**Date**: March 27, 2024

**To:** The Office of Information and Regulatory Affairs
The Office of Management and Budget
725 17th Street NW Washington, D.C. 20503

**From**: Jonathan Hullihan, Stephanie Bontell, Martin Etwop, & James Bruner

**Re**: EO 12866 Meeting regarding "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" (RIN 1870-AA16)

Thank you for the opportunity for Citizens Defending Freedom ("CDF") to provide comments for the Office of Information and Regulatory Affairs review of the Department of Education's proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."

CDF is a non-profit organization with county-level chapters across America to educate citizens on the importance of civil discourse to defend their faith and freedom, endowed by our Creator, and guaranteed by America's founding documents. Through this effort, we assist citizens to resolve breaches of liberty through local awareness, local light, and local action with the goal of promoting accountability and transparency in governance. It is through this perspective that these comments are offered, representative of millions of Americans that believe, as we do, in the core principles of freedom, liberty, and the rule of law.

On July 12, 2022, the Department of Education published in Federal Register 41390, Notice of Proposed Rulemaking ("NPRM").[1] Since that time, CDF has provided parents, citizens, and local school districts with information germane to this NPRM, how it would affect governance, local education and sporting fairness, and the personal privacy of children.[2] We have also answered

[1]*See* U.S. Department of Education. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. (2022). *Federal Register*.

[2]*See* Citizens Defending Freedom. (2023). Title IX Toolkit, at https://www.citizensdefendingfreedom.com/toolkit

many questions on how this NPRM seems to bypass and usurp U.S. congressional representation by amending and modifying the plain language and meaning of Title IX as part of Congress's Education Amendments of 1972.[3] Despite our efforts to educate and inform the general public on how the radical changes pushed through the rulemaking process will impact virtually every city, town, school, and student in the United States, the vast majority of our citizens are not aware of the impact the of NPRM.

The Education Amendments of 1972 mandates that, subject to certain exceptions, that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance …." 20 U.S.C. § 1681(a). Its purpose, therefore, as derived from its plain text, is to prohibit sex discrimination in education. When the Title IX protections were enacted, this was in response to evidence of pervasive discrimination against biological women pertaining to educational opportunities and equal access to sports teams, scholarships, athletic facilities, and other opportunities created through athletic competition when compared to biological male counterparts.[4] This fact is indisputable and a matter of historical record.

Additionally, notwithstanding Title IX's general prohibition on sex discrimination, the statute provides an express carve-out regarding living facilities based on biological sex: "nothing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. As a result, the intent of Congress is clear. The historical and plain meaning by Congress of "sex" did not include "gender identity." The proposed NPRM moves beyond a biological understanding of "sex," and supplements the Congressional plain meaning by adding protection against discrimination based on transgender status. This is in direct conflict with the plain meaning of "sex" at the time of Title IX's enactment and the purpose of Title IX and its implementing regulations, to protect biological women and girls, as derived from their original plain meaning and text. In other words, this proposed NPRM is in direct conflict with the law as passed by Congress and fails to protect opportunities for biological girls and women as intended by the law. Thus, because this NPRM is in direct conflict with congressional intent, statutory plain

[3]See Citizens Defending Freedom. (2023). Title IX Fact Sheet, Subsection 3: "Officials are obligated to recognize the statutory language in the original and historical context in which it was drafted" and quoting the U.S. Supreme Court in *West Virginia v. EPA* (142 S.Ct. 2587) observing that "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Mich. Dept. of the Treasury*, 489 U.S. 803, 809 (1989)). This means abiding by the definition of the word "sex" to be biological and binary as it was when Title IX was passed in 1972 and therefore not in a manner that would include sexual orientation or gender identity). Also noted is the U.S. Supreme Court's 1973 decision, *Frontiero v. Richardson* (411 U.S. 677), in which the Court recognized that "sex, like race and national origin, is an immutable (unchanging) characteristic determined solely by the accident of birth" (Id. at 686, quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

[4] *See* Title IX Enacted. *History at: https://www.history.com/this-day-in-history/title-ix-enacted*

meaning and authority, and by extension, the constitutional guarantee of a republican form of government,[5] it should be viewed as beyond the scope of the authority of the Executive branch.

The United States is a Constitutional Republic. The Constitution grants Congress—our nation's legislative branch—the power to make laws through the legislative process. Members are elected to represent the interests of the people in their congressional district or state, reflecting the constituency and the values they deem important. As proposed, this NPRM, usurps the role of Congress, and by extension, the people represented by their member of Congress, by bypassing the legislative process on a major question of vast economic and political significance.

The impact of vast economic significance is clear. The fiscal year 2025 budget proposed by the Biden Administration requests $82 billion in discretionary funding for the Department of Education in 2025, a $3.1 billion or 3.9-percent increase from the 2023 level.[6] Title IX prohibits sex discrimination in the education programs and activities of entities that receive federal financial assistance. These programs and activities include "all of the operations of ... a college, university, or other postsecondary institution, or a public system of higher education." 20 U.S.C. § 1687(2)(A); *see also* 45 C.F.R. § 86.2(h). As a result, this NPRM represents a potential loss of educational funding worth billions of dollars annually. The Education Department must be able to point out a clear statement from Congress to justify this NPMR or provide a concise understanding how a $82 billion dollar budget is not of vast economic significance.

On the contrary, the current regulations implementing Title IX reflect the plain meaning and statutory intent of Congress, including a clear statement from Congress explicitly permitting schools receiving federal funds to "provide separate housing on the basis of sex," so long as the housing is "[p]roportionate in quantity to the number of students of that sex applying for such housing" and "[c]omparable in quality and cost to the student," 34 C.F.R. § 106.32(b), and "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex [are] comparable to such facilities provided for students of the other sex," *Id*. § 106.33. The current regulations are consistent with the intent of Congress, protection of women and girls based on the scientific definition of biological sex, not gender identity.

Despite this clear and plain reading of the intent of Congress with the current implementing regulations, the NPRM argues that the inclusion of sexual orientation and gender identity discrimination within the meaning of sex discrimination under Title IX is required under *Bostock vs. Clayton County*, 140 S. Ct. 1731 (2020). However, this interpretation is arbitrary and capricious and contrary to law. Acceptance of the NPRM would reinforce a prevalent though severely flawed interpretation of the Supreme Court's decision in *Bostock*, an employment law case that

[5] *See* U.S. Const. art. IV, § 4
[6] *See* FY 2025 Budget, at https://www.whitehouse.gov/wp-content/uploads/2024/03/budget_fy2025.pdf

concerned Title VII, not Title IX. In fact, the Court in *Bostock* expressly declined to comment on Title IX and thus, did not broaden the definition of "sex" to include gender identity. *Id*. 140 S. Ct. at 1753. The Court's terminology in *Bostock* is also fundamentally different from the NPRM. The Majority in *Bostock* used the term "transgender status," and did not adopt "gender identity" as a protected class. Moreover, the *Bostock* court also acknowledged that assuming applications of Title VII to Title IX "would risk amending the statutes outside the legislative process reserved for the people's representatives." *Id*. at 1738.

Under the U.S. Constitution, it is unlawful to implement a sweeping expansion of federal law without congressional approval. As such, altering the definition of "sex" under Title IX to include gender identity and sexual orientation is a decision solely reserved to Congress. In June 2022, the U.S. Supreme Court in *West Virginia v. EPA* (142 S.Ct. 2587) affirmed this, finding that a federal agency may not implement sweeping expansions of regulatory authority without clear congressional authorization. Therefore, the NPRM is ripe for ideology-driven administrative abuse, exceeding enumerated federal powers under the Constitution and violating the distribution of power between Congress and the Executive branch.

The NPRM contradicts Title IX's statutory text, ignores congressional intent, dismisses relevant case law, and adds unnecessary confusion in compliance and enforcement. For example, the NPRM provides multiple contradictions on its requirement of treatment in accord with gender identity– and provides the de minimis harm determination as a test. To this point, throughout the discussion on proposed paragraph 106.31(a), the preamble first reiterates that differential treatment or separation on the basis of sex is prohibited if it leads to more than a de minimis harm, except where it is permitted by statute or regulation. It also states that not treating a person in accord with their asserted gender identity in sex-specific programs or activities is greater than a de minimis harm. 87 Fed. Reg. at 41534-37. This confusing and contradictory test of discrimination for de minimis harm in unclear and should be clarified, or rightfully left to Congress to amend through legislative activity.

The overreach of the NPRM arbitrarily, capriciously, and dangerously meddles in the authority of the States by expanding the scope of discrimination beyond reasonable bounds. The NPRM provided that the proposed regulation may have federalism implications (with "federalism implications" including anything that has substantial direct effects on the States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government). The federalism implications of this NPRM are clear, and will certainly invite litigation among the several States, with a good faith basis for constitutional claims for the major questions of economic and political significance.

To this point, this NPRM is intended to preempt State laws that designate sports teams or other educational programs on the basis of sex rather than gender identity. This is located in the proposed 34 C.F.R. § 106.6(b), providing that "[t]he obligation to comply with this part is not

obviated or alleviated by any State or local law or other requirement." Prior to this rule being published, a comprehensive study on the impact to federalism, financial costs to the States that have enacted such laws, and local costs for compliance should be conducted and considered. Moreover, the NPRM is deceptive in that it would not amend the existing provisions at Section 106.41 that specifically govern school athletics and permit sex-separate competition, of which many states have passed prohibitions against. However, it is likely the broad language of the new rule text at paragraph 106.31(a) would be used to attempt to require schools to allow transgender student to participate on a sports team that corresponds with their purported gender identity. Specifically, the proposed 34 C.F.R. § 106.10 expands the scope of "on the basis of sex" to include gender identity. 34 C.F.R. § 106.41(a) bars discrimination in athletics on that basis, thus requiring educational institutions to allow biological males who identify as female to compete in women's and girls' athletics. Nothing in the NPRM's proposed language limits the scope of proposed 34 C.F.R. § 106.10. This issue should be clarified before publication of the final rule.

As an organization, CDF is obligated to reject any rulemaking that seeks to undermine the Separation of Powers, a bedrock of our Constitutional Republic. As stated by Founding Father James Madison, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (*The Federalist Papers*, No.47). A truly unprecedented act by a federal agency to expand its own regulatory authority, this proposed rule problematically favors National Government control over State and local public school athletic participation and education programs based on the dangerously malleable, purposefully indefinable, and nebulous unfixed category of gender identity, something which will have a substantial, direct, and grave effect on every public school, college, and educational program in the United States for years to come should the NPRM come into effect. This will certainly have insurmountable financial and societal costs that should be considered and analyzed with specificity and diligence with an understanding of the major questions of economic and political significance this NPRM represents.

In consideration of this, we are confident that this overreach of regulatory authority is a violation of separation of powers by usurping congressional authority and will thus have devastating federalism implications on local and State governance of public education systems, including the equality, competitiveness, and the safety of women and girls' athletics. Therefore, the administration should modify the NPRM to remove "gender identity" from any final regulations and include language to uphold the intent of Congress to ensure the integrity of women's and girls' athletics and education programs.

Thank you for your time and attention to this matter and for your service to our blessed nation.