



May 15, 2023

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202
[submitted electronically via rulemaking portal]

RE: 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 Athletic Teams, Docket ID ED- 2022-OCR-0143

Dear Secretary Cardona,

Thank you for the opportunity to comment regarding the Department of Education’s (“the Department,” “ED”) proposed Title IX athletics regulation. The proposal will severely undermine female athletics in ways that directly contradict the express purpose of Title IX of the Education Amendments of 1972. We strongly urge major changes if the Department does not abandon its Title IX regulatory activity altogether.

The proposed rule limits consideration of biological sex in athletics eligibility policies (“biology-conscious policies”) for sex-separate programs at K–12 schools and colleges that receive federal funding to a narrow set of circumstances. ED has asserted that biology-conscious policies must involve a sufficiently “important educational objective,” but concerningly, ED is quite vague in articulating what constitutes such an objective. This will lead to arbitrary and inconsistent enforcement actions by the Office of Civil Rights (OCR) as well as eligibility policies that vary widely from state or state, college to college, and school district to school district. Under the proposal, recipient schools will also lack the authority necessary to establish policies that ensure the safety of female athletes. Efforts to comply with it will likely expose female athletes to undue risks of injury, sexual assault, and sexual harassment.

The proposed rule will also force schools to adopt policies that reduce the athletic opportunities available to biological female athletes. As the number of natal males competing as women increase—which, to be clear, is a core objective of this rulemaking—female records will fall, scholarships and competitive roster positions on women’s teams will be seized by male athletes, team dynamics will shift away from community and camaraderie, and young girls will be discouraged watching boys dominate female competitions. The proposal also creates strong incentives for schools to shift their athletics program portfolios to prioritize sports in which natal male athletes derive fewer competitive benefits from male puberty to maximize the number of sports trans girls

and women can compete in. This will also raise legitimate compliance issues with Title IX as it has traditionally been understood and enforced.

The America First Policy Institute (AFPI) also believes that the regulation exceeds the Department's authority in several ways: it ignores the clear, ordinary public meaning of "sex" in the authorizing statute; it relies on a misapplication of *Bostock v. Clayton County*; and it is an exercise of undelegated authority that purports to answer a "major question" of the kind addressed by *West Virginia v. EPA*.

AFPI's Interest

The America First Policy Institute (AFPI) is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, American military superiority, foreign-policy engagement in the American interest, freedom of conscience, and the primacy of American workers, families, and communities in all we do. In AFPI's view, it is the mandate of policymakers to advance and serve these policy interests above all others. To this end, AFPI affirms and celebrates the American experiment—not as an aesthetic act but as a moral statement. AFPI aims to promulgate American values in our educational institutions, laws, and culture. AFPI does this by disseminating the truth about the American Founding, our shared history, and the principles that underlie our constitutional republic. One of AFPI's core priorities is ensuring that America is a nation of values that can build and prosper. That's AFPI's public policy interest in the Title IX Athletics Notice of Proposed Rulemaking (NPRM), instrumental to a virtuous, free America. These comments explain why the NPRM should not be adopted and why the regulation is bad policy and contrary to the law.

Authors

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- 1. The proposed regulation does not establish a workable definition of "important educational objective" (Sec. 106.41), making it difficult to know when schools can consider biological sex in their athletics eligibility criteria.**

The proposed regulation prevents recipient schools from establishing criteria for limiting participation in athletics to male or female athletes (based on biology or reproductive function) except when the policy is "substantially related to the achievement of an important educational objective." The Department "anticipates that a recipient might assert fairness in competition or prevention of sports-related injury as an important educational objective in its athletics programs,

particularly in competitive athletic programs.”¹ And yet the Department does not explain that such restrictions are reasonable because natal male athletes derive enormous competitive advantages (on average) from male puberty. (Instead, ED presents this scientific fact as an opinion ventured by some stakeholders that has also been expressed by federal courts).²

In its discussion of the “substantial relationship requirement,” however, the Department explains that “criteria that categorically exclude all transgender girls and women from participating on any female athletics teams... would not satisfy the proposed regulation because, in taking a one-size-fits-all approach, they rely on overbroad generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply.”³ This creates a serious interpretative problem. Without a discussion of the scientific research documenting the performance advantages male puberty conveys to athletes, and when they translate into size and strength advantages that make fairness and safety concerns “substantial,” it will be difficult for schools to know what kind of policies the Department will allow. In which sports, and at what levels, will ED agree that there is a “substantial” relationship between biology-conscious eligibility criteria and an ED-approved interest in protecting girls and women in competition? As a result of this gap, OCR will be empowered to make its own determinations based on considerations not addressed by the regulation, even though they could easily be settled now.

A rule that discourages a particular practice, allowing it only under conditions that ED defines very loosely, imposes arbitrary and capricious requirements on recipient schools. And it unduly empowers OCR investigators to issue a range of inconsistent determinations even though it would be relatively simple to establish consistent and detailed criteria. ED should do so now. At a minimum, the Department should describe the existing state of research regarding the size and strength advantages natal male athletes derive from an androgenized body, as well as research describing how these advantages manifest in various sports and at various ages.⁴ One study of elite male and female athletics performance found, “Just in the single year 2017, Olympic, World, and U.S. Champion Tori Bowie’s 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys.” Similar performance disparities were recorded in other sports; in some track and field events, hundreds of boys under 18 outperformed the best adult female result posted in the study year.

ED should build on this to develop a more comprehensive analysis to inform more specific guidance about how ED understands—and how it will enforce—the “substantial relationship requirement.” By providing this guidance, ED will help schools craft policies formed through “reasoned analysis rather than through the mechanical application of traditional... assumptions,” as required by the proposal.⁵

Without this specificity, OCR is likely to make inconsistent determinations when it investigates school and college policies, respecting the kinds of biology-conscious criteria it permits and the rationale it judges sufficiently compelling to justify such criteria. This leaves too much to sub-

¹ 34 CFR Part 106, p. 22872.

² *Ibid.*, p. 22873.

³ *Ibid.*

⁴ Coleman, D., and Shreve, W. (n.d.). Comparing Athletic Performances: The Best Elite Women to Boys and Men. Duke Law: Center for Sports Law and Policy. Retrieved May 13, 2023 from <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf>

⁵ 34 CFR Part 106, p. 22874.

regulatory guidance and the judgment of individual investigators and will likely lead to immense variation in the rules governing student participation in athletics competition from college to college, school district to school district, and state to state—an outcome the Department should like to avoid.

2. The Department’s definition of “important educational objective” is too narrow and will unnecessarily expose female athletes to injury, sexual assault, and sexual harassment.

Biological female athletes are often uncomfortable competing against or sharing intimate facilities with natal male athletes (who often have functional sexual organs). For female victims of sexual violence—who were once an important concern of Title IX regulations—being forced to share intimate facilities with biological male athletes can be re-traumatizing. And yet, ED’s proposal will force some women who have been victimized by violent men to share changerooms with athletes in a state of undress whose male genitalia remain intact—as long as those men say they identify as female. Similarly, rules that force or encourage schools to open women’s bathrooms, changerooms, and hotel rooms on overnight trips to natal male athletes will provide opportunities for sex offenders to victimize female athletes. This is not merely speculative. It has already happened.⁶ And yet, the Department does not discuss these scenarios in any detail. ED can rectify this by including a review of the research literature regarding the attitudes of sexual assault victims toward being forced to share intimate facilities with natal males, including strangers. The research literature regarding trauma triggers for survivors of sexual assault and abuse should also be reviewed to test the wisdom of federal regulations that force schools to allow natal males to share intimate facilities with girls and young women, even where female athletes object to it. If no changes are made in light of that analysis, the discussion accompanying the final regulation should explain the reasoning that led to ED’s determination that these concerns do not merit any accommodation.

ED has identified the question, “What educational objectives are sufficiently important to justify a recipient imposing sex-related criteria that would limit... [an athlete’s participation] ... consistent with... gender identity,” as a priority for commentors. In AFPI’s view, the possibility of increased sexual violence and harassment targeting female athletes as a direct result of this regulation merits ED’s careful attention and consideration. In particular, ED should discuss the subset of transgender females (biological males) who exhibit autogynephilic tendencies, i.e., sexually aroused by imagining and dressing as women (they are also often sexually attracted to women).⁷ Why does ED judge it appropriate for the government to use its regulatory authority to give natal males with this paraphilia access to intimate facilities designed for female athletes—including very young women? Specifically, ED must explain whether a natal male athlete who claims to identify as female to satisfy this paraphilia would create a sex-based hostile environment for women. Under the proposed rule, would that be a violation of Title IX the Department would be willing to investigate?

⁶ Gallion, B. (2022, Aug. 19). “Transgender sexual assault claims at Brevard Public Schools could bring new state rules,” *Florida Today*. Retrieved May 13, 2023, from <https://www.floridatoday.com/story/news/education/2022/08/19/transgender-sexual-assault-report-bathroom-brevard-randy-fine-fdoe-could-bring-new-state-rules/10356216002/>

⁷ Blanchard, R. (1989, Oct.). “The Concept of Autogynephilia and the Typology of Male Gender Dysphoria,” *The Journal of Nervous and Mental Disease*, 177 (10), pp. 616-623. Retrieved May 13, 2023 from https://journals.lww.com/jonmd/Abstract/1989/10000/The_Concept_of_Autogynephilia_and_the_Typology_of.4.aspx

That allowing natal males into women’s spaces will create new threats to women’s safety is not a speculative claim. Violence in schools that have adopted such policies has already been reported, including serious instances of sexual assault. In Loudon County, Virginia, a transgender student sexually assaulted a high school girl in the female restroom. Loudon County Public Schools were notified of the assault and failed to take appropriate action. School officials simply moved the offender to a different high school, where he committed an additional sexual assault, again, in a female bathroom.⁸ The Superintendent proceeded to deceive the public and deny any knowledge of this incident at a public- school board meeting.

Sex-separate adult spaces, including all-women colleges and prisons, have already been opened to trans-women who have not completed medical transition. Lessons from the prison system raise alarms that should be addressed in the final rule. One consequence is skyrocketing number of transgender women (biological males) requesting to be held in female facilities.⁹ This has led to incidences of rape.¹⁰ In one case, a female-identifying inmate at a women’s prison impregnated two biological female inmates.¹¹ Policies designed to accommodate transgender individuals create incentives for biological males to profess false transgender identities to gain access to women to whom they are sexually attracted. Some data suggests that as of 2022, there were around 1,100 transgender male-to-female federal prisoners, and more than 45% of them have a history of a sex offense.¹² The same incentives can be expected to lead some number of male athletes to invent a trans identity to gain access to female students, including at young ages and in situations of vulnerability, if the proposed rule goes into effect. ED must explain why it is not concerned the same problem will present in an athletics context due to this regulatory action.

AFPI urges the Department to make changes to the regulation that will empower recipient schools to establish biology-conscious eligibility criteria when their objective is to protect biological female athletes and to create a truly welcoming athletics environment conducive to student athlete success. At a minimum, ED should revise its discussion of important educational objectives to specifically include creating a safe and welcoming environment for natal female athletes—i.e., one in which they do not have to fear sexual violence, harassment, or intimidation. If ED disagrees and plans to enforce this regulation with the understanding that creating such an environment is *not* an important educational objective, it should say so explicitly. In that case, it should also include a discussion

⁸ Downey, C. (2022, Dec. 6). “‘They Failed at Every Juncture’: Loudoun County Mishandled Bathroom Sex Assault, Grand Jury Finds,” National Review. Retrieved May 13, 2023, from <https://www.nationalreview.com/news/they-failed-at-every-juncture-loudoun-county-mishandled-bathroom-sex-assault-grand-jury-finds/>

⁹ Reinl, J. (2022, Dec.). “The transgender prison experiment UNCOVERED: Male-to-female inmates in women's cellblocks drive rising numbers of rapes and abuse on the new frontline in America's culture wars,” Daily Mail. Retrieved May 13, 2023, from <https://www.dailymail.co.uk/news/article-11458335/Male-female-Trans-inmates-drive-rising-numbers-rapes-abuse-womens-prisons.html>

¹⁰ Clark, D (2022, Apr. 5). “Rikers Island inmate sentenced to 7 years in prison for raping female inmate,” *Office of the District Attorney, Bronx County*. Retrieved May 13, 2023, from <https://www.bronxda.nyc.gov/downloads/pdf/pr/2022/35-2022%20ramel-blount-sentenced-rape-rikers.pdf>

¹¹ Reilly, P. (2022, June 6). “Incarcerated transgender woman Demi Minor impregnates two inmates at NJ prison,” *New York Post*. Retrieved May 13, 2023, from <https://nypost.com/2022/07/16/transgender-woman-demi-minor-impregnates-two-inmates-at-nj-prison/>

¹² Reinl, J. (2022, Dec.). “The transgender prison experiment UNCOVERED.”

explaining its rationale to help recipient schools craft policies that will comply with the proposed regulation.

3. The rule will reduce opportunities for women to compete in school-sponsored athletics, violating Title IX.

The purpose of Title IX of the Educational Amendments of 1972 is to open athletics opportunities to women, not to close them. Opening women's sports to natal males does a disservice to women in several ways: natal males have broken women's records and "earned" spots on highly competitive teams (and the scholarships and opportunity for improvement that comes with positions on those teams). Other female athletes have avoided competition altogether to avoid competing against or sharing intimate facilities with natal males. Male athletes competing in women's sports have injured female athletes on several occasions. For example, in April 2022, a transgender female high school rugby player in Guam injured three other girls in one game. After the game, the coach stated, "Body size, body strength, and the ability to apply force with that size and strength completely dominate any girl that I have on my team."¹³ In late 2022 in North Carolina, a transgender high school volleyball player spiked the ball so fast that it left the opposing female with "trauma to the head and neck" and "long-term concussion symptoms, including problems with her vision."¹⁴ The spike was estimated to have hit the high school girl at about 70 miles per hour. The incident led the school district to forfeit matches to avoid subjecting its athletes to the risk of similar injury, thereby denying female athletes equal athletic opportunities.¹⁵

The proposed regulation will undermine female athletics in other ways too. When natal male athletes, with the size and strength advantages of male puberty, smash female records, they erase women from the history books.¹⁶ When they win NCAA championships, they deprive natal females of recognition and future opportunities that might have opened to a first-place finisher.¹⁷ They also have taken away national nominations, like NCAA Women of the Year, from biological women.¹⁸ Admitting natal male athletes to female competition—and intimate spaces—also changes the

¹³ Rychcik, S. (2022, April 14). "Transgender Rugby Player Allegedly Injured Female Athletes," *Independent Journal Review*. Retrieved May 13, 2023, from <https://ijr.com/transgender-rugby-player-allegedly-injured-female/>

¹⁴ Downey, C. (2022, Oct. 22). "Female High-School Volleyball Athlete Suffers Serious Head Injury after Transgender Player Spikes 'Abnormally Fast' Ball," *National Review*. Retrieved May 13, 2023, from <https://www.nationalreview.com/news/female-high-school-volleyball-athlete-suffers-serious-head-injury-after-transgender-player-throws-abnormally-fast-ball/>

¹⁵ Morik, R. (2022, Oct.). "North Carolina school district votes to forfeit games against rival after transgender athlete injures player," *New York Post*. Retrieved May 13, 2023, from <https://nypost.com/2022/10/22/north-carolina-school-district-votes-to-forfeit-games-against-rival-after-transgender-athlete-injures-player/>

¹⁶ Atkinson, G. (2023, Mar. 10). "Transgender Athletes Breaking Records in Women's Sports," *Alliance Defending Freedom*. Retrieved May 13, 2023 from <https://adflegal.org/article/transgender-athletes-breaking-records-womens-sports>

¹⁷ Glasspiegel, R. (2022, Apr. 4). "Riley Gaines slams NCAA for 'trying to save face' in Lia Thomas tie," *New York Post*. Retrieved May 13, 2023, from <https://nypost.com/2022/04/04/swimmer-who-tied-lia-thomas-taken-aback-in-trophy-handling/>

¹⁸ Musa, A. (2022, Jul. 15). "Transgender swimmer Lia Thomas nominated for NCAA 2022 Woman of the Year Award," *CNN*. Retrieved May 13, 2023, from <https://www.cnn.com/2022/07/15/sport/lia-thomas-ncaa-woman-of-the-year-nomination/index.html>

environment for the female athletes on the team.¹⁹ As one athlete who swam with Lia Thomas explained, “It’s definitely awkward because Lia still has male body parts and is still attracted to women... The 35 of us are just supposed to accept being uncomfortable in our own space and locker room.”²⁰ All of this undermines the integrity and appeal of female athletics. As it happens more and more often—which the regulation is designed to encourage—natal female athletes can be expected to find athletic competition less attractive.

The proposed regulation will further erode female athletics even in circumstances recipient schools can, in theory, adopt biology-conscious eligibility requirements. This is because uncertainties around the types of biology-conscious policies ED will permit will lead many schools to err on the side of opening female athletics to transgender athletes to avoid reputation-damaging scrutiny from OCR. Indeed, the proposed regulation will have the practical effect of empowering transgender activists to use complaints under Title IX and threats thereof to bully schools and colleges into adopting very permissive policies. The only place schools will have solid ground to push back will be in cases where NCAA eligibility criteria—aligned to national and international federation standards—require biology-conscious determinations.²¹

The end result will be to force female athletes to choose between full participation in athletics and their own personal safety—both on the field and in the locker room—on too many occasions. This is a violation of Title IX, an important purpose of which is ensuring that female students have equal athletic opportunities. Title IX litigation against schools that adopt permissive policies due to fears of OCR investigation is the foreseeable result of the proposed regulation, which would pit Title IX against Title IX. ED should address the following question in the final rule: at what point would school policies established to comply with this regulation, but which deter female participation among athletes reluctant to compete against men and boys for safety or environmental reasons, violate Title IX? Schools will need more specific guidance in order to craft compliant policies that balance these concerns.

The fact that policy reforms that open facilities and opportunities designed for women in other contexts have been abused by self-interested actors (for example, in the prison context discussed above) should serve as an immediate caution to the Department. ED should therefore discuss what protections for biological girls and women it will permit when school administrators face situations in which athletes are claiming a false gender identity to obtain benefits, including scholarships established for female athletes, athletic opportunities and recognition, and access to women’s spaces because of malign motivations. Will administrators have to wait until women are harmed in a demonstrable way to intervene without subjecting the institution to charges of discriminating on the basis of gender identity?

¹⁹ McEnany, R., Mims, S., and Campana, A. (2023, Apr. 18). “Trans Athletes Are Turning The Dream Of Title IX Into A Nightmare,” *Daily Caller*. Retrieved May 13, 2023, from <https://dailycaller.com/2023/04/18/opinion-trans-athletes-are-turning-the-dream-of-title-ix-into-a-nightmare-ryann-mcenany-sam-mims-alexandra-caro-campana/>

²⁰ Reilly, P. “Teammates say they are uncomfortable changing in locker room with trans UPenn swimmer Lia Thomas,” *The New York Post*. Retrieved May 13, 2023, from <https://nypost.com/2022/01/27/teammates-are-uneasy-changing-in-locker-room-with-trans-upenn-swimmer-lia-thomas/>

²¹ National College Athletics Association (2023, Apr. 17). “Transgender Student-Athlete Participation Policy,” *Sport Science Institute*. Retrieved May 13, 2023, from <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>

4. Schools can be expected to shift their athletic program portfolios to favor sports in which the biological advantages natal males derive from their physiology are less manifest, which will deprive natal female athletes of equal educational opportunities.

The proposed regulation allows biology-conscious eligibility criteria in loosely defined circumstances. Where schools establish such policies, they are required to “minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied” (Section 106.41(b)(2)(ii)). The Department also expects that schools and colleges “account for the nature of particular sports” on the rationale that “not all differences among students confer a competitive advantage or raise concerns about sports-related injury in every sport.”²² Put another way, the biological benefits of male puberty (and the risk of injury to women competing with natal males) vary across sports. Size and strength advantages are more significant from a safety perspective in rugby than in badminton. When it comes to competitive advantages, natal males derive more benefit from having undergone puberty and/or an androgenized body relative to women (on average) in swimming, soccer, and volleyball than they may in bowling, riflery, or trap shooting.

The easiest way to comply with a regulation that “clarifies” that “a policy... that prevents a person from participating in an education program... consistent with their gender identity subjects a person to more than de minimis harm” while also requiring that schools “minimize[e] harms” when they use biology-conscious criteria, will be to shift the female sports portfolio toward sports in which competition is less physically intense and that require minimal athlete-to-athlete contact.²³ A school that offers more sports where natal males can participate as women without threatening the safety of natal female athletes (as well as fewer competitive contact sports) will have a stronger argument that it is providing equality of athletic opportunity, across the totality of its athletics program, to students who identify as transgender.

The historical record points to a future in which there are more female bowling and badminton teams but fewer soccer, hockey, and rugby teams. Just as colleges opened new female sports and closed some men’s sports where there was insufficient interest to launch a women’s program (for example, wrestling)²⁴ to comply with Title IX’s requirement that they offer equal opportunity to female athletes, schools and colleges will have strong incentives to close female sports where trans-athletes might dominate competition. This will allow them to avoid excluding them and the associated threats of OCR investigations and negative activist-marshaled publicity. Such an outcome is not only a disservice to women. It is also a violation of Title IX’s original purpose. Schools that offer radically different athletics programs to male and female athletes—a real diversity of sports to men but few highly competitive or contact sports to women—will open themselves up to very legitimate criticism, complaints to OCR under existing Title IX regulations, and perhaps even litigation. In other words, the proposed regulation puts Title IX on a very foreseeable collision course with Title IX in this way too. ED must therefore abandon this rulemaking if it cannot clearly

²² 34 CFR Part 106, p. 22876.

²³ *Ibid.*, p. 22877, p. 22891.

²⁴ Dosh, K. (2016, Mar. 17). “The Future of Collegiate Wrestling Isn’t At Division I Level,” *Forbes*. Retrieved May 12, 2023, from <https://www.forbes.com/sites/kristidosh/2016/03/17/the-future-of-collegiate-wrestling-isnt-at-division-i-level/?sh=4081dbfa2fcc>

reconcile the requirements of recipient schools to provide equal athletic opportunities for female athletes and transgender athletes in its final rule.

5. The Department must respect the ordinary public meaning of “sex” in the authorizing statute, which construes male and female in terms of biology and reproductive function.

Congress intended “sex” and “female” to be understood according to their ordinary public meaning when it passed Title IX of the Education Amendments of 1972. The Department nonetheless claims that it is free to require schools to consider a student’s gender identity where it “is different from the sex they were assigned at birth,” noting that “the Department’s Title IX regulations have never explicitly addressed the criteria, if any, a recipient may use to determine a student’s eligibility to participate on a male or female athletic team.”²⁵ The Department went even further in its 2022 Title IX NPRM, noting that

Contrary to assertions made in 2020 and January 2021, the Department does not have a “long-standing construction” of the term “sex” in Title IX to mean “biological sex.” The text of the statute and current regulations do not resolve this issue; neither the statute nor the regulations define “sex,” purport to restrict the scope of sex discrimination to biological considerations, or even use the term “biological.” The Department does not construe the term “sex” to necessarily be limited to a single component of an individual’s anatomy or physiology.²⁶

The idea that Congress in 1972, or the Department in the decades since did not intend for “sex” to be interpreted in biological terms does not withstand even superficial scrutiny. The specific types of sex separation the statute expressly permits—in athletics, living facilities, and father-son and mother-daughter activities—only make sense in terms of reproductive function. Schools established male and female residence halls as women attended college in higher numbers in large part due to concerns about sexual intimacy among unmarried men and women, a concern related to the risk of pregnancy outside of marriage—a concept that cannot be understood without thinking about *biological* sex differences and reproductive function. Sex separation in athletics is justified by fairness considerations given the immense competitive advantages biological male athletes derive from an androgenized body: greater muscle mass, higher bone density, larger wingspan, and greater heart and lung capacity.²⁷ These differences are, by definition, biological. It is hard to understand the relationship between a father and son or a mother and daughter without thinking of reproductive processes (sexual intercourse, pregnancy, and childbirth) rooted in biological capacities. Similarly, the types of sex-separated educational activities the Department has allowed since its 1975 regulation—for example, choruses and human sexuality courses—have justifications related to biological sex differences: male and female students have different reproductive systems to learn about and physiological developmental differences account for typical distinctions in the male and female vocal range. In the statute, original regulation, and 1975 congressional hearing regarding that regulation, sex categories are always treated as binary—men/women, male/female, boy/girl, mother/father—

²⁵ 34 CFR Part 106, p. 22863.

²⁶ 34 CFR 106, p. 41537.

²⁷ Coleman, D., and Shreve, W. (n.d.). “Comparing Athletic Performances”

which corresponds to biological sex categories but not gender categories.²⁸ The Department does not point to an instance of sex separation Congress permits that is not binary in nature and related to biological sex difference or reproductive function, and yet it claims Congress did not mean to construe “sex” in biological terms.

If the statute does not explicitly use the term “biological” to define “sex,” it is presumably because the study of gender identity, as we construe it today, had not even begun when the language of Title IX was being debated in Congress. Only a handful of obscure academics writing at the time posited definitions of “sex,” “male,” and “female” that did not rely on biology. As Susan Stryker observes in a seminal compilation of works on transgender theory, “The word ‘transgender’ itself, which seems to have been coined in the 1980s, took on its current meaning in 1992 after appearing in the title of a small but influential pamphlet by Leslie Feinberg, *Transgender Liberation: A Movement Whose Time has Come*.” Transgender individuals are those who “permanently change[] social gender through the public presentation of self.”²⁹ This is the understanding that informs the proposed regulation, which is intent on opening opportunities to individuals based on how they self-identify. Before the 1990s, academic work in the area was centered on transvestites (who sometimes dress as the opposite sex) and transsexuals (those who have undergone sex reassignment surgery).³⁰

All of which is to say, Congress could not have intended or entertained a meaning of “sex” untethered from biology in 1972. The notion that individuals can have a gender identity completely distinct from their biological sex, and change sexes on that basis, had not even been born yet. As such, ED cannot assert that Congress intended for sex to be construed in a way that had not been invented at the time and, in fact, undermines the ordinary public meaning of the statute. That is akin to discovering a herd of elephants in a mousehole, a novel reading of a word in the statute that allows the executive branch to pursue objectives vastly exceeding its delegated authority. If ED cannot credibly establish that Congress intended a construction not rooted in biology by pointing to statutory language or the congressional record, the final rule should allow schools to adopt definitions of “sex,” “male,” and “female” rooted in biology and aligned to their ordinary public meaning when they elect to establish sex-separate athletics teams.

6. The proposed rule misapplies *Bostock v. Clayton County*.

The Department relies on its reading of *Bostock v. Clayton County* to justify the “Department’s enforcement authority over discrimination based on sexual orientation and gender identity under Title IX” (22865). In its June 2021 Notice of Interpretation regarding Title IX enforcement, the Department explains that it has:

²⁸ United States Congress, House Committee on Education and Labor (1975). Hearing Before the Subcommittee on Equal Opportunities of the Committee on Education and Labor, H. Con. Res. 330. Retrieved May 13, 2023, from https://books.google.com/books?id=RyggAAAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

²⁹ Stryker, S. (2006). “(De)subjugated Knowledges: An Introduction to Transgender Studies.” In *The Transgender Studies Reader*. Stryker, S. and Whittle, S. (Eds), New York: Routledge, p. 4.

³⁰ *Ibid.*

Determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination “because of . . . sex” encompasses discrimination based on sexual orientation and gender identity—properly guides the Department’s interpretation of discrimination “on the basis of sex” under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.³¹

Because the Court found 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’” in an employment discrimination context, ED believes it can extend the scope of sex-based harassment protections in the proposed regulation to cover the same features of identity.³² This is a mistake for two important reasons. First, Title IX has a very different purpose: to prevent discrimination on the basis of sex in the provision of educational opportunities. Sex differences rooted in biology matter in an educational context in ways they do not in an employment discrimination context, which is what *Bostock* adjudicated. This is why Title IX explicitly permits the provision of sex separate activities, facilities, and even institutions and activities. Forcing women to compete against men would deprive them of athletic opportunities, scholarships, and recognition; sex separation in choir and human sexuality courses helps educators to achieve important learning objectives. Indeed, it would turn the very purpose of Title IX on its head. Second, the *Bostock* court went out of its way to explain that its reasoning does not extend to several of the specific issues raised by Title IX, including the permissibility of “sex-segregated bathrooms, locker rooms, and dress codes.”

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.”³³

Indeed, one federal court recently explained that “Title IX’s ordinary public meaning remains intact until changed by Congress,” and the “ordinary public meaning of ‘sex’ turned on the reproductive function when Congress enacted Title IX.”³⁴ As such, it is a mistake for the Department to rely upon *Bostock* to justify expanding this intrusion into school and college athletics eligibility guidelines. The Supreme Court could hardly have warned against it in clearer language. The Department should therefore rescind the proposed rule if it cannot justify extending the scope of sex-based discrimination to include gender identity by referring to clear statutory language authorizing it.

7. The proposed rule oversteps the authority delegated to the agency and purports to answer a “major question” of the kind addressed by *West Virginia v. EPA*.

³¹ 34 CFR Chapter 1, p. 32637-8.

³² 34 CFR 106, p. 41532.

³³ *Bostock v. Clayton County*, 31. <https://www.law.cornell.edu/supct/pdf/17-1618.pdf> 43 *Neese v. Becerra*, 21-CV-163-Z, 2022 U.S. Dist. LEXIS 75847, at *33 (N.D. Tex. Apr. 26, 2022) (internal citations omitted)

³⁴ *Neese v. Becerra*, 21-CV-163-Z, 2022 U.S. Dist. LEXIS 75847, at *33 (N.D. Tex. Apr. 26, 2022) (internal citations omitted).

The Department is blazing forward with this culture-shifting proposal even in the face of *West Virginia v. EPA*, which limits the power of agencies to adopt regulatory programs that “Congress has conspicuously declined... to enact itself.”³⁵ Nor does Congress “typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme.”³⁶ In his concurrence, Justice Neil Gorsuch offers guidance about “when an agency action involves a major question for which clear congressional authority is required”: “First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great ‘political significance,’ [s]econd... when it seeks to regulate ‘a significant portion of the American economy,’... [and t]hird,... when an agency seeks to ‘intrud[e] into an area “that is the particular domain of state law.””³⁷

The proposed Title IX athletics regulation clearly falls into at least two of the three categories. Redefining “sex” in terms of subjective gender identity instead of biology and forcing schools to open female athletics to biological males would advance a monumental cultural shift advocated by the political Left. It is a matter of active policy debate. More than 20 states have passed legislation protecting female athletes,³⁸ and a bill with the same purpose has been introduced in the U.S. House of Representatives.³⁹ These measures are already being litigated in federal courts, and two Supreme Court justices have expressed the view that they will soon be required to rule on the issue.⁴⁰ And yet, the proposed regulations, if implemented, will set up additional areas of litigation. Given how clearly the principle articulated in *West Virginia v. EPA* applies to the proposed Title IX regulation, the Department should withdraw the rule. Its proponents should, instead, make their case to the people’s representatives in Congress. At a minimum, the Department must explain why it believes redefining sex and forcing thousands of schools around the country to allow natal males to compete against female athletes is not a question of vast political significance under the major questions doctrine.

The implications for federalism are just as glaring. Justice Gorsuch stated that “[w]hen an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress’s power, it also risks intruding on powers reserved to the States.” State lawmakers are actively engaged in legislation to protect women’s sports, which clearly falls under the purview of state authority as an exercise of the general police power. (The Department’s argument that it is enforcing a civil rights statute, in which case federal regulations can legitimately override state laws, relies on a fantastical reading of Title IX as outlined above). In addition to the twenty states that have already acted to protect the integrity of female sports and the safety of female athletes, several others are actively contemplating new legislation. The proposed regulation will therefore create legal uncertainty about the enforceability of those laws. *West Virginia v. EPA* is, thus, on point here, too. The executive branch, through an undelegated exercise of administrative authority, is effectively working to

³⁵ *Virginia v. EPA*, No. 20-1530, 20. https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf

³⁶ *Ibid.*, 18.

³⁷ *Ibid.*, 9.

³⁸ Lewis, K. (2023, Apr. 5). “Transgender Athletes in Women’s Sports Now Banned in 40 Percent of U.S.,” *Newsweek*. Retrieved May 13, 2023, from <https://www.newsweek.com/transgender-athletes-womens-sports-now-banned-40-percent-us-1792835>

³⁹ H.R.734 - Protection of Women and Girls in Sports Act of 2023, 118th Congress (2023-24). Retrieved May 13, 2023, from <https://www.congress.gov/bill/118th-congress/house-bill/734>

⁴⁰ *West Virginia v. Heather Jackson*, No. 22A800, Application to Vacate the Injunction, Alito, J., dissenting opinion. Retrieved May 13, 2023, from https://www.supremecourt.gov/opinions/22pdf/22a800_e1p3.pdf

preempt state laws in education, an area in which federal authority is limited and state authority expansive. The Department should therefore abandon this action.

Conclusion

Taken together with the Department's 2022 Title IX NPRM, the proposed rule represents one of the most audacious examples of executive overreach in the country's history. The idea that a 1972 statute designed to open educational and athletic opportunities to women authorizes the Department to open women's sports to natal male athletes—or that the federal courts will permit the action—is not just farfetched. It is based on deeply flawed readings of the authorizing statute and pertinent Supreme Court precedent. That is reason enough to abandon the rulemaking.

As presented, this regulation will profoundly undermine female athletics and seriously harm women. It will be remembered as a turning point in this country's fight for female equality, a reversion to male dominance in publicly funded athletics competitions. If the Department does not abandon the rulemaking to save women from serious harms and indignities (and its legacy from the associated stain), it should, at a minimum, provide much more careful guidance to recipient schools. Most importantly, it must acknowledge that protecting female athletes from intimidation and harassment in the locker room and playing field is an important educational objective, one that justifies biology-conscious athletics eligibility criteria. It must also make clear that changes to an athletics program portfolio designed to decrease the number of women's sports offered in which natal male athletes derive significant advantage from male puberty (so that trans women can compete in most female sports a school offers) would deprive natal female athletes of equal educational opportunity in clear violation of Title IX.

Thank you for considering our concerns. We hope to see them addressed in the final rule.

Sincerely,

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Alexandra Caro Campana
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