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May 15, 2023

Mr. Alejandro Reyes  
Office for Civil Rights  
U.S. Department of Education  
400 Maryland Ave. SW, PCP-6125  
Washington, DC 20202

SUBJECT: Comments on Notice of Proposed Rulemaking:  
Nondiscrimination on the Basis of Sex in Education Programs or  
Activities Receiving Federal Financial Assistance:  
Sex-Related Eligibility Criteria for Male and Female Athletic Teams

Dear Mr. Reyes:

We submit these comments on behalf of America's Future, Public Advocate of the United States, and Conservative Legal Defense and Education Fund in opposition to the Department's Notice of Proposed Rulemaking: "[Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams](#)" ("the NPRM").

[America's Future](#) is a nonprofit educational and legal organization, established in 1946, which is exempt from federal income tax under Internal Revenue Code ("IRC") § 501(c)(3). Among its missions is to conduct research and inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

[Public Advocate of the United States](#) is a nonprofit educational organization, exempt from federal income tax under IRC § 501(c)(4). PA's tax-exempt mission and purposes include education and litigation to protect the family, traditional values, civil liberties, including, but not limited to, freedoms and rights guaranteed by the U.S. Constitution, and proper interpretation of our federal and state constitutions, statutes, and regulations.

[Conservative Legal Defense and Education Fund](#) is a nonprofit educational and legal organization, established in 1982, and is exempt from federal tax under IRC § 501(c)(3). Its mission is to provide conservative leadership through research, and education regarding federal and state constitutional rights, judicial excesses, limited government, traditional family values, and free enterprise.

## SUMMARY

The NPRM is a blatant attempt to overturn administratively the expressed will of Congress as set out in Title IX. That statute was designed to remedy an unequal playing field in scholastic sports to elevate the opportunities for females to the level of males. The proposed rulemaking is designed to elevate the opportunities for males to intrude into female sports and facilities. Not only is it an impermissible departmental construction of Title IX, it would undermine Title IX.

## COMMENTS

### I. The NPRM Directly Contradicts Title IX's Text and Intent.

When Congress passed Title IX of the Educational Amendments of 1972, P.L. 92-318, the legislation provided that “[n]o person in the United State shall, on the basis or sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>1</sup>

The bill's Senate sponsor, Birch Bayh (D-IN), in his remarks upon introducing the legislation, made clear that his objective was to ensure that females have the same educational opportunities available to males. Sen. Bayh attacked “corrosive and unjustified discrimination against women.”<sup>2</sup> He stressed that the bill was designed to address preferential treatment for biological males over females. *Id.* He denounced stereotypes of females as “pretty things who go to college to find a husband ... and finally marry, have children and never work again.”<sup>3</sup> Without question, Sen. Bayh's legislation referred to biological females, not to political constructs of “gender identity.”

Sen Bayh repeatedly lamented disparate opportunities in education and employment between “males” and “females.” *Id.* “I am concerned that in 1970 the percentage of the female population enrolled in college was markedly lower than the percentage of the male population...” *Id.* He further added, “[i]t is of little comfort for women to know that they are encouraged to further their schooling but that ... they will be earning far less than male colleagues for the rest of their lives.”<sup>4</sup>

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<sup>1</sup> 20 U.S.C. § 1681

<sup>2</sup> 118. Cong. Rec. 5803.

<sup>3</sup> 118 Cong. Rec. 5804.

<sup>4</sup> 118 Cong. Rec. 5807.

However, Sen. Bayh made clear that “differential treatment by sex” would be allowed under Title IX “in sports facilities or other instances where personal privacy must be preserved.”<sup>5</sup> Nothing in the language of Title IX even contemplates allowing biological males to penetrate the locker rooms and bathrooms of biological female students.

In the intervening half-century, neither Congress nor this agency has ever redefined the word “sex” in a manner so patently contrary to the legislation’s text or intent. The NPRM is not an intent to “execute the law” as laid out in Title IX. It is not an attempt to “interpret” congressional language. It is a blatant rewriting of the intent and text of Title IX, to accomplish the radical socio-political goals of an administration unwilling to wait on the constitutional process of Congress passing a bill for the president’s signature.

## **II. The NPRM Assumes a Scientifically Unproven “Harm” to “Transgender” Students and Dismisses Scientifically Supported Harms to Opposite-Sex Teammates.**

The NPRM spends a great deal of ink contriving alleged “harms” to students being required to play on teams of the same sex — despite the fact that no scientist found any such “harm” in the last two centuries of sex-segregated high school and college athletics until the last decade.

Citing scattered cases from state and lower federal courts, the Department claims that “[p]articipating in sports on teams that contradict one’s gender identity is equivalent to gender identity conversion efforts, which [is] dangerous and unethical.” NPRM at 41. It makes the unsupported — and historically, utterly unsupportable — claim that “categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports,” as if it is beyond possibility that they could play on teams with other biological men and boys. *Id.* at 32.

The Department argues that subjecting a “transgender woman” “to the State’s moral disapproval of her identity, and subjecting her to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex” constitutes harm “to mental and physical health.” *Id.* at 42. It is difficult to see how this is possible, when most visits to medical professionals also involve “verifying one’s sex,” and this has never been linked to any harm. The Department describes a policy that “prohibited students from participating on teams consistent with their gender identity as ‘punish[ing]’ those students.” *Id.* at 41.

But the NPRM completely fails to consider — or dismisses as politically incorrect — the vast scientific evidence underscoring the harm that state-imposed and state-sponsored transgender ideology does to those it ensnares.

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<sup>5</sup> 118 Cong. Rec. 5807.

**A. The “Science” Upon Which the NPRM Relies Is Unproven, Inaccurate, and Unscientific.**

The “science” upon which the NPRM relies to promote its “gender-affirming care” is composed mostly of radical political activism, bent on a remaking of society, and has little basis in real science. The politico-“scientific” field of gender ideology “has a penchant for exaggerating what is known about the benefits of the practice, while downplaying the serious health risks and uncertainties.”<sup>6</sup>

As noted in a scientific journal, the *Journal of Sex and Marital Therapy*, this past January, the “gender-affirming care” push stems from a “highly politicized and fallacious narrative, crafted and promoted by clinician-advocates, [and] has failed to withstand scientific scrutiny internationally, with public health authorities in Sweden, Finland, and most recently England doing a U-turn on pediatric gender transitions in the last 24 months.” *Id.*

As the *Journal* authors note, it has never been demonstrated “that the benefits [of ‘gender-affirming care’] were substantial enough to outweigh the burden of lifelong dependence on medical interventions, infertility and sterility, and various physical health risks. The studies also failed to quantify the risk to ‘false positives’ — that is, those gender dysphoric youth whose distress would have remitted with time without resorting to irreversible medical and surgical interventions.” *Id.* at 3.

The authors describe “‘runaway diffusion’ — ‘the phenomenon whereby the medical community mistakes a small innovative experiment as a proven practice, and a potentially nonbeneficial or harmful practice ‘escapes the lab,’ rapidly spreading into general clinical settings.” *Id.* Runaway diffusion is exacerbated by premature federal regulations interfering with and preempting good medical practice. The authors describe the 2022 proposal by the Department of Health and Human Services to “mandate healthcare entities to provide ‘gender-affirming’ interventions to minors, or risk claims of ‘discrimination’ and loss of federal healthcare funding [as] yet another example of ‘runaway diffusion.’” *Id.* The NPRM is just the latest example.

In reality, “the field of U.S. pediatric gender [and this Department] has chosen to throw its weight behind two indefensible and contradictory claims: (1) that ‘low quality evidence’ is a misleading technical term which actually describes high quality reliable research; and (2) that true high quality research can only come from randomized placebo-controlled trials, which are unattainable and unethical.” *Id.* at 4.

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<sup>6</sup> E. Abbruzzese, S. Levine, and J. Mason, “[The Myth of “Reliable Research” in Pediatric Gender Medicine: A critical evaluation of the Dutch Studies—and research that has followed,](#)” *JOURNAL OF SEX & MARITAL THERAPY* 1 (Jan. 2, 2023).

**B. “Gender-affirming” Medical Intervention Creates Lifelong Physical Harms to Children.**

The Journal authors reviewed several Dutch studies which purport to show a high degree of success in addressing “mental health” of youth with “gender dysphoria” through “gender-affirming” significant medical interventions. But “[t]he Dutch studies **did not evaluate physical health outcomes** of “gender-affirmative” treatments.” *Id.* at 5. Yet, “[e]ven without setting out to assess the risks, the Dutch research inadvertently revealed that the rate of short-term morbidity and mortality associated with “gender-affirming” interventions may be as high as 6%-7%.” *Id.*

The Dutch studies “reported on only their best-case outcomes at each of the three phases of treatment (puberty blockers, cross-sex hormones, and surgery) — while failing to report the outcomes of the less positively affected, or even harmed, cases.” *Id.*

One of the Dutch “studies,” in 2014, “studied” only 70 subjects — at least initially. *Id.* at 7. “The 70 participants who began the 2014 study, already biased toward more positive outcomes, shrank to 55. Fifteen subjects were dropped from the study and relabeled ‘nonparticipants.’ This subset, however, was not random, but instead heavily skewed toward subjects who experienced serious problems, including 3 who developed severe diabetes and obesity and 1 death following surgical complications.” *Id.*

Now that the Dutch studies have been several years in retrospect, “an examination of the outcomes reveals that standard measures of psychological functioning such as anxiety, depression, anger, and global function showed very little clinically significant change after treatment.” *Id.* at 10.

The Department claims that “gender identity conversion efforts” are “dangerous and unethical.” But the Dutch studies showing “positive” effects from significant medical interventions also utilized significant psychotherapy in achieving their allegedly “positive” results. “Contrary to the now-common but erroneous assertion by the U.S. gender medicine establishment that psychotherapy for gender dysphoria is akin to ‘conversion’ and should be avoided or even banned, the Dutch studies reveal that psychotherapy was a key element of the protocol.” *Id.* at 11.

As the Journal authors note, “Patients and their families cannot make informed decisions about a treatment when the physical health risks are assumed to be minimal and not reported, and only the potential psychological benefits are considered.” *Id.* at 11-12. Yet that is precisely the approach taken by the NPRM. It highlights and exaggerates “mental health” costs of telling “transgender” youth something they do not wish to hear (that they are biologically male or female), while completely dismissing the physical health costs inherent in “gender care” medical intervention.

And these costs are many — and well-documented. More than a quarter of the patients in the Dutch studies expressed “reproductive regret,” distressed over inability to have children after the sterility inevitably caused by surgery to “alter” the sex of the patient. *Id.* at 19. Over 60 percent of participants in the Dutch “studies” were still single in their early to mid-30’s, and many reported “relationship difficulties.” *Id.* Some 70 percent of male-to-female “transitioners” reported experiencing difficulty with sexual functions due to their surgery.

As the Journal authors note, “the rate of medical detransition is already 10%-30% just a few years following transition,” and these numbers “are likely to rise in the future as regret historically has taken over a decade to materialize.” *Id.* at 19-20.

The Endocrine Society has published guidelines in which it forcefully “suggests” such treatments as sex reassignment surgeries and puberty blockers as “gender-affirming care.”<sup>7</sup> Yet it admits that its recommendations for hormone therapy and sex reassignment surgery are based on “low quality” or “very low quality” evidence. *Id.* at 3872, 3880, 3894. The Society admits that studies show a “**young average age at death** following [sex reassignment] surgery and [a] relatively larger number of individuals with somatic morbidity.” *Id.* at 3894 (emphasis added).

As scholars Ryan Anderson and Robert George have noted:

Not only are some medical professionals affirming falsehoods, they are mutilating bodies in the process. So they are deploying bad means (mutilation) in the service of bad ends (affirming falsehoods). Administering high doses of estrogen to **a man who rejects his male reality** for some alternative identity (whether as a woman, non-binary, gender-ambidextrous, etc.), or administering high doses of testosterone to **a woman who rejects her female reality** for some alternative identity (whether as a man, non-binary, etc.), or removing reproductive organs and using plastic surgery to create parts or appendages that resemble those of the opposite sex (or neither, or both), **mutilates the body in an effort to reinforce false beliefs** at odds with reality. This is a misdirection of the medical profession, a violation of sound medical ethics. [R. Anderson & R. George, “[Physical Interventions on the Bodies of Children to ‘Affirm’ their ‘Gender Identify’ Violate Sound Medical Ethics and Should be Prohibited](#),” *CatholicCitizen.org* (Dec. 10, 2019) (emphasis added).]

The NPRM completely ignores the real pain caused to real children by the “government/medical complex” and its rush to impose transgender ideology on immature children, often with irreversible consequences. In 2022, California teenager Chloe Cole (who

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<sup>7</sup> Endocrine Society, “[Endocrine Treatment of Gender-Dysphoric/ Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline](#),” *J. CLIN. ENDOCRINOL. METAB.* 3869 (Nov. 2017).

had “de-transitioned” from identifying as a boy, back to a girl) testified before the Florida legislature about her deep regret after having undergone radical and irreversible surgery. “I really didn’t understand all of the ramifications of any of the medical decisions that I was making,” she testified. “I was unknowingly physically cutting off my true self from my body, irreversibly and painfully.”<sup>8</sup> In a private interview with Florida Surgeon General Joseph Ladapo, Cole lamented, “I don’t know if I’ll be able to fully carry a child.... And because I do not have my breasts, ... I am not able to breastfeed whatever future children I have.”

Renowned Swedish child psychiatrist Christopher Gillberg has called unproved medical interventions on “trans-identifying” children “possibly one of the greatest scandals in medical history.”<sup>9</sup> And for children like Chloe, once the damage is done, at the behest of adults who should have protected her, the scars are lifelong and irreversible.

### C. “Gender-affirming” Policies Like the NPRM Impose Severe Mental and Emotional Harms on Children.

The scars inflicted by radical “gender ideology” are not just physical. They are mental too, and have left deep wounds in the lives of girls denied a fair chance at sporting events because of schools adopting cruel and misguided policies like the NPRM.

In 2019, Connecticut high school sprinter Selina Soule missed the cut to compete in the New England 55-meter regionals — because two biological boys ran faster than she did.<sup>10</sup> “It wasn’t long before I discovered that athletic associations have the power to make rules that directly impacted my ability to win races. No matter how hard I trained, enduring long hours of practice, I just couldn’t beat a boy,” Soule wrote.<sup>11</sup>

I was forced to compete against two biological males in high school, and those athletes took home the top trophies in our girls’ events. It was demoralizing to work incredibly hard to shave fractions of a second off my time only to come in third place. The mental toll of training for something you know you can’t win is devastating for a competitive person like myself. Instead of

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<sup>8</sup> T. O’Neil, “[California ex-trans teen backs Florida ban on Medicaid funds for transgender medical interventions](#),” *Fox News* (July 10, 2022).

<sup>9</sup> J. Van Maren, “[World-renowned child psychiatrist calls trans treatments ‘possibly one of the greatest scandals in medical history’](#),” *The Bridgehead* (Sept. 25, 2019).

<sup>10</sup> R. del Giudice, “[High School Girl Who Lost Race to Transgender Athletes Files Federal Complaint](#),” *Daily Signal* (June 18, 2019).

<sup>11</sup> S. Soule, “I Am a Women’s Track and Field Champion. Here’s Why I Continue to Fight for the Future of Women’s Sports,” *Alliance Defending Freedom* (Oct. 31, 2022).

acknowledging this obvious injustice, many leaders, school administrators, and elected officials are turning a blind eye to the fact that girls' sports are becoming fundamentally unfair. [*Id.*]

Soule is currently suing the state of Connecticut for allowing biological males to tilt the playing field against her.

Soule's fellow plaintiff Chelsea Mitchell has a similar story:

I've lost four women's state championship titles, two all-New England awards, and numerous other spots on the podium to male runners. I was bumped to third place in the 55-meter dash in 2019, behind two male runners. With every loss, it gets harder and harder to try again. That's a devastating experience. It tells me that I'm not good enough; that my body isn't good enough; and that no matter how hard I work, I am unlikely to succeed, because I'm a woman.<sup>12</sup>

Again and again, males win girls' and womens' events and are celebrated by government and media figures, while the girls and women they defeated are deprived, smeared, pushed to the sidelines and even assaulted for daring to decry being cheated of titles they should have won.

In 2018, a little-known man named Will Thomas was listed on the roster of the Penn State men's swim team.<sup>13</sup> The following season, Thomas "transitioned," identified as "Lia Thomas," and began competing in women's swim events. On the men's team, Thomas was decidedly unremarkable. But competing against women, Thomas immediately dominated. "During the last season Thomas competed as a member of the Penn men's team, which was 2018-19, [Thomas] ranked 554th in the 200 freestyle, 65th in the 500 freestyle and 32nd in the 1650 freestyle. As [Thomas'] career at Penn wrapped, [Thomas] moved to fifth, first and eighth in those respective events on the women's deck."<sup>14</sup> In March 2022, Thomas took the NCAA women's championship in the 500-meters.<sup>15</sup> Virginia Tech female swimmer Reka Gyorgy, whom Thomas eliminated from the competition, was heartbroken.

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<sup>12</sup> C. Mitchell, "I Was the Fastest Girl in Connecticut. But Transgender Athletes Made it an Unfair Fight," *Alliance Defending Freedom* (May 26, 2021).

<sup>13</sup> Will Thomas, [2018-19 Men's Swimming and Diving](#), *Penn Athletics*.

<sup>14</sup> J. Lohn, "A Look At the Numbers and Times: No Denying the Advantages of Lia Thomas," *Swimming World* (Apr. 5, 2022).

<sup>15</sup> R. Gaydos, "Ex-NCAA swimmer still upset over Lia Thomas making it to 500 finals in 2022 championships," *Fox News* (Mar. 23, 2023).



“I swam the 500 freestyle in preliminaries where I got 17th, which means I did not make it back to the finals and was first alternate,” her statement read. “I watched Lia Thomas [a biological male] from the pool deck win a women’s national title in a finals that I deserved to be in because the rules in place did not support biological women. I couldn’t help but cry and feel frustrated, angry, and sad. It hurt me, my team, and other women in the pool.” [*Id.*]

In March, 2023, ESPN lauded Thomas in its “Women’s History Month” segment.<sup>16</sup> Riley Gaines, a former University of Kentucky swimmer who was edged out by Thomas for a fifth-place title in another 2022 NCAA women’s event, responded. “Lia Thomas is not a brave, courageous woman who EARNED a national title,” Gaines stated on Twitter. “He is an arrogant, cheat who STOLE a national title from a hardworking, deserving woman. The @ncaa is responsible.... If I was a woman working at ESPN, I would walk out. You're spineless @espn.” *Id.* Gaines explained to Tucker Carlson that she had felt “extreme discomfort” being forced to change in the same locker room as the male Thomas. “That’s not something we were forewarned about, which I don’t think is right in any means, changing in a locker room with someone who has different parts,” Gaines said.<sup>17</sup>

After Thomas spoke out in support of this NPRM, Riley again responded. “Under the guise of competitive fairness? Are you really trying to say you would have won a national title against the men? Does it not break your heart to see women lose out on these opportunities? The Biden Admins proposed bill denies science, truth, and common sense.”<sup>18</sup> “This take is selfish and shows an utter disregard for women. The Biden Administration is actively and aggressively working to pass laws that erase decent and fair treatment for women in sports,” Gaines added.

But while Thomas received “Women’s History Month” plaudits on ESPN, Gaines was physically assaulted while attempting to speak at an event at San Francisco State University – by a man “identifying” as a woman. She was “whisked to safety by police ... after being assaulted” while “transgender activists shouted” at her.<sup>19</sup> “I was ambushed and physically hit

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<sup>16</sup> R. Gaydos, “[Swimmer Riley Gaines slams ESPN for Lia Thomas Women's History Month segment](#),” *Fox News* (Mar. 26, 2023).

<sup>17</sup> A. Griffin, “[Lia Thomas competitor says she felt ‘extreme discomfort’ sharing locker room](#),” *New York Post* (July 27, 2022).

<sup>18</sup> R. Gaydos, “[Riley Gaines sounds off on Brittney Griner, Megal Rapinoe advocating for ‘male inclusion in women’s sports’](#),” *Fox News* (May 2, 2023).

<sup>19</sup> H. Hamilton, “[WATCH: Riley Gaines whisked to safety after being assaulted at San Francisco event](#),” *Washington Examiner* (Apr. 7, 2023).

twice by a man,” Gaines tweeted later. “This is proof that women need sex-protected spaces.”<sup>20</sup>

### CONCLUSION

While the Department prides itself on promoting the “mental health” of boys identifying as girls, the devastating effects on the lives of real girls are simply blown off. Intent on “validating the existence” of “transgender” students’ ability to live a lie, the NPRM demolishes the ability of actual girls and women to experience the promise of Title IX. The NPRM cavalierly dismisses the existence of Chloe Cole, Riley Gaines, Selina Soule, Chelsea Mitchell, and many others like them. Chloe, Riley, Selina and Chelsea are dismissed as “less than,” consigned to the back of the school bus, and marked for public scorn and ridicule. These living, breathing girls are nothing more than collateral damage in the wake of the Biden Administration’s decision to wreak fundamental socio-political change. Gaines is right. The NPRM “denies science, truth, and common sense.” The NPRM is ill-considered, destructive and cruel. It should be abandoned before it does further damage.

Sincerely yours,

*/s/ William J. Olson*

William J. Olson

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<sup>20</sup> Riley Gaines, [Tweet](#) (Apr. 7, 2023).