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214 Massachusetts Ave., NE
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Hon. Miguel A. Cardona
Secretary
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Attention: 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 (RIN 1870-AA19, Docket ID ED-2022-OCR-0143).

Dear Secretary Cardona:

We write to comment on the U.S. Department of Education's NPRM "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" (RIN 1870-AA19), pursuant to the notice-and-comment process outlined in and protected by 5 U.S.C. § 553(c). The proposed rule is arbitrary and capricious, and the Department cannot go through with it.

The rule would have a massive impact on state and local governments and other small entities, unlawfully making decisions about controversial and important policies that Congress has conspicuously declined to weigh in on. The Department attempts to usurp the authority which Congress has clearly left to state governments, local governments, and individual schools and recipients, making a rule without regard for cost in order to push a radical and unpopular ideological position which could not have passed through the democratic legislative process. The rule would also be far more costly than estimated, and indeed, the purported benefits the Department claims are either trivial or so severely concentrated as to make the cost-benefits analysis unreasonable and contrary to the standards of administrative law. Further, the Department ignores certain costs which are obvious and easy to quantify.

For these reasons, the Department should not and cannot go forward with this rule. Our full comment follows. Thank you for your consideration of this pressing matter.

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I. Background

The Department claims that recipients must provide reasons "substantially related to an important educational interest" in order to keep single-sex sports teams restricted to members of the same biological sex.[1] But the Department also explains that, in its view:

> "[c]riteria that categorically exclude all transgender girls and women from participating on any female athletic teams […] would not satisfy the proposed regulation because, in taking a one-size-fits-all approach, they rely on overbroad generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply,"[2]

and that:

> "there would be few, if any, sex-related eligibility criteria applicable to students in elementary school that could comply with the proposed regulation, and that it would be particularly difficult for a recipient to comply with the proposed regulation by excluding students immediately following elementary school from participating on male or female teams consistent with their gender identity."[3]

II. The Proposed Rule Does Not Reasonably Consider Costs and Benefits.

A. The RIA claims, without evidence, that the regulatory action will not interfere with the function of State and local governments.

With respect to cost in particular, the Department claims, in the Regulatory Impact Analysis, that it "has preliminarily determined that this regulatory action would not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions."[4] Yet it also admits that "Twenty States have enacted laws that, to varying degrees, explicitly require that student-athletes participate on male or female athletic teams consistent with their sex assigned at birth," something for which the proposed rule would not allow.[5] The proposed rule would be a violation of federalism. As the Department admits, the issue of athletics and individuals who identify as the opposite sex is controversial and usually involves isolated cases and granular details. Such an admission is not an invitation to have the Department (or any other agency) act on these issues on behalf of states, communities, and LEAs. The Department fails to understand and address, in the NPRM, why it chose to regulate in a manner that has such negative implications for the balance of powers between the federal

[1] 88 FR 22876.
[2] 88 FR 22873.
[3] 88 FR 22875.
[4] 88 FR 22878.
[5] 88 FR 22881.

government and the states which comprise the country. It cannot think that simply stating that "the proposed regulation […] may have federalism implications" absolves it of any need to address the federalism implications that the regulation does have and the reasons for choosing to put its finger on the scales of federal authority against states and localities.[6] At minimum, the Department should have come to grips, in a serious way, with the effect of its rule on the twenty States it mentions (and on any and all other adversely affected jurisdictions) and explained why those effects are justified.

B: The RIA severely underestimates the costs of the proposed rule.

1. The Department does not even attempt to quantify the costs imposed by state and national athletic conferences.

To begin, the Department fails to try to estimate the costs imposed by entities indirectly affected by the proposed rule by way of third-party state and national athletic conferences. The Regulatory Impact Analysis explains that:

> "As noted above, most athletic competition is organized by State athletic associations at the ESE level or under the auspices of the NCAA or similar national athletic associations at the IHE level. It is possible that a State athletic association or relevant governing body would require all of its members, including a private high school, to comply with eligibility and participation criteria that the association sets. The Department thus acknowledges that the implementation of the proposed regulation by these athletic associations may indirectly affect entities that are not directly subject to the proposed regulation. The Department does not currently have sufficient data to estimate the likelihood of these effects or their impact and seeks specific public comment on these issues."[7]

This is not a reasonable approach to the regulation of inter-scholastic competitive athletics. Athletic competition is overwhelmingly facilitated by inter-scholastic organizations and it is a *de facto* necessity that schools with competitive athletic programs find schools with whom they can compete by way of such organizations. It is likewise a *de facto* necessity that schools participate in and follow the rules set by these inter-scholastic organizations. Thus, it is essential that a reasonable analysis of the effects of such a regulation as the one proposed pay careful attention to and thoroughly evaluate the effects of inter-scholastic athletic organizations.

The Department recognizes that "it is reasonable to assume that State athletic associations would review and consider revising their policies on this issue" given the obligations of LEAs, but it nonetheless openly admits that "the Department has not evaluated existing State athletic association policies governing interscholastic athletics to determine whether they would comply

[6] 88 FR 22890.
[7] 88 FR 22880.

with the proposed regulation."[8] That is, it admits that it did not consider a key and obvious consequence of the proposed rule in drafting the rule on private entities, contrary to the demands of *Michigan v. EPA*, which states that "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions" and that such considerations must occur throughout the regulatory process, including "when deciding whether regulation is appropriate and necessary."[9] There are two costs at stake here. First, there is the cost to inter-scholastic athletic organizations, which may or may not have to revise their policies and undertake serious review of what is appropriate (we note that the Department's hyper-specific framework means that intense research into the competitive and social consequences of mixed-sex sports teams will need to be done sport-by-sport). Second, there is the cost placed on non-recipients who nonetheless have to change their policies because they are members of inter-scholastic athletic organizations that contain recipients. This cost is great, but it is totally ignored by the NPRM. Inter-scholastic athletic organizations are, within states, often oligopolistic or even monopolistic, and they certainly are, as the Department admits, at the IHE level. Thus, there is little bargaining power on the part of small entities like private schools that want to pursue different policies from those demanded by the Department. If a non-recipient school has policies in conflict with an organization's, it must either bear the cost of re-evaluating its own policies or else bear the cost of leaving the organization and finding or forming a new one. The Department has, in ignoring these costs—and in attempting to shunt off onto the public its legal obligation to address these costs—in the words of *Motor Vehicle Manufacturers Association v. State Farm,* "entirely failed to consider an important aspect of the problem."[10] It is doubly troubling that the Department has, contrary to the demands of *Michigan v. EPA,* failed to consider an important cost in its initial decision-making process.

The Department attempts to get the public to provide comments on this aspect of the rule despite giving the public no information useful towards this end. For example, the Department later assumes that "if 45 percent of State athletic associations implement a particular policy, 45 percent of LEAs offering athletic teams would be affected."[11] Without any data to support this assumption whatsoever, the public cannot even begin to attempt to comment on the costs associated with inter-scholastic athletic organizations. Failing to provide such crucial information means that the proposed rule "did not give the public a clear understanding of the nature and magnitude of the activity to generate meaningful comment," and thus deprived the public of "the right to comment intelligently."[12]

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[8] 88 FR 22883-22884

[9] *Michigan v. EPA*, 753, 760.

[10] *Motor Vehicle Manufacturers Association v. State Farm*, 43.

[11] 88 FR 22884.

[12] *Ohio Val. Envir. Coalition v. U.S. Army Corps of E*, 674 F. Supp. 2d 783, 804 (E.D. Va. 2009) (internal quotations and brackets omitted).

But it is not just that the Department deprives the public of its administrative-procedural rights by failing to provide information about the distribution of recipients within inter-scholastic athletic organizations or on said organizations' policies. This lack of crucial information makes the Department's calculation of cost arbitrary and capricious as well. The Department writes that, though it "recognizes that LEAs are not evenly distributed across States and, therefore, the policies of a single State athletic association could affect more LEAs than the policies of multiple other State athletic associations that serve a smaller number of schools," it nonetheless

> "assumes that, if 45 percent of State athletic associations implement a particular policy, 45 percent of LEAs offering athletic teams would be affected. More specific estimates would require the Department to develop independent estimates for specific States or groups of States and then correlate those State-specific effects and responses to estimates of the number of LEAs offering athletic teams in each State. There is not enough information available to the Department to develop reliable estimates at this level of granularity, and therefore the Department assumes an equal distribution of LEAs."[13]

The Department cannot get away with ignoring the distribution of LEAs by simply acknowledging that the distribution is, in reality, uneven. The Department cannot simply state that reality is not reflected in its model and think that it has justified the model as a reasonable representation of the world. The Department's obligation to "articulate […] a rational connection between the facts found and the choice made." is not met.[14] It is not enough to merely recognize assumptions and decisions or to simply say that something is so.[15] This is an outrageous assumption to make, because it implies that all state athletic associations are essentially proportional, whereas it makes sense that, for example, one inter-scholastic athletic association might have authority over many schools, say, in one large city, while many others might cover a small collection of schools scattered over large rural areas. This notion applies to states as well, since the states themselves vastly differ in their populations and number of schools or LEAs.

2. The Department made unreasonable assumptions about the effects of the proposed rule when weighing its course of action.

The Department notes that the plurality of athletic associations with policies addressing the participation of student athletes of one sex who wish to identify with the opposite sex "severely limit most or all transgender students from participating on male or female athletic teams consistent with their gender identity"; this plurality of rules would not be allowed under

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[13] 88 FR 22884.

[14] *Motor Vehicle Manufacturers Association v. State Farm*, 43.

[15] See, e.g., *Parhat v. Gates*, quoting Lewis Carroll, The Hunting of the Snark 3 (1876): "the fact that the government has 'said it thrice' does not make [something] true." *Parhat v. Gates*, 532 F.3d 834, 848 (D.C. Cir. 2008).

the proposed rule.[16] The next level of strictness would also likely require review and even changing of policies because they "impose additional requirements" on students identifying with the opposite sex, and because "many of [them] require [biological male students who identify as females] to satisfy additional criteria prior to participating on a female team."[17] In this first category are thirty-five percent of such associations, and in the second are twenty percent, according to the proposed rule. Thus fifty-five percent of associations with such policies currently have strict policies in the Department's view.

Yet the Department subtly attempts to ignore this by assuming that only a "small subset" of recipients, athletic organizations, and states would adopt criteria that would "substantially limit or deny transgender students from participating on male or female athletic teams consistent with their gender identity," or which "would not limit or deny" this participation at all, while "approximately half […] would have policies that establish minimal criteria for the participation of transgender students in high school athletics consistent with their gender identity (e.g., a written statement from the student or someone on their behalf confirming the student's consistent gender identity)."[18] Assuming that these "small subset[s]" are approximately equal in size, we are left with the Department assuming that seventy-five percent of recipients and organizations would adopt permissive policies.[19] This is a ridiculous assumption given what the Department observed from the data. Fifty-five percent of athletic organizations with policies have adopted strict ones, whereas here the Department assumes that only about twenty-five percent would do so in absence of regulation; the Department gives no reason for this discrepancy, and provides no data to support this assumption. We have no answer to the question "Why would future LEAs, states, and associations choose types of rules different from those which already have?" The public has not been given any assumption or reasoning behind the Department's fantastical portrait of a future without its rule, and we are left to guess as to why these proportions differ. The public has thus been deprived of "sufficient information" to comment intelligently on the proposal, and the Department has failed to "articulate […] a rational connection between the facts found and the choice [it] made."[20] While the Department may respond by noting that their cost model reflects these assumptions relatively well, it is nonetheless the case that the Department clearly arrived at its course of action with this unsupported vision of the mix of policies that schools would arrive at in the absence of regulation. There is no evidence that its decision was made reasonably, and any such evidence would be necessary for the public to be able to comment intelligently on the rule.

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[16] 88 FR 22881
[17] Ibid.
[18] 88 FR 22882.
[19] The Department might claim that this is because there are many more schools than athletic associations, but, as we have already shown, one cannot draw reasonable conclusions about the effects of athletic association policies without understanding the distribution.
[20] *Ohio Val. Envir. Coalition v. U.S. Army Corps*, 804; *Motor Vehicle Manufacturers Association v. State Farm*, 43 (internal quotations and brackets omitted).

Similarly, the Department assumes that "there will be no additional time burdens above baseline associated with training in future years."[21] It assumes this because it assumes that training LEA employees to address the qualifications and standards for athletes who identify as the opposite sex will be done on an ad-hoc basis only.[22] But clearly coaches and teachers cannot be left totally in the dark about how to deal with these cases until one comes up. It is unreasonable to claim that there will be no additional costs imposed by the rule, especially since the rule demands granular, case-by-case, and (in most cases) complicated policies which must be administered at the local level (i.e., by schoolteachers and coaches). That is, the Department elected to force upon schools that see a compelling educational interest in maintaining single-sex sports a deliberately complicated system of sport-by-sport, grade-by-grade, and (in most cases) individual-by-individual evaluation. This means that the administration of the rule would be complicated and require a good deal of training. Further, because all students will likely need to be evaluated (certainly all students identifying with the opposite sex), it is not reasonable to think that *any* coaches would be able to skip training how to deal with such cases. The Department wishes for us to believe that schools would be happy to have a coach who was approached by a student identifying with the opposite sex tell the student that the matter of his or her participation on the coach's team will have to wait until after the coach has been given his training. Then, the school or LEA would make time to have the coach be given his ad-hoc training (from whom? Who exactly *is* being trained no matter what?) and then the coach would handle the situation having learned exactly how to deal with every unique, individual, and complicated case. This is a farce. The only reasonable assumption is that every coach or LEA athletic employee must be given the training on how to deal with these cases. The Department must, then, because it demands (in most cases) extensive and complicated case-by-case tests, account for the cost of the proposed rule by adding to its total cost: 1) the time cost of training to review these tests or standards multiplied by the number of relevant LEA employees; and 2) the time cost of reviewing these tests by the total number of student athletes enrolled in recipient LEAs.

C: The "benefits" the RIA claims justify the rule are grossly exaggerated.

1. The Department fails to actually account for costs and benefits related to discrimination, and said benefits are cancelled out by the discrimination the rule would cause.

First, the claim that this rule is necessary to reduce reducible discrimination is absurd. The nondiscrimination requirements of Title IX are clear and the process for suit regarding discriminatory practice is in no way complicated. The Department does not point to some massive wave of discrimination charges in its analysis for the need for this rule; its paltry examples suffice to show that the current rule is functioning as intended. In particular, the

[21] 88 FR 22884.
[22] *Ibid*.

Department would need to show why the key portion of this proposed rule—the demand that only on a sport-by-sport basis may schools institute policies requiring athletic teams to compete with only other members of the same sex—has been necessitated. But the Department does not give any reason for why it is necessary for schools to determine these rules sport-by-sport as opposed to by a blanket policy.

The Department's action is not, in reality, a direct application of the particulars of *U.S. v. Virginia*. In that case, the court explicitly states that it "address[es] specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique'"; that is, opportunities like attendance at the Virginia Military Institute, whose unique curriculum and stature had no equal for women in the Commonwealth of Virginia.[23] The late Justice Ginsburg's opinion clearly and forcefully affirms that "Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both"; the Court likewise holds that "Inherent differences between men and women […] remain cause for celebration."[24] Thus the opinion of the Court would justify separate athletic teams for members of the male and female sexes, perhaps *especially* at such a young age as elementary and middle school, when the influence of peers can easily reinforce sex stereotypes among children and where children who identify with the opposite sex are not likely to have a full grasp of what it means to be male or female.[25] The opinion of the law of the United States, as interpreted by the Supreme Court (and, in particular, the lauded Justice Ginsburg), is that "a community made up exclusively of one sex is different from a community composed of both."[26] The Department does not seem at all to weigh the potential costs, especially in sports where the comparative capacities of athletes identifying as another sex are not known, and especially in early and middle childhood, when it describes the benefit of non-discrimination. In doing so, it has "entirely failed to consider an important aspect of the problem" and likewise failed to meet its obligation to "pay[] attention to the advantages *and* the disadvantages of agency decisions."[27] With the listed benefits thus shown to be either hollow and unrelated to the choice made or greatly reduced, if not cancelled-out, by the potential discrimination and cost to women, the regulatory impact analysis does not present a satisfactory weighing of the advantages and disadvantages of such a sweeping and costly regulation.

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[23] *U.S. v. Virginia*, 534 n.7.
[24] *Ibid.*, 533 (internal quotation marks and brackets omitted).
[25] See especially the evidence concerning behavior outside of traditional gender roles, which affirms that at a young age children who learn only with members of their sex are more likely to be enthusiastic participants in activities traditionally dominated by members of the opposite sex, e.g., Teresa A. Hughes, "The Advantages of Single-Sex Education," National Forum of Educational Administration and Supervision Journal 23 no. 2, 2006-2007, https://files.eric.ed.gov/fulltext/ED492000.pdf; and Marybeth Hunter, "All Boys, All Girls, All Good—The Benefits of Single-Sex Education," The Foreign Service Journal, 2016, https://afsa.org/all-girls-all-boys-all-good-benefits-single-sex-education.
[26] *U.S. v. Virginia*, 533.
[27] *Motor Vehicle Manufacturers Association v. State Farm*, 43; *Michigan v. Envtl. Prot. Agency*, 576 U.S. 743, 753, 760 (2015).

The Department cannot claim that its interpretation of the obligations of Title IX are simply applications of past legal standards used. There is no legal precedent for the notion that there can be no educational benefit to separate male-female athletic education in elementary and middle school, or for the notion that there can be no justification for a blanket policy demanding separate male-female athletic education for all sports available. The standard set out in *United States v. Virginia* does not claim that blanket policies about athletic abilities constitute unlawful "overbroad generalizations about the different talents, capacities, or preferences of males and females."[28] In fact, it explicitly states that "categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women."[29] Given that it is exactly this perpetuation that is at stake—the crowding-out of females from their own sports teams on account of the presence and competition of biological males allowed onto them—the Department must show that there is a great benefit of non-discrimination obtained *and* that discrimination against female students is not perpetuated. As we will show in Section C.2 below, the Department has utterly failed in this regard; the Department has not done this, and indeed, the strict standard of proof required by the proposed rule—which, by requiring sport-specific proof of unfairness, would essentially require a biological male on a female team to introduce unfairness in order for a rule to be made—could potentially lead to great losses for women in particular.

2. The Department does not quantify, qualify, weigh, or even acknowledge the harm and cost to women that the rule could cause, a cost which is easily estimated.

The Department has not even attempted to address, let alone quantify, the disadvantages of this proposed rule for biological male and female athletes. The Department has failed to make any reasonable estimation of the impact this proposed rule could have on student educational outcomes, academic success, athletic participation, or school climate. This is unreasonable and represents a failure to meet even the most basic demands of administrative law. As we show below, these costs are both obvious and serious, such that the Department was totally wrong not to address them.

Indeed, we can expect that the Department's proposed rule would have a qualitatively negative impact on female students' enjoyment of and participation in school athletics. A study of middle-school aged students in South Korea compared the self-reported effort exerted and enjoyment experienced by students in physical education classes that were set-up as either single-sex or coeducational.[30] Students were asked to report on a 7-point Likert scale the amount of effort they exerted in physical education classes, with 1 corresponding to low effort and 7

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[28] *U.S. v. Virginia*, 516.
[29] *Ibid.*
[30] Lyu M, Gill DL. Perceived physical competence, enjoyment and effort in same-sex and coeducational physical education classes. *Educational psychology*. 2011 Mar 1;31(2):247-60.

corresponding to high effort. On average, girls in single-sex physical education classes reported significantly higher effort in class (4.96 vs. 4.36) in single-sex physical education classes compared to girls in coeducational physical education classes.

It is not only obvious to any reasonable person that male-to-female transgender-identifying athletes have a clear physiological advantage over biological females; the academic literature is also definitive in its findings in this regard as well. Studies have shown that male-to-female transgender-identifying athletes retain a clear physiological edge over biological females even after taking hormonal supplements for 12 months.[31,32] As a result, female students' self-perceived experience of coeducation with male-to-female transgender-identifying students in physical education classes can be said to be similar to the self-perceived experience they have when participating in physical education classes with biological males. The distributional change in middle-school aged girls' self-reported effort exerted in physical education classes in a single-sex class setting compared to a coeducational setting would, then, be similar to the distributional change we would see if female-only sports teams were made incorporate male-to-female transgender-identifying athletes.

The Department could have easily quantified this phenomenon, as we will show below. It is reasonable to assume that if, for any given female student, self-reported effort while participating in athletics falls low enough, she will no longer want to compete or participate in such an activity. In many cases—particularly the older the student is—this can translate to girls dropping out of participation in athletics altogether. To estimate the number of high school biological female athletes that would drop out of a high school athletics programs as a result of a policy to allow male-to-female transgender-identifying athletes to compete in female-only athletics programs, we make a very modest assumption that only biological females whose enjoyment or effort exerted in school sports in a coed environment would fall below Q1 - 1.5*IQR of the single-sex environment would actually stop participating in school athletics as a result of the policy change. In statistical practice, observations greater than Q3 + 1.5*IQR (i.e. "upper fence") or below Q1 - 1.5*IQR (i.e. "lower fence") are considered potential outliers in any given distribution. If we assume that the survey data Lyu and Gill (2011) used in their study met the modelling assumptions for the MANOVA model they used in their paper, the distribution of student responses on enjoyment and effort in physical education classes are approximately normally distributed. The probability of a female student response in the single-sex environment falling below the lower fence is less than 0.0035.

Using the 0.0035 quantile of the distribution of female respondents in the single-sex environment as the threshold, we calculated the average proportion of responses below the

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[31] Heather AK. Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology. *International Journal of Environmental Research and Public Health.* 2022 Jul 26;19(15):9103.

[32] Hilton EN, Lundberg TR. Transgender women in the female category of sport: perspectives on testosterone suppression and performance advantage. *Sports Medicine.* 2021 Feb;51:199-214.

threshold from 500 direct Monte Carlo samples with 10 million draws in each sample. We used this to estimate the dropout rate of high school female athletes as a result of the Department's proposed rule. In 2021, had no secondary school previously allowed male-to-female transgender-identifying athletes to compete in female athletics and had this proposed rule been implemented across all athletics programs in all secondary schools nationwide, we estimate that approximately 78,000 high school female athletes could have seen their self-perceived effort in their sport drop below the lower fence of single-sex environment or may have dropped out of their sport entirely.

If we make the generous assumption that no religiously affiliated private schools would be affected by this policy (as this assumption minimizes our cost estimate), and since approximately 9% of all students in the United States attended a private school in the United States[33], then approximately 71,000 high school female athletes may have stopped participating in high school sports. However, it is reasonable to assume that a non-insignificant minority of religiously affiliated private schools would go along with the policy. And even among schools that maintain single-sex sports, such schools will inevitably have to compete against schools which allow male-to-female transgender-identifying athletes to participate on their sports teams, which for practical purposes would produce the same effect for female students who do not wish to compete against biological males (as we noted above in B.1).

To estimate the number of eligible high school students, data for the number of high school students by age and sex were obtained from the U.S. Census Bureau.[34] Students 19 years of age and older were excluded as these students are not eligible to compete in high school sports. Data for the number of high school female athletics participants were taken from the National Federation of State High School Associations (NFHS) 2021-2022 High School Athletics Participation Survey.[35]

To estimate the net effect of the Department's proposed rule, we estimated the number of male-to-female transgender-identifying students who would supposedly benefit from the Department's change in policy.

Herman, Flores, and O'Neill (2022) estimate that 1.43% of high school aged youth between the ages of 13 and 17 identify as transgender.[36] According to the same study, 38.5% of the transgender population identify as male-to-female transgender. The study does not

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[33] "Private School Enrollment," Institute of Education Sciences (IES), (accessed May 5, 2023), https://nces.ed.gov/programs/coe/indicator/cgc/private-school-enrollment.
[34] United States Census Bureau, "School Enrollment in the United States," [2017-2022], Table 2. Single Grade of Enrollment and High School Graduation Status for People 3 Years Old and Over, by Sex, Age (Single Years for 3 to 24 Years), Race, and Hispanic Origin.
[35] National Federation of State High School Associations (NFHS), "2021-22 High School Athletics Participation Survey," https://www.nfhs.org/media/5989280/2021-22_participation_survey.pdf.
[36] Herman, Jody L., Andrew R. Flores, and Kathryn K. O'Neill. "How many adults and youth identify as transgender in the United States?" The Williams Institute, University of California Los Angeles School of Law: 2022.

disaggregate this proportion by age and sex, but if we assume that the percentage of youths identifying as transgender by gender identity is the same for youth 13-17 years of age as it is for the population of individuals identifying as transgender at large, then the percentage of youth 13-17 years of age who identify as male-to-female transgender is 0.55%.

There is no evidence to suggest that school and athletic association policies are significantly hindering transgender-identifying students from participating in school sports. Indeed, many transgender-identifying students participate in school sports even if they are not able to participate on sports teams that match their claimed gender identity. There is no evidence to suggest that transgender students are in significant numbers failing to participate in school sports on account of not being able to participate on sports teams that match their claimed gender identity. According to a recent study published in the Journal of Adolescent Health, male-to-female transgender-identifying high school students were not significantly less likely to participate in sports than their peers, after accounting for controls.[37] As a result, we assumed that the percentage of youths identifying as male-to-female transgender who would participate in high school sports is the same as the proportion of eligible high school women who participate in school sports.

Even still, to demonstrate how absurd the Department's proposed rule is and to illustrate how the Department has utterly failed even an attempt to assess whether the benefits justify their costs, we will make an exceedingly overbroad and unreasonable assumption that, without the Department's proposed rule, all male-to-female transgender-identifying students would be permanently barred from participating in any high school athletics activities of any kind. By making this overbroad assumption, we are, for argument's sake, giving the Department maximum latitude to claim largest benefit possible to result from this proposed rule, even such effect sizes are not rational given the current state of participation of students identifying with the opposite sex in high school sports. But even with this assumption, the number of biological female high school students who would be adversely affected by the Department's proposed rule by dropping out of sports or seeing their effort in participation drop below the lower fence of the distribution of female athletes in a single-sex environment is more than double (2.2 times) the number of male-to-female transgender-identifying students who would be supposedly excluded from participating in high school sports if the Department's proposed rule was not adopted. We estimated that the number of biological females who would be adversely affected by the Department's proposed rule would exceed the number of transgender-identifying students by approximately 42,000 students overall and by approximately 38,000 students if we exclude all students who attend private schools.

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[37] Voss RV, Kuhns LM, Phillips G 2nd, Wang X, Wolf SF, Garofalo R, Reisner S, Beach LB. Physical Inactivity and the Role of Bullying Among Gender Minority Youth Participating in the 2017 and 2019 Youth Risk Behavior Survey. J Adolesc Health. 2023 Feb;72(2):197-206.

We could similarly quantify the effect the Department's proposed rule would have on middle school and early high school aged girls' physical exertion and activity level. A recent study found that girls (aged 12-15 years) displayed significantly more time in moderate and vigorous physical activity compared to low physical activity while playing basketball on single-sex teams as compared to coed teams.[38] We can expect, on average, a similar effect across the population of middle school and high school aged female students nationwide if the Department's proposed rule is adopted and schools broadly include students identifying as male-to-female transgender on female-only sports teams and competitions. As there are significant health benefits associated with moderate-to-vigorous physical activity, the students who suffer a loss of physical activity in sport as a result of participation of students identifying as male-to-female transgender in female-only competitions are clearly adversely affected. Since the number of biological female students adversely affected by the inclusion of athletes identifying as male-to-female transgender will always outnumber the potential athletes identifying as male-to-female transgender that supposedly stand to benefit from the Department's proposed rule, the proposed rule, in the net, stands to cause more harm than good.

The Department has utterly failed to justify that the benefits from the proposed rule outweigh its costs. In particular, the Department has completely failed to take into account the adverse effects and harm the proposed rule would have on female students. The Department has completely ignored the long-term determinantal impacts on personal health,[39] mental health,[40] academic scholarships, academic aptitude,[41] opportunities for sharpening career skills, and the loss of athletic opportunity for biological males and females that could result from the proposed rule as a consequence of allowing athletes of one sex who identify with the opposite sex (particularly male-to-female transgender athletes) to compete against members of the opposite biological sex.

The Department claims it cannot estimate the impact of the proposed rule due to a lack of data. However, we have just demonstrated that it is clearly possible and not at all complicated to estimate the effect this policy could have given existent data and academic literature. The Department has merely demonstrated a lack of will to carry out its statutory obligations to make reasonable assessments of costs and benefits that would result from this proposed rule. Clearly, the Department has the resources at its disposal to estimate the effects this proposed rule would have on students, and clearly, there would be a very real benefit from the Department endeavoring to fund a series of studies to assess the impact of this proposed rule as the potential

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[38] Wallace L, Buchan D, Sculthorpe N. A comparison of activity levels of girls in single-gender and mixed-gender physical education. *European physical education review*. 2020 Feb;26(1):231-40.
[39] Logan K, Cuff S, LaBella CR, et al. Organized sports for children, preadolescents, and adolescents. *Pediatrics.* 2019;143(6).
[40] Sanders CE, Field T, Diego M, Kaplan M. Moderate involvement in sports is related to lower depression levels among adolescents. *Adolescence.* 2000;35(140):793-797.
[41] Holt NL, Kingsley BC, Tink LN, Scherer J. Benefits and challenges associated with sport participation by children and parents from low-income families. *Psychol Sport Exerc.* 2011;12(5):490-499.

impact of this proposed rule is wide and far-reaching as it would in some way affect the overwhelming majority of students nationwide. Yet, the Department has not made any attempt to study the effect this proposed rule would have on student educational outcomes, academic success, athletic participation, school climate, or even on students as a whole. The proposed rule does not protect against the issues described above; in fact, these instances of unfairness are necessary in order for any rule to be made, and such a rule or rules would likely take a long time and much effort to pass muster. The Department has, in failing to quantify, qualify, weigh, address, or even acknowledge these costs, "entirely failed to consider an important aspect of the problem" and likewise has failed to "pay[] attention to the advantages *and* the disadvantages of agency decisions."[42] Given the ease with which a reasonable member of the public could quantify these costs, even in simple terms, the Department has no excuse; it has failed to do what reasonable regulation requires, and, by ignoring these issues, its proposal is arbitrary and capricious.

3. The benefit of clarity is not related to the rule and dubiously present.

The Department begins the RIA with a flatly unreasonable portrait of the benefits of the proposed rule. To begin, the Department claims that while it "acknowledges the interest of some stakeholders in preserving certain recipients' current athletic-team policies and procedures regarding sex-related eligibility criteria and in avoiding potential additional costs to comply with the proposed regulation," ultimately,

> "the Department believes 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. The Department expects that a primary benefit of the proposed regulation would be to provide greater clarity to recipients and other stakeholders about the standard that a recipient must meet under Title IX if it 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 and, as a result, to protect students' equal opportunity to participate on male and female teams consistent with Title IX."[43]

First, it is notable that the Department's second claimed benefit, that the regulation would "provide greater clarity to recipients and other stakeholders," is not a valid benefit of the proposed rule so much as a tautological argument for putting forth any regulation whatsoever. That is, any agency could claim that any rule which imposes new obligations on recipients is necessary to "clarify" existing statutory obligations. The statutory obligation of nondiscrimination is already clear; the agency, here, attempts to define nondiscrimination in a

[42] *Motor Vehicle Manufacturers Association v. State Farm,* 43; *Michigan v. EPA,* 753, 760.
[43] 88 FR 22879.

new way such that formerly justified actions—making a blanket rule to ensure fairness in sports by allowing boys and girls to compete only with members of the same sex—are now called insufficient and discriminatory. This is not "clarifying" the statute, but rather, interpreting it in a new way, striking down laws that Congress and courts have left in place and in a way that is clearly controversial across the country.

The Department has not, by the claimed benefit of clarity, justified the specific course of action chosen, but rather, it has simply justified the fact that it has chosen any course of action at all. Clarity cannot be said to be a benefit of the regulation except in this hollowest sense, and an agency cannot reasonably say that clarity outweighs costs without demonstrating substantial evidence of unclarity; otherwise, the benefit of clarity is marginal and not worth the cost. Thus, the Department has failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[44] Any myriad of other regulations that interpreted the statute in a definitive way would have obtained the benefit of clarity; the cost-benefits analysis of this regulation thus must admit that clarity is not a differentiating factor in favor of this regulation. This is especially true in light of the fact that clarity is listed as the "primary benefit" of the proposed regulation.[45]

Moreover, the proposed rule does not even provide recipients with clarity. The Department does not lay out a standard of evidence for recipients to claim that they have an "important educational interest" in restricting single-sex sports teams only to members of a single sex; indeed, by denying the recipients any ability to mandate that single-sex athletic programs in elementary and middle school contain only members of one biological sex, the Department makes the requirement for recipients much higher than it would seem on its face.[46] After all, it is clearly reasonable that there would be an "important educational interest" in having all athletic activity provide the safety and support of a same-sex environment, lest female students feel threatened, discriminated against, or discouraged by a biological male presence.

That the Department has excluded blanket policies covering all sports and any policies covering the elementary and middle school levels does not clarify, but rather, muddies the waters of what may be reasonably called an "important educational interest." Schools are still faced with the question of what constitutes proof of an important educational interest, and evidence might have to be presented that shows such an educational interest exists in all cases rather than simply in most. If a school must prove that educational interest exists in terms of safety or competition, as suggested by the Department, then must a female student be hurt or all female students beaten by a biological male "identifying" as a female in order for a school to institute a policy? Or will recipients have to fine-tune their laws to arrive at the exact hormonal balance

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[44] *Motor Vehicle Manufacturers Association. v. State Farm*, 43.
[45] 88 FR 22879.
[46] 88 FR 22876.

which constitutes an unfair advantage or threat to safety, as the Department implies may be the case in many sports?[47]

For all of the reasons detailed above, we urge the U.S. Department of Education not to go forward with the proposed rule.

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[47] See, e.g., 88 FR 22874.
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