

May 15, 2023 / Iyar 24, 5783
The Honorable Dr. Miguel Cardona, Secretary
United States Department of Education, Room 2C185
400 Maryland Avenue, S.W.
Washington, D.C. 20202

RE: 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,

On behalf of the Coalition for Jewish Values (CJV), I am submitting this comment regarding the Proposed Rulemaking entitled “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” (Athletics NPRM), published in the Federal Register on April 13, 2023.¹

CJV is the largest rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish principles in American public policy. The proposed rule both directly and indirectly threatens normative Jewish belief and practice in multiple ways, with pragmatic impact upon boys but especially upon girls, and we urge the Department of Education to abandon it.

Insufficient Time and Consideration

On April 6, 2023, the Department of Education publicly announced the availability of the NPRM under the Department’s Title IX regulations. On April 13, 2023, the NPRM was published in the Federal Register with a 32-day comment period, scheduled to close at 11:59PM EDT on May 15, 2023.

This period offers too little time for the American public to analyze and respond to the changes the Department has proposed. Indeed, we note with alarm that the Department has undertaken radical policy changes with such haste and has afforded itself so little time to evaluate their effects.

On April 21, 2023, Montana Attorney General Austin Knudsen wrote to Secretary Miguel Cardona on behalf of 22 State Attorneys General, requesting an extension on the NPRM’s comment period for these reasons. In her May 5, 2023 response on behalf of Secretary Cardona, Assistant Secretary for the Office of Civil Rights Catherine E. Lhamon justified the period’s brevity on the grounds that the Athletics NPRM is “considerably shorter and much narrower in scope” than a related NPRM published in July with a 60-day comment period.

¹ 88 Fed. Reg. 22,860 (April 13, 2023).

We contend that both the Athletics NPRM's 30-day comment period and its 32 pages are inadequate. Nowhere has the Department of Education addressed the regulation's complex and far-reaching consequences. It musters no studies to defend this radical new policy. It cites no evidence. It spares no time for the costs—or for those who will pay them.

Notably, this headlong rush to upend existing protections for women's sports is characteristic of the sudden acceptance of the notion of "gender identity." It is worth recalling that the American Psychological Association considered Gender Identity Disorder to be a mental health condition requiring counseling and mental health treatment—not surgical alteration—barely a decade ago.

In no more than two decades, then, a new belief system has swept across much of America and achieved incredible cultural and institutional power. Yet it is nothing more than that: a belief system, one which millions of Americans consider not only baseless but divorced from reality. Instead of permitting ideological diversity and reasoned debate, the proposed regulation demands ideological conformity and threatens severe consequences for dissent.

The Proposed Regulations Establish a New State Religion

The idea that a person's feelings override biological sex and that that sex can be changed is fundamentally new. It is also devoid of scientific foundation: no surgical procedure or administration of drugs will change the declaration made by each and every one of the 30 trillion cells in the human body, all of which declare sex with an XX or XY chromosome pair.

The following are statements of faith and credo, like those of any other religion:

- "Some children are born in the wrong body."
- "Gender identity is independent of the body."
- "Gender identity should determine whether someone is a boy or a girl."
- "Children and adults should undergo social and surgical alterations in order to appear more like the opposite sex."

The proposed changes codify gender ideology in law. By equating "gender identity" with biological sex, they compel Americans to behave as if they accept what is a tenet of faith—not fact. Contrary to the First Amendment, the Department of Education is creating a state religion and forcing Americans and their schools to practice it. The Constitution is clear. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Proposed Regulations Explicitly Prohibit Normative Jewish Belief

The Bible states: "male and female He Created them." [Genesis 1:27] Judaism teaches that men and women were Created in distinct acts of Creation, and that differences between them cannot be nullified or masked. Recognition that males and females are and will remain different throughout their lives is normative Jewish thought, and numerous Commandments apply differently to men and women. As mentioned earlier, these Biblical teachings are consonant with the biological markers that are a permanent part of each individual's genetic makeup.

The proposed rule violates Constitutional protections, explicitly prohibiting observance of Jewish teachings regarding sex and gender. The rule states: “Criteria that categorically exclude all transgender girls and women from participating on any female athletic teams, for example, would not satisfy the proposed regulation...” The regulation would not demand abandonment of Jewish religious standards more clearly if it asserted that the Book of Genesis is null and void.

The Regulation Promises to Exclude Traditional, Observant Jews from Sports

The foregoing has clear pragmatic ramifications. Under the purported notion of expanding opportunity and avoiding discrimination, the proposed rule threatens to lock observant Jewish students out of organized sports. This is true for both sexes but especially for women, those whom Title IX was designed to protect.

Judaism prohibits most forms of physical contact between males and females outside of immediate family. Many observant Jews take a still more stringent approach, and decline even a handshake from the opposite sex. As a result, traditionally observant Jewish institutions have additional reasons to prohibit student athletes from playing on teams of the opposite sex, beyond even the concerns for safety, privacy, and fairness that are relevant to all female athletes.

A number of sports have physical contact built in, such as wrestling and football, or expect at least occasional contact in the normal course of play, such as basketball, soccer, and baseball. Most observant Jewish students do not, even in casual “pick-up” games, play against or alongside those of the other biological sex. Indeed, it is routine for observant Jewish women to refuse to play if men are simply watching.

Thus the greatest burden will fall on girls and women. As biological boys will far more frequently qualify for girls’ teams than vice-versa, it is the observant girls’ teams that will be forced to withdraw from leagues and conferences because they cannot compete against biological male athletes. It is they who will lose the opportunities and benefits that come with participation in sports.

The Department’s proposed rule will punish dissenting communities, their schools, and above all their girls. It will weed out people with the “wrong” opinions about biological reality from public life. It will force greater exclusion upon observant Jews at a time of growing Antisemitism.

A Backdoor Entry for Antisemitism

Imposition of this new ideology poses special dangers to Jews. If one wanted to persecute Jews without once mentioning Judaism, this is precisely the sort of system that one would design. The rule classifies traditional Jewish beliefs as bigoted and thus traditional Jews as bigots. Employing this reasoning, it becomes morally permissible—even appropriate—to hate Jews.

This is precisely how antisemitism has risen in so many different societies over thousands of years: by portraying it as the principled position.

In effect if not in intent, the Department of Education has found a new pretense for hating Jews.

The Proposed Regulations Contravene President Biden's Commitment to Equity

On February 16, 2023, scarcely a month before the Department of Education published its proposed changes, President Biden issued Executive Order 14091 entitled, "Further Advancing Racial Equity and Support for Underserved Communities."² Among other things, the order directs the federal government to "pursue educational equity so that our nation's schools put every student on a path to success."³

The order defines "equity" to include "members of religious minorities." As we have demonstrated in the preceding sections, however, the Department's Athletics NPRM will inevitably exclude observant Jews from athletic competitions, disproportionately punish observant Jewish girls for their values, and even open Jewish institutions to Antisemitic discrimination by bad actors.

Conclusion

In one stroke, the proposed rule contradicts Jewish standards, demands abandonment of Jewish tenets, and reverses the hard-won achievements of Title IX and the women who fought for its creation. Thus the rule's implementation would have severe consequences for Jews, women, and Jewish women most of all.

The rule would enshrine in law a new state religion and punish all who refuse to abide by its precepts. In doing so, and among its other negative ramifications, it will craft a new weapon for Antisemites who wish to target Jews and Jewish schools.

CJV urges the Department to withdraw this NPRM and reaffirm its commitment to equality on the basis of biological sex, while acknowledging the diversity of belief that has guaranteed freedom to all Americans.

Sincerely,

Rabbi Yaakov Menken
Managing Director

² Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Feb. 16, 2023, <https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-03779.pdf> (website last visited May 12, 2023).

³ Ibid.