

# Congress of the United States

Washington, D.C. 20515

June 23, 2023

## VIA ELECTRONIC TRANSMISSION

The Honorable Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202

Dear Secretary Cardona:

On May 15, 2023, we each urged you to rescind the Department of Education’s (ED) Title IX athletics proposed rule,<sup>1</sup> which ignores the physiological differences between men and women and undoes generations of progress for women and girls’ participation in school sports.<sup>2</sup> Today’s letter requests additional clarity regarding the process you followed when developing this proposed rule prior to its publication in the *Federal Register*. The Biden administration is using the rulemaking process to rewrite fundamentally a law that Congress enacted with the intention of protecting women and girls. The administration is doing so in a way that runs entirely contrary to that intention and the spirit of Title IX. The American people deserve complete transparency regarding that process.

During conversations with our offices on the Title IX athletics proposed rule, ED repeatedly declined to confirm whether it consulted medical professionals in its development of the rule. ED’s notice of proposed rulemaking (NPRM) does not indicate that it solicited medical feedback, even though medical science and inherent biological differences between men and women are the foundation of Title IX.<sup>3</sup> ED’s NPRM also references “correspondence” it received from outside stakeholders, as well as “listening sessions” conducted by ED’s Office for Civil Rights (OCR).<sup>4</sup> While ED released a transcript and written comments submitted by stakeholders in connection with a June 2021 virtual public hearing on this issue, some of ED’s other correspondence and many of the details pertaining to OCR’s listening sessions do not appear to be public.<sup>5</sup>

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<sup>1</sup> 88 Fed. Reg. 22860 (Apr. 13, 2023).

<sup>2</sup> Letter from Sen. Bill Cassidy to Hon. Miguel Cardona, Sec’y, U.S. Dep’t of Educ. (May 15, 2023), [https://www.help.senate.gov/imo/media/doc/title\\_ix\\_letter.pdf](https://www.help.senate.gov/imo/media/doc/title_ix_letter.pdf); Letter from Virginia Foxx, et al. to Hon. Miguel Cardona, Sec’y, U.S. Dep’t of Educ. (May 15, 2023), [https://downloads.regulations.gov/ED-2022-OCR-0143-144678/attachment\\_1.pdf](https://downloads.regulations.gov/ED-2022-OCR-0143-144678/attachment_1.pdf).

<sup>3</sup> Nondiscrimination on the Basis of Sex in Educ. Programs of Activities Receiving Fed. Fin. Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860, 22865 (proposed Apr. 13, 2023) (to be codified at 34 C.F.R. pt. 106).

<sup>4</sup> *Id.*

<sup>5</sup> U.S. Dep’t of Educ. Off. for Civil Rights, *June 2021 Title IX Public Hearing*, U.S. DEP’T OF EDUC. <https://www2.ed.gov/about/offices/list/ocr/public-hearing.html> (last modified Sept. 1, 2022).

According to reports, ED also worked with the White House when deciding how to address the Title IX athletics proposed rule, and some of President Biden’s closest advisors were involved in the process.<sup>6</sup> According to *The New York Times*, a “small team of officials in the Department of Education” began looking into issues involving transgender athletes shortly after President Biden took the oath of office.<sup>7</sup> That team reportedly “worked — in the beginning, on pandemic-era Zoom calls — with officials on the White House Gender Policy Council” (GPC) and went “through multiple draft proposals.”<sup>8</sup>

It is unclear what role the GPC played in the development of ED’s proposed rule beyond what has been reported by *The New York Times*. However, there are indications that the GPC has focused some of its attention on the Title IX athletics issue. For example, in October 2021, the GPC released a document titled *National Strategy on Gender Equity and Equality*, which outlined an “ambitious agenda” for the Biden administration that included promoting “equitable access to sports and school facilities for all student athletes.”<sup>9</sup> Outside groups that participated in meetings with the GPC indicate that the GPC held meetings with stakeholders pertaining to Title IX, including issues related to women’s sports.<sup>10</sup> The White House does not appear to have released details relating to these meetings, and there is no apparent list of all the groups that provided feedback to the White House on this issue. Given the lack of public detail, it is impossible to know who met with the White House, what feedback those stakeholders provided, and how that feedback may have factored into the development of ED’s proposed rule.

There are also serious, unanswered questions about the Office of Management and Budget’s (OMB) review process. There was an extremely short, nine-day period between March 28, 2023, the date that ED sent its proposed rule to OMB, and April 6, 2023, when OMB concluded its review.<sup>11</sup> It is unclear how or why OMB’s review was so brief. Regardless, it appears that the quick turnaround carried important implications for members of the public who attempted to express feedback to OMB. Three organizations reported to Senator Cassidy’s office that they contacted OMB while the proposed rule was under review to request meetings with OMB officials, only to be informed later that their meeting requests had been cancelled because the rule was no longer under review by OMB.

The Biden administration has continued to stifle opportunities for public feedback by limiting the time available for public comment on its proposed rule.<sup>12</sup> The comment period on this proposed

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<sup>6</sup> Katie Rogers, *Biden Plan for Transgender Title IX Rules Began on Inauguration Day*, N.Y. TIMES (Apr. 7, 2023), <https://www.nytimes.com/2023/04/07/us/politics/transgender-athletes-schools-title-ix.html>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The White House, *National Strategy on Gender Equity and Equality* 4, 24 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf>.

<sup>10</sup> Press Release, Women’s Basketball Coaches Ass’n, WBCA Participates in Listening Session on Gender Equity Hosted by the Biden White House (Sept. 8, 2021), <https://wbca.org/about/press-releases/wbca-participates-listening-session-gender-equity-hosted-biden-white-house>; Press Release, Ass’n of Title IX Administrators, ATIXA’s Virtual Title IX Anniversary Listening Session with White House Gender Policy Council (July 21, 2022), <https://www.atixa.org/atixas-virtual-title-ix-anniversary-listening-session-with-white-house-gender-policy-council/>.

<sup>11</sup> Off. of Mgmt. & Budget, Exec. Off. of the President, *OIRA Conclusion of EO 12866 Regulatory Review* (2023), <https://www.reginfo.gov/public/do/eoDetails?rrid=308511>.

<sup>12</sup> Nondiscrimination on the Basis of Sex in Educ. Programs of Activities Receiving Fed. Fin. Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860, 22865; Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

rule was only half the time ED allowed for public comment on its July 12, 2022, NPRM on Title IX.<sup>13</sup> Thirty days is an extremely short timeframe for the American people to comment on changes that, if implemented, would result in a drastic rollback of protections for women and girls. ED should not have rushed this process.

In order to understand better the process ED used for its Title IX athletics proposed rule, we request responses to the following, on a question-by-question basis, no later than July 7, 2023.

1. Please describe with specificity the process ED and the White House followed when developing the Title IX athletics proposed rule.
2. Please provide a full and complete list of all medical organizations ED consulted during the development of the proposed rule and all related documents (see instructions). In addition, please provide an in-depth explanation of how ED weighed feedback from groups on this list when it was developing the proposed rule.
3. Please produce all documents relating to listening sessions held by ED OCR concerning the proposed rule, as well as the communications from stakeholders referenced in ED's NPRM.
4. Please explain why OMB's review of ED's proposed rule lasted only nine days and whether OMB conducted an interagency review during that time period.
5. Were executive branch agencies and departments given an opportunity to review and provide feedback on ED's general approach to Title IX athletics reform, or to the proposed rule itself, separate and apart from the review by OMB that took place between March 28, 2023, and April 6, 2023? Please explain.
6. Please explain why ED chose to allow only 30 days for the public to comment on its proposed rule.

Thank you for your prompt attention to this letter.

Sincerely,



Bill Cassidy  
Ranking Member  
Senate Committee on Health, Education,  
Labor, and Pensions



Virginia Foxx  
Chairwoman  
House Committee on Education  
and the Workforce

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<sup>13</sup> *Id.*