

STATE OF TENNESSEE

Office of the Attorney General



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**SUBMITTED BY EMAIL AND
ELECTRONICALLY VIA REGULATIONS.GOV**

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202
Attention: Alejandro Reyes

Dear Secretary Cardona:

The States of Tennessee, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia respectfully request the U.S. Department of Education (“Department”) extend the deadline to submit comments on the Department’s proposed rule about “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,” 88 Fed. Reg. 22860 (Apr. 13, 2023). The States request the Department extend the current May 15, 2023 deadline to July 12, 2023, which is 90 days after the Department published the proposed rule in the Federal Register.

The current 32-day deadline does not provide the meaningful opportunity to comment that the Administrative Procedure Act requires. The proposed rule would revise 34 C.F.R. § 106.41, a regulation that has undergone no relevant substantive change in the Code of Federal Regulations since the U.S. Department of Health, Education, and Welfare (“HEW,” this Department’s predecessor) promulgated the initial regulation in 1975. HEW’s 1975 regulations were so important that Congress required HEW to give Congress “the opportunity to examine and disapprove” them before they became effective. 88 Fed. Reg. at 22863. The proposed rule attempts to shoehorn concepts such as “gender identity,” a phrase that appears nowhere in Title IX, into the Department’s regulations and treats many States’ laws as illegal under Title IX. *See, e.g., id.* at 22866 (targeting the laws of Idaho, Indiana, and West Virginia).

The States are still reviewing the proposed rule. But the proposal appears to have completely outsourced its federalism analysis. *Id.* at 22890. The proposed rule simply states that it “may have federalism implications” and “encourage[s] State and local elected officials to review and provide comments on this proposed regulation.” *Id.* The Department repeatedly acknowledges that it has failed to develop the quantitative data needed to justify the rule, *id.* at 22861, 22879-80, and proceeds on the mistaken presumption that “the NCAA or similar national athletic associations” alone get to set the rules for intercollegiate sports teams, *id.* at 22880. The NCAA and other athletic associations have repeatedly modified their rules in recent years to move closer to rules the States have developed for their own schools and universities. *Id.* at 22869-70.

The Department should not arbitrarily and capriciously rush this rule. The “usual” length of time for comments is 90 days. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011). And agencies are instructed to provide “at least 60 days” to “afford the public a meaningful opportunity to comment.” Exec. Order 13563, 76 Fed. Reg. 3821, 3822-23 (Jan. 21, 2011). Sixty days was the length of time the Department provided last year for its proposed rule about “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 87 Fed. Reg. 41390 (July 12, 2022) (“2022 Proposed Rule”).

Further, federal courts are currently considering legal issues that may impact the proposed rule. For example, the U.S. District Court for the Eastern District of Tennessee preliminarily enjoined the Department’s 2021 Notice of Interpretation just days after the Department published the 2022 Proposed Rule. 88 Fed. Reg. at 22865 n.6 (citing *Tennessee v. U.S. Dep’t of Educ.*, No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022), *appeal docketed*, No. 22-5807 (6th Cir. Sept. 13, 2022)). The Department’s appeal of that preliminary injunction is currently pending before the U.S. Court of Appeals for the Sixth Circuit with argument scheduled for April 26, 2023.

The Title IX issues implicated by the proposed rule deserve a full 90 days of public comment. Rather than forcing school administrators to rush out comments during the busy end of the academic year, the Department should extend the comment deadline from May 15 to July 12. Tennessee and the co-signing States appreciate your consideration of this extension request.

Sincerely,

A handwritten signature in blue ink that reads "Jonathan Skrmetti". The signature is written in a cursive, flowing style.

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