

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW Washington, DC 20202
Via <https://www.federalregister.gov>

May 15, 2023

Re: RIN Number: 1870-AA19 (Docket Number 2023-07601)

Dear Secretary Cardona:

I write in my personal capacity¹ to respond to the U.S. Department of Education's ("Department") Notice of Proposed Rulemaking, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletics Teams,"² ("NPRM," or "proposed rule") published on April 13, 2023.³ Thank you for the opportunity to offer this comment.

The Department proposes to amend its regulations implementing Title IX of the Education Amendments of 1972 ("Title IX")⁴ to set out a standard that would govern a recipient's adoption or application of sex-related criteria limiting or denying a student's eligibility to participate on a male or female athletic team consistent with that student's self-proclaimed gender identity.

The Department's proposed regulatory standard governing athletics is no minor modification of federal law. It is a significant change from decades of Title IX's application and promises to create a bureaucratic nightmare for any educational institution subject to its provisions.

The proposed regulation would ostensibly "clarify" Title IX's application to such sex-related criteria and reiterate the obligation of schools and other educational recipients (hereinafter collectively referred to as "schools") of Federal financial assistance from the Department that adopt or apply such criteria to do so in a manner that is consistent with Title IX's nondiscrimination mandate. Unfortunately, rather than clarifying Title IX's application to sex-based criteria in athletics, the proposed rule complicates it. And though the proposed rule has been billed as a "compromise,"⁵ proposed rule is anything but. Rather, it complicates the plain text of Title IX's longstanding athletics regulation with vague terms, an unworkable

¹ I have included my organizational affiliation for identification purposes only.

² 88 FR 22860, 34 CFR 106.

³ In July 2022, when ED issued a proposed Title IX rule that would, among others, expand Title IX's sex discrimination prohibition to prohibit discrimination based on gender identity, the Department promised it would issue a separate NPRM to address "whether and how" the Department 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." 87 FR 41390, 34 CFR 106, July, 2022.

⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., Pub. L. 92-318, as amended by Pub. L. 93-568, §3, 88 Stat. 1855.

⁵ Politico.com, Biana Quilantam, "Education Department unveils Title IX transgender sports eligibility rule," <https://www.politico.com/news/2023/04/06/education-department-unveils-title-ix-transgender-sports-eligibility-rule-00090894>, accessed May 8, 2023.

standard, a guaranteed conflict with contrary state laws, and balances the equities against the very girls and women who were at the heart of Title IX’s passage. For these reasons and more, the proposed rule cannot stand.

The Proposed Rule

Title IX’s mandate is simple:

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.⁶

Under Title IX’s current athletics regulation, originally promulgated in 1980,⁷ 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.”

The Department avers, however, that the current athletics regulation isn’t “sufficiently clear” to ensure Title IX’s nondiscrimination requirement is satisfied. The Department states that the proposed rule “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. This assertion ignores the plain letter of Title IX and its implementing regulations.

The Department’s proposed rule⁸ states:

- (b)(2) 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**, 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.

Consistent with the policy aims of the White House—the Department has conflated “sex” with “gender identity” in its proposed Title IX athletics rule. Its rule would bar schools from adopting or enforcing policies that categorically ban transgender students from participating on teams consistent with their gender identity, but it offers a caveat. That exception allows: “in some instances, particularly in competitive high school and college athletic environments, some schools [to] adopt policies that limit transgender students’ participation.” Further, the Department requires that there be a “direct, substantial relationship” between a recipient’s objective and the means used to achieve that objective. A school’s athletic participation criteria cannot rely on “overly broad generalizations” about the talents, capacities, or preferences of male and female students. The Department argues that “very few female student-athletes are transgender” and “transgender students do not necessarily have greater physical or

⁶ Title IX, supra n. 1

⁷ 34 CFR § 106.41

⁸ 88 FR 22860, 34 CFR 106, p. 13 (April 13, 2023). According to the NPRM, the proposed standard was informed by the current Title IX regulation governing single-sex classes (34 CFR § 106.34), and Equal Protection Clause caselaw, and is “consistent” with Title IX’s nondiscrimination prohibition and the framework of the current athletics regulations.

athletic ability than cisgender students that would affect cisgender students' equal opportunity to participate." According to the Department, therefore, 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—and therefore, cannot be an "important educational objective."⁹

Such a cavalier dismissal of the demonstrable physical advantages biological male students have over biological female students ignores the extensive weight of evidence. Even testosterone suppression therapy does nothing to change in any meaningful way the faster muscle twitch response, greater bone density, greater muscle mass, and higher lung capacity that biological boys possess when compared to girls. Such biological distinctions, which give biological males a decided, if not overwhelming, advantage¹⁰ over females in athletic competition, cannot be suppressed and provide the imperative for the original Title IX athletics rule that was adopted decades ago.

For example, in a study¹¹ by two Duke University Law School professors, comparing Olympic champion sprinter Allyson Felix's 400 meters lifetime best of 49.26 to that of men and boys around the world, the pubescent and adult males of all ages outperformed her more than 15,000 times in 2017 alone. To envision these competitive advantages in real time, we need look no further than "Lia" (formerly Will) Thomas who last year clinched the 500-meter freestyle NCAA swimming championship for the women's team at the University of Pennsylvania. During his two years of competing on the men's swimming team at that university, Will Thomas had been ranked a less-impressive 462nd in the nation among his male peers.¹²

Further, as stated in the Preamble to the Title IX Final Rule, published by the Department of Education on May 19, 2020:¹³

⁹ The American public disagrees. A 2022 Washington Post poll found that 55% of Americans are opposed to allowing biological men and boys to compete with women and girls in high school sports, and 58% opposed to it for college and professional sports. See: Tara Bahrapour, Scott Clement, and Emily Guskin, "Most Americans oppose trans athletes in female sports, poll finds," Washington Post, July 22, 2022, available at <https://www.washingtonpost.com/dc-md-va/2022/06/13/washington-post-umd-poll-most-americans-oppose-transgender-athletes-female-sports/>.

The same poll found that more than two-thirds of Americans (68%) say that boys identifying as girls would have a competitive advantage over other girls if they were allowed to compete with them in youth sports.

¹⁰ Andrew Lathan, *Physiological Differences Between Male and Female Athletes*, Houston Chronicle online, June 28, 2018, available at: <https://work.chron.com/physiological-differences-between-male-female-athletes-20627.html>

¹¹ Doriane Lambelet Coleman and Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE CTR. FOR SPORTS LAW & POL'Y (2018), available at <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf>.

¹² Associated Press, "Penn Swimmer Lia Thomas Becomes First Trans Athlete to Win Division I National Title," Sports Illustrated, March 17, 2022, available at: <https://www.si.com/college/2022/03/17/lia-thomas-first-trans-athlete-national-championship-swimmer>. See also, Hank Berrian, "'Her Rankings ... Have Bounced From #462 As A Male To #1 As A Female': 16 Lia Thomas Teammates Sign Letter Asking Penn Not To Sue NCAA, Bar Thomas From Competing," Daily Wire, February 24, 2022, available at <https://www.dailywire.com/news/her-rankings-have-bounced-from-462-as-a-male-to-1-as-a-female-16-lia-thomas-teammates-sign-letter-asking-penn-not-to-sue-ncaa-bar-thomas-from-competing>.

¹³ U.S. Dep't. of Educ., Office for Civil Rights, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Final Rule, 85 Fed. Reg. 30,178 (May 19, 2020).

In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department’s justification for not allowing schools to use “a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex” was that “if progress is measured by determining whether an individual can perform twenty-five pushups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex.”

As for what the Department would consider “important educational objectives” sufficient to pass muster under its proposed rule, the Department says that “ensuring fairness in competition and prevention of sports-related injury” are examples. The examples provided by the Department that *are not* important educational objectives, however, constitute a longer list:

- 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

While other “important educational objectives” must exist, the Department fails to identify them. Instead, it proposes to leave their identification and the determination of their “substantial relation” to a school’s athletic criteria (while minimizing harm to transgender athletes) up to each school under threat of federal funding loss. Based on the Department’s cited authority interpreting “sex” to include “gender identity,” and consistent with the administration’s expansive approach to federal protections based on one’s “gender identity,” the rule promises nothing short of a bureaucratic nightmare for schools that find the protection of girls and women athletes to be an “important educational objective.”

Sex-Based Criteria Under Title IX

Among others, the Department has asked for specific comments on its proposed rule relative to sex-based athletic eligibility criteria, including:

22875 – [W]hether any sex-related eligibility criteria can comply with this proposed regulation when applied to students in these earlier grades and, if so, the types of criteria that may comply with the proposed regulation; and

22878 - Whether any alternative approaches to the Department’s proposed regulation would better align with Title IX’s requirement for a recipient to provide equal athletic opportunity regardless of sex in the recipient’s athletic program as a whole.

Such an “alternative approach” to the proposed rule would be to permit Title IX’s application to the athletic programs of federally funded schools according to the plain letter of the statute and its attendant regulations by maintaining sex separation in athletic contests. Such an approach ensures the clarity the Department seeks; avoids the costs sure to arise from redrafting school policies, negotiating

athletic association regulations, and defending against litigation; and protects the hard-won gains of the women’s movement in leveling the educational playing field.¹⁴

In 1971, a Connecticut judge proclaimed: “Athletic competition builds character in our boys. We do not need that kind of character in our girls.” It was comments like these that helped fuel the groundswell of support for the protection of women’s educational opportunities during the waning days of the sexual revolution. It took a House and Senate Conference Committee several months to work through the more than 250 differences between the House and Senate versions of education bills until Title IX and the provision against sex discrimination was born. Congress had ample opportunity to expand the provision against sex discrimination to include gender identity or transgender status, but chose not to do so.¹⁵

As justification for its proposed athletics rule, the Department cites to the Supreme Court’s 2020 opinion *Bostock v. Clayton County*,¹⁶ and two executive orders: (1) EO 13988 “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation”¹⁷ and (2) EO 14021 “Ensuring and Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.”^{18 19} Taken together, the Department believes these citations prove that the proposed rule is consistent with Title IX’s text, history, and purpose.

¹⁴ See, Celebrating the 25th Anniversary of Title IX, 143 Cong. Rec. 4218 (1997): “The House Education and Labor Committee had a large body of evidence of discrimination against girls and women in our education system. Since I came to the Congress and the committee in 1965 the committee had been involved in hearings related to equal educational opportunities for girls and women. We scrutinized textbooks which only portrayed successful men, admissions policies which excluded women from graduate and professional schools, and vocational education courses.”

¹⁵ Title IX’s origins lay incontrovertibly in the women’s movement, as evidenced by the extensive congressional record indicating its mission to equalize educational opportunities for women. See, Celebrating the 25th Anniversary of Title IX, 143 Cong. Rec. 4218 (1997): “The House Education and Labor Committee had a large body of evidence of discrimination against girls and women in our education system. Since I came to the Congress and the committee in 1965 the committee had been involved in hearings related to equal educational opportunities for girls and women. We scrutinized textbooks which only portrayed successful men, admissions policies which excluded women from graduate and professional schools, and vocational education courses.”

¹⁶ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

¹⁷ Executive Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

¹⁸ Executive Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021).

¹⁹ The Department also cites *A.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *14 (S.D. Ind. July 26, 2022), *vacated as moot*, (S.D. Ind. Jan. 19, 2023); *Hecox v. Little*, 479 F. Supp. 3d 930, 943, 988 (D. Idaho 2020), *appeal argued*, No. 20–35815 (9th Cir. Nov. 22, 2022); and *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618–19 (4th Cir.), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021); 2022 WL 2951430, at *7–11. All three cases relied erroneously on the same *Bostock* analysis the Department does.

But the Department is also forced to wrestle with *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc) in which a panel of the 11th Circuit Court of Appeals determined that a school board’s policy of separating school bathrooms based on biological sex did not violate Title IX or Equal Protection principles. The Department distinguishes *Adams* by arguing that the court’s failure to consider the “the distinct sex-based harms that such [transgender] students suffer from...exclusion” from bathroom use in accordance with their gender identity is contrary to the Department of Justice’s conclusions on Title IX.

Currently pending before the Supreme Court is the state of West Virginia’s application to vacate an injunction from the 4th Circuit Court of Appeals on its sex-separated sports law in *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23–1078 (4th Cir. Feb. 22, 2023), Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit, *W. Va. State Bd. of Educ. v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023). The Supreme Court therein might

Nothing could be further from the truth.

In *Bostock*, the Supreme Court determined that “sex discrimination” within the scope of employment under Title VII of the Civil Rights Act of 1964 also included discrimination on the basis of sexual orientation and transgender status. *Bostock* is the Department’s primary proffered authority for the proposed rule. But the Department ignores the clear caveats and limitations in the *Bostock* opinion itself, the distinctions between Title VII and Title IX, and the wealth of congressional history on Title IX’s enactment and purpose: to provide girls and young women equal educational opportunity.

In his majority opinion in *Bostock*, Justice Neil Gorsuch began, “We proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.”²⁰ At no point did the majority substitute sex for gender identity. Instead, the Court noted, “An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because *it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.*”²¹

Gorsuch continued by addressing behaviors generally expressed by each sex:

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. *Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth...But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex.* Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.²²

Though *Bostock* has been cited endlessly for the proposition that the decision demands that all civil rights law be altered to reflect sexual orientation and transgender status as stand-ins for sex (a favorite argument of this administration), the decision does no such thing. Indeed, as though to remove any doubt that sex and transgender status were interchangeable or co-equal, the Court explicitly limited its holding to Title VII—wherein traits or actions tolerated in one sex over another are a form of impermissible sex discrimination. Specifically, Gorsuch stated:

finally clarify Title IX’s provisions as relates to sex, gender identity, and the state’s legitimate interest in legislating on education. The Court’s determination will no doubt impact the Department’s proposed rule.

²⁰ *Bostock*, 140 S.Ct. at 1739.

²¹ *Id.* at 1741 (emphasis added).

²² *Bostock*, 140 S.Ct. 1741–1742 (emphasis added).

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether 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.”²³

The Court’s Title VII precedent supports the proposition that relying in even small part on an individual’s underlying biological sex (as with the case of sexual orientation or transgender status) is prohibited within an employment setting. Yet, unlike Title VII, a “sex-prohibitive” anti-discrimination law, Title IX differs significantly in its text, purpose, operation, and in certain of its applications, including athletics. It is “sex-affirmative,” requiring consideration of a student’s biological sex in a set of limited exceptions. A sex binary—male v. female—is the foundation upon which the entire statute’s operation rests. Title IX’s use of the words “both” and “either” to address educational disparities within its regulations reinforces the understanding that there are only two sexes, and that the opportunities for both must be equal under the law.

Not only does the longstanding Title IX athletics regulation permit schools to “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,” it also instructs universities to consider male or female sex in their distribution of athletic scholarships.²⁴ Under the Department’s reading of *Bostock*,²⁵ however, any school receiving direct or indirect federal funding would not only have to open all athletic teams to students based on gender identity, but it would have to alter any associated athletic spaces—such as locker rooms and overnight housing accommodations for sports teams. Such a dangerous interpretation sacrifices the safety, privacy, and equality of girls and women to appease a pet policy agenda, without any demonstrated necessity. Such an interpretation also ignores the extensive congressional record on Title IX’s purpose, the law’s specific provision of separate spaces to protect the privacy and safety of girls and women—those for whom the law was passed—and ignores the Supreme Court’s restriction of its holding in *Bostock* to Title VII alone.²⁶

Title IX leveled the educational playing field for girls and women, has increased women’s participation in high school sports 10 times over,²⁷ and was hailed as a feminist triumph when it was enacted into law in 1972. In high school athletics alone, the rate of girls’ participation in 2016 was more than 10 times what

²³ Id. at 1737.

²⁴ 34 C.F.R. §§ 106.41(b), and 106.37(c).

²⁵ In both the current NPRM, and the NPRM on Title IX from July, 2022. See n. 2, *infra*.

²⁶ Without realizing it, the Department has implicitly conceded that *Bostock* does not apply. By providing the *option* of adopting sex-specific criteria and allowing a *balancing of interests* for “important educational objectives,” the Department recognizes that sports (as in Title IX) and employment (as in Title VII) are inherently different. By conceding also that males and females are “unique,” this, too weakens the Department’s application of *Bostock*: such a characterization considers the unique strengths and abilities of both sexes—something impermissible under a *Bostock* rationale, or any reading of Title VII.

²⁷ Susan Ware, *Title IX: A Brief History with Documents* vi, 23 (2007).

it was prior to Title IX's passage—representing an increase of over 1000 percent.²⁸ But in a painful twist of irony, the same law that once provided a platform for female advancement is set to be sacrificed to a political agenda under the guise of “equality.” Under this impending Title IX rule change on athletics, the sex discrimination of old is new again.

Regulatory Shortcomings: Harms and Process

The Department has also asked for specific comments on its proposed rule relative to its clarity, including:

22888 - Are the requirements in the proposed regulation clearly stated? And does the proposed regulation contain technical terms or other wording that interferes with their clarity?

A fulsome response to this question requires addressing the Department's underlying assumptions in turn.

Benefits v. Harms

The Department claims two benefits of the proposed rule: (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.” Without the rule, the Department claims that “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.”

The NPRM states that “There is also evidence suggesting that allowing transgender children to socially transition (*i.e.*, present themselves in everyday life consistent with their gender identity) is associated with positive mental health outcomes for those children...[and] ensuring that transgender students have the opportunity to participate on male or female teams consistent with their gender identity can be part of a transgender student's social transition and is thus a crucial benefit to those students' health and well-being.”

However, the NPRM is devoid of reference to any potential harm certain to be experienced by women and girls who may find themselves with a diminished ability to obtain athletic records, championships, athletic scholarships, or even playing time due to the inclusion of a biological male on their sports team. Indeed, the Department has clearly weighted the scales in its proposed rule against the interests of biological girls and women.²⁹ Under threat of loss of federal funding and with no concrete calculus to

²⁸ Dr. Amy S. Wilson, National Collegiate Athletic Association, *45 Years of Title IX: The Status of Women's Intercollegiate Athletics* (2017), available at: https://www.ncaa.org/sites/default/files/TitleIX45-295-FINAL_WEB.pdf.

²⁹ The Department's failure to conduct studies on the physical and psychological impact experienced by girls when playing with or against biological boys before proposing the rule argues for the extension of the comment period to at least 90 days. Despite repeated requests from multiple organizations and members of Congress to do just that, the Department has flatly declined an extension. A discussion of the research evidencing the value in sex-separated educational opportunities, including athletics, is beyond the scope of this comment.

utilize when determining eligibility for athletics—in addition to stressing that harms to participation for transgender students must be minimized and that “broad assumptions” about “cisgender” student athletic abilities are illegitimate—the Department has all but made the decision for schools while misleadingly portraying its proposed rule as one aimed at “increasing flexibility.”

A Hobson’s choice emerges. School subject to the proposed rule can: (1) lose federal funding by keeping girls and women’s sports separated by sex, as intended by the drafters of Title IX or (2) subject themselves to the risk of substantial personal injury judgments by allowing participation on women’s athletic teams based on gender identity.³⁰

The Department estimates that the cost to recipients over 10 years would be in the range of \$23.4 million to \$24.4 million, a notably low estimate considering the number of schools that currently receive federal funding, how much time would be required to evaluate and recalibrate existing athletic policies, and training that would also be required on any new policies that are ultimately enacted. Despite this, the Department has unilaterally concluded that the benefits of its proposed rule “far outweigh the costs.”

Process

It is highly questionable whether the Department is acting within the scope of its authority in promulgating the Title IX athletics rule at all.³¹

In 1974, Congress passed an amendment to Title IX introduced by Senator Jacob Javits (R-NY),³² which directed the U.S. Department of Health, Education, and Welfare (HEW) to issue a regulation that contained, “with respect to intercollegiate athletic activities, reasonable provisions considering the

³⁰ Injuries sustained by girls and women during athletic contests with transgender athletes are not the stuff of mere speculation. Significant bodily harm to young women in sporting events with transgender athletes is already well-documented. See, e.g., Paulina Dedaj, *High school volleyball player says she suffered concussion after being injured by trans athlete, calls for ban*, Fox News, April 21, 2023 available at <https://www.foxnews.com/sports/high-school-volleyball-player-says-suffered-concussion-being-injured-trans-athlete-calls-ban>; Max Sherry, *Local football league under fire after transgender athlete injures female player*, Sport Bible, April 17, 2023, available at: <https://www.sportbible.com/football/league-under-fire-after-transgender-athlete-injures-female-player-609233-20230403>; Holt Hackney, *Professor Maintains that Trans Athletes Causing Serious Injuries to Girls*, Sports Law Expert Blog, December 22, 2022, available at: https://sportslawexpert.com/2022/12/12/professor-maintains-that-trans-athletes-causing-serious-injuries-to-girls/?utm_source=rss&utm_medium=rss&utm_campaign=professor-maintains-that-trans-athletes-causing-serious-injuries-to-girls.

³¹ Some scholars have so argued. See, e.g., Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003), available at: <http://scholarship.law.marquette.edu/sportslaw/vol14/iss1/21>.

³² The Javits Amendment was a direct response to a contemporaneous proposal from Senator John Tower (R-TX) to exempt revenue-producing sports from determinations of Title IX compliance. Representative Patsy Mink (D-HI), a prime sponsor and author of Title IX, clarified that the athletics regulation correctly interpreted Congress’ intent to include sports within the reach of equal educational opportunity, and contended that critics were simply “rearguing their opposition to the law itself rather than to the substance of the regulations.” See: Hearing on H. Con. Res. 330 Before the House Subcomm. on Equal Opportunities of the Comm. on Educ. & Labor, 94th Cong., 58 (1975). Sen. Tower’s proposal was rejected, Senator Javits’ Amendment was adopted, and the final Title IX rule—including athletics—was adopted in 1975.

nature of particular sports."³³ The amendment made it perfectly clear that Congress intended Title IX to cover athletics for both sexes at all federally funded schools.

HEW thereafter promulgated all final regulations—including the regulation on athletics—to implement Title IX in 1975. These were to go into effect "unless the Congress shall, by concurrent resolution, find that the standard, rule, regulation, or requirement is inconsistent with the act from which it derives its authority and disapprove such standard, rule, regulation, or requirement."³⁴ According to the congressional record, the purpose was to determine "if the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood."³⁵ Extensive hearings and debate specifically on the athletics regulation followed, and interested stakeholders submitted substantial evidence and testimony.³⁶ The clear determination was that the regulation writers had indeed understood Title IX the same way Congress had: athletics were to be included within Title IX's provisions.

Therefore, in contrast to the regulatory process so often employed by this administration (and specifically by the Department), Congress utilized its *express opportunities* in 1974 (with adoption of the Javits Amendment) and 1975 (with hearings confirming the athletics regulation's meaning and the congressional intent behind the Javits Amendment) to decide whether the proposed athletics regulation had properly reflected its intent. By adopting the Javits Amendment and holding hearings that reflected the regulation's applicability specifically to female inclusion in athletics, Congress likewise divested the Department of any further authority to create or alter existing regulations on athletics.

At its creation in 1979, the Department of Education then assumed responsibility for enforcement of Title IX³⁷ adopting the Title IX regulations promulgated by HEW—including the athletics regulation—virtually unchanged.³⁸

Assuming, for the sake of argument, the Department even possesses the authority to regulate athletics, the proposed rule fails to meet its regulatory burden under the Administrative Procedure Act (APA),³⁹ which governs all agency rulemaking.

The Department has divorced the current proposed rule on athletics from the larger proposed rule on Title IX that was released in July 2022.⁴⁰ But a proposed rule on one portion of Title IX, without reference to the remainder of that same law, and the failure to address the interrelatedness or intended cooperation of both proposed rules raises the specter of a violation under the APA.

³³ Sex Discrimination Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484.

³⁴ 20 U.S.C. § 1232(d)(1).

³⁵ Sex Discrimination Regulations: Hearings Before the House Subcomm. on Postsecondary Educ. of the House Comm. on Educ. & Labor, 94th Cong. 1 (1975) (statement of Rep. O'Hara, Chair of the Subcommittee).

³⁶ See *id.*; *Hearing on H.R. Con. Res. 330 Before the House Subcomm. on Equal Opportunities of the Comm. on Educ. & Labor*, 94th Cong. (1975); *Prohibition of Sex Discrimination: Hearings Before the Senate Subcomm. on Educ. of the Comm. on Labor & Pub. Welfare*, 94th Cong. (1975).

³⁷ 20 U.S.C. § 3441 (a)(3)(2000).

³⁸ Department of Education Organization Act, 45 Fed. Reg. 30,802 (May 9, 1980) (later codified at 34 C.F.R. pt. 106.41).

³⁹ 5 U.S.C. 551 et seq.

⁴⁰ See *supra*, n. 2.

For example, the July 2022 proposed rule asserts that “separation based on gender identity is more than a de minimis harm,” and therefore constitutes unlawful sex discrimination under Title IX. But it is unclear how such a “de minimis harm” standard applies (or doesn’t apply) to the April 2023 proposed rule. In certain instances, both rules might even conflict.

By way of illustration, a college is, under the July 2022 proposed rule, required to keep all bathrooms gender-neutral in order to prevent sex discrimination on the basis of “gender identity.” But a college may, in the “important educational interest” of preventing injuries, keep its college sports sex-separated under the April 2023 proposed rule which addresses athletics alone. Under this scenario, are schools to conclude that the Department is unconcerned with the privacy interests of young women, but sometimes interested in preventing their injuries because preventing injuries can constitute an “important educational interest”? Such a seeming contradictory scheme once again leaves schools to “figure it out,” and smacks of an APA violation: a rule that is not the result of “reasoned decision making,” and that has all the hallmarks of being both “arbitrary” and “capricious” (as discussed, *supra*). The proposed rule has other weaknesses, not the least of which is that it is populated with vague and undefined terms that may be interpreted differently by different schools—such as “important” or “substantial.” The Department requires that schools must assess all athletic criteria separately for each sport, level of competition, and grade or education level, but clarifies that in elementary and middle school, for example, criteria that categorically exclude all transgender girls and women from participating on any female athletic teams cannot satisfy the proposed regulation. As a result, young women progressing through school and eventually into high school would begin their athletic journey by playing with and against biological boys, only to switch to an all-girls team in high school and beyond.⁴¹ The mental, physical, and educational impacts (on both boys and girls) of such a requirement are not addressed in the proposed rule and likely have not even begun to be assessed.

Such a contortionist reading of a 50-year is laughable at best, and ultra vires at worst.

In all APA rulemaking, agencies are required to “engage in reasoned decision-making, and... to reasonably explain...the bases for the actions they take and the conclusions they reach.”⁴² All agency actions are presumptively reviewable and will be set aside if they are “arbitrary” or “capricious.”⁴³ A “rule is arbitrary and capricious if (1) the agency ‘has relied on factors which Congress has not intended it to consider’; (2) the agency ‘entirely failed to consider an important aspect of the problem’; (3) the agency’s explanation ‘runs counter to the evidence before the agency’; or (4) the explanation ‘is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’”⁴⁴ Although reviewing courts are not entitled to “substitute [their] own judgment for that of the agency,”⁴⁵ neither are courts permitted to “rubber stamp” agency actions. Instead, courts “must ensure that the agency considered all of the relevant factors.”⁴⁶

⁴¹ This, of course, assumes that the school can prove that maintaining sex-segregated teams is an “important educational objective” sufficient to dodge a Title IX complaint and avoid the heavy hand of the Department’s intervention.

⁴² *Bhd. of Locomotive Eng’rs & Trainmen v. Fed. R. R. Admin.*, 972 F.3d 83, 115 (D.C. Cir. 2020) (quoting *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891, 1905, 207 L.Ed.2d 353 (2020)) (cleaned up).

⁴³ *Regents of the Univ. of California*, 140 S. Ct. at 1905; 5 U.S.C. § 706(2)(A).

⁴⁴ *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 934 F.3d 649, 663 (D.C. Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

⁴⁵ *Am. Bankers Ass’n*, 934 F.3d at 663 (internal quotation marks omitted).

⁴⁶ *Oceana, Inc. v. Ross*, 920 F.3d 855, 863 (D.C. Cir. 2019).

The Department is not entitled to base its regulation on “unsupported speculation,” but instead must provide some “factual basis for this belief” that transgender athletes are being restricted from athletic participation in federally funded schools.⁴⁷ And the Department does little, even in the abstract, to explain the necessity of permitting transgender scholastic athletes to participate according to their gender identity, rather than biological sex. It’s “conclusory statements” about the need for the rule “do not suffice to explain the [Department’s] decision.”⁴⁸

The Department’s failure to consider significant issues—such the interests of women and girls in maintaining sex-segregated athletics, their reliance interest on the Department’s longstanding interpretation of Title IX in protecting those interests, and the increased complexity and costs associated with a school’s administration of its athletic programs—is an utter failure of reasoned decision making under the APA, which in and of itself ought to be sufficient to invalidate the proposed Title IX regulation altogether.

Federalism Concerns & State Impact

The Department has asked for comment specifically related to the following:

22891 - Federalism: Executive Order 13132 requires the Department to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. “Federalism implications” means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulation—§ 106.41(b)(2)—may have federalism implications. We encourage State and local elected officials to review and provide comments on this proposed regulation.

Currently, at least 20 states have policies restricting transgender students from playing on teams aligning with their gender identities.⁴⁹ While there is no explicit preemption language in the proposed Title IX rule, it is clearly intended to preempt state laws banning athletic participation according to gender identity.⁵⁰

The Department does not possess carte blanche authority to invalidate whatever state law it pleases. To begin, a regulation that expressly pre-empts state law is inherently dubious; if an agency purports to wield the power to supplant valid state laws, it should be able to ground its assertion in clear statutory language demonstrating that Congress, in fact, gave the agency that power. A state’s inherent sovereignty to legislate in the area of education should not be lightly displaced; if it must be, it should be by Congress, not an administrative agency. Agencies have only the authority given to them by Congress; they cannot impose mandates of “vast economic and political significance” that lack clear statutory

⁴⁷ See *New York v. United States Dep’t of Homeland Sec.*, 969 F.3d 42, 83 (2d Cir. 2020).

⁴⁸ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016).

⁴⁹ Movement Advancement Project, “Bans on Transgender Youth Participation in Sports,” https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans, accessed May 8, 2023.

⁵⁰ The Biden Administration has repeatedly emphasized its commitment to “combatting” what it calls “legislative attacks on transgender kids at the state level.” See White House, Fact Sheet: Biden–Harris Administration Advances Equality and Visibility for Transgender Americans (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/fact-sheet-biden-harris-administration-advances-equality-for-transgender-americans/>.

authority.⁵¹ Under the aegis of a longstanding federal prohibition against sex discrimination in education, the Department claims the authority to shackle state schools to an interpretation of that law favoring gender identity in scholastic sports over biological sex, even where contrary state law clearly forbids it. That violates core principles of federalism and renders any finalized rule an ultra vires act.

The outcome of a finalized rule—the unilateral invalidation of the duly enacted laws of 20 states—would be nothing short of extraordinary. The Department’s strongarming of states and schools through unilateral statutory expansion is even more egregious considering the U.S. Supreme Court’s recent reassertion in *Cameron v. EMW Women’s Surgical Center, P.S.C.*, that “[p]aramount among the States’ retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law.”⁵² A state’s “opportunity to defend its laws in federal court” and to exercise its sovereign power to enact laws governing its own citizens “should not be lightly cut off.”⁵³ After all, “a State ‘clearly has a legitimate interest in the continued enforceability of its own statutes.’”⁵⁴ With such a conflict between the law in 20 states and this proposed federal regulation, federalism concerns abound. The Supreme Court has continually expressed a commitment to the sovereign dignity of the states, particularly on matters such as education that are delegated to the states under the 10th Amendment.⁵⁵

Conclusion

When agencies seek to enact transformative regulations, they must respect the manifest intent of Congress, the procedural restraints imposed by the APA, and the delicate balance of state–federal power. The Department has plainly failed to do so here. The Biden Administration’s overhaul of a decades-old education law and its implementing athletics regulation is both unnecessary and for the reasons stated herein, legally deficient. In proposing that each school interpret the Department’s athletic eligibility criteria as it sees fit, while weighting the scales in support of gender identity over biological sex and rendering the duly enacted laws of 20 states null and void, the proposed rule falls under its own weight.

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⁵¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

⁵² *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1011 (2022).

⁵³ *Id.*

⁵⁴ *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986)).

⁵⁵ U.S. Const. amend. XIV: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”