



May 15, 2023

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

Submitted via Federal eRulemaking Portal at [regulations.gov](https://www.regulations.gov)

Re: Comment on Docket ID ED-2022-OCR-0143-0001

Dear Secretary Cardona:

The Foundation Against Intolerance & Racism (FAIR) is a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties for all Americans, and promoting a common culture based on fairness, understanding, and humanity. We submit this comment regarding the Department of Education's proposed regulations on Title IX of the Education Amendments of 1972, *Nondiscrimination of 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").

I. Background and the Proposed Rule

Passed by Congress as part of the Education Amendments of 1972, 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). The lawmaking history that led to Title IX informs the Congressional intent behind this landmark law, as well as the body of regulations currently in effect governing compliance with Title IX.

Years after the passage of the Civil Rights Act of 1964, lawmakers and concerned citizens led efforts to codify the rights of women to equally participate in university life, which they argued would lead to greater economic equality between men and women entering the workforce. In a [floor speech](#) in the House of Representatives in 1970, Representative Martha W. Griffiths stated, "[i]t is shocking and outrageous that universities and colleges, using Federal moneys, are allowed to continue treating women as second-class citizens, while the Government hypocritically closes its eyes." Congressional Record, House (March 9, 1970). In a [speech](#) introducing the Women's Equality Act in 1971, Senator Birch E. Bayh opined: "[t]o my mind our greatest legislative failure relates to our continued refusal to recognize and take steps to eradicate the pervasive, divisive, and unwarranted discrimination against a majority of our citizens, the women of this country." The eventual result of these lawmakers' efforts was the passage of Title IX of the Education Amendments of 1972.

Once Title IX was codified in law, the executive branch began its work drafting the regulations which now govern how schools comply with Title IX requirements. The current Title IX regulation governing athletics provides:

No 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 interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a).

This regulation goes on to state that schools “may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” As it relates to the Proposed Rule, the most important provision among the current Title IX regulation on athletics is 34 C.F.R. § 106.41(c), which states: “A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics *shall provide equal athletic opportunity for members of both sexes*” (emphasis added). One factor to be considered in determining whether a school has successfully offered equal athletic opportunities is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” *Id.* at 106.41(c)(1).

Title IX’s reach is immense. It applies to all federally-funded schools, from preschool through graduate level, and vocational schools. Virtually all public schools, public universities, and private universities receive federal funding. In fact, out of the approximately 5,300 colleges and universities in the nation, fewer than twenty accept no federal funds. *See* Dean Clancy, *A List of Colleges That Don’t Take Federal Money* (updated Aug. 10, 2020); Eric Schmidt, *Private Colleges Accept Federal Money* (The College Fix, Feb. 28, 2020). Thus, any proposed regulation under Title IX will affect the vast majority of the educational system in the United States, from preschool through a Phd program, and everything in between.¹

The Proposed Rule seeks to amend current Title IX athletics regulations by adding a standard that must be met by schools that implement a policy of limiting participation on a single-sex sports team to members of only one sex. If finalized, the Proposed Rule would require:

[I]f a recipient 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)

¹ The exception is private K-12 schools. However, many of those schools (as much as 35%) receive some form of federal financial assistance.

minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

Federal Register, Vol. 88, No. 71, p. 22866 (April 13, 2023)

The Department of Education issued the Proposed Rule because it “believes that the current regulations are not sufficiently clear to ensure Title IX’s nondiscrimination requirement is fulfilled if a recipient adopts or applies sex-related criteria that would limit or deny students’ eligibility to participate on male or female athletic teams consistent with their gender identity.” *Id.* To be clear, nothing in Title IX, as passed by Congress, protects against discrimination on the basis of gender identity; instead, it only protects against discrimination on the basis of sex. Nonetheless, the Department of Education, by way of the Proposed Rule, is attempting to change the way schools establish male and female sports teams by adding a new requirement meant to protect students on the basis of their gender identity. Since gender identity can result, for example, in a biological male labeling himself as a female or a woman, a policy cannot simultaneously protect one’s sex while also protecting one’s gender identity. In short, by expanding Title IX’s protections to include gender identity, the Proposed Rule unavoidably results in diminished protection of students on the basis of their sex.

II. Suggestion on the Proposed Rule

We urge the Department of Education to withdraw the Proposed Rule, in its entirety, because it is an unworkable and contradictory policy that will harm biological females, the very group of humans Congress intended to protect with Title IX. The Proposed Rule would retain the existing Title IX requirement that schools *provide equal athletic opportunity for members of both sexes*, while also adding a new requirement that implicitly contradicts this requirement, thereby making compliance with the Proposed Rule impossible.

A competitive sports team that is open to both male and female members cannot effectively accommodate the abilities of members of both sexes, a key factor in establishing compliance with Title IX regulations. This is due to the fact that physical ability of males versus females, on average, is widely disparate in several measures. (See, for example, a study funded by the National Institutes of Health, published in 2013, which “revealed that males score substantially better on muscular strength and cardiovascular endurance tests.” *A meta-analysis of sex differences in physical ability: revised estimates and strategies for reducing differences in selection contexts*, Courtright, SH, *J Appl Psychol*, 2013 Jul;98(4):623-41.) It is simply not possible for females, on average, to be competitive with males in most physical activities.

It is for precisely this reason that a team of both male and female members also cannot possibly effectively accommodate the interests of members of both sexes, another key measure of Title IX compliance. While it is true, as is often said, that there is more to sports than winning, competing for the *chance* to win is a central part of sports. Female athletes who are forced to compete against males are often put in a position where they not only expect to lose, they are sure that they have no chance to win because of the insurmountable physical advantages of male athletes. If female athletes are put in a

position where they no longer have the opportunity to win, no matter how hard they work, because they are required to compete against a biological male, all of the other values that sports is meant to instill—perseverance, discipline, teamwork—are lost as well. Success in sports also has other life benefits, such as college scholarships and for the most successful, professional opportunities.

The Department of Education must utilize its rulemaking authority to protect students in accordance with the Congressional intent that inspired Title IX. The Proposed Rule does nothing to protect female athletes, but instead will result in settings where the rights of females are diminished if not erased in favor of one narrow group of males. FAIR respectfully requests that the Department withdraw the Proposed Rule.

Respectfully submitted,

The Foundation Against Intolerance & Racism