediction, it is already happening. For example, take Reka Gyorgy, a 2016 Hungarian Olympian swimmer who

---

[7] The Proposed Rule is also a direct attack on Texas's domestic affairs. Texas's Constitution prohibits the State from denying or abridging "[e]quality under the law . . . because of sex . . . ." TEX. CONST. art. I, § 3a. And the Proposed Rule also forces Texas to create a specific, sex-based exception for to its preexisting statutes and regulations. *See* TEX. EDUC. CODE § 33.0834.

[8] Joanna Harper et. al, How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin?, 55 BRITISH JOURNAL OF SPORTS MEDICINE 865, 870 (2021) ("[T]he small decrease in strength in transwomen after 12-36 months of [gender-affirming hormone therapy] suggests that transwomen likely retain a strength advantage over cisgender women."), https://bjsm.bmj.com/content/bjsports/55/15/865.full.pdf; see also David J. Handelsman, Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty, 87 CLINICAL ENDOCRINOLOGY 71 (2017) (observing that "while testosterone deficiency may lead to loss of bone density, the overall structural framework of the skeleton is likely to change slowly if at all"), https://anzac.edu.au/publications/pubdata/pdf/2017_28397355.pdf.

competed on Virginia Tech's swim team in 2022. Female Athletes Br. at 14. The NCAA Women's Swimming & Diving Championships held on March 17th, 2022, was Reka's last collegiate swim meet. Because of the participation of Lia Thomas, a man, Reka missed qualifying for the finals by one spot in the women's 500 freestyle. *Id.* Lia Thomas would go on to "win" the NCAA Championship for women's 500 freestyle, which also denied Emma Wyant first place, Erica Sullivan second, and Brooke Forde a place on the podium.[9] Lia Thomas is not unique: Austin Killips, a man who identifies as a woman, took first place in a professional cycling race in New Mexico.[10] Tiffany Newell, another man who identifies as a woman, is breaking Canadian women's track and field records.[11] And these are merely the tip of the iceberg.[12]

The fallout from the Department's Proposed Rule will ultimately fall on women and girls like Reka Gyorgy. Unlike previous errors which contained no inherent discrimination, this Proposed Rule singles out women for discrimination that ensures they will be denied "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Virginia*, 518 U.S. at 532. As the variety of court cases cited by the Department show, it is women and girls who must "take the risk" of a biological male athlete joining their team and thereby rendering their athletic competitions unfair, denying them opportunities for awards or scholarships. No biologically male athlete is being asked to or will assume the same risks. This is a frontal attack on women and girls, and an attempt to erase the very gains for women and girls that Title IX has sought and protected for over half a century.

IV. The Proposed Rule Will Harm Girls and Women in Texas and Other Signatory States.

Above and beyond depriving women of the opportunities afforded them by existing law, there is copious evidence that allowing males to compete with women has harmed women and has generally increased the risk of injury for them. For example, the World Rugby organization (based in England) found that female players tackled by someone who had undergone male puberty had "at least a 20-30% greater risk" of injury than when playing against only biological females.[13] The

---

[9] 2022 NCAA Division I Women's Swimming & Diving Championship Results, https://swimmeetresults.tech/NCAA-Division-I-Women-2022/.

[10] Reuters, *Cycling governing body defends policy after trans athlete's victory*, NBC News (May 3, 2023), https://www.nbcnews.com/nbc-out/out-news/cycling-governing-body-defends-policy-trans-athletes-victory-rcna82630.

[11] Corey Walker, *Transgender athlete wins four consecutive races, smashes record*, The Lion (May 3, 2023), https://readlion.com/2023/03/03/transgender-athlete-wins-four-consecutive-races-smashes-record/#:~:text=Transgender%20athlete%20wins%20four%20consecutive%20races%2C%20smashes%20record,-Published%20March%203rd&text=(Daily%20Caller)%20%E2%80%93%20A%2050,started%20their%20transition%20in%202017.

[12] Grant Atkinson, *Transgender Athletes Breaking Records in Women's Sports*, ADF Legal (Mar. 20, 2023), https://adflegal.org/article/transgender-athletes-breaking-records-womens-sports (identifying approximately 30 other instances of men seizing opportunities from women in high school, collegiate, and Olympic women's sports).

[13] Sean Ingle, *World Rugby bans trans women from elite women's game due to injury risks*, The Guardian (Oct 9, 2020),

inequality and increased injury risks for women resulting from men playing on women's rugby teams in the UK has resulted in numerous referees quitting the women's sport in protest.[14] And in Australia, an amateur football league is receiving backlash as a 30-year old man who identifies as a woman has reportedly hospitalized one woman and caused multiple injuries to others.[15]

In Guam, a man identifying as a woman was allowed to play rugby at the high school level. He injured three women.[16] An alarmed coach stated that the trans-athlete had a clear advantage, whose "body size, body strength . . . completely dominate[d] any girl that I have on my team." There was also a recent and highly publicized incident that occurred at a North Carolina women's volleyball match in which a "brutal" ball spike by a man caused head and neck injuries for a woman, Payton McNabb, who was playing on the opposing team.[17] McNabb suffered a concussion and has continued to suffer impaired vision, partial paralysis on her right side, constant headaches, anxiety, and depression. *Id.*

In addition to physical injuries, this rule will also likely result in States facilitating what has long been recognized by every State as sexual harassment: the indecent exposure of genitalia.[18] The prospect of this occurring has already led to reports of issues in locker rooms used by teams in athletics programs that have allowed men who say they are women play on women's sports teams.[19]

Ultimately, these incidents have one thing in common: in every case, women were competing against a biological man in a women's sports event. Biological men competing against each other are undertaking no out-of-the-ordinary risk—just the everyday risk that sports always entail. The same holds true for biological women competing against each other. Women who choose to

---

https://www.theguardian.com/sport/2020/oct/09/world-rugby-bans-trans-women-from-elite-womens-game-due-to-injury-risks.

[14] Steve Warren, *Broken Bones vs. Hurt Feelings: UK Rugby Refs Quitting After Bearded Transgender 'Women' Hurt Female Players*, CBN (Dec. 10, 2022), https://www2.cbn.com/news/world/broken-bones-vs-hurt-feelings-uk-rugby-refs-quitting-after-bearded-transgender-women.

[15] Shay Woulahan, Women's Football League, Reportedly Injured Players, The Post Millenial (Apr. 3, 2023), https://thepostmillennial.com/women-soccer-players-injured-by-trans-identified-biological-competitor-male-during-match.

[16] Luke Gentile, *Transgender rugby player slams female athletes, coach says three injured*, Washington Examiner (Apr. 13, 2022), https://www.washingtonexaminer.com/news/watch-transgender-rugby-player-slams-female-athletes-coach-says-three-injured.

[17] Paulina Dedaj, *High school volleyball player says she suffered concussion after being injured by trans athlete, calls for ban*, Fox News (Apr. 21, 2023), https://www.foxnews.com/sports/high-school-volleyball-player-says-suffered-concussion-being-injured-trans-athlete-calls-ban.

[18] Jeff Burtka, *Indecent Exposure Laws by State*, FindLaw (May 17, 2021), https://www.findlaw.com/state/criminal-laws/indecent-exposure-laws-by-state.html (listing all 50 States' indecent exposure laws).

[19] Alyssa Guzman, *Trans swimmer Lia Thomas 'dropped [his] pants' and exposed [his] 'male genitalia' in a women's locker room after a meet, claims University of Kentucky athlete Riley Gaines*, Daily Mail (Feb. 9, 2023), https://www.dailymail.co.uk/news/article-11731777/Trans-swimmer-Lia-Thomas-dropped-pants-exposed-male-genitalia-womens-locker-room.html.

compete in mixed-gender sports do face some additional risk, but it is a risk knowingly and voluntarily accepted. But when one group—biological women who are forced to compete against biological men in events previously reserved only for women—is so obviously being singled out and exposed to risks and dangers above and beyond the norm, it becomes clear that no State which wants to protect the safety of women and girls can endorse the Proposed Rule.

CONCLUSION

The Proposed Rule ignores biology, is outside the Department's statutory authority, places States into an impossible situation where they must comply and risk violating their residents' rights to equal protection under the law or lose vital education funding, and it puts States' residents at risk of physical and sexual harms. As a result, our States ask the Department to rescind the Proposed Rule.

Very truly yours,

Ken Paxton
ATTORNEY GENERAL OF TEXAS

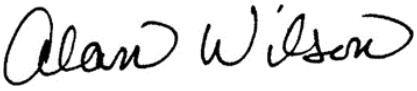
Tim Griffin
Attorney General of Arkansas

Theodore E. Rokita
Attorney General of Indiana

Daniel Cameron
Attorney General of Kentucky

Lynn Fitch
Attorney General of Mississippi

Michael T. Hilgers
Attorney General of Nebraska



Alan Wilson
Attorney General of South Carolina

Marty J. Jackley
Attorney General of South Dakota

Sean D. Reyes
Attorney General of Utah