



June 23, 2022

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

Re: Proposed Title IX Rulemaking

Dear Secretary Cardona:

As you are aware, we as State Attorneys General play a critical role in preserving federalism and the balance of power among the States and the federal government. This is especially true with statutes such as Title IX that implicate the education system where primary responsibility rests with parents, local governments, and the states—**not** the federal government.¹ To that end, we have fought steadfastly to protect the rights of girls and women under Title IX against attacks from this Administration. Your proposed rule merely pretends to reserve the issue of biological males participating in women’s sports for a separate rulemaking. This wolf comes as wolf: defining the term “sex” to include gender identity will destroy women’s sports. **Because the Biden Administration’s attempt to change the focus and meaning of Title IX is an attack on the rights of girls and women and will make them less safe and cause them to lose vital opportunities, we will fight your proposed changes to Title IX with every available tool in our arsenal.**

Today, Title IX turns fifty. While Title IX has broad applications, perhaps its greatest success has been in providing women the benefits of enhanced athletic participation. Duke Law Professor Doriane Coleman reports that due to the “empowering” impact of Title IX: “Women and girls today have the opportunity only boys and men had in the previous period to reap the widely recognized and highly valued benefits of being physically strong, of being

¹ As President Carter noted when signing the bill, Congress enshrined this principle in the Department of Education Organization Act: “[P]arents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role.” 20 USC § 3401(3) & (4) (Pub. L. 96–88, title I, § 101(3) & (4), Oct. 17, 1979, 93 Stat. 669).

on teams and developing the myriad skills associated with competitive sport, of attending college on athletic scholarships, and of high-end competitive experiences.”²

The Women’s Sports Policy Working Group, which includes female athletic champions such as Donna De Varona, Martina Navratilova, and Nancy Hogshead-Makar, recognizes that the protection of the girls’ and women’s category in sport is vital, saying:

If sports were not sex-segregated, female athletes would rarely be seen in finals or on victory podiums . . . Girls and women learn the benefits of teamwork in pursuit of conference, state and national championships; the confidence and self-esteem that flows from competent performance of physical skills; the life-changing power of competing against the best and standing on the podium; confidence borne of testing the limits of strength, speed, skill and reaction time; and the power of personal achievement and public recognition when setting school, meet and other records. And as sports double as an academic and social tool, these lessons and benefits reverberate well beyond the playing field throughout the lives of all female athletes.³

The Biden Administration’s Title IX revisions, however, will end sex-based protections for biological women in sports which threatens the safety of female athletes and will lead directly to the demise of women’s sports and regression in the progress of women generally.

Since its enactment in 1972, Title IX has led to an explosion in the participation of girls and women in sports. In 2021, 3.4 million girls played high school sports and 219,000 women played NCAA sports. In fact, NCAA statistics show that since 1982 (when the NCAA began separating male and female participation rates) female participation rates in athletics have risen from 43% of the male participation rate (74,329 to 169,800) in 1982 to 78% (219,177 to 278,988) in 2021—almost doubling.⁴ And just like the Women’s Sports Policy Working Group, we, along with many Americans, believe these successes of women on America’s playing fields correlate directly to greater opportunities for women in America’s board rooms. Thus, your effort to roll back progress for biological women in sports is a civil rights issue of the highest order.

The Biden Administration’s insistence on redefining “sex” in Title IX ignores science. In so doing, it will walk back decades of progress for women in sports. Not only that, the misguided move to gut Title IX’s protections greatly increases risks of concussive injuries for girls and women in contact and combat sports.

² Coleman, D.L., Joyner, M.J., Lopiano, D., “Re-Affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule,” *Duke Journal of General Law & Policy*, Vol. 27:69-134, p. 72.

³ Women’s Sports Policy Working Group, Science not Ideology Dictates the Need for Sex Segregation in Sports, <https://womenssportspolicy.org/the-issue/>

⁴ NCAA Sports Sponsorship and Participation Rates Database, <https://www.ncaa.org/sports/2018/10/10/ncaa-sports-sponsorship-and-participation-rates-database.aspx>.

The scientific evidence is clear. The performance advantage of men over women is typically 10-50% depending on the sport.⁵ The reason for male athletic advantage is biology. Males have 45% higher lean body mass, 33% higher lower body muscle mass and 40% higher upper body muscle mass, 54% higher knee extension strength, and 30% higher maximum cardiac output.⁶ The result is that by the ages of 14-15 many adolescent males have surpassed the best measurable elite (i.e., Olympic and world championship level) female performances in nearly all sports.⁷

Nor are these male advantages capable of suppression to a level that would allow meaningful competition of transgender girls and women (biological males) with biological girls and women, through so-called reassignment surgery or testosterone suppression.⁸ Furthermore, male advantages begin *in utero* with males experiencing surges in testosterone in the womb and during a mini-puberty stage during the first six months after birth.⁹ These early surges of testosterone lead, for instance, to higher bone density in the male spine and larger size of the axial skeleton in infant males.¹⁰ Male athletic performance advantages are observable well before adolescence.¹¹ Even with hormone suppression from pre-puberty, transgender

⁵ Hilton, E.N., Lundberg, T.R., Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage, *Sports Med.* 2021 Feb;51(2): 199-214.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; Wiik, A., Lundberg, T.R., Rullman, E., Andersson, D.P., Holmberg, M., Mandic, M., Brismar, T.B., Dahlqvist Leinhard, O., Chanpen, S., Flanagan, J.N., Arver, S., Gustaffson, T., Muscle Strength, Size, and Composition Following 12 Months of Gender-affirming Treatment in Transgender Individuals, *J. Clin. Endocrinol. Metab.* 2020 Mar 1;105(3):dgz247.

⁹ See, e.g., Pedersen, Ultrasound evidence of sexual difference in fetal size in first trimester, *Br. Med. J.* 1980 281(6250): 1253; Persson et al., Impact of fetal and maternal factors on the normal growth of the biparietal diameter, *Scandinavian Association of Obstetricians and Gynaecologists* 1978 78: 21-27; Schwartzler et al., Sex-specific antenatal reference growth charts for uncomplicated singleton pregnancies at 15–40 weeks of gestation, *Ultrasound in Obstetrics and Gynaecology* 2004 23(1): 23-29; Broerre-Brown, et al., Sex-specific differences in fetal and infant growth patterns: a prospective population-based cohort study, *Biology of Sex Differences* 2016 7: 65; Galjaard, et al., Sex differences in fetal growth and immediate birth outcomes in a low-risk Caucasian population, 2019 *Biology of Sex Differences* 10: 48; Gilsanz, et al., Differential Effect of Gender on the Sizes of the Bones in the Axial and Appendicular Skeletons, *J. of Clin. Endocrin. And Metabol.* 1997 21(3): 415-430; Lanciotti, et al., Up-To-Date Review About Minipuberty and Overview on Hypothalamic-Pituitary-Gonadal Axis Activation in Fetal and Neonatal Life, *Frontiers in Endocrinology* 2018 9:410; Boas, et al., Postnatal penile length and growth rate correlate to serum testosterone levels: a longitudinal study of 1962 normal boys, *Eur. J. of Endocrin.* 2006 154(1): 125-129; Kiviranta, et al., Transient Postnatal Gonadal Activation and Growth Velocity in Infancy, *Pediatrics* 2016 138(1): e20153561; Becker, et al., Hormonal ‘minipuberty’ influences the somatic development of boys but not of girls up to the age of 6 years, *Clin. Endocrin.* 2015 83: 694-701.

¹⁰ *Id.*

¹¹ Catley, M.J., Tomkinson, G.R., Normative health-related fitness values for children: analysis of 85347 test results on 9-17-year-old Australians since 1985. *Br. J. Sports Med.* 2013 Jan;47(2):98-108 (showing 9-yr. old males 9.8% faster in short sprints, 16.6% faster in mile run, 9.5% better standing long jump, completed 33% more push-ups in 30 seconds and had a 13.8% stronger grip); Tambalis K.D., Panagiotakos, D.B., Psarra, G., Daskalakis, S., Kavouras, S.A., Geladas, N., Tokmakidis, S., Sidossis, L.S., Physical fitness normative values for 6-18-year-old Greek boys and girls, using the empirical distribution and the lambda, mu, and sigma statistical method, *Eur. J. Sport Sci.* 2016 Sep;16(6):736-46 (6-yr. old boys when compared to 6-yr. old girls completed 16.6% more shuttle runs in a given time and could jump 9.7% further from a standing position).

females will still have a height advantage over biological girls and women.¹² Of course, height is a key factor in athletic success in many sports. In short, girls and boys, men and women are biologically distinct, and those key biological differences cannot be realistically undone.

Importantly, not only do these biological differences mean that girls and women are at an enormous competitive disadvantage when facing biological men in sport, but because of significant size, speed, and strength disparities girls and women are at greater risk of injury when competing against biological males in contact and combat sports. The risk of injury to girls and women is heightened by scientific evidence showing females are at greater risk of concussive injury in sports.¹³ Thus, while the last several decades have been marked by an intense focus on reducing concussions in sports, the Biden Administration would unwisely create a risk of rolling back progress on sport concussions, thereby increasing risk of severe injury to girls and women.

Unfortunately, by redefining “sex” in Title IX to mean little more than whatever gender identity an individual believes himself to be at a particular moment, the Biden Administration’s Department of Education (the “Department”) has made a mockery of Title IX’s fundamental organizing principle—basic biology. As we warned in our prior correspondence,¹⁴ the proposed rule will take these benefits from girls and women throughout the United States by allowing biological males with demonstrable physical advantages to compete in women’s athletics. This ruins opportunities for many girls and women. While there are many examples of this,¹⁵ the highly publicized case of Lia Thomas, the first transgender athlete to win a Division I national championship,¹⁶ is the most noteworthy. Kentucky swimmer Riley Gaines,

¹² Boogers, L.S., Wiepjes, C.M., Klink, D.T., Hellinga, I., van Trotsenburg, A.S.P., de Heijer, M., Hanema, S.E., Trans girls grow tall: adult height is unaffected by GnRH analogue and estradiol treatment, *J. Clin. Endocrinol. Metab.* 2022 Jun 6;dgac349. Doi: 10.1210/cinlnem/dgac349.

¹³ See, e.g., Brown, K.A., Patel, D.R., Participation in sports in relation to adolescent growth and development, *Transl Pediatr* 2017;6(3):150-159; Gill, N., Study: State Concussion Laws Effective in Reducing Rates of Injury, *NFHS* (Nov. 2, 2017), available at: <https://www.nfhs.org/articles/study-state-concussion-laws-effective-in-reducing-rates-of-injury/> (When “comparing the rates in gender comparable/available sports (basketball, soccer, baseball/softball), females had almost double the annual rate of concussions as males.”); <https://www.rugbypass.com/news/long-term-brain-damage-could-be-a-significantly-bigger-issue-in-womens-rugby-than-mens-says-lead-concussion-doctor/>.

¹⁴ Attorney General Knudsen Leads 15-State Coalition Against Federal Attempt To Weaken Title IX, <https://media.dojmt.gov/wp-content/uploads/Title-IX-Coalition-Letter-4.5.22.pdf>

¹⁵ See e.g. “Concerned Women for America announced Thursday that the organization filed a Title IX complaint against the University of Pennsylvania. CWA contends that Penn is violating Title IX by allowing Thomas to compete on the women’s team This is not the first Title IX complaint CWA has filed in response to a prominent transgender athlete. After Franklin Pierce University (FPU) track athlete CeCe Telfer won a Division II national championship in the 400m hurdles in 2019, CWA filed a Title IX complaint with the Office for Civil Rights (OCR) at the Department of Education. OCR found that FPU’s transgender inclusion policy violated Title IX and the school was forced to rescind its policy.” https://www.espn.com/college-sports/story/_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship, *Equality Florida, et al. v. Florida, et al.*, Cause No. 4:22-cv-00134-AW-MJF, pending in the United States District Court for the Northern District of Florida, filed on March 31, 2022; and, “21 conservative AGs push back on Education Department’s Title IX guidance.” <https://www.politico.com/news/2021/07/16/conservative-ags-education-department-title-ix-499867>.

¹⁶ https://www.espn.com/college-sports/story/_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship.

who swam against Thomas in the 200-yard freestyle NCAA swimming championships, put it best: “The majority of us female athletes, or females in general, really, are not okay with this, and they’re not okay with the trajectory of this and how this is going and how it could end up in a few years”—and called on the NCAA to change its rules to protect female competitive sports.¹⁷

While Lia Thomas stands athwart biology—aiming for Olympic glory as a self-declared woman¹⁸—swimming’s worldwide governing body, FINA, has finally acknowledged the harms that accompany the willful disregard of science and sense: allowing biological males to compete in women’s athletics irreparably destroys opportunities for women and girls. On June 19, 2022, FINA adopted a new gender eligibility policy that only permits swimmers who transitioned by age 12 or the onset of male puberty (known as Tanner Stage 2) whichever is later and who have since transition continuously suppressed testosterone to a level within the female range to compete in women’s events. As James Pearce, spokesperson for FINA president Husain Al-Musallam, told The Associated Press: “This is not saying that people are encouraged to transition by the age of 12. It is what the scientists are saying, that if you transition after the start of puberty, you have an advantage, which is unfair.”¹⁹ This is a step in the right direction, but it’s still deeply problematic. Transitioning by age 12—or before puberty—still doesn’t erase the relative physical advantages characteristic in biological males. As explained above, biological males acquire male sport advantages as a result of different body structure from birth, males are genetically different, and experience several early surges of testosterone that females do not. Furthermore, puberty can begin for some as early as age 9, thereby allowing as much as a three-year period for acquisition of significant male performance advantage through male puberty before the FINA cut-off. Finally, while we appreciate FINA’s focus on a level playing field, we do not consider it wise public policy to encourage hormonal intervention at such an early age merely to attempt to alter the category in which one may later compete in sports.

Beyond the gender identity issue, the Department has failed to offer sufficient justification as to why the Title IX regulations require revision. The May 2020 Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (“2020 Rule”), was an historic rulemaking that better aligned Title IX regulations with the text and purpose of 20 U.S.C. § 1681, Supreme Court precedent and other caselaw, and addressed the practical challenges facing students, employees, and schools with respect to sexual harassment allegations. For the first time in history, and despite the shadow governance of former administrations, sexual harassment regulations under Title IX were codified into law.

Your newly proposed rule guts the historic 2020 Rule. And it does so for no reason other than some apparent need to pander to your far-left constituencies. The 2020 Rule guarantees victims and accused students strong, clear, procedural rights in a predictable, transparent

¹⁷ <https://www.foxnews.com/politics/kentucky-swimmer-lia-thomas-female-sports-trajectory>.

¹⁸ “Transgender swimmer Lia Thomas reveals her Olympic dream as US trials for Paris draw closer.” <https://www.abc.net.au/news/2022-06-01/transgender-swimmer-lia-thomas-reveals-olympic-dream/101116092>.

¹⁹ “FINA effectively bans transgender athletes from competing in women’s swimming events.” <https://www.usatoday.com/story/sports/olympics/2022/06/19/fina-adopts-new-policy-transgender-athletes-swimming-events/7677611001/>.

process designed to reach reliable outcomes. It also provides essential provisions protecting free speech, academic freedom, and religious liberty. Your proposed rule decimates this fair and thoughtful framework.

We also requested that Assistant Secretary for Civil Rights, Catherine Lhamon, recuse herself from the Title IX rulemaking process given her past statements and record. As Assistant Secretary for Civil Rights at the Department of Education from 2013 to 2017, Ms. Lhamon played a crucial role in creating the Title IX catastrophe cleaned up by the 2020 Rule. The Department did not merely put its thumb on the scale of justice under her leadership, it became a biased institution. What followed were hundreds of successful lawsuits against schools for denying basic due process²⁰ and widespread criticism from across the ideological spectrum. We reiterate that her past record as Assistant Secretary for Civil Rights and her statements about the 2020 Rule make it impossible for the Department to include her in reasoned rulemaking on these topics.

The Biden Administration's regulatory changes threaten to destroy Title IX's entire *sine qua non*. **American women and girls deserve better. And if this Administration won't commit to protecting women's rights under Title IX, rest assured, we will.**

Respectfully,



AUSTIN KNUDSEN
ATTORNEY GENERAL OF MONTANA



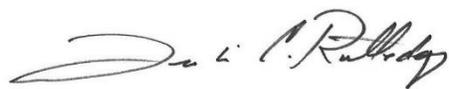
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²⁰ These lawsuits, more often than not resulted in victories for accused students across the country in state and federal court, including key wins at the appellate level. *See, e.g., Doe v. Oberlin Coll.*, 963 F.3d 580, 581 (6th Cir. 2020); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 205 (3d Cir. 2020); *Doe v. Purdue Univ.*, 928 F.3d 652, 656 (7th Cir. 2019); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 60 (1st Cir. 2019); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1070 (2018); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (2018).



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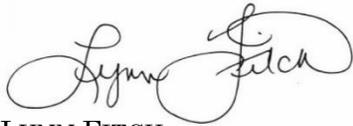
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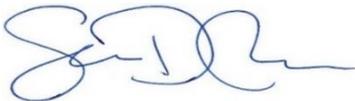
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