



STATE OF SOUTH CAROLINA
DEPARTMENT OF EDUCATION

ELLEN E. WEAVER
STATE SUPERINTENDENT OF EDUCATION

TO: District Superintendents & South Carolina School Board Members

FROM: Ellen E. Weaver

DATE: April 23, 2024

RE: New Title IX Regulations

Last Friday morning, the U.S. Department of Education released a deeply troubling new Title IX rule which included an effective date of August 1, 2024. This rule seeks to fundamentally and radically re-write Title IX of the Education Amendments of 1972, a longstanding civil rights law prohibiting sex discrimination in all federally funded education programs.

Title IX has been a landmark achievement of law and progress, ensuring equality of opportunity and protecting the rights of girls and women.

Now, under the guise of “fairness,” the U.S. Department of Education seeks to expand the long-standing prohibition against discrimination based on “sex” to include “sex stereotypes, sex-related characteristics (including intersex traits), pregnancy or related conditions, sexual orientation, and gender identity.” This is not fairness: it is fiat.

This rule is contrary to the express text and undisputed original understanding of the statute it purports to implement. Worse yet, it turns the statute on its head and would rescind 50 years of progress and equality of opportunity by putting girls and women at a disadvantage in the educational arena. By redefining the class of people that Title IX intends to protect, the Biden administration’s rule seeks to change the meaning and purpose of the underlying law, thus compelling the speech of students and teachers related to preferred pronoun use; upending biology-based protections for females in athletics, bathrooms, locker rooms, overnight accommodations, and other sex-separate spaces and activities; placing massive legal uncertainty and compliance costs on districts; and creating chaos and confusion for teachers, students, and parents.

Even a surface-level analysis of the 1,500 pages of regulations reveals violations of the U.S. Constitution, longstanding civil rights protections, and the Federal Administrative Procedures Act. Because of these and potentially other violations, we fully anticipate this rule will be tied up in litigation for some time and, eventually, will be struck down or modified, in whole or in part, by the federal courts.

Therefore, we recommend districts not implement the new rule at this time. It is possible—even likely—that a court will enjoin the rule prior to its effective date. The South Carolina Department of Education will consult closely with the governor, state attorney general, and legislative leaders to provide further guidance and analysis as potential legal challenges to this rule develop.

My clear message to district leaders: you are not alone, we have your back, and we value your input. Together, we will navigate these uncharted waters, avoiding divisive distractions from Washington as we seek to maintain a laser focus on what truly matters: providing outstanding educational opportunity for every student.

In May of 2023, I joined with five other state leaders to submit a written comment on this subject to the U.S. Department of Education (see attached). We stated then, and the same is true now:

This is not about being against anyone, but about being for fairness, safety, and biological reality. Every child must be treated with understanding and kindness. But we must not jeopardize the safety and wellbeing of women and girls in order to pursue a radical, theoretical agenda with no basis in biological reality.

The proposed rule conflates gender identity with biological sex and, in so doing, eviscerates and silences the voice of South Carolina voters who have spoken clearly through their democratically elected representatives. See S.C. Code § 59-1-500 (2022). The Department seeks to accomplish this redefinition of terms by regulatory fiat and an exercise of power reserved for the United State Congress.

South Carolina students are not pawns to be sacrificed in cynical political gambits. Accordingly, our State will defend the inherent dignity of every person, while refusing to upend long-standing federal law, violate common sense, or acquiesce to radical attempts to redefine biological reality by bureaucratic diktat.

Cc: Governor Henry McMaster
Attorney General Alan Wilson
President Thomas Alexander
Speaker Murrell Smith
Chairman Greg Hembree
Chairlady Shannon Erickson



May 15, 2023

Secretary Miguel A. Cardona
United States Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Re: Public Comment, Docket ID No. ED-2022-OCR-0143-0001

Dear Secretary Cardona,

Thank you for the opportunity to comment and provide feedback on the U.S. Department of Education's ("Department") proposed rule regarding sex-related eligibility criteria for male and female athletic teams ("proposed rule"). For the following reasons, we strongly urge the Department to abandon its attempt to rewrite Title IX's core protections for women and girls.

As an initial matter, we have serious legal concerns about the proposed rule. Perhaps most significantly, we think the proposed rule conflicts with Title IX itself, which guarantees women "an equal opportunity to participate in sports." *See Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1779 (2020) (Alito, J., dissenting). The Attorney General of South Carolina has already submitted a comment letter with other States on these legal issues, and we incorporate those comments here by reference.

As South Carolina elected officials, we write now separately to draw attention to Title IX's positive impact on women's sports in South Carolina. It is no secret that Title IX has had a "remarkable impact" on girls and women in sports across the country. *See, e.g., Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818 (11th Cir. 2022) (Lagoa, J., concurring) ("At nearly every park in the country, young girls chase each other up and down soccer fields, volley back and forth on tennis courts, and shoot balls into hoops. And at colleges, it is now commonplace to see young women training in state-of-the-art facilities, from swimming pools to basketball arenas, with the records of their accolades hung from the rafters."). This impact is particularly evident in a State like South Carolina. Simply stated, Title IX has been transformative for our State, and there is an abundance of evidence to support this claim. But that transformation did not occur overnight.

The proposed rule would undermine five decades of hard-fought progress. Women's sports are now thriving in South Carolina. In recent years, the South Carolina Gamecocks women's basketball team has won two NCAA championships and seven SEC tournament titles. Just weeks ago, the Clemson Tigers women's golf team won its first-ever ACC Championship. Likewise, the

Furman Paladins and the College of Charleston Cougars women's golf teams recently won their respective conference championships.

And South Carolina citizens (and the world) are taking notice. The Gamecocks women's basketball team regularly sells out home games, and the team recently announced that it will play its opening game against Notre Dame in Paris, France—the first time an NCAA regular-season basketball game has been played on Parisian soil.

But the success story of women's sports is not limited to the collegiate level. Young women and girls across South Carolina are excelling on women's sports teams. Young female participation in sports has skyrocketed in South Carolina in recent years, and South Carolina high schools currently sponsor female basketball, cheer, cross country, golf, lacrosse, soccer, softball, swim, tennis, track, volleyball, and wrestling teams. Many of these young women go on to compete at the highest collegiate and professional levels. As they watch South Carolina's women succeed at the collegiate and professional levels, young women are filled with the hope that this inspires.

As noted above, these trends in South Carolina are representative of larger trends across the nation. See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 15 (2001) (“Since the enactment of Title IX, female participation in competitive sports has soared to unprecedented heights. Fewer than 300,000 female students participated in interscholastic athletics in 1971. By 1998-99, that number exceeded 2.6 million, with significant increases in each intervening year. To put these numbers in perspective, since Title IX was enacted, the number of girls playing high school sports has gone from one in twenty-seven, to one in three. Sports participation among even younger girls has also changed dramatically; a 1998 report found that the number of girls ages six to eleven who regularly participate in vigorous sports such as soccer, volleyball, and basketball increased eighty-six percent since 1987, from 2 million to 3.8 million.”).

Increased participation in sports leads to a number of positive outcomes for biological women and girls, including increased competition, increased physical and mental health, and overall better social well-being. 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), <https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-in-sports-and-public-policy/> (“Girls who play sport 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.”).

Critically, these outcomes are dependent on women's and girls' ability to play and compete on teams that are limited to their own biological sex. This is true for multiple reasons, including basic scientific principles that reflect significant physiological differences between the sexes. *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (“Men and women are not physiologically the same for the purposes of physical fitness programs. The Supreme Court recognized as much in its discussion of the physical training programs addressed in the *VMI* litigation”); see also *Clark, By & Through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (“The record makes clear that due to average physiological differences, males would displace females to

a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished.”).

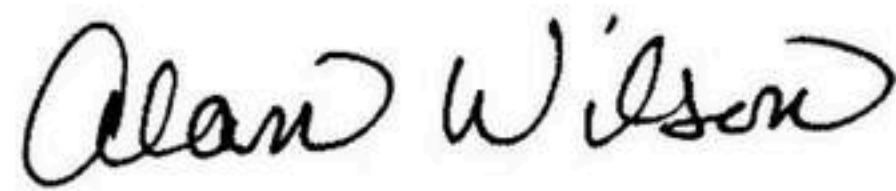
The proposed rule ignores these realities and instead purports to adopt a case-by-case approach to maintaining sex-separated sports teams. In addition to imposing a potentially unworkable and vague standard, this approach threatens the real and meaningful gains experienced by women and girls since Title IX was enacted. It reduces, diminishes, and even removes opportunities for women and girls to participate in athletic competition.

This is not about being *against* anyone, but about being *for* fairness, safety, and biological reality. Every child must be treated with understanding and kindness. But we must not jeopardize the safety and wellbeing of women and girls in order to pursue a radical, theoretical agenda with no basis in biological reality.

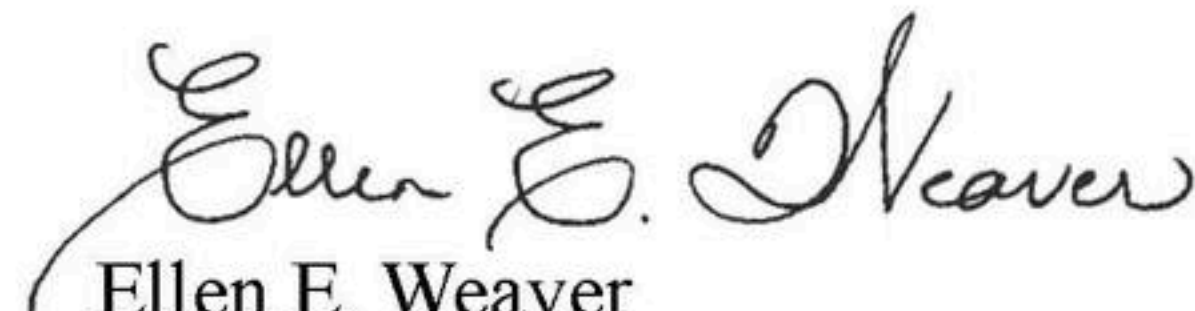
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Our State motto is “Dum Spiro Spero,” which means “While I breathe, I hope.” South Carolina women and girls have accomplished much in the past 50 years, and this instills hope in the lives of young women across our State. And we know that they can excel even further. We respectfully ask that you set aside political posturing and not stand in their way.

Sincerely,



Alan Wilson
Attorney General



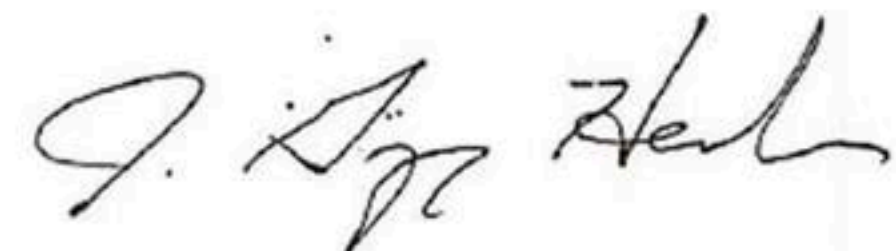
Ellen E. Weaver
State Superintendent of Education



Thomas C. Alexander
President of the Senate



G. Murrell Smith, Jr.
Speaker of the House of Representatives



J. Greg Hembree
Chair, Senate Education Committee



Shannon S. Erickson
Chair, House Education and Public Works
Committee