

May 15, 2023

**Via Federal eRulemaking Portal**

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

**Re: EPPC Scholars Comment Opposing ED’s Athletics NPRM “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:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in response to the Department of Education’s (ED) notice of proposed rulemaking (NPRM) “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.”<sup>1</sup> This Athletics NPRM would establish a new regulatory standard under Title IX that would govern sex-related criteria as it relates to a student’s participation, on the basis of “gender identity,” in sex-specific athletics teams at federally funded educational institutions.

Rachel N. Morrison is an EPPC Fellow, director of EPPC’s HHS Accountability Project, and former attorney at the Equal Employment Opportunity Commission. Mary Rice Hasson is the Kate O’Beirne Senior Fellow at EPPC, an attorney, and co-founder of EPPC’s Person and Identity Project, an initiative that equips parents and faith-based institutions to counter gender ideology and promote the truth of the human person. Eric Kniffin is an EPPC Fellow, member of the HHS Accountability Project, and a former attorney in the U.S. Department of Justice’s Civil Rights Division.

Title IX of the Education Amendments of 1972, the landmark federal civil rights law that prohibits sex discrimination in education, has been lauded for its vital role in advancing athletics opportunities for girls and women over the last fifty years. Nevertheless, ED proposes this Athletics NPRM, whose vague terms and draconian threats will have the predictable effect of putting schools subject to Title IX on their heels. Schools will understandably want to avoid DOJ enforcement actions and will roll over, abandon common sense, and adopt new policies that would allow males in practically every circumstance to participate on and compete against female sports teams. ED’s proposed regulatory standard would thus deny females the equal opportunities in athletics they have enjoyed for 50 years, turning Title IX’s long-standing protections from sex discrimination on their heads. It will have devastating impacts for girls’ and women’s sports. As proposed, the rule is arbitrary and capricious, exceeds statutory authority, and is contrary to law. The rationale for the proposed changes is unsupported by substantial evidence and selectively embraces and ignores case law to advance the Departments’

---

<sup>1</sup> 88 Fed. Reg. 22860.

radical policy agenda. ED claims its proposal will provide clarity, yet it is unworkable and will cause confusion. The proposed regulatory standard contradicts long-standing scientific understandings of the human person and places ideology ahead of sound policy. It turns the clock back on girls' and women's rights, harms children's interests, and ignores religious freedom of educational institutions and students. We urge the Department to withdraw and abandon the Athletics NPRM.

## **I. ED fails to establish a need for the Athletics NPRM.**

EO 12866, section 1(b) establishes the principles of regulation, including that “Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.” To justify amending the current athletics regulation, which has been the standard for decades, ED must provide specific evidence as to how the current standard causing harms or burdens. ED has failed to meet that standard.

This Athletics NPRM follows ED's July 2022 Title IX Proposed Rule, which would expand Title IX's sex discrimination prohibition to prohibit discrimination based on gender identity (among other bases).<sup>2</sup> In that Proposed Rule, the Department promised it would issue a separate NPRM to address “whether and how” ED should amend its current athletics regulation and “the question of what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team.”<sup>3</sup> That is what ED seeks to do here.

Under the current athletics regulation, educational institutions may “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>4</sup>

According to ED, the current athletics regulation isn't “sufficiently clear” to ensure Title IX's nondiscrimination requirement is satisfied. But the regulation has successfully governed athletics *for over four decades*. ED fails to provide evidence that it was never or is not now insufficiently clear. Rather, any confusion should be attributed to ED's unlawful guidance and statements claiming that Title IX's sex discrimination prohibition extends to discrimination based on gender identity. It is arbitrary and capricious for ED to cause confusion and then blame that confusion on regulations that have functioned fine for decades.

From day one, the Biden administration has made no secret of its desire to privilege the concept of “gender identity” over the reality of biological sex.<sup>5</sup> But ED has failed to demonstrate need and a substantial evidentiary basis for the Athletics NPRM. This is nothing more than arbitrary and capricious rulemaking by the Department.

## **II. ED's proposed regulatory standard does not provide clarity.**

The Department proposes the following regulatory text:

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity,

---

<sup>2</sup> 87 Fed. Reg. 41,390.

<sup>3</sup> 87 Fed. Reg. 41,537.

<sup>4</sup> 34 CFR § 106.41 (Athletics).

<sup>5</sup> See Rachel N. Morrison, *Gender Identity Policy Under the Biden Administration*, 23 Federalist Soc'y Rev. 85 (May 2, 2022), <https://ssrn.com/abstract=4104566>.

such criteria must, for each sport, level of competition, and grade or education level: (i) Be substantially related to the achievement of an important educational objective; and (ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.<sup>6</sup>

ED claims its proposal “would provide needed clarity” and “would not affect a recipient’s discretion” to offer sex-specific teams based on competitive skill or for contact sports.<sup>7</sup> Nothing could be further from the truth: rather than provide clarity, the proposed regulatory standard introduces chaos. This makes ED’s proposal arbitrary and capricious.

### **III. The Athletics NPRM would have devastating consequences for female sports.**

Inter-scholastic and collegiate athletics are already riven with conflict over the question of biological male athletes who identify as transgender participating in competitions previously reserved for females. The NCAA position is unclear and in a state of flux, as are many policies set by state-level and sports-specific governing bodies.<sup>8</sup> More importantly, female student’s right under Title IX to participate equally in athletics cannot be dependent on the shifting positions of governing bodies of particular sports or schools.

#### **A. Public opinion and current science support protecting female sports.**

The reason why we have *female* sports is because we recognize the significant physiological and anatomical differences between males and females, and the resulting performance advantage for males—an advantage that has not diminished even though female athletes now receive the same top-level training as male athletes. Biological sex must continue to be the basis for participation standards in interscholastic athletics—a position that Americans intuitively support.

In 2022, a Washington Post-University of Maryland survey found that 55% of Americans do not think males who identify as transgender women should be permitted to compete in girls’ (female) high school sports; less than one-third favored allowing self-described “transgirls” (males) to compete in female interscholastic sports.<sup>9</sup> When it comes to elite-level-sports, Americans are even more adamant: 60% say males do not belong in female college or professional sports, regardless of their self-described “gender identity.”<sup>10</sup> A year later, polls reported even stronger results in favor of sex-specific female sports: According to a Washington Post-Kaiser Family Foundation poll, a “supermajority of Americans don’t want biological males in women’s sports” (May 2023).<sup>11</sup> Although ED’s proposed regulations maintain that youth sports are somehow different, and that “categorical” exclusions of biological males would not pass regulatory muster, 62% of Americans disagree: They do “not believe biological males should be allowed to compete against biological girls” in youth sports.<sup>12</sup>

---

<sup>6</sup> 88 Fed. Reg. 22,890 (proposed 34 CFR § 106.41(b)(2)).

<sup>7</sup> 88 Fed. Reg. 22,860, 22,870.

<sup>8</sup> Transgender Student-Athlete Participation Policy, NCAA, <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>.

<sup>9</sup> Madeline Halpert, “Only 3 in 10 Americans Support Trans Athletes’ Participation in Female Sports, Poll Finds,” *Forbes*, June 20, 2022. <https://www.forbes.com/sites/madelinehalpert/2022/06/14/only-3-in-10-americans-support-trans-athletes-participation-in-female-sports-poll-finds/?sh=6b21653426cf>

<sup>10</sup> *Id.*

<sup>11</sup> Houston Keene, “Majority of Americans Believe Gender Determined at Birth, Against Biological Males in Women’s Sports: Poll,” *Fox News*, May 5, 2023.

<sup>12</sup> *Id.*

Science supports those beliefs. A research review published in 2021 in the journal *Sports Medicine* states that “the performance gap between males and females becomes significant at puberty and often amounts to 10-50%, depending on the sport.”<sup>13</sup> This performance gap is greatest in sports like track and field that require explosive power—track and field, incidentally, is the among the most popular sports for high school female athletes.<sup>14</sup> The basis of this performance gap is physiological: Males and females are physiologically different—on average, males have a built-in biological advantage. They are bigger, stronger, faster, have more muscle mass, stronger bones, greater lung and cardiovascular capacity, and more fast-twitch muscle fibers (which gives an advantage in explosive power); males, on average, also have more upper-body muscle and lower-body muscle than females.<sup>15</sup> The male body is simply built differently—an advantage conferred by nature. As exercise physiologists have long acknowledged, in direct competitions between male and female athletes, males will win. For females to have the chance to win, especially at elite levels of competition, males and females must compete in separate categories.<sup>16</sup> *This performance advantage cannot be erased even when males suppress their testosterone production:* longitudinal studies show that “the loss of lean body mass, muscle area and strength typically amounts to 5% after 12 months of treatment” to suppress testosterone.<sup>17</sup> Moreover, suppressing testosterone does not eliminate enduring male-bodied anatomical advantages. A 15-year-old male who uses medication to suppress his natural testosterone does not lose the performance advantages conferred by nature, rooted in numerous physiological differences.

ED acknowledges the importance of fairness in competition but glosses over the basic requirements for true competition. Researchers define competitive fairness, which requires “a reasonable chance of all participants to win,” as essential to athletics: “[C]ompetitive fairness [is] a fundamental value in sport, even a prerequisite for the existence of sport.” Without a “reasonable chance to win . . . sport is neither competitive nor fair to the participants who are certain to lose.”<sup>18</sup> When even the best female athletes compete directly against mediocre male athletes, it’s clear they have no “reasonable chance” to win, no matter how hard they train or how outstanding their successes against female competitors. The unfairness is a “devastating experience,” says Connecticut runner Chelsea Mitchell, describing her inevitable losses on the track to male athletes who identified as “transgirls.”<sup>19</sup> Losing to a

---

<sup>13</sup> Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 *Sports Medicine* 199 (2021), <https://doi.org/10.1007/s40279-020-01389-3>.

<sup>14</sup> Jill Kochanek, & Daniel Gould, *The Status of High School Girls’ Sport Participation: A Report Compiled for the State of Michigan Women in Sports Task Force*, Institute for the Study of Youth Sports, Michigan State University, East Lansing, Mich. (2020).

<sup>15</sup> Eduardo Saez-Saez de Villarreal et. al. *Does Plyometric Training Improve Strength Performance? A Meta-Analysis*, 13 *J. Sci. Med. Sport* 513 (2010), <https://pubmed.ncbi.nlm.nih.gov/19897415/>; A. E. Miller, *Sale DG. Gender Differences in Strength and Muscle Fiber Characteristics*. 66 *Eur J Appl Physiol Occup Physiol* 254 (1993), <https://pubmed.ncbi.nlm.nih.gov/8477683/>.

<sup>16</sup> “Virtually all elite sports are segregated into male and female competitions. The main justification is to allow women a chance to win, as women have major disadvantages against men who are, on average, taller, stronger, and faster and have greater endurance due to their larger, stronger muscles and bones as well as a higher circulating hemoglobin level. Hence, elite female competition forms a protected category with entry that must be restricted by an objective eligibility criterion related, by necessity, to the relevant sex-specific physical advantages.” David J. Handelsman, et. al. *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 *Endocrine Reviews* 803 (2018), <https://doi.org/10.1210/er.2018-00020>.

<sup>17</sup> Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 *Sports Medicine* 199 (2021), <https://doi.org/10.1007/s40279-020-01389-3>.

<sup>18</sup> Matt Moore & Nafees Alam, *Point / Counterpoint: Transgender Sport Participation Policy*, 3 *Sport Social Work J.* 95, 96 (2023).

<sup>19</sup> Chelsea Mitchell, *I Was the Fastest Girl in Connecticut. But Transgender Athletes Made it an Unfair Fight*, USA Today (May 25, 2021), <https://news.yahoo.com/fastest-girl-connecticut-transgender-athletes-110054181.html>.

male, transgender-identified athlete, she wrote, “tells me that I’m not good enough; that my body isn’t good enough; and that no matter how hard I work, I am unlikely to succeed, because I’m a woman.”<sup>20</sup> That’s just not fair. All males and females deserve a team on which to play. The costs to females, who are muscled out of positions on “girls” or “women’s” school athletic teams by males who identify as “girls” or “women,” are likely to be substantial. A fair policy, on the other hand, is one in which every person has a chance to play, based on biological sex.

**B. Title IX is responsible for increased participation in female sports and educational opportunities for women.**

Historically, women had few athletic opportunities in school. But that all changed when Congress passed Title IX in 1972. It has been 50 years since Title IX became law and ensured equal educational opportunities on the basis of sex. Title IX was pivotal for females: interscholastic athletic opportunities for girls and young women skyrocketed in the years following its enactment. On a national level, ten times as many females now participate in high school sports compared to the pre-Title IX era.<sup>21</sup> Because of Title IX, schools created new opportunities for girls and young women—females—to participate and compete in athletic activities with other females. Because of these new opportunities, females—in massive numbers—came off the sidelines and became athletes, experiencing the exhilaration of competition, teamwork, fitness, recognition, and athletic excellence.

According to a 2020 report by the Institute for the Study of Youth Sports, nearly half of high school females in Michigan are athletes.<sup>22</sup> This outstanding level of participation and achievement for female athletes is possible *only* because of *female* sports teams—teams separated on the basis of biological sex. How do we know? Because pre-Title IX, females did not participate at the same level, achieve the same levels of excellence, nor enjoy the same level of opportunities. Title IX is widely lauded for championing women’s sports, and since its implementation, participation by girls and women in athletics have increased more than tenfold.<sup>23</sup>

Because of the opportunity to compete in interscholastic sports, millions of female athletes across the country have had the chance to go to college, their educations funded by the athletic scholarships they earned. Countless more were healthier and happier because of their participation in interscholastic sports. As we learned during the COVID pandemic, decreasing opportunities for young people to participate in sports takes a serious toll on mental and physical health of young people.<sup>24</sup> Why should even one female be deprived of the opportunities that come from competing in female-only competitions?

In a slap in the face to female athletes across the country, ED released the Title IX Proposed Rule on the 50th anniversary of Title IX. If finalized, ED would require women to give up their spots on teams, in competitions, at championships, and on the podium. Biological men will continue to receive women’s honors and awards, all in the name of “gender identity” nondiscrimination. To date, biological males have

---

<sup>20</sup> *Id.*

<sup>21</sup> Charles L. Kennedy, *A New Frontier for Women’s Sports (Beyond Title IX)*, *Gender Issues*, (1-2), 78 (2010), <https://link.springer.com/article/10.1007/s12147-010-9091-y>.

<sup>22</sup> Jill Kochanek & Daniel Gould, *The Status of High School Girls’ Sport Participation: A Report Compiled for the State of Michigan Women in Sports Task Force*, Institute for the Study of Youth Sports, Michigan State University, East Lansing, Michigan (2020).

<sup>23</sup> See *Adams v. School Board of St. Johns County*, 57 F.4th 791, 817-21 (11th Cir. 2002) (en banc) (Lagoa, J., specially concurring) (describing the ways in which Title IX “has changed the face of women’s sports as well as our society’s interests in and attitude toward women athletes and women’s sports”).

<sup>24</sup> Timothy A. McGuine, et al., *High School Sports During the COVID-19 Pandemic: The Effect of Sport Participation on the Health of Adolescents*, 57 *J. Athl. Train* 51 (2022), <https://doi.org/10.4085/1062-6050-0121.21>; <https://meridian.allenpress.com/jat/article/57/1/51/465818/High-School-Sports-During-the-COVID-19-Pandemic>.

stolen spots, titles, and championships from female athletes of all ages and skill levels in at least 29 categories of sports--and counting.<sup>25</sup>

This Athletics NPRM would merely put the nail in the coffin on the future of women's sports.

**IV. ED arbitrarily and capriciously declares that elementary and middle schools must automatically allow males to participate in female sports.**

Without elaboration, the Department declares that it “currently believes” there are “few, if any, sex-related eligibility criteria applicable to students in elementary school” that would comply with the proposed regulatory standard.<sup>26</sup> ED further believes it would also be “particularly difficult” for a policy that excludes students “immediately following elementary school” from participating on sex-specific teams consistent with their gender identity to comply with the standard.<sup>27</sup> If adopted, this view would likely undermine any sex-specific distinctions for athletics in elementary schools, effectively discouraging female participation in entry-level sports. How do we know? Because, as recounted elsewhere in this document, female participation in sports was far lower in the years before Title IX secured equal opportunities for girls' athletics.

Even in high schools and colleges, the level of evaluation required under the NPRM places an onerous burden on recipients seeking to adopt any sex-specific policy based on biology and provides a large incentive to adopt a blanket policy allowing participation based on gender identity for all sex-specific athletic teams.

**V. The proposed regulatory standard is contrary to law and violates Title IX's text, purpose, and structure.**

Title IX provides, “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 education program or activity receiving Federal financial assistance.”<sup>28</sup>

In the Title IX Proposed Rule, ED declined to define the term “sex” because, it argued, “sex can encompass many traits and because it is not necessary for the regulations to define the term for all circumstances.”<sup>29</sup> But “to clarify the scope of Title IX's prohibition on discrimination on the basis of sex,” ED proposed that discrimination on the basis of sex be expanded to include (“at a minimum”) discrimination on the basis of:

- sexual orientation,
- gender identity,
- sex stereotypes (i.e., “fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex”),
- sex characteristics (including “a person's physiological sex characteristics and other inherently sex-based traits,” and “intersex traits”), and
- pregnancy or related conditions (defined as “(1) Pregnancy, childbirth, termination of pregnancy, or lactation; (2) Medical conditions related to pregnancy, childbirth,

---

<sup>25</sup> Grant Atkinson, Transgender Athletes Breaking Records in Women's Sports, Alliance Defending Freedom, March 10, 2023 (revised).

<sup>26</sup> 88 Fed. Reg. 22,875.

<sup>27</sup> 88 Fed. Reg. 22,875.

<sup>28</sup> 20 U.S.C. § 1681(a).

<sup>29</sup> 87 Fed. Reg. 41,531.

termination of pregnancy, or lactation; or (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions”).<sup>30</sup>

Relevant for the Athletics NPRM, neither the Title IX Proposed Rule, nor the Athletics NPRM define “gender identity.” It is irrational for ED regulate discrimination “on the basis of sex” or “gender identity” while refusing to define what “sex” or “gender identity” even are. Without knowing what “sex” or “gender identity” are, one cannot know what sex discrimination and a violation of Title IX are.

As explained below, “sex” in Title IX is clearly and historically meant to refer to “biological sex.” ED’s failure to appreciate the degree to which it is effectuating change in sex discrimination under Title IX is arbitrary and capricious. Indeed, ED’s proposal to expand sex discrimination to include “gender identity” would rewrite the landmark civil rights laws and take away girls’ and women’s rights—the impetus for passing Title IX in the first place. ED’s radical rewriting of Title IX is a major question that raises serious constitutional problems concerning the separation of powers under *West Virginia v. EPA*.<sup>31</sup>

**A. Title IX was not amended by *Bostock*, and *Bostock* does not support the need for regulatory action.**

ED cites to the Supreme Court’s decision in *Bostock v. Clayton County*.<sup>32</sup> In the Title IX Proposed Rule, ED explained that the Department’s “prior position (*i.e.*, that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity) is at odds with Title IX’s text and purpose and the reasoning of the *Bostock* Court and other courts to have considered the issue in recent years—both before and after *Bostock*.”<sup>33</sup> ED claimed that its proposed definition is “consistent with *Bostock* and other Supreme Court precedent” because *Bostock* “makes clear that it is ‘impossible to discriminate against a person’ on the basis of sexual orientation or gender identity without ‘discriminating against that individual based on sex,’ even assuming that sex refers only to certain ‘biological distinctions.’”<sup>34</sup>

Indeed, *Bostock* was not a Title IX case. Rather, in *Bostock* the Supreme Court held that under *Title VII of the Civil Rights Act of 1964* “an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’”<sup>35</sup> Title VII is the federal law that prohibits sex (and race, color, religion, national origin) discrimination in employment, a completely different context than education and Title IX. Notably, *Bostock*’s Title VII analysis does not apply to Title IX because Title IX has a different sex-specific structure and, unlike Title VII, specifically uses language based on a biological binary, as detailed below.

The Majority in *Bostock* used the term “transgender status,” and did not adopt “gender identity” as a protected class. Thus, HHS cannot rely on *Bostock* to support the inclusion of the term “gender identity” within the definition of “sex discrimination.” The *Bostock* Court premised its decision on the assumption that “sex” refers only to the “biological distinctions between male and female.”<sup>36</sup> To be consistent with *Bostock*, ED must assume “sex” refers to “biological distinctions between male and

---

<sup>30</sup> 87 Fed. Reg. 41,515.

<sup>31</sup> No. 20-1530 (U.S. Jun. 30, 2022).

<sup>32</sup> 140 S. Ct. 1731 (2020).

<sup>33</sup> 87 Fed. Reg. 41,530.

<sup>34</sup> 87 Fed. Reg. 41,532.

<sup>35</sup> 140 S. Ct. at 1737.

<sup>36</sup> *Id.* at 1739.

female” (which it does not do) and that “sex” is incompatible with a gender spectrum or fluidity (which is promoted in the Athletics NPRM).

Further, *Bostock* was a limited holding. The Supreme Court specifically cabined its decision to the hiring and firing context under Title VII, stating it was not addressing other Title VII issues, such as sex-specific bathrooms, locker rooms, and dress codes, or other laws.<sup>37</sup> While the Court acknowledged concerns by some that its decision could make sex-segregated bathrooms, locker rooms, and dress codes “unsustainable” and “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination,” the Court did not address those concerns.<sup>38</sup> The Court explained that such questions were for “future cases” and the Court would not prejudge any such questions because “none of th[o]se other laws [we]re before [them].”<sup>39</sup> Likewise, ED should not prejudge those questions the Court left unanswered, especially as it relates to sex-segregated bathrooms, lockers rooms, dress codes, and housing in the education context. The Supreme Court was clear that *Bostock* did not decide any issue beyond hiring and firing under Title VII, and it is arbitrary and capricious for ED to ignore *Bostock*’s limitations and claim *Bostock* requires its regulatory action. As the Sixth Circuit recently put it, “*Bostock* extends no further than Title VII.”<sup>40</sup>

In 2021, ED issued a *Bostock* Notice of Interpretation (without going through the notice and comment process) purportedly applying *Bostock*’s reasoning to Title IX, even though *Bostock* stated that its implications for other laws were questions for “future cases.”<sup>41</sup> The *Bostock* Notice preemptively stated ED will enforce Title IX to prohibit discrimination based on sexual orientation and gender identity, based on *Bostock*.<sup>42</sup> But on July 15, 2022, a federal district court preliminarily enjoined the *Bostock* Notice document for not following the public notice and comment process required under the Administrative Procedure Act.<sup>43</sup>

To the extent ED is relying on *Bostock* as the legal impetus for its definition, that basis is deficient. *Bostock* requires no such regulatory action. It is arbitrary and capricious and contrary to law for ED to claim *Bostock* requires ED’s interpretation under Title IX and supports its need for rulemaking.

## **B. The Athletics NPRM’s treatment of relevant caselaw is arbitrary and capricious.**

The NPRM’s treatment of appellate cases interpreting Title IX is also arbitrary and capricious. *Adams v. School Board of St. Johns County* is the most recent federal appellate decision, and the only en banc federal appellate decision, to consider the attempt to use Title IX to secure the right for some students to be classified not according to their biological sex but according to their gender identity.<sup>44</sup> The en banc Eleventh Circuit interpreted the word “sex” in the context of Title IX and its implementing

---

<sup>37</sup> 140 S. Ct. at 1753.

<sup>38</sup> *Id.* at 1753.

<sup>39</sup> *Id.*

<sup>40</sup> *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021).

<sup>41</sup> *See* 87 Fed. Reg. 41395, 41530, 41532, 41533.

<sup>42</sup> Office for Civil Rights, U.S. Dep’t Educ., Notification of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 16, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>.

<sup>43</sup> *Tennessee v. Dep’t of Educ.*, No. 3:21-cv-308 (D. Ten. July 15, 2022) <https://adfmlegalfiles.blob.core.windows.net/files/TennesseeOrderOpinionPI.pdf>, appeal docketed, No. 22–5807 (6th Cir. Sept. 13, 2022).

<sup>44</sup> 57 F.4th 791 (11th Cir. 2002) (en banc).



regulations.<sup>45</sup> It found that the “plain meaning of ‘sex’ at the time of Title IX’s enactment” meant “biological sex” and did not include “gender identity.”<sup>46</sup>

The Athletics NPRM does not address the *Adams* decision on the merits, but attempts to minimize its significance by pointing out that the claims in that case “did not involve athletics or the athletics regulation that is the subject of this Athletics NPRM.”<sup>47</sup> This is at odds with the Departments’ reliance on *Bostock*, which involved a different context (employment) and federal statute (Title VII). But the Departments’ arbitrary and capricious hypocrisy is most clearly seen in its treatment of *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*,<sup>48</sup> which is cited favorably three times in the Athletics NPRM,<sup>49</sup> and Eleventh Circuit’s panel decision in *Adams*,<sup>50</sup> which ED cited favorably in its Title IX Proposed Rule.<sup>51</sup> These cases also involved transgender plaintiffs challenging separate-sex bathroom policies, but the difference is that the Fourth Circuit’s decision in *Grimm* and the Eleventh Circuit’s panel decision in *Adams* ruled in favor of the plaintiff, while the Eleventh Circuit’s en banc decision in *Adams* ruled in favor of the school district. It is arbitrary and capricious for the Department to cite favorably a Seventh Circuit case and two bathroom cases while ignoring a third bathroom case simply because it persuasively held that “sex” in Title IX means “biological sex” and not “gender identity.”

### C. Under Title IX, “sex” is a binary classification and means “biological sex.”

ED attempts to justify its proposal to require participation in athletics based on “gender identity” as “consistent with Title IX’s guarantee of nondiscrimination on the basis of sex.”<sup>52</sup> Nothing could be further from the truth.

Title IX prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance.<sup>53</sup> It’s also clear that Title IX and its accompanying regulations repeatedly recognize the fact of biological sexual difference and clearly presuppose “sex” as a binary classification (male or female). As a federal court observed last year, “Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each ‘sex.’”<sup>54</sup> The following select references from the Title IX statute and long-standing regulations illustrate the point:

- Title IX provisions are not to be construed as prohibiting an educational institution “from maintaining separate living facilities for the *different sexes*.”<sup>55</sup>
- Addressing changes in admissions policies for “an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*.”<sup>56</sup>
- References to “men’s” and “women’s” associations as well as organizations for “boys” and “girls” in the context of organizations “the membership of which has traditionally been limited to persons of *one sex*.”<sup>57</sup>

---

<sup>45</sup> *Id.* at 811.

<sup>46</sup> *Id.* at 814-15.

<sup>47</sup> 88 Fed. Reg. 22,869, n.10.

<sup>48</sup> 822 F.3d 709, 723 (4th Cir. 2016).

<sup>49</sup> 88 Fed. Reg. at 22863, 22868, and 22878

<sup>50</sup> 968 F.3d 1286 (11th Cir. 2020).

<sup>51</sup> 87 Fed. Reg. at 41531.

<sup>52</sup> 88 Fed. Reg. 22,865.

<sup>53</sup> Office for Civil Rights, U.S. Dep’t Educ., *Title IX and Sex Discrimination* (last modified Aug. 20, 2021), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>54</sup> *Neese v. Becerra*, 2:21-CV-163-Z, 22 (N.D. Tex. Apr. 26, 2022).

<sup>55</sup> 20 U.S.C. § 1686 (emphasis added).

<sup>56</sup> 20 U.S.C. § 1681(a)(2) (emphasis added).

<sup>57</sup> 20 U.S.C. § 1681(a)(6)(B) (emphasis added).

- References to “boys” and “girls” conferences.<sup>58</sup>
- “[S]eparation of students by sex within physical education classes or activities.”<sup>59</sup>
- “[C]lasses in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for *boys and girls*.”<sup>60</sup>
- “[S]eparate teams for members of *each sex* where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>61</sup>

The ordinary meaning of the word “sex” in 1972, when Congress passed Title IX, yields the same result.<sup>62</sup> The Eleventh Circuit surveyed contemporary dictionaries and found:

Reputable dictionary definitions of “sex” from the time of Title IX’s enactment show that when Congress prohibited discrimination on the basis of “sex” in education, it meant biological sex, i.e., discrimination between males and females. *See, e.g., Sex, American Heritage Dictionary of the English Language* (1976) (“The property or quality by which organisms are classified according to their reproductive functions.”); *Sex, American Heritage Dictionary of the English Language* (1979) (same); *Sex, Female, Male, Oxford English Dictionary* (re-issue ed. 1978) (defining “sex” as “[e]ither of the two divisions of organic beings distinguished as male and female respectively,” “female” as “[b]elonging to the sex which bears offspring,” and “male” as “[o]f or belonging to the sex which begets offspring, or performs the fecundating function of generation”); *Sex, Webster’s New World Dictionary* (1972) (“[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions.”); *Sex, Female, Male, Webster’s Seventh New Collegiate Dictionary* (1969) (defining “sex” as “either of two divisions of organisms distinguished respectively as male or female,” “female” as “an individual that bears young or produces eggs as distinguished from one that begets young,” and “male” as “of, relating to, or being the sex that begets young by performing the fertilizing function”); *Sex, Random House College Dictionary* (rev. ed. 1980) (“[E]ither the male or female division of a species, esp. as differentiated with reference to the reproductive functions.”).<sup>63</sup>

As shown here, Contrary to ED’s claims, Title IX’s specific language communicates an understanding of sex as binary (male or female) and permits and accommodates separate facilities for males and females (toileting, locker rooms, etc.) and certain kinds of sex-specific activities and athletic competitions *in fulfillment* of its statutory intent to ensure equality between males and females. As Justice Ginsburg wrote in *United States v. Virginia*,<sup>64</sup> laws prohibiting sex discrimination do not prohibit sex-based distinctions that account for the differences between males and females: “Physical differences between men and women ... are enduring. The two sexes are not fungible.” Thus, ED has no grounds for concluding that the current Title IX regulations, which safeguard necessary sex-based distinctions while ensuring equality, fail to “fully” implement Title IX’s anti-discrimination mandate.

Title IX aims to ensure equality while accounting for sexual difference (male and female). Title IX regulations should likewise recognize that “sex” under Title IX means “biological sex,” a binary

---

<sup>58</sup> 20 U.S.C. § 1681(a)(7)(A).

<sup>59</sup> 34 CFR § 106.34.

<sup>60</sup> 34 CFR § 106.34 (emphasis added).

<sup>61</sup> 34 CFR § 106.41 (emphasis added).

<sup>62</sup> *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (“[O]ur job is to interpret the words consistent with their ‘ordinary meaning ... at the time Congress enacted the statute.’” (second alteration in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))).

<sup>63</sup> *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022).

<sup>64</sup> 518 U.S. 515, 534 (1996).

classification. The Athletics NPRM is arbitrary and capricious and contrary to law because it fails to recognize the text of Title IX and the biological and binary classification of “sex.”

**D. The Athletics NPRM subverts Congress’ intent in passing Title IX and introduces instead a contradictory purpose.**

Although the purpose of Title IX and its accompanying regulations is to prohibit discrimination on the basis of sex (an objective, verifiable status as male or female), ED hijacks the regulatory process to impose a new goal—enabling athletes to participate in sports on the basis of an asserted “gender identity,” a self-designated status that contradicts one’s given sex.

ED states that “the purpose of this regulatory action, the Athletics NPRM, is to propose a regulatory standard under Title IX that would govern a recipient’s adoption or application of sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female athletic team consistent with their gender identity (referred to below as “sex-related criteria” or “sex-related eligibility criteria”).”<sup>65</sup>

ED cloaks this unlawful purpose with a linguistic veneer that evokes Title IX’s “sex” language by referencing “sex-related criteria” and “sex-related eligibility criteria” as considerations for determining whether participation by “gender identity” has been lawfully or unlawfully limited.<sup>66</sup> Title IX and the current regulations, however, refer to “sex” as “sex”—a binary of male or female (“members of one sex,” “each sex,” “the other sex,” and “both sexes”)—and to external “factors” relevant to “equal opportunity,” such as comparative time and resources for male and female teams.<sup>67</sup> “Sex-related criteria” has no relevance under Title IX’s clear language, which recognizes “sex” as referring to males or females.

ED uses the phrase “sex-related criteria” or “sex-related eligibility criteria” to suggest these ambiguous and vague concepts are legitimate bases for lawful regulations supporting sex-separate teams. Nothing could be further from the truth. By its own terms, Title IX clearly acknowledged the significance of sexual difference and permitted sex-specific (male or female) teams. “Sex” (determined at conception) *is* the criteria by which sex-specific teams are determined. No other criteria are needed to determine eligibility for a male or female team, and certainly not undefined “sex-related” criteria.

ED similarly obscures the clear meaning of discrimination “on the basis of sex” by mischaracterizing the language and intent of current regulations in ways that imply “sex” is irrelevant to Title IX’s purpose. ED claims § 106.41(c) requires “a recipient [to] provide equal opportunity *regardless of sex* in its athletic program as a whole...”<sup>68</sup> (It used similar language when it described the Biden Administration’s concerns in Executive Order 14021: to “determine whether changes to the Department’s Title IX regulations are necessary to fulfill Title IX’s mandate and OCR’s commitment to ensuring equal and nondiscriminatory access to education for students at all education levels, *regardless of sex.*”)<sup>69</sup> In contrast, current section (c) specifically refers to sex in a comparative manner (“both sexes,” “unequal expenditures for male and female teams,” etc.), language that reinforces “sex” as a *necessary*

---

<sup>65</sup> 88 Fed. Reg. 22,860.

<sup>66</sup> 88 Fed. Reg. 22,860. In the Title IX Proposed Rule, ED also claimed that its purpose in proposing new regulations was “to clarify what criteria, if any, a recipient of Federal funding should be permitted to use to establish students’ eligibility to participate on a particular male or female athletic team.” Under past regulations, recipients had no difficulty in determining eligibility to participate on male or female athletic teams: eligibility was determined on the basis of “sex,” not on the basis of an undefined “sex-related criteria.”

<sup>67</sup> 34 CFR § 106.41 (Athletics).

<sup>68</sup> 88 Fed. Reg. 22,867.

<sup>69</sup> 88 Fed. Reg. 22,865, 22,875.

consideration—not to suggest, as the phrase “regardless of sex” implies, that “sex” (male or female) is irrelevant.

## **VI. The proposed regulatory standard is unworkable and effectively requires participation based on gender identity.**

Under the proposed regulatory standard, any sex-specific policy must be based on a “direct, substantial relationship” between a recipient’s objective and the means used to achieve that objective. ED acknowledges that ensuring fairness in competition and prevention of sports-related injury are “possible important educational objectives,” but is quick to point that those interests do “not necessarily require schools to adopt or apply sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity.”<sup>70</sup> The NPRM points to alternative strategies and mitigating measures that could be taken instead, such as “appropriate coaching and training, requiring use of protective equipment, and specifying rules of play.”<sup>71</sup>

According to the Department, none of the following would qualify as an important educational objective:

- Communicating or codifying disapproval of a student or a student’s gender identity;
- Adoption solely for the purpose of excluding transgender students from sports;
- Requiring adherence to sex stereotypes;
- Adoption solely for the purpose of administrative convenience; or
- As a pretext for an impermissible interest in singling out transgender students for disapproval or harm.<sup>72</sup>

The NPRM emphasizes that any criteria must not rely on “overly broad generalizations” about male and female students’ “talents, capacities, or preferences,” noting that “very few female student-athletes are transgender” and “transgender students do not necessarily have greater physical or athletic ability than cisgender students that would affect cisgender students’ equal opportunity to participate.”<sup>73</sup> But the number of students who identify as transgender is completely irrelevant. If it’s so few, then it hardly justifies the costs of the rulemaking. But, as we have seen the number of biological males who identify as woman and compete in women’s sports has only been increasing and nothing in the proposed regulatory standard takes the total number of students who identify as transgender into consideration.

The NPRM explains that criteria that “assume all transgender girls and women possess an unfair physical advantage over cisgender girls and women in every sport, level of competition, and grade or education level” would rely on an impermissible generalization.<sup>74</sup> It is hard to see how a school could come up with a policy that does not rely on any level of generalization regarding fairness or safety or the average ability of biological males and females.

Under the proposed regulatory standard, any sex-specific policy that does not permit participation based on the novel category of “gender identity” would have to be evaluated based on (a) sport, (b) level of competition, and (c) the grade or education level, with an eye towards minimizing “harms” to a privileged subset of students: those who seek to participate in sex-specific sports not on the basis of biological sex but rather on the basis of subjective self-perception, or “gender identity.” This is a complex and time-consuming

---

<sup>70</sup> 88 Fed. Reg. 22,872.

<sup>71</sup> 88 Fed. Reg. 22,873.

<sup>72</sup> 88 Fed. Reg. 22,872.

<sup>73</sup> 88 Fed. Reg. 22,873-74.

<sup>74</sup> 88 Fed. Reg. 22,873.

evaluation that schools must undertake, even for just a single sport, level of competition, and grade level. ED provides little guidance into how it will evaluate schools' policies, leaving schools in the dark as to how to comply with the proposed regulatory standard.

Indeed, the NPRM states that criteria that “categorically exclude all transgender girls and women from participating on any female athletic teams” would not satisfy the proposed regulatory standard because they would take a “one-size-fits-all approach” and rely on “overbroad generalizations” that are not specific to the sport, level of competition, and grade or education level to which they apply.<sup>75</sup> Here again, ED uses language (“transgender girls and women”) that obscures rather than illuminates the facts of the matter: Current regulations, which determine eligibility based on sex, properly and “categorically” exclude all males—even those who identify as “transgender girls and women”—from “participating on any female athletic teams.”

It is unclear whether the Department would consider participation policies based on biology for all teams in a specific sport or all sports at a specific grade level as relying on an overbroad generalization. A categorical exclusion “on the basis of sex” (male or female) that aims to ensure fair competition and safety would seem, on its face, to be squarely within the intended purpose of Title IX. It would be arbitrary and capricious to treat policy language that matches Title IX’s own non-discrimination language as impermissible under the proposed regulation. We ask the Department to clarify the kind and degree of specificity required of a participation policy, and to state whether a permissible policy must be tailored to every team within a single sport.

ED “anticipates that *some* uses of sex-related eligibility criteria” would satisfy the proposed regulatory standard “in *some* sports, grade and education levels, and levels of competition” (emphasis added).<sup>76</sup> Yet it is hard to see how any policy would satisfy ED’s onerous proposed regulatory standard. Indeed, it appears the goal of the proposed regulatory standard is to coerce schools into foregoing the use of *any* sex-related eligibility criteria and adopting blanket participation based on gender identity instead. While the Department recognizes fairness and safety as important educational objective, nothing in the proposed regulation requires educational institutions to consider those objectives in establishing their policies. Further, there is no requirement to consider the harm to female athletes.

## **VII. The Athletics NPRM expands Title IX’s scope of protection to an arbitrarily selected set of terms, which are poorly defined, not defined at all, or defined as open-ended categories.**

“Sex” is an objective fact, a biological classification of “male” or “female,” linked to the organism’s whole-body design to fulfill one of two reproductive roles. Yet the Athletics NPRM disregards decades of clarity regarding the meaning of “sex,” and introduces a new arbitrarily selected term—“gender identity”—which it fails to define. In the Title IX Proposed Rule, ED admits that “[t]he statute does not explicitly reference distinct forms of sex discrimination, such as discrimination based on ... gender identity.” Undaunted, ED assumes legislative-style powers and writes its own preferred protected characteristic, rather than accepting the limited, historical meaning of “sex” and long-standing and well-grounded athletics regulations.

Specifically, ED unlawfully extends the scope of Title IX, re-interpreting “sex” to include “gender identity.” But bald assertions are no substitute for evidence. ED needs to specify the evidentiary base on which it relies for its claim that gender identity falls within the statutory language and legislative intent of Title IX. Other questions need attention too: On what basis did ED select gender identity, but not the other categories identified in the Title IX Proposed Rule? Were other new categories considered, and

---

<sup>75</sup> 88 Fed. Reg. 22,873.

<sup>76</sup> 88 Fed. Reg. 22,861.

if so, on what basis were they excluded? What is the nexus between gender identity and historical evidence of sex discrimination? ED provides no answers, making its proposed regulatory standard arbitrary and capricious.

ED fails to define “gender identity.” GLAAD defines “gender identity as “[a] person's internal, deeply held knowledge of their own gender” (but fails to define “gender”), and then boldly claims that “[e]veryone has a gender identity.” In contrast, a psychiatrist at a Dallas children’s gender clinic defends the idea that a child might reject all “gender” labels, in favor of an “agender” identity, meaning a person who is “genderless, without a gender identity.”<sup>77</sup>

ED uses the term “cisgender” throughout the NPRM to refer to those who identify as their biological sex.<sup>78</sup> The Media Reference Guide from GLADD, an LGBTQ advocacy group, defines “cisgender” as “[a]n adjective used to describe people who are not transgender” or “a person whose gender identity is aligned with the sex they were assigned at birth,” and concludes by saying, “[c]urrently, cisgender is a word not widely understood by most people.”<sup>79</sup> ED fails to explain how Title IX contemplates those who are allegedly “cisgender.” The fact that ED is using the term “cisgender” is an admission that there is a biological distinction with a difference between those who identify as transgender and those who are called cisgender.

ED also references those who identify as “nonbinary,” or those “who do not identify as exclusively male or female.”<sup>80</sup> GLAAD defines “non-binary” as follows: “Nonbinary is an adjective used by people who experience their gender identity and/or gender expression as falling outside the binary gender categories of ‘man’ and ‘woman.’ Many nonbinary people also call themselves transgender and consider themselves part of the transgender community. Others do not. Nonbinary is an umbrella term that encompasses many different ways to understand one's gender. Some nonbinary people may also use words like agender, bigender, demigender, pangender, etc. to describe the specific way in which they are nonbinary.”<sup>81</sup> According to GLAAD’s description, “non-binary” is a subjective label that could mean almost anything.

ED states, “When applying sex-related criteria to nonbinary students, a recipient may need to determine whether the criteria do, in fact, limit or deny a nonbinary student’s eligibility to participate on a male or female team consistent with their gender identity to determine whether the proposed regulation would apply.”<sup>82</sup> But it is unclear how a recipient would craft a nondiscriminatory athletics policy based on such a fluid and subjective label.

### **VIII. Title IX protects “sex,” not “gender identity,” which is subjective, often fluid, and stands in opposition to the objective nature of “sex.”**

“Gender identity” conceptualizes a person’s desire to assume and express a self-defined identity, based on feelings incongruent with or divergent from the person’s biological sex (objectively male or female).

---

<sup>77</sup> Vera Papisova, *What it Means to Identify as Agender*, Teen Vogue (Jan. 20, 2016), <https://www.teenvogue.com/story/what-is-agender> (quoting Dr Meredith Chapman of Children’s Health in Dallas, Texas).

<sup>78</sup> 87 Fed. Reg. 41,532.

<sup>79</sup> GLAAD Media Reference Guide, <https://www.glaad.org/reference/trans-terms> (last visited Sept. 12, 2022).

<sup>80</sup> 88 Fed. Reg. 22,865.

<sup>81</sup> GLAAD Media Reference Guide, <https://www.glaad.org/reference/trans-terms> (last visited Sept. 12, 2022).

<sup>82</sup> 88 Fed. Reg. 22,869.

**A. By all available measure, Congress in 1972 intended to prohibit discrimination on the basis of biological sex, not gender identity.**

On its face, Title IX clearly permits certain distinctions “on the basis of sex” to take account of biological differences between males and females. These distinctions based on biology are consistent with Title IX’s purpose of advancing equality between the sexes. In an arbitrary attempt to expand the scope of Title IX beyond its legislative intent, the Athletics NPRM (like the Title IX Proposed Rule) seeks to inject the undefined category of “gender identity” into the sex-based protections of Title IX.

When Title IX was passed and implemented, no one—not legislators, psychologists, or the average person—would have understood “sex” to mean “gender identity.”<sup>83</sup> As a federal court put it recently, “Congress enacted Title IX in 1972. At that time, ‘sex’ was commonly understood to refer to physiological differences between men and women—particularly with respect to reproductive functions.”<sup>84</sup>

Nor is there any evidence that Congress intended Title IX’s prohibition of discrimination “on the basis of sex” to apply to “gender identity.” In contrast, the notion of “sex stereotypes,” included in later Title IX analyses, was a familiar concept integral to ongoing cultural and political discussions of sex discrimination. The term “gender identity,” however, was largely unknown in 1972 outside the specialized fields of psychiatry and psychology. To the extent “gender identity” entered the public conversation, it denoted the *rejection* of, or *disassociation* from, biological sex (male or female), and the personal expression of a desired, alternative social presentation.

**B. Logic, language, and medical history all confirm that gender identity is not sex.**

It is logically incoherent to claim that a statute that intends to ensure sex-based equality simultaneously protects claims based on “gender identity,” a self-perception that emerges from the *rejection* of one’s sex-based identity.

Historically, the term “gender identity” was coined in 1968 by psychoanalyst Robert J. Stoller to express a person’s psychological self-categorization, *distinct* from sex (male or female).<sup>85</sup> In fact, “gender identity” connotes a psychological feeling of *incompatibility* with the sexed body; the term describes the interior “sense” or experience of a person who feels alienated from the sexed body (male or female) or

---

<sup>83</sup> Judicial opinions interpreting Title IX sometimes used the word “gender” as a synonym for “sex,” although the Title IX legislative history used the term “sex.” See, for example, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). But to date, as described in our discussion on the *Bostock* decision, the Supreme Court has not defined “gender identity” as included within the meaning of “sex,” for purposes of Title IX.

<sup>84</sup> *Neese v. Becerra*, 2:21-CV-163-Z, 22 (N.D. Tex. Apr. 26, 2022) (citing 20 U.S.C. § 1681) (internal citations omitted).

<sup>85</sup> Richard Green., *Robert Stoller’s Sex and Gender: 40 Years On*, 39 Arch Sex Behav. 1457-65 (2010), <https://doi.org/10.1007/S10508-010-9665-5>. John Money, a sexologist, conceptualized the term “gender” and “gender roles” earlier, in the mid-1950s, based on his work with “transsexuals” and patients who suffered disorders of sexual development. He theorized that a person’s social identity need not align with the fact of the person’s sex and believed that a child’s identity as a boy or girl depended on social conditioning rather than biology. He tested his theories on twin boys, one of whom suffered the loss of his penis during circumcision. Under Money’s direction, the parents raised the boy as a girl and Money prematurely declared his experiment a success. It was a failure. The boy later reverted to his masculine identity as a teen, but the psychological damage was immense. He eventually committed suicide. The story was chronicled by John Colapinto in *As Nature Made Him: The Boy who Was Raised as a Girl* (2006).

who experiences a strong desire to present socially as the opposite sex. It was a rare phenomenon (until recently), with prevalence estimated at less than 0.002%.<sup>86</sup>

When Title IX became law, the field of psychiatry regarded a person's assertion of a "gender identity" incongruent with the person's biological sex to be a sign of serious mental illness. The pioneering use of surgery to alleviate the extreme mental suffering of adults (mostly males) whose "gender identity" clashed with the reality of the person's biological sex further emphasizes the historical divergence between "sex" and "gender identity." These surgeries initially were described as "sex change" surgeries, a term that signals the oppositional dynamic between sex and "gender identity." The individual who expresses a "gender identity" incongruent with natal sex (a "transgender" identity) and desires "sex change" surgery *repudiates* and seeks to escape the sexed body and natal identity as male or female, in pursuit of a desired but physiological impossible result: a "sex change."

The first American who gained notoriety for seeking "sex change" surgery was a male named George Jorgenson, who underwent surgical castration in Europe and returned to America as Christine Jorgenson.<sup>87</sup> The initial castration and later surgeries to create a "neo-vagina" changed Jorgenson's physical presentation and psychologically validated Jorgenson's expressed social identity but did not "change" Jorgenson's genetic sex. The truth is that no one can change sex, because, according to the Institute of Medicine, "every cell has a sex," meaning a person's sex (male or female) is genetically expressed in every cell of the human body.<sup>88</sup> Modifying the appearance of a person's body and destroying or impairing the natural functions of the sexed body do not "change" the person's sex.

The current field of "gender medicine" no longer describes these medical or surgical interventions as "sex change" or "sex reassignment" procedures (implicitly acknowledging the impossibility of "changing" one's sex). Instead, it describes these interventions as "gender affirming" procedures—procedures that attempt to remedy the *dissonance* between mind and body by modifying the appearance and function of the sexed body to better align with, and validate, the person's psychological self-concept.<sup>89</sup> Put differently, the person seeking "gender-affirming" interventions desires to alter the appearance and function of the body *precisely because* the concrete physical reality of sex *contradicts* the person's inner feelings or self-perception ("gender identity"). The goal of "gender affirming" medical and surgical interventions is to create an *appearance or social presentation* that more closely matches the person's subjective sense of self ("gender identity"), which *diverges* from the objective fact of the person's sexual identity as male or female.

This dissonance between mind and body was long viewed as a mental health disorder, although it wasn't until 1980 that "gender identity disorder" first appeared in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) of Mental Disorders as an official mental health diagnosis.<sup>90</sup>

---

<sup>86</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Health Disorders (5th ed. 2013) ("Gender dysphoria" presents in 0.002% of the population.).

<sup>87</sup> Rebecca Poole, *From GI Joe to GI Jane: Christine Jorgensen's Story* (June 30, 2022), <https://www.nationalww2museum.org/war/articles/christine-jorgensen>.

<sup>88</sup> *Exploring the Biological Contributions to Human Health: Does Sex Matter?*, Inst. of Medicine 1 (2001), <https://doi.org/10.17226/10028>.

<sup>89</sup> The latest surgical techniques can construct a facsimile of the genitalia of the opposite sex (e.g., a "neo-phallus" or "neo-vagina") but cannot transform a person of one sex into the opposite sex. It is impossible to create fully functioning reproductive organs and genitalia of one sex within the body of the opposite sex, because sex is a "whole body" classification of the organism's design to produce either large gametes (ova) or small gametes (sperm).

<sup>90</sup> Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 261 (3d Ed. 1980).



Subsequent versions of the DSM reinforced the conceptual opposition between a person’s natal sex and psychological self-perception (or “gender identity”). DSM-IV described “gender dysphoria” as distress arising out of perceived conflict between “biological sex” and “gender identity.”<sup>91</sup> In 2013, the DSM was revised to replace “gender identity disorder” with “gender dysphoria,” a diagnosis based on clinical distress arising from the experience of gender *incongruence* (a perceived discordance between the fact of a person’s biological sex and the individual’s self-perceived identity).<sup>92</sup>

The American Psychological Association’s guidance on “gender and sexual orientation diversity in children and adolescents in schools” (promoting a gender-affirming approach to transgender identification) *contrasts* “sex” and “gender identity.”<sup>93</sup> It defines “sex” as “a person’s *biological* status ... typically categorized as male, female or intersex,” while describing “gender identity” as referring “to one’s *sense* of oneself as male, female or something else,” regardless of the person’s biological sex.<sup>94</sup>

Historically, then, the psychological sciences not only consistently distinguished “sex” and “gender identity,” but also, in the context of transgender identification, framed them as “incongruent,” unharmonious, or incompatible with one another. The American Psychological Association (APA) today describes a person who identifies as “transgender” as one who has a “gender identity and biological sex [that] are not congruent.”<sup>95</sup> According to the APA, “transgender” is “an umbrella term ... wherein one’s assigned biological sex doesn’t match their felt identity.”<sup>96</sup> The Human Rights Campaign Foundation publication entitled *Coming Out: Living Authentically as Transgender or Non-binary* defines “gender identity” as a person’s subjective self-perception, and a “transgender” gender identity as one that is “different from their sex assigned at birth.”<sup>97</sup> Expressing a transgender “gender identity” *contradicts* (but cannot change) a person’s immutable biological sex.

It’s not clear precisely what “gender identity” is (and ED fails to define the term), but it’s clear what it isn’t: “gender identity” is not the same as “biological sex.” In fact, the only thing that is certain when a person declares a “transgender,” “nonbinary,” “gender identity” is that the person is *rejecting* a sex-based identity, determined by natal or biological sex. Consequently, redefining “sex” (a biological reality) to include “gender identity” (a contradictory self-perception) does violence to the express intent of Title IX and, as discussed below, jeopardizes the rights of the very people—females—it was designed to protect.

### **C. Efforts to change Title IX into a law that prohibits discrimination on the basis of gender identity threatens females’ sex-based rights.**

In practical terms, interpreting discrimination protections “on the basis of sex” to privilege “gender identity” effectively guts Title IX of meaningful protections for females and threatens to erase 50

---

<sup>91</sup> Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 532-33 (4th Ed. 1994).

<sup>92</sup> Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 452 (5th Ed. 2013).

<sup>93</sup> Gender And Sexual Orientation Diversity in Children and Adolescents in Schools, American Psychological Association (2015) <https://www.apa.org/pi/lgbt/resources/diversity-schools>.

<sup>94</sup> Gender And Sexual Orientation Diversity in Children and Adolescents in Schools, American Psychological Association (2015), <https://www.apa.org/pi/lgbt/resources/diversity-schools>.

<sup>95</sup> *Id.*

<sup>96</sup> *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools*, American Psychological Association & National Association of School Psychologists (2015), <https://www.apa.org/pi/lgbt/resources/diversity-schools?item=3>.

<sup>97</sup> “Gender identity—One’s innermost concept of self as man, woman, a blend of both or neither—how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.” *Coming Out: Living Authentically as Transgender or Non-binary*, Human Rights Campaign Found., <https://www.hrc.org/resources/coming-out-living-authentically-as-transgender-or-non-binary>.

years of women’s sex-based rights under the law. Title IX’s sex-based distinctions are grounded in common sense, historical perspective, and biology. They recognize that women’s safety is often threatened by the intrusion of males into private spaces where women are sexually vulnerable (e.g., spaces for toileting, showering, and sleeping). A high-profile incident in Loudoun County, Virginia, illustrates the problem: a male student wearing a skirt went unchallenged into the girls’ restroom and sexually assaulted a female student.<sup>98</sup> When school policies normalize biological males—regardless of how they identify—entering female single-sex spaces, girls (biological females) will be told to ignore their discomfort lest they make a trans-identified student feel uncomfortable or be subject to a Title IX complaint for “harassment.” At the same time, bad actors will take advantage of the situation and girls will be less safe. Concern for the privacy and safety of females has motivated states like Tennessee and Oklahoma to pass laws requiring sex-specific bathroom use in schools (sex determined at birth).<sup>99</sup> Conversely, the ideological claim that gender identity beliefs should be privileged over the reality of biological sex has motivated lawsuits seeking to deny females their rights to sex-specific private spaces.

Efforts to shoehorn “gender identity” into Title IX’s protections against “sex discrimination” undercut the very purpose of Title IX, which was intended to ensure female equality, opportunity, safety, and privacy. The Athletics NPRM’s disregard the common-sense, reasonable sex-based restrictions permitted under Title IX by requiring recipients to grant access to single-sex facilities, programs, and activities on the basis of “gender identity.” “Gender identity” also threatens to stall women’s progress and equality in specific arenas, such as interscholastic athletics, where biological differences between the sexes come into play.

#### **IX. The Athletics NPRM contradicts with and undermines the Department’s Title IX Proposed Rule.**

According to the Title IX Proposed Rule, “a policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than de minimis harm on the basis of sex.”<sup>100</sup> It equates any exclusion with more than de minimis harm.<sup>101</sup> Yet under the Athletics NPRM, ED does not adopt the “de minimis” harm standard and would (in theory) allow certain athletic policies prohibit participation based on gender identity. ED fails to explain why it believes it could be permissible to ignore the harm to those who identify as transgender in the athletics context. In reality, ED’s rejection of the de minimis standard is a reflection of the reality that males and females are biologically distinct and that those differences matter when it comes to physical activity, such as athletics.

---

<sup>98</sup> Caroline Downey, *Judge Rules Loudoun County Teen Sexually Assaulted Female Student in Girls’ Bathroom*, Yahoo News (Oct. 26, 2021), <https://news.yahoo.com/judge-rules-loudoun-county-teen-131413442.html>.

<sup>99</sup> Associated Press, *Oklahoma Bathroom Law Challenged in Federal Lawsuit*, FoxNews.com (Sept. 7, 2022), <https://www.foxnews.com/us/oklahoma-bathroom-law-challenged-federal-lawsuit>.

<sup>100</sup> *E.g.*, 88 Fed. Reg. at 22,866, 22,876–77.

<sup>101</sup> 88 Fed. Reg. at 22,877; *see also* 87 Fed. Reg. 41391 (“[A] recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity.”). The “gender identity” de minimis standard tips the scales permanently against females, turning the statutory purpose of Title IX on its head. It means that “gender identity” trumps sex-based rights *every time*. Under the de minimis standard, sex-specific facilities, programs, and activities will no longer be single-sex—simply by ED fiat. Redefining “sex” to mean “gender identity” completely erases the protections females need, and disadvantages females in every encounter with males-who-identify-as-women. The de minimis standard is a harsh slap in the face to all women who have relied on Title IX protections in education.

**X. The Athletics NPRM’s inclusion of “gender identity” as a protected category will have devastating consequences for parental rights and children’s interests.**

**A. The Athletics NPRM would undermine schools’ rights and parents’ rights.**

For the past couple of years, parents across America have been discovering, and blowing the whistle on, the harmful impact of “gender identity” policies in public schools. With good reason. Five years ago, California parents were stunned to learn that teachers had read their kindergarten children books about transgender-identified children, then conducted a “transgender reveal” for a newly-transitioning classmate—all without parental permission.<sup>102</sup> Today, such stories are commonplace, and parents are outraged. Some have filed lawsuits, and many have fled the public schools.<sup>103</sup>

The Supreme Court has long recognized the fundamental right of parents “to direct the upbringing and education of children under their control.”<sup>104</sup> Parents have the right to direct their children’s education and to make decisions for them, because parents have a correlative responsibility for their children. The Court also recognizes that the “natural bonds of affection lead parents to act in the best interests of their children.”<sup>105</sup> Absent evidence of abuse, abandonment, or neglect, parents have the right to make educational and medical decisions for their children and can be trusted to make decisions for the overall good of the child.

The Athletics NPRM fails to recognize, much less deferring to, parents’ constitutional rights to guide their children in education- and athletics-related matters and personal decisions. Nor does ED acknowledge the tremendous grief, alienation, and upheaval in family relationships too often caused by a school’s decision to facilitate a child’s “gender transition,” without parental knowledge or consent.<sup>106</sup> Consistent with the policies first promoted by ED under the Obama Administration, ED’s Athletics NPRM embeds gender ideology in public schools by giving privileged status to “gender identity” claims. The consequence of day-after-day, year-after-year promotion of “gender identity” exploration in schools, from pre-K to the university, has a formative influence on impressionable children. The result: a culturally driven, unprecedented rise in self-defined (transgender) identities and identity confusion. Schools are not the only contributing factor (social media and peer relationships play strong roles), but they are a substantial one. A 2021 study of Pittsburgh high schoolers reported that 9.2% of high schoolers now identify as transgender or gender diverse—a shocking increase in little over a decade.<sup>107</sup>

Every child should be treated kindly and welcomed. But adding “gender identity” to Title IX’s anti-discrimination categories will accelerate efforts by schools to promote gender exploration and the “coming out” process to school children of all ages. GLSEN, for example, the leading promoter of

---

<sup>102</sup> Dr. Susan Berry, *Parents Frightened: Kindergartners ‘Crying, Shaking’ Over Transgender Book Teacher Read*, MicedTimes.com (Aug. 24, 2017), <https://www.mixedtimes.com/news/parents-frightened-kindergartners-crying-shaking-over-transgender-book-teacher-read>.

<sup>103</sup> *Judge Issues Injunction: Madison School District Staff Cannot Lie or Deceive Parents About Gender Transitions*, Wis. Inst. for Law & Liberty (Sept. 29, 2020), <https://will-law.org/judge-issues-injunction-madison-schools-staff-cannot-lie-or-deceive-parents-about-gender-transitions-at-school/>.

<sup>104</sup> *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925).

<sup>105</sup> *Parham v. J. R.*, 442 U.S. 584, 602 (1979)

<sup>106</sup> Bailee Hill, *Florida Mom Filing Suit After Child Transitioned At School Without Her Consent: Happening All Over*, Foxnews.com (May 2, 2022), <https://www.foxnews.com/media/florida-mom-january-littlejohn-lawsuit-transgender-school>.

<sup>107</sup> Kacie M Kidd, et al., *Prevalence of Gender-Diverse Youth in an Urban School District*, 147 *Pediatrics* e2020049823 (2021). A decade ago, the percent of the adult population identifying as transgender was estimated to be a fraction of a percent (0.002). Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 452 (5th Ed. 2013).

“LGBTQ-inclusive” K-12 schools, tells students that “[g]ender identity is how you identify and see yourself. Everyone gets to decide their gender identity for themselves.... If you don’t feel like a boy or a girl, you might identify as agender, genderqueer, nonbinary or just as a person.... You have a right to identify however you want, and your identity should be respected.” GLSEN, like the schools it serves, says not a word about bodily reality, and the fact that no one can change sex, ever. Instead, GLSEN materials teach students that “sex” is merely a “label” given by the medical community when a child is born. It’s up to the child to decide if the label will stick. Children also are taught that they have “cis-privilege” if their “identities align,” because they “get to move through the world without thinking about gender [or] being misgendered.”<sup>108</sup> This too creates pressure on children to select an identity that helps them fit in with the rainbow school culture.

From Alaska to Florida, Texas to Vermont, and every place in between, schools are vocal promoters of “gender identity” exploration and validating a child’s self-declared identity. In a growing number of states, school districts create a “Gender Support Plan” to facilitate a student’s “gender transition,” often behind the parents’ backs. Under many policies, students themselves are (erroneously) given premature decision-making power by schools, tasked with deciding their own “gender identity” (regardless of the sexed body), whether or not to begin a gender transition (social, medical, or surgical), and whether or not to involve their parents.

To lessen the risk of that a school will be accused of failing to address a “hostile” environment for a trans-identified child, schools will amp up their celebrations of transgender identities, and take pains to undo practices that could be perceived as “cisnormative,” “heteronormative,” or “harassing.”<sup>109</sup> When schools fear the loss of federal funds—such as federal lunch money to feed low-income students—they have a strong incentive to become ideological messengers promoting gender identity, regardless of parents’ wishes or permission.

In practical terms, adding “gender identity” to the protected characteristics under Title IX, means that schools will be forced, upon threat of losing federal funding, to introduce concepts of gender identity, encourage “gender exploration,” insist that other students and staff use “chosen names” and pronouns, validate the expressed “transgender identities” of students and teachers, celebrate “gender identity” “coming out” declarations, use trans-inclusive curricula, and forbid teachers to tell parents what their children are learning or “who” they currently identify as. School culture, much like the youth media culture, is already saturated with LGBTQ themes, curricula, and activist teachers. Under the guise of fostering a safe and inclusive environment for LGBTQ-identified students, school leaders offer faux-science curricula (such as “gender inclusive” puberty education) and police the use of pronouns, sometimes enforcing compliance by threatening disciplinary action (for students) or job loss (for staff). “Gender identity” rules generally also permit males who identify as females to use restrooms, locker rooms, and other private spaces formerly reserved for females. Mental health issues are escalating, and test scores are falling, but schools are doubling down on ideological content and goals. Gender identity policies have no place in schools; Title IX cannot protect both sex-based rights and “gender identity” claims at the same time.

## **B. The Athletics NPRM would further accelerate the school to clinic pipeline.**

Backed by government support for “gender-affirming care,” schools in some cities are enmeshed with the business side of adolescent gender clinics.<sup>110</sup> Clinicians provide trainings for teachers on

---

<sup>108</sup> *Gender Terminology Guide*, GLSEN, <https://www.glsen.org/activity/gender-terminology>.

<sup>109</sup> *Id.*

<sup>110</sup> The gender clinics at Lurie Children’s Hospital (IL) and Seattle Children’s Hospital (WA), for example, have collaborative relationships with local public school districts.

“transgender” youth, “gender affirmation,” social transition, and medical/surgical transition. Teachers and school staff, in turn, follow the advice of gender clinicians, validate children’s “gender identities” (no matter how young or troubled), facilitate their “gender transitions” (often behind parents’ backs) and refer them (and sometimes their parents) to gender clinics for medical interventions.

The “gender-affirming” climate in schools, fueled by policies that teach and privilege “gender identity” explorations, has been described by some parents as a school-to-gender-clinic-pipeline. This is another reason why we oppose the injection of “gender identity” into the school environment. Gender-affirming medical and surgical interventions cause serious harm to the developing bodies and vulnerable psyches of children.

Across the globe, gender specialists and whistleblowers have raised alarm over the scant evidence supporting gender-affirming protocols and the mounting evidence that gender affirmation causes harm to minors. In the wake of extensive evidence reviews, several leading European gender clinics recently ended or curtailed gender-affirming interventions for minors. Extensive psychotherapy, open to exploring alternative diagnoses and non-invasive ways of managing gender dysphoria, is emerging as the first-line response to adolescent identity distress.

The number of children and adolescents diagnosed with gender dysphoria or identifying as “transgender” has risen dramatically over the past decade, becoming “an international phenomenon, observed all across North America, Europe, Scandinavia, and elsewhere.”<sup>111</sup> The typical patient profile also has changed markedly: until recently, patients seeking treatment for gender dysphoria were usually either adult males or very young children, mostly boys. Today, the typical patient is an adolescent, usually female.<sup>112</sup>

Alongside the explosive growth in gender-dysphoric or transgender-identified children and adolescents, the worlds of psychology and medicine have witnessed a sea change in the dominant clinical approach towards these issues—changes which raise serious ethical questions.<sup>113</sup> For years, gender dysphoria in children was addressed through “watchful waiting” or with psychotherapy for the child and family. In most (up to 88%) of these situations, the child’s gender dysphoria (identity distress) would resolve by puberty.<sup>114</sup> In contrast, nearly all minors who begin gender-affirming social and medical transitions today persist in transgender identification.<sup>115</sup> Based on the belief that “gender variations are not disorders, gender may be fluid and not binary,” the gender-affirming approach insists that children and adolescents who identify as transgender should be permitted “to live in the gender that feels most real or

---

<sup>111</sup> Kenneth J. Zucker., *Adolescents with Gender Dysphoria: Reflections on Some Contemporary Clinical and Research Issues*, 48 Archives of Sexual Behavior 1983, n.3 (2019), <https://link.springer.com/article/10.1007%2Fs10508-019-01518-8>.

<sup>112</sup> *Id.*

<sup>113</sup> Lucy Griffin et al., *Sex, Gender and Gender Identity: A Re-Evaluation of the Evidence*, 45 BJPsych Bulletin 291 (2021), <https://pubmed.ncbi.nlm.nih.gov/32690121/>.

<sup>114</sup> Devita Singh et al., *A Follow-Up Study of Boys with Gender Identity Disorder*, 12 Frontiers in Psychiatry 632784 (2021), <https://www.frontiersin.org/articles/10.3389/fpsy.2021.632784/full>.

<sup>115</sup> See, for example, this study from the Tavistock and Portman NHS Gender Identity Development Service (UK), which found 98% of adolescents who underwent puberty suppression continued on to cross- sex hormones. Polly Carmichael, et al., *Short-Term Outcomes of Pubertal Suppression in a Selected Cohort of 12 To 15 Year Old Young People with Persistent Gender Dysphoria in the UK*, 16 PloS one e0243894 (2021), <https://doi.org/10.1371/journal.pone.0243894>.

comfortable to that child and to express that gender with freedom from restriction, aspersion, or rejection.”<sup>116</sup>

According to gender therapist Laura Edwards-Leeper, gender affirmation means “the gender identity and related experienced asserted by a child, an adolescent, and/or family members” should be accepted as “true” and “the clinician’s role in providing affirming care to that family is to empathetically support such assertions.”<sup>117</sup> Consequently, the gender-affirming model rejects “therapeutic approaches that encourage individuals to accept their given body and assigned gender,” and contends that alternative approaches “may inadvertently cause psychological harm.”<sup>118</sup>

Despite the “absence of empirical data” to support them, the gender affirming model and gender affirming medical and surgical interventions have been heavily promoted by transgender activists, allied clinicians, and several establishment medical organizations.<sup>119</sup> Even so, the rapid swing from the “watchful waiting” therapeutic paradigm to a “gender affirmative” protocol that validates all asserted “gender identities” and puts adolescents on a path towards “gender-affirming” medical interventions is unprecedented. So too is the number of transgender- identified adolescents seeking irreversible “transgender” body modifications—drastic measures that some come to regret.<sup>120</sup>

Clinical concerns over the outcomes of gender affirmation have escalated.<sup>121</sup> Gender affirmation has a domino effect, beginning with psycho-social transition.<sup>122</sup> Although it is not physically invasive, once begun, psycho-social transition is psychologically difficult to walk back. Children who socially transition are more likely to persist in a transgender-identification than children who do not socially transition. This raises serious ethical questions.<sup>123</sup> The Dutch gender-affirming protocol never supported social transition for pre-pubertal children, over concerns that it would tip the scales towards persistence in

---

<sup>116</sup> Laura Edwards-Leeper et al., *Affirmative Practice with Transgender and Gender Nonconforming Youth: Expanding the Model*, 3 *Psychology of Sexual Orientation & Gender Diversity* 165 (2016), <https://www.apa.org/pubs/journals/features/sgd-sgd0000167.pdf>.

<sup>117</sup> *Id.* at 165.

<sup>118</sup> *Id.* at 166 (citing Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth, Substance Abuse and Mental Health Services Administration (2015), <https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4928.pdf>).

<sup>119</sup> *Id.*

<sup>120</sup> Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, 50 *Arch Sex Behav* 3353 (2021), <https://pubmed.ncbi.nlm.nih.gov/34665380/>.

<sup>121</sup> For example, see the following recent publications: William Malone et al., *Puberty Blockers for Gender Dysphoria: The Science Is Far From Settled*, 5 *The Lancet Child & Adolescent Health* e33 (2021), [https://doi.org/10.1016/S2352-4642\(21\)00235-2](https://doi.org/10.1016/S2352-4642(21)00235-2); Kirsty Entwistle, *Debate: Reality Check—Detransitioners’ Testimonies Require Us to Rethink Gender Dysphoria*, *Child & Adolescent Mental Health* (2020), <https://doi.org/10.1111/camh.12380>; Paul W. Hruz, *Deficiencies in Scientific Evidence for Medical Management of Gender Dysphoria*, 87 *The Linacre Quarterly* 34 (2020), <https://doi.org/10.1177/0024363919873762>.

<sup>122</sup> When a minor’s desired identity is affirmed, the minor initiates external “social” changes to express the desired identity (name, pronouns, hair, clothing, etc.).

<sup>123</sup> Kenneth J. Zucker, *The Myth of Persistence: Response to “A Critical Commentary on Follow-Up Studies & ‘Desistance’ Theories about Transgender & Gender Non-Conforming Children” by Temple Newhook et al.*, 19 *Int’l J. of Transgenderism* 231 (2018). Michael Biggs, *Revisiting the Effect of GnRH Analogue Treatment on Bone Mineral Density in Young Adolescents with Gender Dysphoria*, 34 *J. of Pediatric Endocrinology & Metabolism* 937 (2021), <https://doi.org/10.1515/jpem-2021-0180>.

transgender identification.<sup>124</sup> Social transition sets the child on a path toward medical transition before the child is mature enough to appreciate the long-term physical and psychological consequences.

For pre-pubertal children, social transition also creates an impetus for the next step in gender affirming care: puberty blockers. A pre-pubertal child who presents as a member of the opposite sex views puberty with extreme anxiety, as the growth of secondary sex characteristics will reveal the child's true sexual identity. Puberty blockers interrupt the child's natural development and preserve the child's secret, if only for a time.

Puberty is a whole-body developmental process. Preventing its normal course, for an indeterminate time, has unknown long-term consequences beyond the "pause" in development of secondary sex characteristics: The child's social and cognitive maturation (including advances in executive functioning and other brain functions) is suspended along with other developmentally appropriate growth, including bone growth. Stopping the puberty blockers will allow the development of secondary sex characteristics to resume, but the time lost from the unnatural delay in biological maturation cannot be recaptured. No longer described as "fully reversible," puberty blockers have negative effects on bone density, social and emotional maturation, and other aspects of development. Further, puberty blockers generally fail to lessen the child's gender dysphoria and results are mixed in terms of effects on mental health.<sup>125</sup> Long-term effects remain unknown.<sup>126</sup>

Multiple studies show that the vast majority of children who begin puberty blockers go on to receive cross-sex hormones, the next step in gender-affirming care, with life-altering consequences.<sup>127</sup> Blocking a child's natural puberty (preventing maturation of genitals and reproductive organs) and then introducing cross-sex hormones renders the child permanently sterile.<sup>128</sup> Gender clinicians now admit that puberty blocking may impair the child's later sexual functioning as an adult as well.<sup>129</sup> These losses cannot be fully comprehended by a child, precluding the possibility of informed consent.

Cross-sex hormones carry numerous health risks and cause many irreversible changes in adolescents' bodies, including genital or vaginal atrophy, hair loss (or gain), voice changes, and impaired fertility. They also increase cardiovascular risks and cause liver and metabolic changes.<sup>130</sup> The flood of opposite sex hormones has variable emotional and psychological effects as well. Females who take testosterone experience an increase in gender dysphoria, particularly regarding their breasts, creating

---

<sup>124</sup> Annelou L. C. de Vries, & Peggy T. Cohen-Kettenis, *Clinical Management of Gender Dysphoria in Children and Adolescents: The Dutch Approach*, 59 *J. of Homosexuality* 301 (2012), <https://doi.org/10.1080/00918369.2012.653300>.

<sup>125</sup> Annelou L. C. de Vries et al., *Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow-Up Study*, 8 *J. Sex Med.* 2276 (2011), [https://www.jsm.jsexmed.org/article/S1743-6095\(15\)33617-1/pdf](https://www.jsm.jsexmed.org/article/S1743-6095(15)33617-1/pdf).

<sup>126</sup> There are no long-term, rigorous studies on the safety and outcomes of using puberty blockers to disrupt natural puberty in healthy but dysphoric children for an extended time.

<sup>127</sup> Polly Carmichael, et al., *Short-Term Outcomes of Pubertal Suppression in a Selected Cohort of 12 To 15 Year Old Young People with Persistent Gender Dysphoria in the UK*, 16 *PloS one* e0243894 (2021), <https://doi.org/10.1371/journal.pone.0243894>.

<sup>128</sup> Stephen B. Levine, *Ethical Concerns About Emerging Treatment Paradigms for Gender Dysphoria*, 44 *J. Sex Marital Ther.* 29 (2018), <https://pubmed.ncbi.nlm.nih.gov/28332936/>.

<sup>129</sup> Abigail Shrier, *Top Trans Doctors Blow the Whistle on "Sloppy Care,"* *Common Sense* (Oct. 4, 2021), <https://bariweiss.substack.com/p/top-trans-doctors-blow-the-whistle>.

<sup>130</sup> *Gender-Affirming Hormone in Children and Adolescents*, *BMJ EBM Spotlight Blog* (Feb. 25, 2019), <https://blogs.bmj.com/bmjebmspotlight/2019/02/25/gender-affirming-hormone-in-children-and-adolescents-evidence-review/>.

heightened demand for double mastectomies on teens as young as 13.<sup>131</sup> The gender affirming model recommends performing mastectomies on the healthy breasts of adolescent girls in order to address emotional discontent. This is an unethical practice described by psychotherapist Alison Clayton as nothing less than “dangerous medicine.”<sup>132</sup>

The gender-affirming approach continues to push ethical boundaries. The World Professional Association for Transgender Health (WPATH) recently released its proposed “Standards of Care Version 8,” which eliminated recommended ages for adolescents to receive cross-sex hormones, double mastectomies (“chest masculinization”), male breast augmentation and facial surgery, and removal of testes, vagina, or uterus, prioritizing providers’ flexibility to provide these medical and surgical interventions at even younger ages.<sup>133</sup> This is unethical human experimentation—on *children*. A Swedish teen who underwent medical transition and then de-transitioned after suffering substantial bodily harm describes the “gender affirming” medical protocol this way: “They’re experimenting on young people ... we’re guinea pigs.”<sup>134</sup>

Schools that promote “gender identity” exploration and “gender transitions” are the gateway to medical and surgical “transgender” interventions. Protecting “gender identity” under Title IX, as the Athletics NPRM intends, will put countless numbers of children on the transgender assembly line—and lead to irreversible harm.

**XI. ED arbitrarily and capriciously claims benefits the Athletics NPRM does not provide, ignores harm to female students, and fails to consider actual compliance costs to schools.**

ED identifies two benefits of its proposal: (i) “providing a standard to clarify Title IX obligations for recipients that adopt or apply sex-related eligibility criteria,” and (ii) “protecting students’ equal opportunity to participate on male and female teams consistent with Title IX.”<sup>135</sup> First, as explained above, the proposed regulatory standard does not provide clarity and instead increases confusion. Thus, ED cannot claim clarity as a benefit and must consider confusion as a cost. Second, Title IX requires equal opportunity based on sex, not gender identity. Requiring participation standards based on gender identity is *inconsistent* with Title IX and undermines Title IX’s protections for female athletic opportunities. In short, neither benefit ED claims results from its proposal, making it arbitrary and capricious.

Without the proposed regulatory standard, ED claims “some students may suffer harm as a result of being unable to gain the benefits associated with equal opportunity to participate on athletic teams at school” because participation on a team inconsistent with a student’s gender identity is “not a viable option for many students.”<sup>136</sup> All students are permitted to participate based on their sex and just because a student chooses not to, does not mean that it is not a viable option or that Title IX requires additional options be provided to that student.

---

<sup>131</sup> Johanna Olson-Kennedy et. al. *Chest Reconstruction and Chest Dysphoria in Transmasculine Minors and Young Adults: Comparisons of Nonsurgical and Postsurgical Cohorts*. *JAMA Pediatr*. 2018 May 1;172(5):431-436. doi: 10.1001/jamapediatrics .2017.5440. PMID: 29507933; PMCID: PMC5875384.

<sup>132</sup> Alison Clayton, *The Gender Affirmative Treatment Model for Youth with Gender Dysphoria: A Medical Advance or Dangerous Medicine?*. *Arch Sex Behav* (2021), <https://doi.org/10.1007/s10508-021-02232-0>.

<sup>133</sup> WPATH Standards of Care, Version 8, Draft for Public Comment, December 2021, “Adolescent” Chapter, p. 3.

<sup>134</sup> Mission: Investigate. Trans Children (“Trans Train 4”) (Nov. 26, 2021), <https://www.svtplay.se/video/33358590/uppdrag-granskning/mission-investigate-trans-children-avsnitt-1>.

<sup>135</sup> 88 Fed. Reg. 22,861.

<sup>136</sup> 88 Fed. Reg. 22,861, 22,870.



While the proposed regulatory standard requires schools to minimize harm to students based on gender identity, no such consideration is given to harm to female students who will be negatively impacted by policies that permit participation based on gender identity. Further, no mention is made of any harm to other students, especially female athletes who could be denied equal opportunity to participate under the Department’s proposal. The Department’s failure to acknowledge or consider these harms in its regulatory impact analysis is arbitrary and capricious.

ED estimates that the cost to recipients over 10 years would be in the range of \$23.4 million to \$24.4 million, which seems extremely low considering the number of schools that receive federal funding, the time needed to evaluate existing athletic policies for compliance, and the regular trainings on the policies.<sup>137</sup> ED must also consider the costs (quantitative and qualitative) of allowing biological males to compete in female athletics based on “gender identity.” These costs include:

- Potential losses in female participation, with consequent reduced health benefits, increased obesity, poorer mental health, and loss of social connection.
- Potential loss of female participation and leadership opportunities, particularly at the high school level, as girls experience displacement by male athletes who identify as transgender and exert leadership based on superior athletic prowess.
- Potential loss of scholarships and academic opportunities facilitated by athletic participation.
- Costs of retrofitting locker rooms, restrooms, equipment, and facilities to accommodate male bodies competing in women’s categories and to ensure safety and privacy of all participants.
- Likely administrative and legal costs for school districts, regional athletic organizations, and inter-collegiate athletic organizations in managing rules changes, record-keeping, and participation criteria, and responding to potential legal challenges from displaced female athletes.
- Likely costs of a “gender identity” criteria that results in greater need for retrofitting educational and athletics facilities to accommodate student needs for privacy (single stall “all-gender” restrooms and locker rooms instead of multi-user facilities; measures to ensure privacy in dormitories and overnight accommodations; and other additional privacy measures, e.g., doors, curtains, and other measures).
- Potential increased costs in monitoring for and preventing any sexual assaults in all-gender restroom and locker room facilities, occasioned by male students gaining unchallenged access to female facilities or in response to female requests to ensure safe access to shared facilities.<sup>138</sup>
- Potential costs of litigations as female athletes seek to defend their sex-based rights in court.
- Costs related to confusion of changing policies mid-school year or mid-sports season.

ED’s conclusion that the benefits of its proposal “far outweigh the costs” is arbitrary and capricious.<sup>139</sup> As explained above, ED claims benefits that do not result from its proposal and ignores the high costs to female students and schools, making the Athletics NPRM arbitrary and capricious.

---

<sup>137</sup> 88 Fed. Reg. 22,861.

<sup>138</sup> See, for example, the situation in Loudoun County, Virginia, where a teen male wearing a skirt was unchallenged entering the female restroom and subsequently assaulted a female student. Virginia Abram, *Teenager Found Guilty in Loudoun County Bathroom Assault*, Yahoo News (Oct. 25, 2021), <https://news.yahoo.com/teenager-found-guilty-loudoun-county-004300075.html>.

<sup>139</sup> 88 Fed. Reg. 22,861.

**XII. The Athletics NPRM raises serious religion freedom concerns, which ED failed to address.**

**A. The proposed regulatory standard must respect religious exercise protections under the First Amendment and RFRA.**

As, the Supreme Court in *Bostock* explained, it is “deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution”—a “guarantee” that “lies at the heart of our pluralistic society.”<sup>140</sup> The Court flagged three doctrines protecting religious liberty it thought relevant to claims of sex discrimination:

1. Title VII’s religious organization exemption, which allows religious organizations to employ individuals “of a particular religion”<sup>141</sup>;
2. The ministerial exception under the First Amendment, which “can bar the application of employment discrimination laws ‘to claims concerning the employment relationship between a religious institution and its ministers’”<sup>142</sup>; and
3. The Religious Freedom Restoration Act (RFRA), which the Court described as a “super statute” that “might supersede Title VII’s commands in appropriate cases.”<sup>143</sup>

Because it is constitutionally and statutorily required and since ED is relying on *Bostock* in the Title IX Proposed Rule, upon which this rule is premised, ED should recognize explicitly the important protections for religious exercise under the First Amendment and RFRA.

**B. Any final rule should consider the Supreme Court’s forthcoming decision in *303 Creative LLC v. Elenis*.**

The ED will almost certainly not review public comments and issue a final rule before the Supreme Court decides *303 Creative LLC v. Elenis*.<sup>144</sup> That case involves a public accommodations nondiscrimination law and freedom of speech, religious liberty, and artistic freedom—issues raised directly by the Title IX Proposed Rule and the Athletics NPRM. As such, it would be arbitrary and capricious for ED to issue a final rule without consideration of the *303 Creative* decision.<sup>145</sup> ED should also allow the public an opportunity to comment on the application, if any, of the Supreme Court’s decision in *303 Creative* on its proposed regulatory standard. ED should either extend the public comment period or, at a minimum, open a supplemental comment period after the Supreme Court’s decision is issued in *303 Creative*.

---

<sup>140</sup> *Bostock*, 140 S. Ct. at 1754.

<sup>141</sup> 42 U.S.C. § 2000e-1(a). Title VII defines “religion” as “all aspects of religious observance and practice, as well as belief.” *Id.* § 2000e(j).

<sup>142</sup> *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).

<sup>143</sup> *Id.* (citing 42 U.S.C. § 2000bb-3).

<sup>144</sup> No. 21-476 (U.S.).

<sup>145</sup> Indeed, one federal court criticized the Department of Health and Human Services (HHS) for issuing a final rule on Section 1557 before the Supreme Court’s *Bostock* decision was issued and said the agency should have halted publication of the rule to consider *Bostock*’s implications. *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Human Servs.*, 485 F. Supp. 3d 1, 42 (D.D.C. 2020) (“It is sufficient for the Court to determine that *Bostock*, at the very least, has significant implications for the meaning of Title IX’s prohibition on sex discrimination, and that it was arbitrary and capricious for HHS to eliminate the 2016 Rule’s explication of that prohibition without even acknowledging—let alone considering—the Supreme Court’s reasoning or holding.”).

**C. ED must address the impact of its proposed regulatory standard on religious schools and students.**

The Athletics Rule fails to consider its impact on religious schools and students. While the Title IX religious exemption is acknowledged in the background section on “history of Title IX’s application to athletic programs,” ED fails to explain how the religious exemption would interact with its proposed regulatory standard.<sup>146</sup>

We ask that the Department explicitly recognize that Title IX’s religious exemption applies to the Athletics NPRM and would allow religious schools to not comply with the proposed regulatory standard to the extent its application “would be inconsistent with the religious tenets of the organization.”<sup>147</sup>

We also ask the Department to clarify how schools—religious or secular—with different participation policies will be able to ensure fair play and safety for female student athletes.

Relevant questions include the following:

- Are policies school-dependent or does one school’s policy trump another school’s policy when the schools compete against each other?
- How are schools supposed to address their student athletes’ access to locker rooms or restrooms when they are competing at a school with different participation and athletics policies?
- Would a school with an athletics policy that allowed participation based on gender identity violate Title IX by competing against or at a school that did not permit participation or access to locker rooms or restrooms based on gender identity?

The Department must consider all these implications of its proposal, how its proposal will comply with constitutional and statutory religious freedom protections, and any resultant harm to religious schools and students, who would be denied opportunities to compete or participate in athletics because of other schools’ differing participation policies.

**XIII. The Athletics NPRM raises serious federalism concerns.**

**A. The Department acknowledges that its proposed regulatory standard conflicts with state “saving women’s sports” laws and “may have federalism implications.”**

As recognized in the Athletics NPRM, at least twenty states have passed laws that prevent biological males, regardless of how they identify, from joining female-specific athletic teams. The Department acknowledges (without elaboration) that its proposal “may have federalism implications” or “substantial direct effects” on the states or the relationship between states and the federal government.<sup>148</sup> It is clear that the proposed regulation conflicts with requirements under state laws, setting up a legal quandary for schools if and when the Athletics NPRM is finalized.

---

<sup>146</sup> 88 Fed. Reg. 22,862.

<sup>147</sup> 20 U.S.C. § 1681(a)(3).

<sup>148</sup> 88 Fed. Reg. 22,880, 22,891.

**B. Title IX is a Spending Clause statute and is therefore subject to the *Pennhurst* clear-statement rule.**

The “federalism implications” ED acknowledges are heightened because Congress passed Title IX pursuant to its authority under the Spending Clause.<sup>149</sup> As the Supreme Court has long made clear, “if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously.”<sup>150</sup>

This principle, known as the “*Pennhurst* clear statement rule,” reflects the system of “dual sovereignty” enshrined in our Constitution.<sup>151</sup> The principle states that Congress cannot impose conditions on state funding without providing them with a clear statement as to what these conditions entail. “[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”<sup>152</sup> Thus, the “legitimacy of Congress’ power to legislate under the [S]pending [Clause] ... rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”<sup>153</sup> The Supreme Court has discerned that this rule is constitutionally required because without it Congress’s spending authority would be “limited only by Congress’ notion of the general welfare.”<sup>154</sup> Given “the vast financial resources of the Federal Government,” Congress would have power “to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”<sup>155</sup>

The fact that Title IX is an exercise of the federal government’s Spending Clause and is thus subject to the *Pennhurst* clear statement rule, makes Title IX constitutionally distinct from Title VII. This is yet another reason why the Department cannot simply import the Supreme Court’s interpretation of Title VII in *Bostock*.

Though the Athletics NPRM repeatedly points to *Bostock*, it never even mentions the Spending Clause, let alone offer an account of why the Department would be able constitutionally permitted to impose its proposed regulatory standard on public schools consistent with *Pennhurst*.

**C. The Athletics NPRM is unconstitutional under the *Pennhurst* clear-statement rule.**

In examining the Athletics NPRM under the clear-statement rule, the Department need not start from scratch. In *Adams*, the en banc Eleventh Circuit recently examined Title IX under this standard.<sup>156</sup> At issue in that case was a school district’s “practice of separating school bathrooms based on biological sex.”<sup>157</sup> The court found that this policy could only violate Title IX “if the meaning of ‘sex’ [in Title IX] unambiguously meant something other than biological sex, thereby providing the notice to the School Board that its understanding of the word ‘sex’ was incorrect.”<sup>158</sup> Citing evidence similar to that compiled in Section V.C. above, the court found that found that the clear-statement rule precluded the plaintiff’s

---

<sup>149</sup> U.S. Const. art. I, § 8, cl. 1; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (“[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress’ authority under the Spending Clause.”).

<sup>150</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>151</sup> *Murphy v. Nat’l Collegiate Athletics Ass’n*, 138 S. Ct. 1461, 1475 (2018).

<sup>152</sup> *Pennhurst*, 451 U.S. at 17.

<sup>153</sup> *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585-86 (1937)).

<sup>154</sup> *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O’Connor, J., dissenting).

<sup>155</sup> *Id.* (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

<sup>156</sup> 57 F.4th at 815-17.

<sup>157</sup> *Id.* at 796.

<sup>158</sup> *Id.* at 816.

novel interpretation of Title IX.<sup>159</sup> The court also noted that the dissent implicitly acknowledged this point.<sup>160</sup>

Like the “unremarkable[ ] and nearly universal” bathroom policy at issue in *Adams*, the Department’s Athletics NPRM violates the Spending Clause, and therefore by extension the Administrative Procedure Act, unless the text of Title IX put states on notice in 1972 that this law would prevent them from excluding biological males from sports teams designated for biological females.

Before finalizing the Athletics NPRM, the Department must examine its proposal under the Spending Clause’s clear-statement rule. If the Department cannot demonstrate why its proposal passes this standard, it must withdraw the Athletics NPRM.

**D. Congress did not grant the Department authority under Title IX to preempt state law.**

In the Title IX Proposed Rule, ED proposed adding § 106.6(b), which would state, “*Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement. Nothing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination.”<sup>161</sup> The Proposed Rule explained that language would make “clear in a simple comprehensive statement that the Title IX regulations preempt *any* State or local law with which there is a conflict.”<sup>162</sup> Further, “[t]his clarification would ensure that the proposed regulations appropriately cover the full scope of Title IX while not extending further than the Department’s authority to promulgate regulations to effectuate Title IX.”<sup>163</sup>

While we agree state laws do not alleviate a recipient’s burden to comply with Title IX regulations to receive federal funding, Title IX regulations cannot preempt inconsistent or conflicting state laws. Title IX imposes strings on the receipt of federal funding. To the extent that an educational institution is unable to follow Title IX regulations due to oversight, choice, or a conflicting state law requirement, it would be unable to comply with the strings attached to receipt of federal funding. The appropriate response from ED is disallowance of federal funding. ED does not have the power under Title IX to preempt state laws. To the extent ED’s proposed regulations purport to preempt state law, they are “extending further than the Department’s authority” and contrary to law.

The Proposed Rule also stated that proposed § 106.6(b) would not “preempt a State or local law that provides greater protections to students and does not conflict with these regulations.”<sup>164</sup> It is unclear what the Department views as “greater protection to students.” State laws that ensure girls and women have access to sex-specific private spaces and sports teams free from biological males, regardless of gender identity, provide greater protection to female students.

If proposed § 106.6(b) is adopted (which it shouldn’t be), ED should make clear that it does not extend to the proposed athletics regulatory standard.

---

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> 87 Fed. Reg. 41569.

<sup>162</sup> 87 Fed. Reg. 41405.

<sup>163</sup> *Id.*

<sup>164</sup> 87 Fed. Reg. 41405.

**XIV. ED should clarify that tax exempt status is not federal financial assistance, subjecting an institution to Title IX.**

Current Title IX regulations define “federal financial assistance” as:

- (1) A grant or loan of Federal financial assistance, including funds made available for:
  - (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
  - (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
- (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
- (3) Provision of the services of Federal personnel.
- (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
- (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.<sup>165</sup>

Last year, two district courts have held that a private school which is tax exempt, and did not otherwise receive federal financial assistance, was nevertheless receiving federal financial assistance based on its tax-exempt status and thus subject to Title IX.<sup>166</sup> This is absurd. Under these strained rulings, any organization that Congress does not choose to tax could be subject to all federal spending legislation. ED should clarify that tax-exempt status is not “federal financial assistance” under Title IX and does not subject schools not otherwise receiving federal financial assistance to the proposed regulatory standard.

**XV. ED should consider alternatives to its proposed regulatory standard.**

ED should consider the following alternatives to its proposed regulatory standard:

- Not regulating as the current standard is sufficiently clear and better aligned with Title IX’s text and purpose.
- Adding a requirement that educational institutions consider and minimize the harm to biological females.
- Permit schools to make participation policies based on sports, not level of competition (i.e., varsity, junior varsity, C team).
- Allow schools to maintain their current sports policies under a grandfathered status.

---

<sup>165</sup> 34 CFR § 106.2(g).

<sup>166</sup> *E.H. v. Valley Christian Acad.*, 2:21-cv-07574-MEMF, 10 (C.D. Cal. Jul. 25, 2022) (“Accordingly, the Court holds that Valley Christian’s tax-exempt status confers a federal financial benefit that obligates compliance with Title IX.”); *Buettner-hartsoe v. Balt. Lutheran High Sch. Ass’n*, No. RDB-20-3229, 6 (D. Md. Jul. 21, 2022) (“The tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution. CPS cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX.”).

- Delay compliance of any final rule by applying the athletics regulation’s adjustment period or providing schools an entire school year to review, consider, and adopt any updates to their existing policies.
- Allow schools in states that have “saving women’s sports” laws to follow state law and not be found in violation of Title IX or have to forgo federal funding.

#### **XVI. ED should extend the comment period on the Athletics NPRM.**

It appears ED is attempting to minimize and cut out public input. Despite the norm under the pre-publication regulatory review process, rules of great policy significance, like the Athletics PRM, would be subject to review by nonpartisan economic experts in the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) for at least three months, and interested parties may request meetings to provide input the agency must consider before the regulations are unveiled as proposed (or final) rules.

But the Athletics NPRM was before OIRA for one week and no meetings occurred with the public. Indeed, we requested a meeting (and we can only assume others did as well), only to have our request ignored and then denied because OIRA’s review was “completed.” The auto-generated email informing me my meeting request was cancelled said, “We endeavor to accommodate all EO 12866 meeting requests.” We find this hard to believe as this is not the first time EPPC has had meeting requests denied or even a scheduled meeting (on a date of OIRA’s choosing) cancelled.<sup>167</sup>

Multiple groups have written to ED requesting a reasonable extension of time for the public comment period. Those requests should not be ignored. This is a significant and major proposal that will have massive impacts across the country and for millions of Americans. Considering ED short circuited the pre-publication review process and denied public participation at that stage, it is all the more important that ED extend the unusually short comment period for a total of 60-90 days to allow the public more time to weigh in on this important proposal.<sup>168</sup> Indeed, this proposal was an important enough issue that the Department saw fit to single out and propose regulations separately from the remained of the Title IX Proposed Rule.

#### **XVII. ED should hold finalization of the Title IX Proposed Rule until it completes review of the Athletics NPRM.**

The Title IX Proposed Rule would define discrimination “on the basis of sex” to include discrimination on the basis of “gender identity.” Under the proposed regulations, “preventing any person from participating in an education program or activity consistent with their gender identity would subject them to more than de minimis harm on the basis of sex and therefore be prohibited.”<sup>169</sup> Since school

---

<sup>167</sup> See Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review (Oct. 8, 2021), <https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/>; Mollie Hemingway, *New Details Confirm Biden Hijacked Regulatory Process to Benefit Planned Parenthood*, Federalist (Sept. 27, 2021), <https://thefederalist.com/2021/09/27/new-details-confirm-biden-hijacked-regulatory-process-to-benefit-planned-parenthood/>.

<sup>168</sup> Cf. Exec. Order 13563, 76 Fed. Reg. 3821, 3822-23 (Jan. 21, 2011) (“at least 60 days” is necessary to “afford the public a meaningful opportunity to comment”); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) (90 days is the “usual” length of time for public comments).

<sup>169</sup> 87 Fed. Reg. 41,535 (citing proposed § 106.31(a)(2)).

sports are considered “an education program or activity,”<sup>170</sup> the very text of the proposed regulations appear to require participation in sports be based on gender identity.<sup>171</sup>

Indeed, the Department of Justice (DOJ) under the Biden administration issued a statement of interest in a federal court case about a state law ensuring only biological females can participate in girls’ and women’s sports.<sup>172</sup> DOJ claimed that the law violates Title IX. It argued that *current* Title IX regulations do not “address how students who are transgender should be assigned to such teams” and do not “require, or even suggest” that schools assign students who identify as transgender to teams based on their biological sex. “[A]ny interpretation of Title IX’s regulations that requires gender identity discrimination would violate the statute’s nondiscrimination mandate,” the statement declares. It doesn’t get much clearer than that. DOJ’s statement exposes the Biden administration’s (and presumably the Department’s) true legal position: Title IX and current regulations require schools to permit participation in sex-specific sports on the basis of gender identity. (Translation: the sun is setting on female-only sports.)

Nowhere does the Title IX Proposed Rule explicitly state that participation in sex-specific sports must (or may) be based on biological sex. Indeed, there is no indication that schools can choose *not* to take gender identity into consideration.

Anything short of an explicit statement by ED that athletes’ gender identity does not apply to sex-specific school sports would be patently unfair to female athletes and antithetical to the 50-year legacy of Title IX. The Department’s failure to state its position outright in the Title IX Proposed Rule is not only politically cowardly, but also arbitrary and capricious. The Biden administration has already telegraphed in court its legal and policy position: Regardless of current or future regulations, when it comes to athletics, Title IX requires schools to privilege biological-males-who-identify-as-girls over female athletes.

It would be arbitrary and capricious for the Department to finalize the Title IX Proposed Rule without finalizing review of the Athletics NPRM. We ask that the Department conduct a thorough review of the Athletics NPRM *before* it finalizes the Title IX Proposed Rule. If ED chooses to move forward and finalize both interrelated rules, it should do so at the same time. Otherwise, ED will introduce more chaos and confusion regarding what athletic policies are permitted under Title IX regulations.

## Conclusion

We urge ED to abandon and withdraw the Athletics NPRM.

---

<sup>170</sup> 87 Fed. Reg. 41,400.

<sup>171</sup> The Title IX Proposed Rule contemplates that the Title IX Coordinator would ensure athletics comply with Title IX obligations. 87 Fed. Reg. 41424 (“Similarly, a Title IX Coordinator could have designees that oversee compliance with different aspects of the recipient’s Title IX obligations, such as those related to athletics....”). In responding to complaints, Coordinators are to consider the scope of the alleged sex discrimination, including “in connection with a specific athletic team,” and “take steps to repair an educational environment in which sex discrimination occurred, such as within a specific ... athletic team.” 87 Fed. Reg. 41,445, 41,447.

<sup>172</sup> *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D.W.V. June 17, 2021), <https://www.justice.gov/crt/case-document/file/1405541/download>.



Sincerely,

Rachel N. Morrison, J.D.  
Fellow and Director  
HHS Accountability Project  
Ethics and Public Policy Center

Mary Rice Hasson, J.D.  
Kate O'Beirne Senior Fellow and Co-Founder  
Person and Identity Project  
Ethics and Public Policy Center

Eric Kniffin, J.D.  
Fellow  
HHS Accountability Project  
Ethics and Public Policy Center