WISCONSIN INSTITUTE FOR LAW & LIBERTY

May 15, 2023

RE: Public Comment on Document No. 2023-22860 and Docket ID ED-2022-OCR-0143

To Whom it May Concern:

The Wisconsin Institute for Law & Liberty (WILL), is a non-profit public-interest law and policy organization dedicated to the rule of law, individual liberty, constitutional government, and a robust civil society. WILL submits this public comment to raise significant concerns about the proposed regulation involving Title IX in the context of athletics.

The Department's reinterpretation of Title IX in this proposed regulation is an illegal action by the Department because it is antithetical to the purpose of the law–namely, to create equal opportunities for women and girls in sports.

If the Department does not amend this proposed rule, fairness and safety for women and girls in athletics will be at risk, both on and off of the field; religious organizations will be forced to either forego their beliefs or risk litigation and federal investigations; and school administrators will be set up to fail. WILL addresses these concerns below and requests that the Department respond to each of these issues and reject the proposed regulation that will create great harm for students and schools receiving federal aid.

1. <u>The Department's proposed rules are an unnecessary and illegal interpretation of Title IX because the Department is acting outside of the scope of law.</u>

The intent of Title IX in the context of athletics is to create equal opportunities for women and girls. *See* 20 U.S.C. sec. 1681(a). The main provision of Title IX states, "No 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." As a result, the law eliminated obstacles that many women and girls faced in both education and athletics, ultimately providing women and girls numerous opportunities to compete and build confidence. That is now at risk.

Since its passage, Congress has not voted to amend Title IX to specifically redefine "sex" as including gender or gender identity. *See* Document No. 2022-13734 and Docket ID ED-2021-OCR-0166. Instead, the Department is trying to illegally legislate through regulation by redefining what it means to be a woman or a girl, and in so doing harming the very groups the statute was designed to assist.

The proposed change to Title IX in the context of athletics illegally expands the scope of the law to include, among other things, participation in sports based on "gender

identity." Yet this proposed rule does not define sex or gender. Such rulemaking would create out of thin air a legal right for biologically male students who identify as females to compete against biologically female students where Congress has clearly provided no such right—directly encroaching on the Title IX protections for female student athletes.

Proposing such changes goes well beyond the statutory scope established by Congress. The Department does not have authority to broaden the definition of "sex" in the law. The U.S. Supreme Court recently reaffirmed that our Constitution's requirement for separation of powers means that executive agencies may not adopt regulations that go beyond the scope of laws written by Congress. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

Furthermore, the Department is relying on Executive Order 13988, 86 FR 7023 (Jan. 25, 2021), which is an incorrect interpretation of the decision by the U.S. Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In fact, a federal court has enjoined the Department from implementing its guidance against several states. *See State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).

Importantly, the *Bostock* Court considered sex discrimination in the Title VII employment context and explicitly held that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Bostock v. Clayton County*, 590 U.S. at 1742. The logic of *Bostock* was limited to discrimination based on the cultural expression of gender, i.e., how an employee dressed or otherwise presented herself. Such a radical change in the law should be adopted by Congress and not by administrative fiat.

Therefore, Executive Order 14021, 86 FR 13803 (Mar. 11, 2021), which directed the U.S. Department of Education to implement this reinterpretation of Title IX in its regulations, is an illegal agency action and this proposed rule, which was drafted under its auspices, must be rejected.

2. The Department's proposed regulation will undermine competition and safety for women and girls.

The proposed regulation would bar schools from adopting or enforcing policies that categorically ban transgender students from participating on teams consistent with their gender identity. This undermines competition and safety for women and girls.

The physiological advantages that men and boys have over women and girls are undeniable. Women and girls are simply not as physically strong or powerful. It is difficult to imagine an activity that highlights this more than athletics. As a result, allowing biological boys to play on girls' sports teams will result in girls losing spots on their teams, biological boys being chosen over girls for awards and scholarships, and biological boys taking playing time that would have otherwise gone to girls. Considering

the differences in strength and physicality, biological boys competing against or on teams with girls also increases the risk of physical injury to girls.

a. Girls in elementary schools deserve equal opportunities as well.

As for elementary school, the Department has stated that it "currently believes that there would be few, if any, sex-related eligibility criteria applicable to students in elementary school that could comply with the proposed regulations," so in effect, elementary schools will have to allow all transgender students to participate on the opposite sex teams. But considerations about the physiological differences between boys and girls are relevant in elementary school as well. Girls would be at an increased risk of physical injury if they were forced to play against biological boys.

One of the undersigned attorneys was a two-sport collegiate athlete and, although she did not have to compete against biological males in NCAA affiliated games, she frequently trained with them. Even though the undersigned attorney was one of the fastest female athletes and was a starter on the women's softball and basketball teams, the males routinely outperformed her with relative ease. This includes noticeable differences in speed, strength and agility. Frankly, it made her a better athlete to be able to *practice* against a higher level of competition. But if she would have had to *compete* against males, she would not have stood a chance.

The Department indicates competition in sports is not important because competition in elementary school sports teams prioritize "broad participation and teaching basic skills." Competition is inherent to sports. It is what sports are about. Instilling the desire for children to compete and be the best they can be is desirable and important to sports at *all* levels. This helps students build a work ethic which transfers over to academics and eventually the work force. Competition in sports does not just begin after elementary school.

Also, the long-term effect this proposed rule would have on girls and athletics would be devastating. The Department expresses concern only for biological boys, specifically that if schools do not allow those who identify as transgender to play on girls' sports teams in elementary school, they may lose interest in team sports or athletic activity altogether. What about the girls whose playing time, opportunities to be on the team, and awards are taken by biological boys? Has the Department considered the negative impact on those girls? What if girls lose interest in sports or athletic activity because of this loss of opportunity? This further supports that the Department should abandon the proposed rule.

b. *Myriad real-life examples demonstrate the harmful effect on girls.*

The concerns for women's and girls' safety and access are not hypothetical. Lia Thomas, who swam for three years on the University of Pennsylvania men's team as Will Thomas, now identifies as a woman. Thomas ranked in the mid-500s as a male and

soared to being one of the top-ranked swimmers as a woman. Without a doubt, Lia Thomas has prevented opportunities for women swimmers due to the competitive advantage as a biological male.

In North Carolina, a school district voted to forfeit its games against a rival after one of its players was injured by a transgender student. During a volleyball game, a transgender athlete spiked the ball, hitting the girl in the face and causing a concussion and neck injury. The school stated that it will not participate in any more volleyball games against the rival school due to safety concerns.

In Vermont, a school forfeited a basketball tournament citing concerns over fairness and safety due to a biological male being on another team.

In Connecticut, from 2017 to 2019, two males won 15 women's track championship titles that were previously held by nine different girls.

In Idaho, Madison Kenyon and Mary Kate Marshall had to compete against June Eastwood, a biological male at the University of Montana, who competed on the men's cross country and track and field teams for three years before transitioning and joining the school's women's teams. Eastwood won the Big Sky Conference indoor track championship in the mile.

In West Virginia, Taylor Allen, a middle-school student and athlete, joined a group of female athletes, coaches, sports officials and parents of female athletes, in filing an amicus brief to protect girls' and women's sports. Allen recently wrote in an op-ed that, even in middle school, boys on average have biological physical advantages that Allen and her teammates could never hope to beat. Also in West Virginia, Lainey Armistead, who played soccer on a scholarship at West Virginia State University, joined a lawsuit to defend the state's Save Women's Sports law. Armistead recounted that, in her experience growing up with brothers, males are stronger, faster, and bigger than females. Allowing males to compete on women's sports team would be devasting not only to fairness but to morale and safety.

These are just some examples. Fairness and safety of girls are at risk if the Department proceeds with this proposed regulation.

Title IX in the context of athletics provides a clear example of why biological differences between men and women matter and how Title IX has created equal opportunities for women and girls. When those biological differences are ignored, it is women and girls who lose. They lose opportunities to compete, opportunities to experience camaraderie and teamwork, opportunities to build confidence, and opportunities to win awards and scholarships. Scholarships translate into both athletic and career opportunities for many women who might not otherwise be able to afford to attend college, and now that could be at risk. Therefore, the Department should reject the proposed regulation.

3. The Department's proposed regulation also poses safety risks off of the playing field.

In addition to creating safety risks on the field or court, this proposed regulation will create real safety risks in single-sex spaces like locker rooms.

In Wisconsin, we have already seen the effect of the efforts by this Administration to prioritize transgender students over girls. We are representing a family whose daughter experienced a severe invasion of privacy in the girls' locker room when a male student, who is 18 years old, approached her and her friends, entered the shower area, announced, "I'm trans, by the way," fully undressed and exposed his male genitalia to the minor girls and showered next to them.

Despite being subject to Title IX requirements, upon learning of this incident involving alleged sexual harassment, the school district failed to properly initiate the Title IX process. The district failed to provide support to the victims, violating the existing Title IX requirements. Instead, district administrators spoke to at least one of the families about use of a "Gender Support Tool" and produced a locker room use guidance document which indicated that if the girls desired more privacy, it was the *girls* who would have to leave the women's locker room and use another space.

If this is occurring in Sun Prairie, Wisconsin, it is likely occurring across the country, or will, if the proposed rule is implemented. The Department's proposed rules fail to address how school districts are expected to both comply with this proposed regulation while also ensuring that sexual harassment does not occur. Federal law defines sexual harassment as "unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education program or activity." *See* 34 C.F.R. sec. 106.30(a) Yet the proposed rules do not address how to prevent instances of sexual harassment from occurring between students and their transgender classmates in places such as a locker room shower. We urge the Department to consider the future of single-sex spaces in schools and the impact on minor girls. The proposed rules will only result in more confusion and harmful situations occurring.

Outside of our home state of Wisconsin, a student in California recently raised concerns at a school board meeting about a biological male putting girls' safety in jeopardy by being allowed to use the girls' locker room. After a video emerged of a transgender student assaulting a girl, another student at the school stated this biological male has been using the women's restroom and locker room. Yet the proposed rules only further confuse the situation and provide no recourse or protection for these young women.

4. The Department's proposed regulation would violate the First Amendment.

Furthermore, the proposed regulation on athletics apply to those whose views may be grounded in sincere religious beliefs. The proposed changes will force some students,

coaches and administrators to choose between living in accordance with their personal convictions and risking becoming the subject of a complaint.

For example, an interscholastic team at a Christian school may point to Jesus' teachings on the topic (*see* Mark 10:6), but the Title IX regulation could result in a loss of funding, or even investigation into these groups simply for expressing sincerely-held religious beliefs. Schools that choose to protect their students by maintaining sex-specific sports teams and locker rooms in accordance with their religious convictions risk costly litigation in addition to potentially having their federal funding revoked. Significantly, this is would also be a violation of the Free Exercise Clause of the First Amendment.

This is also unworkable in practice. If one school adopts criteria which leads it to conclude that biological boys should be allowed to play on girls' teams, and they travel to an away game to compete against a school that reached the opposite conclusion—a religious school, for instance—then what locker room should the transgender student use? Could a religious school be punished for enforcing a locker room policy consistent with its religious beliefs about sex if it hosts a girls' team with a transgender student? As discussed in more depth in the next section, this proposed rule sets up administrators and athletic directors for failure.

State interscholastic athletic organizations should not be encouraged by the federal government to adopt or enforce transgender participation policies which ultimately harm private religious school members. In Wisconsin, private religious schools may participate in the interscholastic athletic association. As the WIAA has acknowledged, its religious school members have been engaged and cooperative with rules and have been quality hosts for membership tournaments for the more than two decades since private schools were granted an option to become members. The WIAA provides a valuable role in organizing athletic programs and facilitating tournaments for students to compete at the highest levels of competition in the state. Considering this dynamic, the proposed rule would harm *both* girls and boys whose schools limit athletic team membership on the basis of biological sex.

The proposed rule would infringe upon the First Amendment protections of religious schools, students, coaches and administrators.

5. <u>The Department's proposed regulation will set up school administrators for failure.</u>

Last, the proposed regulation would require that if a district "adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such 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." It goes on to state that this would not affect the discretion of the school "to offer separate male and female athletic teams when selection is based on competitive skill or the activity involved is a contact sport."

A few significant concerns must be addressed by the Department. First, the discussion of "eligibility to participate" creates confusion because that phrase is not defined. Does the Department intend for this to mean that the student must play? Does this mean a spot on a team? Is there liability for the school if the transgender student has a spot but doesn't play? How are school districts expected to navigate this vague provision?

Second, the proposed regulation uses the phrase "substantially related to the achievement of an important educational objective." What does this mean? Does this apply to club sports teams, like powder puff football for girls? Or does this apply to school-sponsored athletics only? Could school administrations disagree on whether it is related to the "achievement of an important educational objective" and change their policy? It is highly onerous for schools to determine what this means and how to execute it. Even if one district makes a certain determination (or faces a challenge in court on this standard), there is nothing to stop another district (or court) from reaching another determination under this vaguely-worded provision, with inconsistent treatment of student athletes the likely outcome.

Third, schools must adopt criteria to "minimize harm" to transgender students. Again, this is not defined. Do the interests of all female athletes yield to a small fraction of students? If schools supposedly have discretion to consider safety in contact sports, does this become outweighed by this requirement to minimize harm to transgender students? Furthermore, what about the harm to biological girls and the risk of sexual harassment in same-sex spaces? Title IX was created to protect biological girls, yet the proposed rule lacks any real consideration for women and girls.

Fourth, how does this proposed rule apply to individuals who identify as nonbinary or gender fluid? If the Department's intent is to expand the definition of sex, the proposed rule fails to clarify the full extent of the new definition. The proposed rule does not provide clarity on this for administrators who will ultimately be required to implement the final rule.

The proposed rule does not address these questions and ultimately will create further confusion, but one thing is sure: protections for biological women and girls will be eroded or eradicated as a result.

It is evident that this Administration intends to inject gender identity into athletics while placing the onus upon school districts to determine whether doing so would be problematic or not. Schools are likely to err on the side of allowing transgender student athletes to participate in the athletic program consistent with their gender identity in order to avoid federal investigations by the Department. This accomplishes the goal of

the Biden Administration without having to explicitly mandate that districts allow transgender athletes to participate in the athletic program consistent with their gender identity at all levels of competition.

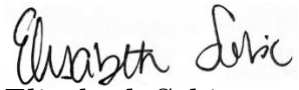
Not only is the proposed regulation confusing, but the logistics of implementing it are unworkable for school districts, which will be forced to navigate state and federal laws, interscholastic athletic association regulations, and threat of legal challenges. Several states have enacted laws limiting athletic participation based on biological sex. School districts may be confused about which law they are expected to follow. There is already confusion and the regulation does not yet have the force of law. School districts are unsure of how and when the federal government might enforce this proposed regulation once it is final. It is setting up school boards and administrators for failure.

Ultimately, we urge the Department to consider what the proposed rules would mean for the competition and safety of women and girls, their privacy rights in single-sex spaces, the constitutional protections for religious individuals and entities, and the unworkability of the rules in practice. The Department should reject the proposed rules. If the Department decides to move forward with the proposed change to Title IX in athletics, we believe the regulation will not survive a legal challenge.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Richard Esenberg
President & General Counsel



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