**Filed Electronically**
May 15, 2023

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

**Re: Parents Defending Education's Comments on the Office of Civil Rights, Department of Education, Proposed Rulemaking, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 88 Fed. Reg. 22860, Docket ID ED-2022-OCR-0143 (Apr. 13, 2023)**

Dear Secretary Cardona:

Parents Defending Education ("PDE") is a national, nonpartisan, grassroots organization, whose members are parents of school children. PDE's mission is to use advocacy, legislation, and, if necessary, litigation to prevent the politicization of K-12 education. PDE submits these comments to express its concerns about Docket ID ED-2022-OCR-0143, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 88 Fed. Reg. 22860 (Apr. 13, 2023) ("Proposed Rule").

The Proposed Rule establishes a new standard for Title IX recipients to apply when determining whether the recipient can limit or deny participation on an athletic team associated with one's gender identity rather than one's biological sex. The Department of Education asserts that the new standard is necessary, in part, because States "have created additional uncertainty" by categorically restricting athletic participation based on biological sex. 88 Fed. Reg. at 22866. But the Department's Proposed Rule injects a confusing balancing test where Title IX recipients must evaluate the "educational objective" of the competition and "minimize harms" to students before determining whether the recipient will permit a transgender athlete to compete on a team associated with their gender identity rather than their biological sex. This is not only confusing, it's also unlawful.

***First*,** the Proposed Rule dramatically deviates from Congress's intent to ban discrimination "on the basis of sex," because it extends the definition of "sex" to include gender identity. Several federal courts have held, and PDE agrees, that the Department's interpretation directly contradicts the plain language of Title IX. By effectively rewriting Title IX, the Department will arrogate to itself the lawmaking authority expressly reserved for Congress. *See* 5 U.S.C. §706(c).

***Second***, the Proposed Rule violates biological females' ability to compete in single-sex athletics. By allowing institutions to include biological males on teams specifically designated for biological females, the Department seeks to upend half a century of progress in female athletics and backpedal longstanding practice. Less than a year after the country celebrated 50 years of Title IX, the NCAA women's basketball championship game garnered 12.6 million viewers, far surpassing viewership of the men's championship game. Campione, Katie, *LSU vs. Iowa National Championship Game Draws Largest Women's College Basketball Audience on Record, Deadline*, (Apr. 3, 2023), perma.cc/W2L7-V9KA. This shows the profound impact of Title IX, which provided a space in which women's athletic competitions could flourish and be celebrated on the national stage. *See* Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J. L. Reform 13, 15 (2000) (noting "the number of girls playing high school sports [increased] from one in twenty-seven" in 1972 to "one in three" by 2000). The Proposed Rule undermines this competition by eliminating single-sex sports and giving males increased opportunities—whether it be in the form of a jersey, podium, or scholarship—at the expense of females.

***Third***, the Proposed Rule credits "fairness" and "safety" as underlying factors for the urgency of the agency action. But the Proposed Rule ignores the biological differences between males and females, forcing females to compete against males, compromising both fairness and safety. This violates the very law—Title IX—the Proposed Rule purports to protect.

***Fourth***, the Proposed Rule ignores the fundamental rights of parents to make decisions with and for their children. The Proposed Rule does not require parental consent to affirm a student's gender identity if it does not correlate with the child's biological sex. Only some state athletic associations have established any sort of "criteria or eligibility" to participate on a team associated with one's gender identity, but even the ones that establish such a standard permit a written statement from virtually any adult identifying the child's gender identity. 88 Fed. Reg. at 22881. The authority to identify a minor child's gender identity rests with the parents, not "a community member or teacher." The Proposed Rule threatens to cut parents out of the process of making important decisions with their children.

***Fifth***, the Proposed Rule risks compromising "privacy" for all pubescent students, especially in the "private" and "separate" spaces of biological female athletes like restrooms, locker rooms, lodging accommodations for competitive sports travel, and medical facilities on school property and at school-sponsored events.

***Sixth*,** the Proposed Rule constitutes a "significant regulatory action." It will impose significant costs on local, state, and federal education and athletic institutions across the country. The Department cites the lack of "available quantitative data" as reasoning for its inability to "fully quantify the economic impact of the proposed regulation." 88 Fed. Reg. at 22861. Despite this proclamation, the Department still concludes it will cost a mere "23.4 million to 24.4 million" over 10 years. *Id.*

***Finally*,** the Proposed Rule fails to comply with the requirement of Public Law 105-277 and 5 U.S.C. §601. The Appropriations Act of 1999 requires federal agencies to assess a proposed rule's effect on parental rights. The Proposed Rule contains no such assessment.

## I. The Proposed Rule's definition of "sex" is inconsistent with Title IX.

Title IX states: "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 educational program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). The law acknowledges that in certain circumstances, recipients must separate males and females, and it ensures that in those circumstances, both males and females are being afforded the same opportunities. The Proposed Rule targets these protections by going after the longstanding and implicit assumptions in Title IX, reinterpreting "sex" to include gender identity. Under this novel definition of "sex," Title IX recipients must now permit biological males to compete with and against biological females in many circumstances. But the text, structure, history, and purpose of Title IX point to the single conclusion that "sex" refers to biological and immutable characteristics. *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813-14 (11th Cir. 2022) (en banc). The Department must amend the Proposed Rule accordingly.

While Title IX does not expressly address sports, the implementing regulations clarify that the law covers student athletics. *See* 34 C.F.R. §106.41(a) ("No person shall, on the basis of sex, be excluded from participation in … any interscholastic, intercollegiate, club or intramural athletics."). And to ensure the Department properly "consider[s] the nature of the particular sports," Congress possesses the power to review all sports-related regulations. Pub. L. 93-380, §844, 88 Stat 484 (Aug. 21, 1974).

At the time Congress passed Title IX, "'sex' was commonly understood to refer to physiological differences between men and women—particularly with respect to reproductive functions." *Neese v. Becerra,* 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022). In fact, the "overwhelming majority of dictionaries" at the time of Title IX's enactment "define[d] 'sex' on the basis of biology and reproductive function." *Adams*, 57 F.4th at 812. These sources recognize that "sex, like race and national origin, is an

immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Other sections of the law show that Congress understood sex to be binary. For example, Section 1681(a)(8) states that if father-son or mother-daughter activities are provided for "one sex," reasonably comparable activities must be provided for "the other sex." Likewise, Section 1681(a)(2) distinguishes between "institution[s] which admit[] only students of one sex" and "institution[s] which admit[] students of both sexes." And the Supreme Court has, for decades, interpreted Title IX to prohibit schools that accept federal funding from treating men better than women (or vice versa). *See, e.g.*, *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 530 (1982); *Cannon v. Univ. of Chi.,* 441 U.S. 677, 680 (1979). Thus, "[a]s written and commonly construed, Title IX appears to operate in binary terms—male and female—when it references 'sex.'" *Neese,* 2022 WL 1265925, at *12.

Both Congressional action and inaction, moreover, reinforce the common sense reading of Title IX's reference to "sex." Twice in the past decade, Congress has considered legislation to amend Title IX to apply to gender identity. *See, e.g.*, H.R.1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). Yet "Congress has not amended the law to state as much," and "it is questionable," to put it mildly, "whether the Secretary can alter the term 'sex' by administrative fiat." *Neese*, 2022 WL 1265925, at *13; *see also Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 462 (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation."). This failed legislative action does not give the agency implicit authority to pick up where Congress left off. Rather, the agency must possess the clear and independent authority to take such action.

The Supreme Court's decision in *Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731 (2020), is not to the contrary. There, the Court "proceed[ed] on the assumption that 'sex'... refer[red] only to biological distinctions between male and female." *Id.* at 1739. In other words, the Court's decision rested on the premise that sex is binary and immutable. And it did not address the very core of Title IX, which distinguishes between males and female *because* of the biological distinctions.

As further evidence of this, "[t]he *Bostock* decision only addressed sex discrimination under Title VII; the Supreme Court expressly declined to 'prejudge' how its holding would apply to 'other federal or state laws that prohibit sex discrimination' such as Title IX.'" *Tennessee v. United States Dep't of Educ.,* 2022 WL 2791450, at *15 (E.D. Tenn. July 15, 2022) (quoting *Bostock,* 140 S. Ct. at 1753); *see* also *Pelcha v. MW Bancorp, Inc.,* 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he rule in *Bostock* extends no further than Title VII."); *Bear Creek Bible Church v. EEOC,* 571 F. Supp. 3d 571, 621 (N.D. Tex. 2021) ("Defendants read *Bostock* as a broad pronouncement that discrimination against homosexual or transgender conduct is

always sex discrimination, notwithstanding the Supreme Court's explicit reservation of judgment on other types of policies, like dress codes and separate bathrooms based on biological sex."). *Bostock*'s reasoning is therefore inapplicable in the Title IX context. *See Adams*, 57 F.4th at 811 ("We cannot, as the Supreme Court did in *Bostock*, decide only whether discrimination based on transgender status necessarily equates to discrimination on the basis of sex."). As the Northern District of Texas recognized, "[i]f anything, *Bostock* reinforces the distinction between biological sexes." *Bear Creek Bible Church*, 571 F. Supp. 3d at 625 (citing *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996)).

Although the Proposed Rule purports to give recipients some flexibility, it ultimately permits these recipients to allow transgender athletes to participate on teams based on gender identity rather than sex. The Department has determined that despite significant evidence to the contrary, Title IX somehow permits this flexibility. In reaching this conclusion, the Department repeats its interpretative gymnastics seen in other Title IX rules, concluding that because *Bostock* addressed sex discrimination under Title VII, Title IX's definition of "sex" must also cover gender identity. As explained above, this simply doesn't comport with the text or purpose of Title IX, nor is this interpretation consistent with *Bostock* itself.

The Department's reliance on *Bostock* is also inconsistent with the position the Department publicly adopted less than two years ago, when it concluded that the "Court's opinion in *Bostock* does not affect the Department's position that its regulations authorize single-sex teams based only on biological sex at birth." U.S. Dep't of Educ., Office for Civil Rights, *Memorandum from Principal Deputy General Counsel Delegated the Authority and duties of the General Counsel Reed D. Rubinstein to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights re Bostock v. Clayton Cnty.*, 36 (Jan. 8, 2021), perma.cc/8TKC-ZWHX ("*Bostock* Letter"). The Department further stated:

> In *Bostock*, the Court took the position that "homosexuality and transgender status are inextricably bound up with sex," such that "when an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex." Under that logic, special exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male

> student-athlete who identifies as female must play on the male team, just like any other male student-athlete.

*Bostock* Letter at 36. Although the Department attempts to memory-hole its initial analysis by "archiv[ing]" it and "mark[ing] [it] not for reliance," *Bostock* Letter at 1, it makes little effort to explain why it is no longer sound. The Department may not "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

## II. The Proposed Rule would unlawfully eliminate female athletes' right to compete in single-sex athletic competitions.

Title IX guarantees "equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41. Under Title IX, females must have an equal "chance to be champions." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004). The Proposed Rule does away with this and permits biological males to compete with and against biological women. 88 Fed. Reg. at 22866. Only in limited circumstances does the Proposed Rule allow recognizing "sex-related distinctions" and allow recipients to restrict participation accordingly. *Id.* This overhaul of Title IX as it applies to sports undermines the very purpose for which it was enacted: to provide the same opportunities for females that are provided for males.

Distinguishing between males and females is "unremarkable." *Adams*, 57 F.4th at 796. Yet the Proposed Rule makes the unremarkable somehow remarkable, turning decades of progress in women's sports on its head. Under this new regulatory scheme, biological females must compete against biological males to earn a spot on the team, win a trophy, or receive an athletic scholarship. Given the well-documented biological differences between men and women, this will inevitably sideline certain women athletes in favor of male athletes. *See Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (recognizing that "due to average physiological differences, males [will] displace females to a substantial extent if they [are] allowed to compete" in women's sports, and that "athletic opportunities for women [will] be diminished" as a result); *see also* Martha L. Blair, *Sex-based differences in physiology: what should we teach in the medical curriculum?*, Advances in Physiological Education, Vol. 31 No. 1 (Jan. 1, 2007), perma.cc/R44A-DPV5. After all, men have different bone structure, muscle mass, hemoglobin levels, and hormones. And Title IX historically has appreciated these distinctions, authorizing sex-specific competitions, particularly when "contact sports" are involved. 34 C.F.R. §106.41(b). These historic sex-specific athletic competitions have leveled the playing field and given women a space in which to compete. *See* Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Female Athletes the Same Funding as Men*, World Econ. F. (Aug. 25, 2016) ("Girls who play sports stay in school

longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead.").

The Proposed Rule does away with this history. Indeed, recent court rulings subjecting independent schools to the Department's interpretation of Title IX only underscore the stakes of the Proposed Rule's radical reinterpretation of federal civil rights law. *See Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, 2022 WL 2869041 (D. Md. July 21, 2022); *E.H. v. Valley Christian Acad.*, 2022 WL 2953681 (C.D. Cal. July 25, 2022). While PDE believes these opinions are erroneous, *see M.H.D. v. Westminster Sch.*, 172 F.3d 797 (11th Cir. 1999); *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n*,134 F. Supp. 2d 965 (N.D. Ill. 2001); *Zimmerman v. Poly Prep Country Day Sch.,*888 F. Supp. 2d 317 (E.D.N.Y. 2012), they highlight a growing risk that the Department's atextual interpretation of Title IX will affect virtually every female student-athlete in the country. By requiring school districts to allow biological males—with all of their attendant physiological advantages—to compete against biological females based solely on their internal notion of gender identity, the Department will inevitably deprive female student-athletes of achievements, scholarship opportunities, and the satisfaction that comes with winning a fair competition.

## III. The Proposed Rule is neither fair nor safe.

The Department justifies the Proposed Rule by concluding the proposal is rooted in fairness and promotes safety. But the Proposed Rule itself violates "fairness" and "safety" in the most basic ways.

First, as explained above, it eliminates single-sex athletic competitions, meaning females must compete against males to earn a spot on the team, win a spot on the podium, or receive athletic scholarships. Because of the fundamental differences between males and females, this eviscerates opportunities for women and undoes the significant progress made over the past five decades. Instead, the Proposed Rule secures for males the nearly unfettered right to play on a team "consistent with the[ir] gender identity"—in other words, the right to play on females' teams. 88 Fed. Reg. 22860.

Second, this ignores the basic distinctions between males and females and puts females at risk for greater injury. Males possess "categorically different strength, speed, and endurance." Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances the Best Women to Boys and Men*, Ctr. for Sports Law & Policy, perma.cc/3Z7R-W6Q2. These physical differences increase the risk to females to compete against males, particularly in contact sports. Recognizing this, Title IX's existing regulations expressly address "contact sports," separating contact sports by sex to promote the physical wellbeing of athletes. 34 C.F.R. §106.41(b). Yet despite

the existing regulations, and the apparent physical differences between males and females, the Department forged ahead with the Proposed Rule, failing to undertake any serious analysis of its impact on athlete safety.

Even anecdotal evidence points out the obvious: males and females have important biological differences that make them compete differently. For example, a student competing in varsity level volleyball reported significant mental and physical delays after experiencing a severe neck injury caused by a transgender female—biological male—athlete. Caroline Downey, *Female Volleyball Player Testifies to Physical, Mental Trauma Since Injury by Trans Athlete*, National Review (Apr. 20, 2023), perma.cc/D2W5-QGWE. The MMA's first transgender female (biological male) athlete fractured a biological female's skull at a fight in 2014. Bhavesh Purohit, *When transgender fighter Fallon Fox broke her opponent's skull in MMA fight*, (Sept. 30, 2021), perma.cc/G876-K6KA. The biological female was concussed, fractured a portion of her skull, and had to receive seven staples in her head. *Id.* In early April, a biological female athlete suffered an injury from a transgender female—biological male—soccer player in Australia. Wayne Flower, *Parents upset at 'unfair advantage' of trans woman in female soccer league will be offered training to better understand 'lived experience' of transgender players*, UK Daily Mail, (Apr. 2, 2023), perma.cc/H95F-TZUE. After parents and athletes complained, they were required to take training to understand the "lived experience" of a transgender female (biological male). The biological male remained on the team. *Id.*

None of these stories illustrate "fair" or "safe" athletic competitions. And they explain why Title IX distinguishes between the two sexes. Even in the face of social and political pressure, some athletic organizations today have expressly prohibited biological males from competing against biological females. Rodrigo Perez Ortega, *World Athletics banned transgender women from competing. Does science support the rule?* (Apr. 4, 2023), perma.cc/R76G-DZ5X. Allowing males to participate in female athletic competitions puts females at a higher risk for mental and physical setbacks from injury and missed competitive opportunities, and it limits their ability to seek athletic scholarships and awards. This outcome is the antithesis of Title IX. *See Clark*, 695 F.2d at 1131.

## IV. The Proposed Rule would violate parents' fundamental rights under the Fourteenth Amendment.

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." The Amendment "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000)

(plurality) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)); *but see Troxel*, 530 U.S. at 80 n.* (Thomas, J., concurring in the judgment) (expressing interest in reevaluating the meaning of the Privileges or Immunities Clause in parental-rights case). Among these unenumerated rights are those that are "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257-58 (2022) (quoting *Glucksburg*, 521 U.S. at 721).

Nearly 100 years ago, the Supreme Court held that the "liberty" protected by the Fourteenth Amendment includes the right of parents to "establish a home and bring up children" and "to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Two years later, the Court held that the "liberty of parents and guardian" includes the right "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925). Children are "not the mere creature of the state," *id.* at 535, and the "right[]... to raise one's children ha[s] been deemed 'essential'" and one of the "'basic civil rights of man,'" *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). After all, "most children, even in adolescence, simply are not able to make sound judgment concerning many decisions," and that parents must be involved in these decisions, particularly in the context of schools and athletics. *Parham v. J.R.*, 442 U.S. 584, 603 (1979); *see also Mahanoy Area Sch. District v. Levy*, 141 S. Ct. 2038, 2052 (Alito, J., concurring) (noting that the doctrine of *in loco parentis* simply gives schools a "measure of authority … to carry out their state-mandated educational mission," not necessarily authority over all decisions). These parental rights are rooted in the "historical[] ... recogni[tion] that natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602 (citing 1 W. Blackstone, Commentaries, 447; 2 J. Kent, Commentaries on American Law, 190). If the Proposed Rule is any indication, the Department appears to have forgotten this basic constitutional principle.

A child's gender identity implicates the most fundamental issues concerning the child, including the child's religion, medical care, mental health, sense of self, and more. Yet despite "extensive precedent" that parents must be involved in decisions concerning these types of issues, *Troxel*, 530 U.S. at 66 (listing cases), the Proposed Rule invites schools to coopt parents' rights to make those decisions. Schools could strip parents' prerogative to make decisions regarding the athletic team a child participates in based on the child's gender identity. Because the Proposed Rule redefines "sex" to include "gender identity," schools may insist that they should defer to a child's decisions regarding these issues—regardless of their parents' wishes and constitutional rights. The Proposed Rule contains no reference to parents' roles in making these decisions, nor does it establish uniform criteria for determining when a student is eligible to compete on a team based on gender identity. 88 Fed. Reg. at 22881.

## V. The Proposed Rule compromises the privacy rights of all students.

"The Supreme Court has long recognized the need for privacy in close quarters, bathrooms, and locker rooms to protect individuals with anatomical differences—differences based on biological sex." *Bear Creek Bible Church*, 571 F. Supp. 3d at 625 (citing *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996)). The Proposed Rule disregards these privacy concerns altogether.

The problems stemming from eliminating single-sex spaces aren't hypothetical—rather, we are already seeing these problems manifest regularly. For example, the NCAA permitted a transgender female—a biological male—to occupy the same locker room as biological females without any warning at a swim competition. There, the biological male swimmer exposed his male genitalia. Halon, Yael, *Lia Thomas exposed 'male genitalia' in women's locker room after meet, Riley Gains says, dropped 'his pants*,' Fox News Digital (Feb. 9, 2023), perma.cc/H8AY-4GJJ. More recently, a Wisconsin high school transgender female—a biological male—similarly exposed male genitalia to the biological females who were also in the female locker room after gym class. Alec Schemmel, *Trans student exposed girls to male genitalia in school locker room, legal group claims*, Fox 25 (Apr. 21, 2023), perma.cc/EKW8-QXTF. While the female students reported feeling uncomfortable and filed complaints with the school, the school failed to notify any of their parents or initiate its sexual harassment protocol. *Id.* This directly contradicts Title IX's express mandate that a Title IX recipient "provide separate … locker room, and shower facilities on the basis of sex." 34 C.F.R. §106.33; *see also Adams*, 57 F.4th at 811.

## VI. The Proposed Rule grossly understates its costs.

The Department claims the Proposed Rule will impose a small regulatory cost of "$23.4 million to $24.4 million" over 10 years. 88 Fed. Reg. at 22861. But simply declaring this does not make it so. The Department must show its work. Based on the scope of this novel regulation, this estimation defies both logic and common sense.

This Proposed Rule encompasses numerous facilities, including bathrooms and locker rooms, in each of the 98,000 public schools across the country. National Center for Education Statistics, *Table 105.50. Number of educational institutions, by level and control of institution: Selected years, 1980-81 through 2017-18*, perma.cc/YL2U-P2B2. And each one will require individualized re-engineering based on the existing layout of the facilities. An estimate in Loudon County shows that bathroom renovations alone will cost the school district $11 million dollars for two of its eighteen high schools. Nick Minock, *Loudoun schools explore replacing boys and girls bathrooms with all-gender, single stalls*, WJLA (Apr. 12, 2023), perma.cc/CN4W-WU52. This figure excludes the other sixteen high schools, sixty-five elementary schools, and

twenty-one middle schools in that school district alone. The Department fails to contend with this or any other compliance costs that the Proposed Rule imposes.

The Department provides no justification for its paltry estimate. Yet based on the vast number of impacted institutions, it is unfathomable that this rule would cost less than 25 million over 10 years. The Loudoun County estimate alone supports a figure far exceeding the $100 million threshold for an "economically significant" rule. Executive Order on Regulatory Planning and Review, Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993). In addition, the Proposed Rule will "adversely affect a sector of the economy, … public health or safety, [and] State, local, or tribal governments or communities in a material way." *Id.* If the Department is going to stick school districts and athletic associations with the bill for upending Title IX, it must conduct a more detailed assessment of costs and benefits, including a quantification of the regulation's effects. Athletes, families, and communities deserve better.

## VII. The Proposed Rule fails to comply with Public Law 105-277 and 5 U.S.C. §601.

Finally, Section 654 of Public Law 105-277 requires agencies to assess whether a proposed rule "strengthens or erodes the authority and rights of parents in the education, nurture, and upbringing of their children." 5 U.S.C. §601 note (Assessment of Federal Regulations and Policies on Families). As discussed above, the Proposed Rule significantly affects parents' abilities to direct the care, custody, and control of their children. *See Troxel*, 530 U.S. at 65. The Proposed Rule makes no attempt to comply with Section 654 or otherwise determine what effect the Department's actions will have on parental rights. Although PDE opposes the rule in its entirety, the Department must, at a minimum, include such an assessment in any final version of the Rule.

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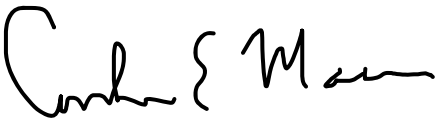
Competitive athletics present a zero-sum situation. For every biological male that makes the women's team, a biological female is denied the opportunity to participate on that team. For every biological male that wins a first, second, or third place trophy for participating on a women's team, a female is kept off the podium. And the consequences don't end there. Rather, the Proposed Rule denies these biological females the opportunity to compete, foster teamwork, develop leadership skills, and receive scholarships in recognition for their achievements. Title IX secured for females the same benefits and opportunities enjoyed by males. The Proposed Rule now secures for males the same benefits and opportunities already enjoyed by males at the expense of females.

Title IX exists for important reasons. And its application in the context of sports furthers the important goal of providing opportunities for adolescent girls and adult women alike. The Department can dress up its Proposed Rule in language like "fair," "safe," and "equitable." At its core, though, the Proposed Rule is anything but. Accordingly, PDE strongly opposes finalizing the Proposed Rule.

Please contact me if the Department would like additional information pertaining to the subject matter discussed in this comment.

Sincerely,



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