ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

May 15, 2023

Secretary Miguel A. Cardona
U.S. Department of Education
VIA REGULATIONS.GOV

RE: 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,

Alliance Defending Freedom (ADF) opposes the Notice of Proposed Rulemaking on Title IX of the Education Amendments of 1972.

The Biden administration's proposed sports rule is a slap in the face to female athletes who deserve an equal opportunity to compete on the playing field. The proposed rule degrades women and tells them that their athletic goals and placements do not matter. When society and the law try to ignore reality, people get hurt. And, in sports, Congress recognized long ago that it's women and girls who pay the price.

That price has already been felt and it is only going up. From the Atlanta pool at the NCAA Swimming and Diving Championships to track podiums in Connecticut, female athletes like Selina Soule, Riley Gaines, Madison Kenyon, Mary Kate Marshall, and Chelsea Mitchell have already been displaced by males competing in women's sports. Countless other women and girls across the country have already lost championships, qualifying points, placements, and even the opportunity to compete in competitions. Their efforts and the harm they have suffered have been completely erased. The message this sends to women and girls wanting equal opportunity is both devasting and demoralizing—a message the Biden administration wants to memorialize now in its proposed sports rule.

Thankfully, a growing number of states are stepping up to protect women's athletics. Right now, 21 states and counting have enacted laws that protect women and girls from having to compete against males, and polls show that a majority of Americans agree that the competition is not fair when males are permitted to compete in women's and girls' sports. Every woman deserves the respect and dignity that comes with having an equal opportunity to excel and win in athletics.

But the proposed sports rule seeks to undo this progress. Fifty years ago, Congress acted to protect equal opportunity for women by passing Title IX. Now, by radically rewriting this federal law, the Biden administration is threatening the advancements that women have long fought to achieve in education and athletics. Rather than protect women's equal opportunities, the sports rule puts girls on defense, forcing them to advocate for the very existence of their own sports teams.

ADF is an alliance-building legal organization that advocates for the right of all people to freely live out and speak the truth. ADF pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters involving Title IX, the First Amendment, athletic fairness, student privacy, and other legal principles addressed by the proposed rule.

BACKGROUND

Shortly after the Biden administration took office, the Department of Education issued "guidance" that interpreted the term sex in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), to compel schools to allow males to compete in female sports. The Department issued this mandate without notice and comment, and so it has been enjoined in 20 states in an ADF case.[1]

Now the Department seeks to exacerbate this injustice through two rulemakings. *First*, last fall, the Department proposed a wide-ranging Title IX rule redefining sex to mean gender identity under Title IX.[2] That proposed rule, which ADF will call for shorthand the Title IX rule, redefines sex across the board in education. Even though this rule claims to not discuss athletics, it necessarily sweeps in physical education classes, sports teams, and extracurricular athletics. *Second*, in this proposed rule, which ADF will call for shorthand the sports rule, the Department proposes to explicitly address eligibility for participation on sex-separated athletic teams—and to require schools to allow males to play on female teams in virtually all cases.[3]

---

[1] *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022), *appeal docketed*, No. 22-5807 (6th Cir. Sept. 13, 2022).

[2] Dep't of Educ., Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022).

[3] Dep't of Educ., 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*, 88 Fed. Reg. 22,860 (April 13, 2023) (to be codified at 34 C.F.R. 106.41(b)).

Last fall, in response to the Department's proposed Title IX rule, ADF submitted five formal comments urging the administration to abandon course.[4] As ADF explained, the Title IX rule—like the Department's guidance—violates Americans' legally protected freedoms and threatens women's advancements.

- **The Title IX rule lacks legal authority:** Nothing requires schools to give special treatment to males who want to compete in girls' sports. To the contrary, it is illegal for the Secretary of Education, an unelected bureaucrat, to rewrite federal law without Congress' authority.
- **The Title IX rule hurts female athletes:** Redefining sex in Title IX undermines fairness in women's sports and diminishes privacy and safety in school facilities. Allowing males on female teams threatens females with injury and takes away podium spots from girls who earned them.
- **The Title IX rule undermines parental rights:** The Title IX rule wrongly seeks to compel schools to treat students as whatever sex they prefer—without parents' knowledge or consent.
- **The Title IX rule harms suffering students and the medical profession:** The Title IX rule harms students with gender dysphoria and coerces doctors to perform dangerous, life-altering medical procedures.[5]
- **The Title IX rule violates freedoms of speech and religion, and it tramples due process:** The Title IX rule threatens to force students and teachers to use pronouns and titles that are inconsistent with a person's sex, with no due process protections for those accused of violations.

ADF thus urged the Department to abandon the Title IX rule.

But instead, the Department has proceeded with the proposed Title IX rule *and* it has now proposed the sports rule—which will directly provide that males must be allowed to play on female teams in nearly all cases. The Department's sports rule suffers from all the legal and policy infirmities as the Department's

---

[4] Press Release, ADF, *ADF to Biden: Hands off Title IX* (Sept. 12, 2022), https://adflegal.org/press-release/adf-biden-hands-title-ix, ADF Exs. 1–5, attached (formal comments on each topic). An exhibit list is enclosed on the final page of this comment.

[5] Relying on the same theory of sex discrimination in Title IX, the U.S. Department of Health and Human Services (HHS) is engaged in rulemaking under Section 1557 of the Affordable Care Act. ADF's attached 1557 comments provide medical evidence rebutting this mistaken understanding. *See* ADF Exs. 6–12, attached.

guidance and Title IX rule, and more—not the least of which is its disastrous effect on women's equal opportunities in athletics.

DISCUSSION

The Biden administration should abandon its plans to open female athletic teams to males. Title IX is an equal opportunity statute. It requires schools to protect females from having to compete against males in female sports and it respects females' rights to privacy and safety in intimate spaces like locker rooms.[6] The Department's sports rule violates Title IX and is a transparent end-run around Congress and the voters.

I. The Biden administration lacks the legal authority to rewrite Title IX and put males on female sports teams.

Redefining sex in Title IX to encompass gender identity has no basis in law and will cause a multitude of harms. This was true for the Department's informal guidance redefining sex in Title IX, it was true for its rulemaking last fall redefining sex in Title IX across education, and it is true for this sports rule.

A. The sports rule violates Congress' requirement that schools field female teams and sports.

The Department lacks the power to adopt the sports rule, because Congress acquiesced to and adopted the 1975 Title IX sports rule[7] and its 1979 guidance. As a result, those standards are now part of the Title IX statute, and agencies lack the authority to edit their authorizing statutes. But those standards not only permit—they often require—schools to field female-only teams and sports. The sports rule therefore directly contradicts the statute by requiring schools to field males in female teams and sports in many contexts.

Congress adopted the 1975 Title IX sports rule by virtue of the peculiar legislative history of that rule. In that history, Congress ordered the Department to promulgate a rule,[8] and subjected that rule to Congressional review before it went into effect. Congress then engaged in that review, and it held extensive hearings on

---

[6] 34 C.F.R. §§ 106.33, 106.34, 106.41.

[7] Under this rule, a school may provide 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." Schools also must provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41.

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

the rule. In those proceedings Congress considered, and rejected, proposed amendments to the rule and to Title IX itself, which would have precluded the requirement to field female-only teams and sports.[9] Instead, the rule Congress accepted provides (as the Department concedes) that it is a "longstanding requirement [that] reflects the Department's recognition that a recipient's provision of male and female teams *can advance rather than undermine* overall equal opportunity in the unique context of athletics *by creating meaningful participation opportunities that were historically lacking for women and girls*."[10]

Congress thus legislated Title IX to allow for sex-separated sports to protect women's opportunities. The Department concedes that the Supreme Court held that this history "strongly implies that the [Title IX] regulations accurately reflect congressional intent."[11] The case is even stronger: Congress itself affirmed the regulations and guidance themselves.

Congress' 1975 review of the Title IX sports rule alone would be sufficient to render the 1975 rule part of the Title IX statute by acquiescence, and thus to make the right to women's sports untouchable by the Department—but Congress went even further. In 1988, Congress adopted the Civil Rights Restoration Act and asserted its adoption of the "consistent and long-standing executive branch interpretation" of Title IX's application to athletics.[12] Congress thus adopted and made part of the statutory scheme both the 1975 Title IX athletics rule and its guidance through 1987, including the Department's 1979 Policy Interpretation,[13] as several scholars and courts concluded.[14]

The sports rule is illegal. The 1975 Title IX sports regulation and its 1979 policy interpretation require schools to have female-only sports and teams, where there is sufficient interest and ability to sustain a team for each sex. This regulation

---

[9] 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); 122 Cong. Rec. at 28,147.

[10] 88 Fed. Reg. at 22,877 (citing 1979 Policy Interpretation, 44 Fed. Reg. 71,421) (emphasis added).

[11] 88 Fed. Reg. at 22,862–63.

[12] Public Law 100–259; 102 Stat. 28 (Mar 22, 1988).

[13] 44 Fed. Reg. 71,413 (Dec. 11, 1979).

[14] Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003), attached as ADF Ex. 13 (discussing cases and Congressional sources).

was promulgated because of educational institutions' historical provision of opportunities for male sports teams and the concomitant exclusion of opportunities for "members of the other sex," that is, because of educational institutions' historical exclusion of sports teams for females.[15] As a result, if a school has teams that are not co-ed (that is, it has male sports teams), the regulations require the school to create female sports teams. Under this regulation, the Department cannot legally require, or permit, a school to allow a male into female teams, because the statute (as acquiesced to by Congress) requires the female teams to be female-only, and female means sex, not gender identity.

The Department claims that "the Javits Amendment reflects that the Department has discretion to tailor its regulations in the athletics context that it might not have in other contexts."[16] That assertion ignores the fact that Title IX addresses sex, not gender identity. Giving the Department discretion to regulate athletics by sex does not empower it to regulate by gender identity. Moreover, this claim by the Department ignores the fact after the Department enacted regulations in 1975, Congress adopted them through extensive hearings and rejection of amendments, then Congress explicitly adopted the 1975 rule and 1979 interpretation in the CRRA. In so doing, Congress statutorily removed the Department's ability to use the Javits Amendment to contradict the approach taken by the 1975 and 1979 Title IX standards, because they are now part of the statute. By using gender identity to trump sex in this proposed sports rule, the Biden Administration is trying to rewrite Title IX without Congress.

B. The proposed rule violates Title IX's entire text and purpose for female athletics.

The sports rule is a sweeping violation of the Department's authority—not in service of Title IX's purpose, but in opposition to it.[17] Congress passed Title IX to protect women's equal access to education and athletics "on the basis of sex," and President Richard Nixon signed it into law in 1972. But, as one commenter put it, "The idea that Nixon and leaders in Congress—the likes of Tip O'Neill and Hale Boggs, Mike Mansfield and Robert Byrd—considered sex the same as gender identity is too ridiculous for words."[18] Title IX uses a male-female binary that

---

[15] 44 Fed. Reg. at 71,418.

[16] 88 Fed. Reg. at 22,866.

[17] Cf. Michael E. Rosman, *Gender Identity, Sports, and Affirmative Action: What's Title IX Got to Do With It?*, 53 St. Mary's L.J. 1093 (2022), attached as ADF Ex. 14.

[18] Rich Lowry, *Executive Aggrandizement vs. Women's Sports*, NRO (April 11, 2023), https://www.nationalreview.com/2023/04/executive-aggrandizement-vs-womens-sports/.

excludes the gender identity concept.[19] No one seriously thought that Title IX required schools to let men play on women's teams. The original understanding of the word sex in Title IX—as well as Title IX's purpose, structure, and context—points to this binary, biological understanding.[20]

That lack of clear statutory authority for the Department's new interpretation of Title IX should end the analysis for two independent reasons. *First*, whether the Department may force schools nationwide to allow males to play on female teams or sports is a major question, if there ever was one. So under the Supreme Court's major questions doctrine, the Department must have clear statutory authority before it may impose this mandate.[21] *Second*, Title IX is also a Spending Clause statute, so, under the federalism clear-notice canon, the Department cannot add any Title IX conditions unless they were unmistakably clear in the statute when the statute was enacted.

But the Department concedes that there has not been prior clear notice or authority for this sports rule. It says "[a]thletic programs have long been recognized by Congress, the Department, and Federal courts as an integral part of a recipient's education program or activity subject to Title IX."[22] And, crucially, it concedes that, rather than providing clear notice that men must be allowed to play on women's teams, the Department itself has had confusion and varied understandings about

---

[19] 20 U.S.C. §§ 1681, 1686.

[20] *See, e.g.*, *supra* n.4 & *infra* n. 29 (detailing these textual and structural arguments); *accord Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc); *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425 (N.D. Tex. Nov. 11, 2022); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023); *D.H. v. Williamson Cnty. Bd. of Educ.*, No. 3:22-CV-00570, 2022 WL 16639994, at *10 (M.D. Tenn. Nov. 2, 2022).

[21] *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

[22] 88 Fed. Reg. at 22,861-62 (citing Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (Javits Amendment); U.S. Dep't of Health, Educ., and Welfare, Final Rule: *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. 24128, 24134 (June 4, 1975); U.S. Dep't of Health, Educ., and Welfare, Office for Civil Rights, *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413 (Dec. 11, 1979) (1979 Policy Interpretation), https://www.govinfo.gov/content/pkg/FR-1979-12-11/pdf/FR-1979-12-11.pdf; *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 516, 531-32, 532 n.22 (1982)).

whether men can play on female teams under Title IX.[23] With no clear notice, there is no authority for the sports rule under both doctrinal canons.

C. The sports rule hurts female athletes.

By rewriting Title IX, the sports rule is threatening to erode advancements that women have long fought to achieve. Women and girls deserve to compete on a level playing field. Everyone knows the truth that allowing males into female sports creates disadvantages that threaten females' opportunities. But the Department has rejected reality and chosen ideology over justice and law.

When we ignore biological reality, women and girls get hurt. In athletics, girls may be physically hurt; and across the country, women and girls are unjustly losing medals, podium spots, public recognition, and the opportunity to compete when males take their places. Just in the past few years, young women and girls have been displaced hundreds of times under the ideology adopted by this sports rule. Those are hundreds of opportunities lost forever, and the sports rule promises to impose that injustice system wide for millions of females far into the future.

D. The sports rule undermines female privacy and safety.

Forcing schools to allow students to play sports based on their subjective gender identity jeopardizes the safety, privacy, and dignity of all students—especially female students and young students. Women and girls should be able to change, shower, and sleep without fear of men watching them. But if males may play on female teams, males may access female athletic facilities and team members' private facilities. Female students and employees will be forced to share locker rooms, showers, swimming pools, and other intimate spaces—including hotel rooms on overnight trips or bedrooms in athletic dorms. When men are allowed in women's spaces, women lose. They lose privacy, they lose safety, and they lose dignity. Faced with the prospect of being forced to compete against males—and faced with the prospect of sharing locker rooms, showers, and other private spaces with males—many women and girls will reevaluate whether to play sports at all. But the sports rule ignores this impact, as well as the resulting liability for schools who fail to protect women and girls.

The Department should not force females—especially young girls—to share private spaces with males. Locker rooms, showers, restrooms, and bedrooms should

---

[23] 88 Fed. Reg. at 22,861, 22,865–66.

be private and safe. Schools have a duty to respect females' dignity by not assigning males as their roommates or allowing males into their private spaces.

E. The sports rule undermines parental rights.

The sports rule's lack of privacy protections also undermines parents' authority. Because the Biden administration's understanding of Title IX extends to teachers and employees, it threatens to allow males to be assigned as females' coaches and chaperones and to let adult males sleep or shower with women and young girls—even elementary school girls. The rule does not even make any provision for allowing schools to inform parents or students before or after this happens. And this nightmare scenario is not hypothetical: school districts already cite Title IX to allow this to happen and they cite educational privacy rules to conceal this critical information from parents and students.

This dynamic highlights an even more fundamental problem: the Department seeks to compel schools to treat students as whatever sex they identify as—without first asking parents. This mandate undermines parents' authority to make vital decisions about their child's emotional, mental, or physical health by giving that right to school staff instead.

F. The sports rule violates constitutional and statutory rights.

The threat today from the sports rule is most dangerous for women and girls, but freedom for every American to speak and live the truth is at stake. Every American should be free to live in every area of life according to the truth that humans are male or female. No one should be punished for that. But the Department has made no provision for respecting the rights of free expression in education, and so its rewrite will weaponize Title IX to force people to deny truth in athletics.

We know what will happen next, because we can see it already happening across the country. Vermont school officials, for instance, suspended Travis Allen from his coaching job and disciplined his teenage daughter Blake Allen for calling a male student "a dude" and for using male pronouns when expressing the view that the male student should not be allowed to change in the girls' locker room.[24]

The Department's officials are free to believe what they choose—as we all should be—but they cannot legally threaten to withhold federal funding to punish

---

[24] Complaint, *Allen v. Millington*, No. 2:22-cv-00197-cr (D. Vt. Oct. 27, 2022) attached as ADF Ex. 15.

schools, administrators, teachers, coaches, and students who choose not to abandon truth. The Department should not force schools to censor and compel speech by forcing everyone, on a Title IX harassment or hostile environment theory, to pretend that a male athlete is female or to use pronouns and titles that are inconsistent with a person's sex. The Department has no power to require students and teachers to express messages with which they disagree as a matter of faith.

What's more, everyone loses when these new sports mandates are tied to the Biden administration's hands-free, no-rules adjudication of Title IX complaints—campus kangaroo court procedures that lack even basic due process protections. Redefining Title IX to add new protected classes threatens to bring Star Chamber procedures down on the heads of Americans who refuse to speak or live a lie.

The sports rule also threatens to burden religious schools and their female athletes in violation of their constitutional and statutory freedoms. Even though religious schools are exempt from Title IX, religious schools stand to lose under the sports rule because religious schools often play in the same athletic leagues and in the same sports facilities as other schools that are subject to Title IX. The sports rule thus creates an uneven playing field for religious schools' female athletic teams by requiring them to compete against other teams that include biological males.[25]

If the sports rule goes into effect, female athletes from religious schools will no longer be able to remain in many of their current sports leagues. By requiring secular private schools, public schools, and charter schools to open their teams and facilities to males, the Department threatens to make it impossible for religious schools to play in the same leagues and facilities as non-religious schools unless the religious schools abandon their beliefs in the binary nature of sex and fail to protect the rights of their female athletes to fair competition, safety, and privacy. Many religious schools will field no team at all if their female athletes have to share locker rooms with males, or if their female athletes will be subject to serious competitive disadvantages and heightened risks of injury by having to compete against males.[26] If religious schools must leave their elementary school, high school, or college athletic associations, they will suffer harm by being excluded from state-wide competitions, events, and championships, by being excluded from a state-wide

---

[25] *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 833 (E.D. Tenn. 2022), attached as ADF Exs. 16–40; *see infra* n. 29.

[26] *E.g.*, Samantha Pell, *Maryland High School Leaves Athletic Association over Transgender Policy* (Mar. 22, 2019), https://wapo.st/3B3uh7k.

association, and by being unable to offer female student athletes opportunities to compete at the highest levels of high school competition.[27]

Rather than repeat these and many more arguments made at length in ADF's comments last fall about how redefining Title IX breaks the law and harms everyone, ADF's past comments are attached and incorporated by reference.[28]

After ADF filed those comments, many important developments occurred in many pending cases. So ADF also attaches and incorporates by reference several key filings and decisions in these ongoing cases that shed further light over the proper understanding of Title IX.[29] In these cases and amicus briefs, many female

---

[27] Under the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act, the Department has to consider these reliance interests in its rulemaking and to avoid placing these substantial burdens on religious exercise. But the Department ignores this important issue—i.e., how the sports rule substantially burdens religious organizations and schools in violation of these laws.

[28] *See* ADF Exs. 1–5, attached.

[29] The Department is on weak legal, policy, and evidentiary ground any time it seeks to push a redefinition of sex that leads to limiting women's equal opportunities in athletics. The following court filings attached to this comment from the following important Title IX cases show this to be the case in great detail. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (Eleventh Circuit en banc decision & ADF amicus brief, attached as ADF Exs. 41–42); *Barrett v. Montana*, No. DV-21-581-B (Mont. 18th Jud. Dist.), *appeal docketed*, No. DA 22-0586 (Mont. Oct. 13, 2022) (ADF amicus brief filed Feb. 22, 2023, attached as ADF Ex. 43); *A.M. v. Indianapolis Pub. Schs.*, No. 22-2332, *appeal dismissed* 2023 WL 371646 (7th Cir.) (ADF and Alabama amicus briefs filed Sept. 13, 2022, attached as ADF Exs. 44–45); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023) (key court filings and key expert reports, as well as six pdfs of op-ed commentary setting forth policy considerations, attached as ADF Exs. 46–102); *D.N. v. DeSantis*, Case No. 0:21-cv-61344-RKA (S.D. Fla.) (ADF intervention motion and declaration filed Sept. 12, 2021 and ADF amicus brief filed Feb. 5, 2023, attached as ADF Exs. 103–106); *Faith Action Ministry Alliance v. Fried*, No. 8:22-cv-01696 (M.D. Fla. 2022) (complaint and preliminary injunction motion with legal claims, as well as joint stay, dismissal, and religious exemption, attached as ADF Exs. 107–111); *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), *aff'd,* No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023) (court filings and three pdfs of op-ed commentary setting forth policy considerations, attached as ADF Exs. 112–133); *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425 (N.D. Tex. Nov. 11, 2022) (district court opinion and ADF amicus briefs, attached as ADF Exs. 134–135); *Soule v. Conn. Ass'n of Schs., Inc.*, 57 F.4th 43 (2d Cir. 2022) (key case filings plus five pdfs of op-ed commentary setting forth policy considerations, attached as ADF Exs. 136–164); *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022)

athletes (including Selina Soule, Chelsea Mitchell, Madison Kenyon, Riley Gaines, Debbie Powers, Macy Petty, and Cynthia Monteleone) have shared their stories of competing against males and have taken public stands that sex in Title IX refers to the biological binary.

II. The sports rule puts girls on defense, forcing them to advocate for the very existence of their own sports teams.

All these problems would be a part of any proposal like the sports rule that allows males to play on female teams, but the sports rule nevertheless manages to make things worse by introducing an equal protection-style balancing test that schools must satisfy to separate teams by sex.

Rather than protect women's equal opportunities, the sports rule puts girls on defense, forcing them to advocate under this balancing test for the very existence of their own sports teams. The sports rule is thus fundamentally unfair—and it is unworkable, unscientific, illogical, and incoherent.

A. The sports rule's balancing test excludes most female sports.

Under the sports rule, the Department puts a heavy thumb on the scales against female athletes. The sports rule provides that schools may have sex-separated teams only if the decision to separate the team survives a detailed new balancing test: if the decision (1) is made "for each sport, level of competition, and grade or education level," (2) is "substantially related to the achievement of an important educational objective"; and (3) minimizes "harms to students" who seek to participate on the team based on gender identity.[30] The Department claims that

---

(key court filings and two pdfs of op-ed commentary setting forth policy considerations, attached as ADF Exs. 16–40). The expert reports reveal the science and evidence behind gender dysphoria and sex-separated sports, including showing for example that puberty suppression followed by cross-sex hormones has little effect on adult height—giving males a retained athletic advantage in many sports. They also show for example that a female athlete received head and neck injuries from a jump spike delivered by a male athlete on the opposing girls' team.

[30] The proposed regulation reads, in full:

> 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:

this balancing test would "preserve and build on the current regulatory framework"[31] but it instead takes away females' legal rights to female teams.

First, this test is illegal as described above. It cannot be reconciled with Title IX text, purpose, and structure (which concerns biological sex and seeks to advance the opportunities of biological females); the 1975 rule; or 1979 policy interpretation, which require female-only teams based on simpler and frequently satisfied criteria. Replacing that test with this proposed test is illegal because Congress adopted the previous tests.

Second, the sports rule categorically forbids all state laws saving women's sports, and it introduces chaos by prohibiting simple, uniform rules keeping males from playing on females' teams.[32] In one fell swoop, it takes away female athletes' legal rights under Title IX and state laws to equal athletic opportunities. And it does so with almost no legal analysis.

Third, the preamble makes clear that, under the new balancing test, elementary and junior high schools must automatically let males play female sports.[33] The Department says that there is no way that the test will come out in favor of allowing sex-separated teams at these age levels. But there is no rational reason to disregard the evidence showing that male and female physiology differs at each age (and not just at college or high-school ages), that there is a risk of injury and unfairness to girls at younger ages if they play against males, and that in general sex-separated educational activities have educational benefits.[34]

> (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.

88 Fed. Reg. at 22,891.

[31] 88 Fed. Reg. at 22,867.

[32] *E.g.*, 88 Fed. Reg. at 22,866.

[33] The preamble says that it would be "particularly difficult" to exclude students from participation based on gender identity "immediately following elementary school." 88 Fed. Reg. at 22,875.

[34] Indep. Council on Women's Sports (ICONS) Amicus Br., *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078 (4th Cir. May 3, 2023), attached as ADF Ex. 90 (setting forth the science on pre-puberty physicality).

The Department seeks to substitute its own educational goals for schools, saying that young children are all similar physically in these grade levels and that the primary educational goal for youth sports is just to learn basic physical and emotional skills, such as leadership skills, teamwork, hand-eye coordination, and physical fitness.[35] This ignores that schools have other goals in many sports—goals such as fair competition, privacy, and safety—for students at young ages and certainly for students beginning puberty. It seems that the Department's true goal is to condition children early to the idea that female sports include males who identify as females.

Fourth, the preamble explains that, under this balancing test, every school, including high schools and colleges, must allow males to compete in female sports in all but the most "competitive" or contact-based sports.[36] But it is terrible policy to single out and eliminate young girls' teams and older girls' no-cut, intramural, club, or junior varsity female teams—teams designed to let women and girls of smaller size and ability have a chance to safely participate in athletics. It is hard to think of a surer way to discourage nascent and recreational female athletic participation than to say that there is no opportunity for females to safely play sports unless they are already so physically strong that they could hold their own competitively at the varsity or college level in contact sports. Just because a team has a "lower level of competition" does not mean that it is safe or fair to allow any male who wishes to play. To the contrary, the sports rule makes the youngest, most vulnerable, and least athletic girls the first to be injured and displaced by males. And, because there is less public attention for youth sports, recreational leagues, or "less competitive" female sports, their injuries will receive less visibility.

Fifth, the sports rule, in theory, allows more narrowly tailored sex-separations in collegiate or high school highly competitive or contact-based sports teams—ostensibly as some sort of a moderate compromise. But any compromise is an illusion. The ability to retain sex-separated sports teams even at the highest competitive levels in contact sports is elusive in theory and effectively impossible in practice.

B. The sports rule's balancing test is unworkable.

Under the sports rule's balancing test, schools *might* be able to have some sex-separated sports at the highest level of collegiate or high school contact sports.

---

[35] 88 Fed. Reg. at 22,874–75.

[36] 88 Fed. Reg. at 22,875.

But the Department still unfairly and illegally prioritizes the rights of males over females in these situations.

Even at high school or college levels, the Department requires schools to assemble a mountain of evidence to keep just one male out of a female team or sport. Administrators have to develop participation criteria by sport, by competition level, by grade level, by team, and by individual athlete, marshalling proof in each instance (1) that female-only participation eligibility is "substantially related to the achievement of an important educational objective" (whatever that means), rather than resting on (2) what the Department deems to be stereotypical generalizations and pretexts,[37] while showing (3) that the school simultaneously "minimized" what the Department views as harm to the males kept off of female teams (however that would even be possible).

Unpacking this balancing test shows it is both unworkable and almost always eliminates female-only athletics. The Department will not consider an educational objective "important" or non-pretextual if the Department thinks that the objective is just cover for disapproval of students who identify other than as their sex, as a desire to harm a particular student, as a desire to exclude students who identify other than as their sex from sports, as adherence to sex stereotypes, as assumptions about the conduct of students who identify other than as their sex, as assumptions about male superiority or physical advantages, or as an excuse for administrative convenience.[38] The sports rule also forbids reliance by schools on "overbroad generalizations that do not account for the nature of particular sports," meaning that the Department gets to veto and redo any fairness or safety decisions made by schools with which it disagrees.[39] And the Department cites many policies allowing males to play on women's sports as informative of its understanding of the requirements of the sports rule's new balancing test.[40] With all this to prove, it is hard to see what evidence in individual cases could ever satisfy the Department.

What is more, even if a school passes through this evidentiary gauntlet—assembling a mountain of evidence to justify an individual student's participation and successfully persuading the Department that none of this is a generalized stereotype or impermissible pretext—the school still must allow the male on the female team unless the school adequately "minimized harm" to the excluded male student. The preamble says that if the Department thinks that if a school can

---

[37] 88 Fed. Reg. at 22,872–74.

[38] 88 Fed. Reg. at 22,872.

[39] 88 Fed. Reg. at 22,873, 22,876.

[40] 88 Fed. Reg. at 22,869–70, 22,872–74.

reasonably adopt or apply alternative criteria for athletic participation that the Department thinks would cause less harm and still achieve its important educational objective, then the school has to do so (much like a "least restrictive means" test from strict scrutiny analysis).[41] Plus, even if no reasonable alternative exists, the Department still requires a school to balance any identified harm to the excluded student against its important educational objective. The Department does not explain how this balancing would occur, or even how schools would gain information about harms. Yet the sports rule always requires schools to minimize the harm caused by sex-separated teams by taking into account the "difficulty of obtaining documentation, [or] risk of invasion of privacy or disclosure of confidential information."[42] That means, that if a male would find it inconvenient—or feel that it is an invasion of his privacy—to have to show a birth certificate or pass a basic medical exam or play on a male team, that alone is enough to let the male play on a female team. On top of all this, the Department says 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"[43] because participation on a team inconsistent with a student's gender identity is "not a viable option for many students,"[44] which further suggests that any rule that excludes males from female teams harms males—and thus any exclusion of males from female sports categorically must be minimized.

While schools navigate this impossible gauntlet, the Department lurks in the background ready to veto any sex-separation in athletics and yank federal funding if the school gets the balance "wrong" in even one instance. School administrators will not likely assume the risky burden of developing a detailed rationale for basing participation on biological sex for every sport at every athletic level. Most likely they will default to allowing males on females' teams. Indeed, legal guides are already telling schools to drop female sports now rather than try to pass this test.[45]

---

[41] 88 Fed. Reg. at 22,869–70, 22,874, 22,877.

[42] 88 Fed. Reg. 22,877.

[43] 88 Fed. Reg. 22,861.

[44] 88 Fed. Reg. 22,871.

[45] One guide advises K-12 schools this way: "Prepare for change if your state is one of the approximately 20 states that has adopted legislation banning transgender athlete participation in youth sport. Such bans will conflict with the new Title IX regulation. While this may lead to extensive litigation about the enforceability of the state laws, we anticipate federalism principles will prevail and that such bans will be found to violate Title IX. . . . If your athletics association imposes restrictions on transgender participation in elementary

Of course, the one thing missing from all of this analysis is any effort to minimize harm to women and girls—the very mandate of the statute. Minimizing their loss of equal opportunities and minimizing the stigma and discrimination that they face when males displace them is what Congress requires. But the new test would prohibit that. The Department does not even factor females' concerns into the balancing test.

Instead, the sports rule points to what it considers alternative strategies and mitigating measures, such as "appropriate coaching and training, requiring use of protective equipment, and specifying rules of play."[46] In other words, females will face re-education and coercion from their coaches and teachers to acquiesce to males in their sports; females will have to put on new shields, masks, and gear to defend themselves from the physical dangers of males playing on their sports teams; and females will even have to change the rules of their games, just to allow males to play. A rule that more greatly contradicts the existing congressional mandate to protect women is hard to imagine.

Women's sports won't survive the sports rule. Only women's sports will be put to the Department's new test—a test that women's sports teams are meant to fail. Male-dominated sports will as a practical matter rarely be put to this test and are likely to pass it and remain separated by sex. Women naturally will not pass the try-outs or other selective recruitment processes to play male sports (that's why Title IX was enacted). Plus, it's possible to see someone concluding that Division I male football or basketball or wrestling is sufficiently competitive that women should not be allowed to play, or to conclude that it could be incredibly dangerous

---

and middle school sports, be ready to advocate that such policies be eliminated as they are unlikely to comport with the final regulation, and you are likely to be in violation of Title IX if you implement them at your institutions." Bryan Cave Leighton Paisner LLP, *Department of Education's New Proposed Rule for Transgender Participation in Athletics* (April 11, 2023), https://www.lexology.com/library/document.ashx?g=3f3245fe-5883-4be9-8403-bf310c6217a7. The guide tells high schools that it "seems highly unlikely that defensible justifications will be available for exclusionary policies outside the context of intercollegiate competition." *Id.* And the guide advises colleges to reconsider their national or international athletic standards, too: "Either the collegiate athletic associations or you as institutions may want to proactively prepare reasoned and scientifically/medically supported explanation for how the adopted criteria further important educational objectives. If you feel that sport-specific regulations will be important, look to the international federation and national governing body publications to determine if sufficient evidence exists to justify imposition of criteria to limit participation in the specific circumstances contemplated." *Id.*

[46] 88 Fed. Reg. at 22,873.

for women to play these contact sports. But it's hard to see the same being true for men in women's sports. Because of their natural advantages over women, plenty of males will easily meet the physical requirements to join and to be competitive on female teams. Males are already successfully competing in women's sports in surprisingly high numbers because of the Department's illegal 2021 Title IX mandate and similar approaches taken by other bodies. There is no comparable phenomenon of women successfully competing in men's sports during this same timeframe. And because the Department will consider the level of competition and risk of injury lower in women's sports, its balancing test will require schools to let men play—any exclusion will be "stereotypical."

The practical consequences of this test will not merely destroy competition on female teams, it will remove the most competitive categories of female sports teams from athletic programs. Under the sports rule, schools may either assume major litigation risks from the Department or they may assume major injury risks for women on their teams. To solve this dilemma, they will inevitably cut female sports teams in which size and strength advantages matter—spelling the end of the most competitive and athletic forms of female sports. Because schools do not want to lose federal funding or pay out large personal injury claims, most schools will be pressured by insurers to sunset female teams in any categories of sports where biological males pose an elevated injury threat to women (such as contact sports like football, soccer, basketball, volleyball, hockey, and rugby). And schools will be pressured to maintain female teams only in categories of sports without as much of a risk of contact (such as archery, bowling, dance, trivia, and video gaming).

But the proposed rule imposes even greater injustice. The balancing test has one more step: the sports rule also requires colleges to review their athletics programs *as a whole*[47] to ensure students have equal access based on gender identity to athletics opportunities across sports. That means, that if schools want to keep *any* sex-separated teams, *other* teams will have to be abandoned to get the balance right—putting even more female teams on the chopping block.

Finally, this balancing test is made even more unpredictable and idiosyncratic when the Department, without explanation, proposes to allow for students to identify not merely as the opposite sex, but also as nonbinary, as a member of neither sex, or as a member of more than one sex.[48] This (and the long list of other possible often-fluid identities) raises the specter that a student could seek the right to participate on both a male and a female team, if the student so

---

[47] *E.g.*, 88 Fed. Reg. at 22,863, 22,867, 22,878, 22,880, 22,889.

[48] 88 Fed. Reg. at 22,869.

identifies; that a student could require creating an entirely new team for each gender identity; that a student could often change teams; and that a student could constantly require a school to reassess and re-justify its rationales, criteria, and balance of teams. But any third or new categories of sports teams would take away resources and visibility from female sports, threatening even more unfairness.

C. The sports rule's balancing test is atextual and lawless.

This entire proposed balancing test lacks any sound legal policy principles—the sports rule's approach has no grounding in Title IX or any other coherent source of law. None of these rules or limits are found in Title IX. The Department is just making everything up as it goes along.

In fact, never does the sports rule justify including males on female teams in the first place as a sound approach under Title IX—instead, the Department treats that question as a settled issue. The Department assumes that the question is closed from its previous statements,[49] or from the prior proposed rule,[50] or from some selectively cited district court or circuit court opinions,[51] rather than conducting its own textual analysis of Title IX. The Department acknowledges the existence of adverse court opinions like *Adams* or *B.P.J.*, but it never engages their reasoning or authorities, and it never explains why its favorite court opinions are right and why all the others are wrong. The doctrine of reasoned decision-making requires that the Department give notice of its rationale by offering some reason why certain opinions are right and others are wrong—as opposed to just reciting lots of cases and saying which ones it's going with.

Much of the sports rule's preamble essentially concedes that *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), does not apply to Title IX—making arguments that admit that *Bostock*'s hermeneutic does not apply to an equal opportunity statute protecting women's rights. Every time the Department states that schools can, but need not, adopt sex-specific criteria, the Department implicitly concedes that *Bostock* does not govern.[52] And every time it describes how male and female athletic teams are "unique circumstances," it concedes that sports are not like employment.[53] The Department vaguely says that declining to recognize a

---

[49] 88 Fed. Reg. at 22,865.

[50] *E.g.*, 88 Fed. Reg. at 22,866, 22,876.

[51] *E.g.*, 88 Fed. Reg. at 22,868, 22,871–73, 22,877.

[52] *E.g.*, 88 Fed. Reg. at 22,860, 22,871 ("[T]he proposed regulation would not prohibit a recipient's use of sex-related criteria altogether.").

[53] *E.g.*, 88 Fed. Reg. at 22,862, 22,866–67, 22,888–90.

gender identity is the same as punishing gender non-conformance,[54] but it does not explain how Title IX addresses that concept either.

Nor is there anything in the current regulation that extends Title IX to gender identity or requires the sports rule's balancing test. The Department claims that the current regulation "say[s] that a recipient must still provide equal opportunity in its athletic program as a whole."[55] But this is incomplete at best. The regulation says that schools must provide equal opportunity "for members of both sexes," not that schools must provide equal opportunity generally or on a gender-identity theory. Title IX isn't about fairness and safety generally in sports. It's about fairness and safety for women and girls by sex (not by gender identity), because females have been historically disadvantaged in educationally sponsored athletics.

Elsewhere, the Department recognizes that under its current regulation "a recipient's provision of male and female teams *can advance rather than undermine* overall equal opportunity in the unique context of athletics *by creating meaningful participation opportunities that were historically lacking for women and girls*."[56] In other words, the Department admits that the current regulation imposes a duty to provide equal opportunity to students in a sex-based, sex-conscious way—by female-only teams to remedy past and systematic discrimination—not by imposing gender identity ideology. That is why the Department recognizes that under its current regulation "an institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to qualify for the men's team."[57]

Introducing a balancing test into this regulation departs from the current regulation's clear rules that do not involve any values-based policy balancing. The current regulation has a simple standard requiring schools to allow female teams if there are male teams.[58] In service of that simple rule, it includes a multi-factor analysis for the factual question of whether males and females have an equal

---

[54] *E.g.*, 88 Fed. Reg. at 22,868, 22,871.

[55] *E.g.*, 88 Fed. Reg. at 22,863, 22,867, 22,878, 22,880, 22,889.

[56] 88 Fed. Reg. at 22,877 (citing 1979 Policy Interpretation, 44 Fed. Reg. 71,421) (emphasis added).

[57] 88 Fed. Reg. at 22,863 (citing U.S. Dep't of Health, Educ., and Welfare, Office for Civil Rights, *Sex Discrimination in Athletic Programs*, 40 Fed. Reg. 52655, 52656 (Nov. 11, 1975)). As explained above, this regulation is binding by congressional acquiescence, which is why the sports rule cannot change it to require the abolition of women's teams.

[58] 34 C.F.R. § 106.41(c).

number of various program components. In contrast, with an equal-protection style balancing test the very existence of the legal rule depends on weighing intangible policy, interests, and values determinations—something very different from factual comparisons about the number of playing fields, salaries of coaches, or amount of athletic equipment allotted between male and female teams.[59] The key to understanding what is novel in the sports rule is what the Department is comparing or evaluating under its proposed balancing test, not the mere fact that under the current regulation schools must have an equal balance of opportunities between male and female teams.

In short, *everything* in the current regulation counsels against the sports rule. The Department admits that women suffered prior disadvantages and it admits that Title IX in the sports context seeks to provide equal opportunity for women. So the Department has all but conceded that changing this regulation and enacting the sports rule conflicts with Title IX because it lessens the opportunity for women by including men who identify as women.

What's more, the sports rule even conflicts with the Department's own proposed (but not yet finalized) Title IX rule. That rule generally prohibits "a policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity" and says that it applies in any situation where the exclusion "subjects a person to more than de minimis harm on the basis of sex."[60] But this sports rule equates any exclusion with more than de minimis harm.[61] And the sports rule's balancing test does not incorporate the "de minimis" harm standard at all, instead allowing sex-separated teams even if they may cause some students more than de minimis harm.

The only possible legal policy principles behind the balancing test appear to be from the equal-protection context. But Title IX is a statute with simple and longstanding rules, especially in athletics. Title IX seeks to promote women's equal opportunities, not to create a roving form of scrutiny for protected classes that were never approved by Congress in this statute. The Equal Protection Clause is simply irrelevant to Title IX. Even the Department admits that "the scope of Title IX differs from the scope of the Equal Protection Clause."[62]

---

[59] *E.g.*, *Daniels v. Sch. Bd. of Brevard Cnty., Fla.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997).

[60] *E.g.*, 88 Fed. Reg. at 22,866, 22,876–77.

[61] 88 Fed. Reg. at 22,877.

[62] 88 Fed. Reg. at 22,867.

Not only is the proposed equal-protection framework irrelevant to what Title IX requires, the Department gets the equal-protection framework wrong. It adopts the wrong equal-protection standards and then warps them beyond recognition. Sex discrimination is subject to intermediate scrutiny, not strict scrutiny. But the sports rule's new regulatory text essentially provides for heightened scrutiny of a sex-separated team. That is the wrong standard. Dividing sports by biological sex easily meets the correct equal-protection standard of intermediate scrutiny, as many appellate courts have held.[63] Moreover, an equal-protection challenge to sex-separated sports teams arguably presents merely an under-inclusiveness challenge: a male who identifies as female is not seeking to end all sex classifications, but is seeking access to the sex-based benefit of being on a girls' sports team and of competing against girls.[64] A school's adoption of male and female teams is subject to the heightened scrutiny that applies to sex-based policies, but an under-inclusiveness challenge to eligibility criteria arguably receives only rational-basis review. And a school does not act irrationally when it defines sex biologically for sports.

Another legal complication is that the Department's preamble anticipates a broad role for athletic associations like the National Collegiate Athletic Association ("NCAA") to set standards for association member institutions. Indeed, much of the analysis proceeds on the mistaken presumption that "the NCAA or similar national athletic associations" alone get to set the rules for intercollegiate sports teams, and that these rules will be just fine under Title IX.[65] The Department does not explain how the NCAA's standards meet its balancing test and it does not consider conflicts between these standards and its balancing test, casting doubt on this presumption. But even assuming that the Department would allow the existence of NCAA standards to supersede the balancing test, or to presumptively satisfy the test, the Department would run headlong into another constitutional problem: improper delegation of federal rulemaking standards to a private entity.[66] Title IX requires schools to follow Title IX—the NCAA's existence or beliefs gives neither schools nor the Department an excuse to violate the statute.

---

[63] Alabama Amicus Br., *A.M. v. Indianapolis Pub. Schs.*, No. 22-2332 (7th Cir. Sept. 13, 2022), attached as ADF Ex. 45.

[64] *See also* Ed Whelan, *Transgender Bathroom/Sports Claims Are Underinclusiveness Challenges*, (Jan. 18, 2023), https://www.nationalreview.com/bench-memos/transgender-bathroom-sports-claims-are-underinclusiveness-challenges/, attached as ADF Ex. 165.

[65] 88 Fed. Reg. at 22,880, 22,869, 22,875–76, 22,880, 22,883, 22,885–86.

[66] *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 668 (D.C. Cir. 2013).

D. The sports rule's balancing test lacks evidence.

The difficulty of meeting these balancing tests and retaining sex-separated sports also flies in the face of evidence before the Department—evidence that the Department agrees justifies some sex-separation in sports out of fairness concerns or to prevent injury.

The Department recognizes in the preamble that sex is not a stereotype. At times, the sports rule agrees that sex is real, sex characteristics are real, and that there are in theory valid ways of determining sex, such as various identity documents from birth.[67] The sports rule proposes to limit the use of these valid sex-related criteria if it conflicts with its broader goal of allowing students to join teams based on their gender identity.[68]

But the Department never explains why sex discrimination provisions in Title IX require students to be allowed to play sports based on gender identity that contradicts the student's sex. Nor does it explain why physical sex advantages, including pre-puberty advantages by sex, do not matter in athletics.[69] The Department never explains why it can ignore the evidence showing that male and female physiology differs at each age, that there is a risk of injury and unfairness to girls at all ages if they play against males, and that in general sex-separated educational activities have educational benefits. Instead, the Department just seems to assume that the use of biological characteristics related to sex is an impermissible stereotype—and then it only applies that conclusion against persons who identify other than as their sex.[70] The Department says that it is a stereotype to consider the physical abilities of all persons identifying as other than their sex to be the same.[71] But the Department allows what it calls "overbroad generalizations" about the characteristics of men who identify *as men*—so why can schools not use those "generalizations" for men who identify as women? How does this treatment of all sex distinctions as "overbroad generalizations" unconnected to individual skills

---

[67] 88 Fed. Reg. at 22,871.

[68] 88 Fed. Reg. at 22,871.

[69] *See, e.g.*, USA Swimming, 2021-2024 National Age Group Motivational Times, Long Course Meters (Oct. 1, 2020), https://www.usaswimming.org/docs/default-source/timesdocuments/time-standards/2024/2021-2024-national-age-group-motivational-times.pdf, attached as ADF Ex. 166.

[70] 88 Fed. Reg. at 22,872, 22,876.

[71] 88 Fed. Reg. at 22,873–74.

not spell the end of all biological distinctions in sports in favor of the Department's preferred general objectives of "inclusion," "fairness," or "safety"?

The Department recognizes in the preamble that fairness and safety interests are valid, but its treatment of these concerns is inconsistent. The sports rule acknowledges the benefits of athletic participation for all students (although it casts these benefits at a general level rather than as a right of women and girls to have fair and safe competition), and it acknowledges that "fairness in competition may be particularly important for recipients in some sports, grade and education levels, and levels of competition."[72] The Department recognizes that the size and strength advantages associated with male puberty can increase the risk of a sports-related injury to women in contact sports and so it agrees that problems arise when male athletes compete against females at high levels of female competition, which disadvantages women competing for scholarships and limited spots on highly competitive teams. If this is the case—if fairness and safety for women matters—it applies at all levels of competition, and the sports rule is arbitrary by making it virtually impossible to keep teams sex-separated at virtually any level of competition.

The mounting evidence of the harm to women and girls from allowing males to play on female sports teams is why sporting organizations around the world are reconsidering allowing males to play on females' teams, reversing the trend of allowing males to take female opportunities.[73] The new World Athletics policy, for instance, is an example of an international sporting body evaluating the risks that women face when competing with males, and realizing that it is necessary to bar males from women's sports if they have experienced any part of puberty.[74] This

---

[72] *E.g.*, 88 Fed. Reg. at 22,860–61, 22,872 ("The Department recognizes that prevention of sports-related injury is an important educational objective in recipients' athletic programs and that—as courts have long recognized in cases involving sex-separate athletic teams—fairness in competition may be particularly important for recipients in some sports, grade and education levels, and levels of competition").

[73] 88 Fed. Reg. at 22,869–70 (collecting policies).

[74] World Athletics, *Rule C3.5: Eligibility Regulations For Transgender Athletes (Version 2.0, approved by Council on 23 March 2023, and coming into effect on 31 March 2023)*, *in Book of Rules*, https://www.worldathletics.org/download/download?filename=ace036ec-a21f-4a4a-9646-fb3c40fe80be.pdf&urlslug=C3.5%20-%20Eligibility%20Regulations%20Transgender%20Athletes, attached as ADF Ex. 167. Of course, rules such as these are not perfect—a better policy is a clear line between the sexes, so that no policy incentivizes any use of puberty blockers on children—but the growing adoption of these revised policies are a step in the right direction. The Department should not buck this trend.

policy is supported by an extensive body of research, such as an article that was recently published in the area of sports science: "Should Transwomen be Allowed to Compete in Women's Sports?" The article (co-authored by expert Dr. Gregory A. Brown) examines the biological basis of sex, provides an overview of sex differences in sports performance, and then discusses the effect of testosterone suppression and puberty blockers.[75] And this trend gives the lie to the Department's assumption that all sports body policies will move in the direction of maximizing participation based on gender identity.[76]

The Department also tries to wave away the effect of this rule, claiming that the number of males seeking to play female sports is relatively low and incredibly small.[77] But this claim is both irrelevant and false. A 2021 study suggests that the rate of transgender identification among America's youth may be as high as 9 in 100.[78] Title IX does not allow the deprivation of equal opportunities for what the Department arbitrarily deems a "small" number of female athletes. And current evidence shows much higher and increasing rates of male participation in female sports under the gender identity ideology that this rule would impose. The fact that Title IX's existing rules prohibit letting men compete in women's teams and leagues, and the fact that so many states prohibit males from participating in female sports in obedience to those rules, and the fact that the Department's 2021 gender identity mandate under Title IX is enjoined, all explain why there are not yet more male interlopers in female sports. But this rule would change those numbers drastically. It is arbitrary and capricious for the Department to justify this rule based on an allegedly small number of instances of male participation in female sports when this rule would open the floodgates to that participation.

---

[75] Gregory A. Brown Ph.D., Professor of Exercise Science, Physical Activity and Wellness Laboratory, Department of Kinesiology and Sport Sciences, University of Nebraska Kearney & Tommy Lundberg Ph.D., Assistant Senior Lecturer, Department of Laboratory Medicine, Division of Clinical Physiology, Karolinska Institutet, Stockholm, SWE, *Should Transwomen be Allowed to Compete in Women's Sports?*: *A View From an Exercise Physiologist*, Sport Policy Center, https://www.sportpolicycenter.com/news/2023/4/17/should-transwomen-be-allowed-to-compete-in-womens-sports, attached as ADF Ex. 168.

[76] 88 Fed. Reg. at 22,883.

[77] 88 Fed. Reg. at 22,884.

[78] William Malone, *Time to Hit Pause on 'Pausing' Puberty in Gender-Dysphoric Youth*, Medscape (Sept. 17, 2021), https://wb.md/3D4IVf5. In addition, by making a faulty assumption about the low numbers of males identifying as females (and vice versa), the sports rule undermines its own basis for existence by showing that there is no need numerically for the new rule.

E. The sports rule's balancing test is arbitrary and incoherent.

At the same time, if the Department were correct that Title IX addresses gender identity, there is little logical ground in the statute to use balancing tests at all—tests invented out of whole cloth for the first time in this rule.

Rather than have one rule that applies to everyone, a balancing test in the gender-identity context invites arbitrary, uneven, and inconsistent enforcement. No one can predict what a school will, must, or may do. That lack of clarity is unfair for everyone. When the Department assesses so many policies and supporting rationales on a case-by-case basis under such a loose balancing test, it seems possible that the Department will accept some rationales but not others for policies that do the same thing. Female athletes will ask why federal civil rights protections allow them to have their own teams in some states and at some schools, but not in others.

And given that the proposed rule (without evidence) wrongly likens "participating in sports on teams that contradict one's gender identity . . . to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical,"[79] and describes what it sees as various harms from not allowing students on teams by gender identity,[80] and given that the sports rule wrongly says that medical opinion considers "social transition" of minors to be "crucial" for their self-esteem and mental health,[81] the sports rule will not satisfy even its own favored activists, who will seize upon this language to get a court to vacate as inconsistent and arbitrary even a slim possibility of allowing schools to protect sex-separated sports. They will no doubt pursue litigation claiming that any exclusion of males from female sports is a strong dignitary or other mental harm that every school must avoid under the sports rule.

At the same time, the sports rule requires schools to allow males who identify as females to be admitted into most female teams, but the rule makes no allowance for schools allowing males who identify as males onto female teams—retaining all the prior rules for those cases. That effect constitutes "discrimination" against certain men based on gender identity, under the Department's own theory, because in that case males who identify as males receive less favorable treatment than

---

[79] 88 Fed. Reg. at 22,871.

[80] 88 Fed. Reg. at 22,870–71, 22,877.

[81] 88 Fed. Reg. at 22,879–80. For the reasons set forth in ADF's prior Title IX and Section 1557 comments and attachments, these harms rest on a lack of solid scientific and medical evidence; the better treatment for gender dysphoria in children is watchful waiting.

males who identify as females. That is literally "gender identity discrimination." Yet the ostensible point of the sports rule is to prohibit gender identity discrimination.[82] The sports rule is therefore self-contradictory and incoherent.

Of course, the current regulation does not require schools to make decisions by gender identity, requires sex-based distinctions including female-only sports and teams, and generally prohibits unequal treatment of the sexes. So the statute does not draw any distinctions by gender identity.[83] But because the Department rejects that interpretation, it cannot coherently explain why under this rule males who identify as males can be legally disfavored to males who identify as females under Title IX.

In short, this rule's entire approach is unworkable, lawless, incoherent, and arbitrary. And women's sports will suffer the effects.

III. The sports rule is not entitled to judicial deference.

For some time, it appeared that the Department might not issue any Title IX rulemakings, as instead the Department issued "guidance" to avoid the hassle of notice-and-comment rulemaking. But the Department is now re-promulgating the guidance's sports mandate through its twin rulemakings. It seeks to make its mandate binding nationwide and eligible for *Chevron* deference—so that federal courts never consider whether Congress in fact sought to end women's sports when it passed Title IX. When the Department sought to impose the same mandate during the Obama administration, it claimed *Chevron* deference for its view of Title IX,[84] and it claimed *Auer* deference for its view of its binding regulations.[85]

But the Department cannot look to deference to save the sports rule. The proposed rule's balancing test lacks any basis in statutory text, and it conflicts with Title IX and the Constitution. Title IX does not address gender identity; indeed, allowing males onto females' teams violates Title IX. There is thus no ambiguity for a court or an agency to construe, and there is no reason for any court to give the Department deference under any existing standard.

---

[82] 88 Fed. Reg. at 22,877.

[83] 88 Fed. Reg. at 22,871.

[84] *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

[85] *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

And there is now a new and further reason why the Department likely will be unable to resort to agency deference. Since the rulemaking began, the Supreme Court agreed to hear *Loper-Bright Enterprises v. Raimondo*, a case reconsidering *Chevron* deference or restricting its scope.[86] ADF filed an amicus brief in this *Chevron* case on behalf of Christian Employers Alliance, explaining that unelected, unaccountable bureaucrats are weaponizing federal laws such as Title IX to violate Americans' most fundamental rights.[87] The Biden administration's radical agenda, whole-of-government approach thus merits no deference from the courts. The Department thus should consider the eventual decision in this case and address the arguments in ADF's attached brief. It should face the realistic prospect that the Supreme Court is posed to rein in unaccountable bureaucrats, overrule *Chevron v. Natural Resources Defense Council,* and affirm that courts should not defer to federal agencies when they overstep their executive authority and violate the freedoms the First Amendment protects for all Americans.

IV. The Department should protect female athletes.

The Department should abandon this rule, the 2022 proposed Title IX rule, and the 2021 Title IX mandate, and leave in place the existing Title IX regulations and guidance to protect female athletes.

A. The Department should not force schools to put males in female sports.

The Department has a duty to consider alternatives to its proposed rulemaking, and here, the proper alternative to adopt is one of no action. Taking no action will leave in place the current framework of Title IX, which obligates the Department to protect women's equal opportunities by ensuring that women and girls need not compete against males.

---

[86] *Loper Bright Enterprises v. Raimondo*, No. 22-451, 2023 WL 3158352, at *1 (U.S. May 1, 2023) (memorandum opinion granting review on Question 2 presented by the petition for a writ of certiorari, i.e., whether "the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency"). In addition, the Supreme Court's decision to hear *Loper Bright* warrants allowing additional public comment on that question after that case is decided in a supplemental period and in favor of delaying any final rulemaking until after the Court issues its decision.

[87] ADF Amicus Br., *Loper-Bright Enterprises v. Raimondo*, No. 22-451 (U.S. Dec. 15, 2022), attached as ADF Ex. 169.

The Department thus should not adopt the proposed rule as written, should not proceed with its fall Title IX rulemaking, and certainly should not adopt any version of the sports rule that would allow or require males to play on female teams. Some activists have criticized the proposed rule for not requiring every school to allow every male to play on every female sports team if they so identify. But no version of the final rule should force schools to put males on females' teams or to give them access to females' private spaces, in whole or in part, as a categorical rule or under any form of a balancing test.

B. The Department should enforce Title IX and protect female athletes.

Furthermore, even if the Department adopts the proposed rule, the Department should change the proposed rule to protect women's sports.

First, the Department could make clear in the regulatory text and in the preamble that the rule does not require any school to violate state law. Just because a regulated entity receives federal funding does not mean that the entity or the Department should be free to set aside or preempt state law. Withdrawing educational funding will be catastrophic, and therefore the Department should allow schools to disregard this rule if they must do so to follow state law.

Second, the Department should also factor this federalism dynamic into its cost-benefit analysis, its regulatory impact analysis, and its (almost non-existent) federalism analysis[88]: the reliance interests at stake are federal funding for the entirety of 21 states and counting—a far cry from the merely $23–24 million or so in compliance costs that the Department naively anticipates on the mistaken belief that every school and state will abandon state law and female athletes.

No analysis is accurate that assumes that schools and states can or will participate contrary to state law. Indeed, the Department's failure to address these reliance interests—reliance interests to the tune of hundreds of billions of dollars in federal funding—makes its rulemaking lack reasoned decision-making. If the Department has not considered the reliance of schools, states, and students on their continued ability to access education funding, it has failed to consider an important factor and is procedurally invalid. And, indeed, these massive reliance interests are why the major questions doctrine and the federalism clear-notice canon apply to this rulemaking, requiring a more limited interpretation of Title IX in accord with its unmistakable meaning at the time of enactment.

---

[88] 88 Fed. Reg. at 22,890.

In other words, the Department must estimate that many states would rather abandon federal educational funding than comply with this lawless imposition of Title IX. This rule's economic estimates must calculate not only the loss of that funding but the harms that will result to all students and to society when that funding is abandoned.

Third, the Department should remove any requirement to justify sex-separated athletics and facilities under a balancing test or to document reasons for retaining sex-separated athletics or facilities. As is, the proposed rule's balancing test requires a mountain of bureaucratic paperwork for each student who is placed against their wishes in a sex-separated category of athletics (a paperwork burden that the Department overlooks in its regulatory impact analysis). This paperwork requirement has no basis in the statutory text; it introduces a lack of clarity and predictability; and it threatens to induce schools to throw up their hands, avoid any litigation risks, and simply abandon sex-separated athletics.

The Department should also state that there is no requirement to cut sports teams to achieve any form of balancing across sports teams, such as to compensate for female teams on which males are not allowed to play. Another alternative the Department should consider is to provide that a fully acceptable (and indeed, legally required) way to minimize harms to students excluded from teams of the opposite sex is to allow those students to compete on or try out for the team of their own sex. Another alternative to consider is to explain whether the adjustment period in the current regulation will extend to compliance with any amendments made by the sports rule, effectively giving schools a three-year grace period for compliance. The Department could also consider the alternative of grandfathering existing programs and policies.

Fourth, the Department could issue a rule that does not contradict the existing Title IX rules and standards, but more strictly enforces them. For example, the Department could define sex, women, girl, female, and gender, to provide for their biological binary meanings at the time of Title IX's enactment consistent with the existing rules, and to exclude gender identity ideology from those definitions. This step would ensure that officials cannot redefine terms at will, and it would ensure that the regulations' text aligns with the correct legal meaning. Under such a rule, recipients of federal funds that allow males to compete on female teams using gender identity ideology would know they are violating Title IX and risk federal funding.

Fifth, it is far past time for the Department to enforce Title IX in the way it was written—to take action against states and schools that allow males to take away females' athletic opportunities. Before President Biden took office, the Department was processing and acting on complaints that males were taking away

females' Title IX athletic rights. The Department should reinstate these enforcement actions, act on all complaints, and enforce the existing law to protect women's sports.

V. The Department's regulatory redefinition of sex discrimination is procedurally unlawful.

To return to the beginning: the sports issue does not exist in isolation from the broader problems with reinterpreting Title IX in education. Many aspects of education are interrelated under Title IX. Allowing males onto female athletic teams will harm women's privacy and dignity in locker rooms, shared showers, overnight hotel rooms, and other private spaces; will create conflicts with the parental rights, due process rights, free speech rights, and free exercise rights of students, teachers, schools, states, and families; and threatens to create facilities and litigation costs far beyond the regulatory impact analysis' estimate because schools will need to act to protect women and girls—like cutting "unbalanced" sports teams, renovating shower and locker room facilities, and paying far more for increased privacy protections, like separate hotel rooms.

Reasoned decision-making requires that, whenever the Department decides whether Title IX includes gender identity, it considers *all* these issues (issues that involve significant reliance interests) because they are all interrelated: deciding that Title IX addresses gender identity does not make a decision just about sports or admissions or discipline or facilities or just about one other aspect of education. It makes a decision about them all.

It is arbitrary and capricious for the Department to ignore these interrelated issues, reliance interests, and costs. They must be considered together as part of any Title IX rulemaking on gender identity—whether in the Title IX rulemaking or in this sports rulemaking. The Department cannot engage the sports question in isolation. But it seems almost certain that the Department seeks to shirk this duty of reasoned decision-making.

Something fishy is going on with the Biden administration's Title IX twin rulemakings on Title IX and women's sports. Rather than engaging in one, unified comprehensive form of reasoned decision-making, the Department has attempted a regulatory two-step. This two-step consists of: (1) issuing a broad gender identity rule that applies across the board—including to sports—while deferring any reasoned decision-making about its application to sports, and then (2) issuing a sports rule that finds the inclusion of gender identity as to sports a *fait accompli*, not open to reasoned consideration or comment, including as to its interaction with other aspects of education.

Make no mistake: the Department acted in bad faith by deterring public comment on women's sports in the Title IX rule in 2022. The public was told last year not to comment about sports, and instead to comment only on the forthcoming sports rule about the application of Title IX's sex discrimination provision as to women's sports. The Department's press releases, fact sheet, and notice to the public in the Title IX rule did not solicit comment on this important and high-profile issue and instead said that the Department would issue separate proposed regulations to address "whether and how" to amend the current regulations on sex-specific athletics 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." The Department even said that it did not then propose to change current Title IX regulations, under which schools 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 expressly discouraged comments on "this issue," saying that they are beyond the rule's scope, and thus signified that they will not be considered.[89]

But then, when the sports rule came out, not only was the comment period shorter, the sports rule treated the meaning of sex under Title IX as applied to sports as a done-deal, not conducting any textual analysis itself and just selectively citing cases that held that Title IX requires this outcome.[90] The only explanation for this separate rulemaking was to evade public participation and accountability by removing the most controversial issues from notice and comment in the initial Title IX rule, and then hoping to do the same on the sports rule.

This process not only deterred public participation, it failed to provide the required notice of the Department's reasoning. Under the Administrative Procedure Act, 5 U.S.C. § 553, the Department must acknowledge changes are being made, offer good reasons, and address reliance and religious freedom interests.[91] But nowhere does the 2022 Title IX proposed rule's notice offer a statement about its effect on women's sports, consider reliance interests, or provide a rationale for such

---

[89] 87 Fed. Reg. 41537. The notice states: "the Department plans to address by separate notice of proposed rulemaking 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. The scope of public comment on this notice of proposed rulemaking therefore does not include comments on that issue; those comments should be made in response to that separate rulemaking."

[90] *E.g.*, 88 Fed. Reg. at 22,877.

[91] *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

a change to women's sports—all of which is necessary to give the public adequate notice. Such "notice" as the Department provided—an effort to tell the public not to comment on this rule as to sports—was inadequate because it does not "fairly apprise interested persons of the nature of the rulemaking" by disclosing the Department's *action and rationale.*[92] When a notice states a "proceeding was limited to changing" one part of a standard and provides a "substantive sections focus entirely" on that part, the notice is inadequate to reasonably inform the public the Department proposes to change another part.[93] The Department has thus failed its duty to give proper notice and to reasonably explain its Title IX rule's effect and rationale.[94]

Nor can the Department claim that this cynical omission was harmless. To be sure, many members of the public still submitted comments about women's sports. But courts only "rarely" find harmless error for failure to provide notice for a comment opportunity.[95] And courts have "repeatedly" rejected the idea that "because at least a few parties to the rulemaking did in fact comment upon the question" the notice must have been adequate.[96] "[T]he comments received do not cure the inadequacy of the notice given."[97]

Because the Department never addressed Title IX's application to sports in its 2022 Title IX rule, either on athletic extracurricular teams or physical education classes, nothing it can do in the present 2023 sports rule can cure that lack of notice.[98] No "post hoc rationalizations" are permitted to defend agency actions, and when offered, they "are not properly before" a court.[99]

The Department has acted in bad faith—for the sole purpose of dissuading and limiting public participation in rulemaking. The APA forbids such bad-faith

---

[92] *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (cleaned up).

[93] *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995).

[94] *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

[95] *Texas Med. Ass'n v. HHS*, No. 6:21-cv-425-JDK, 2022 WL 542879, at *13 (E.D. Tex. Feb. 23, 2022).

[96] *MCI*, 57 F.3d at 1142.

[97] *Id.*

[98] *Dep't of Homeland Sec.*, 140 S. Ct. 1891.

[99] *Id.* at 1909.

gamesmanship with the public.[100] In the sports rule, the Department has given "an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process."[101]

Whichever rule the Department finalizes first—the Title IX rule or this sports rule—is thus invalid on these grounds. Neither rule gave proper notice or consideration of all of these interrelated interests. And there is no way to sequence the issuance of these rules to cover for these omissions. On the one hand, the Title IX rule lacks crucial consideration of sports. On the other hand, the sports rule lacks crucial consideration of every other aspect of Title IX. Whichever rule seeks to establish sexual orientation and gender identity as a protected class fails the requirements of reasoned decision-making by failing to address significant issues in the preamble so that the public could comment on the Department's rationales. The Department should republish a comprehensive proposed rule addressing Title IX in its totality before proceeding with rulemaking on these topics.

VI. The Biden administration torched bipartisan norms for good government when it rushed the proposed sports rule.

The Department shattered bipartisan norms governing public participation in the regulatory process when it rushed this rule out without allowing for pre-publication regulatory review, a reasonable comment period, or transparency into its rulemaking procedures.

A. The Biden administration has abandoned longstanding, norms allowing for public participation in pre-publication regulatory review.

In its rush to advance this Title IX sports rule, the Biden administration has taken the extraordinary step of jettisoning longstanding, bipartisan norms governing the pre-publication regulatory review process.

The *same day* as the proposed rule was published on the Department's website, the White House announced that it would no longer abide by the pre-publication regulatory review process that has governed rulemakings of both

---

[100] *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

[101] *Id.* at 2575.

parties for decades.[102] Under this pre-publication regulatory review process, rules of great policy significance, like the sports rule, would be subject to review by nonpartisan economic experts in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for at least three months, and interested parties may request meetings with the Office of Management and Budget (OMB) and other relevant federal agencies to provide input the agency must consider before the regulations are unveiled as proposed or final rules. But the sports rule was before OIRA for one week and no meetings occurred with the public. Then, the same day, the White House announced a new Executive Order and a series of new OIRA rules to provide that thus rushed, partisan regulatory review process would now be the norm—all under the guise of "modernizing" regulatory review.[103]

Without this robust public participation, the administration's rulemakings are more likely to be ill-conceived and vulnerable to judicial vacatur in litigation on substantive and technical grounds.

B. The Department's comment period is impermissibly brief and designed to evade robust public participation.

The Department has also signaled that it does not intend to engage in a good-faith comment process in another way: by setting an unusually short comment period. The legal, financial, and equal opportunity implications of this proposed rule are monumental. And the Department discouraged comment on them in the 2022 Title IX public comment process. Thirty-two days is simply too short a timeframe in which to allow the public to comment on this sports rule.

The Department should extend the current May 15, 2023 deadline to July 12, 2023, which is 90 days after the Department published the proposed rule in the Federal Register, or it should reopen the comment period for a commensurate time. Thirty-two days is far too short. The "usual" length of time for comments is 90 days.[104] Usually, "at least 60 days" is necessary to "afford the public a meaningful opportunity to comment."[105]

---

[102] It is not a coincidence that this release was also late in the day before a holiday weekend—a weekend important to the Christian and Jewish religions, when the public's attention was likely elsewhere.

[103] White House, Modernizing Regulatory Review, https://www.whitehouse.gov/omb/information-regulatory-affairs/modernizing-regulatory-review/.

[104] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011).

[105] Exec. Order 13563, 76 Fed. Reg. 3821, 3822-23 (Jan. 21, 2011).

C. The Department should disclose its method of reading and responding to public comments.

Given the rise of the appearance of impropriety raised by the rushed pre-publication regulatory review and by the surprisingly short period of public comment for this rule, the Department should identify any methods of sampling or other anomalies in the process. In the past, the Department has responded only to stakeholders on one side of the issue, never reaching out to the female athletes, schools, and states suing the Department over its unlawful reinterpretation of Title IX. And the Department ignored, for instance, the testimony of female athletes in listening sessions, preferring instead to credit only the testimony of its preferred activists.

Without reading every comment, and responding to significant comments, the proposed Title IX rule and the proposed sports rule will not comply with the APA. So the Department should identify and explain in the final rule's notice the size of any samples collected; each methodology used to select a sample; its de-duplication process; any self-imposed deadline or caps on hours; and the percentage of the sample actually reviewed. The Department should specifically identify whether the sample or its methodology rested on an estimate of what the Department or its contractor could accomplish under time and budget constraints that the Department had imposed on itself and its contractor.

The Department also should explain how its sample of unique and "pivot" comments is representative of the broader pool. If not, the Department must explain how it addressed the full range of significant issues. Any report from a contractor, including proposals on sampling, should be specifically disclosed in the docket for comment.

These efforts would help avoid the flaws in a similar high-profile rulemaking on these issues before the Department of Health and Human Services (HHS),[106] where HHS "fail[ed] either to review all unique public comments or to employ a methodology reasonably designed to capture the significant comments raised by the public."[107] HHS reviewed only a small fraction of the non-duplicative comments, did not employ a sampling methodology likely to produce an adequate sample of the comments received, and did not explain its use of sampling in the final rule.

---

[106] *See* 84 Fed. Reg. 63,831; 86 Fed. Reg. at 2,261.

[107] *See Facing Foster Care in Alaska v. HHS*, No. 21-cv-00308, ECF No. 4141 at *3–4, 6-9 (D.D.C. June 17, 2022). Ex. 1 to Declaration of Renee Cooper, HSAG, Summary of Comments – Final Report (Apr. 8, 2020), attached as ADF Exs. 170–172.

CONCLUSION

Girls shouldn't be spectators in their own sports. The Biden administration should withdraw this disastrous sports rule.

Respectfully Submitted,

Julie Marie Blake
Senior Counsel
ALLIANCE DEFENDING FREEDOM
ADF REGULATORY PRACTICE TEAM

Christiana Kiefer
Senior Counsel
ALLIANCE DEFENDING FREEDOM
ADF CENTER CONSCIENCE INITIATIVES

Enclosure: Exhibit List

Exhibit List

1. ADF Title IX Rule Comment—Lacks Legal Authority
2. ADF Title IX Rule Comment —Hurts Female Athletes
3. ADF Title IX Rule Comment —Harms Unborn Children
4. ADF Title IX Rule Comment —Undermines Parental Rights
5. ADF Title IX Rule Comment —Violates Free Speech, Religion
6. ADF Section 1557 Rule Comment—Main
7. ADF Section 1557 Rule Comment Attachment—*ACPeds* Attachments Part 1
8. ADF Section 1557 Rule Comment Attachment —*ACPeds* Attachments Part 2
9. ADF Section 1557 Rule Comment Attachment —EMTALA Attachment
10. ADF Section 1557 Rule Comment Attachment —Legal Attachments
11. ADF Section 1557 Rule Comment Attachment —*Tingley* Filings
12. ADF Section 1557 Rule Comment Attachment —Factual Attachments
13. Jocelyn Samuels, Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003)
14. Michael E. Rosman, *Gender Identity, Sports, and Affirmative Action: What's Title IX Got to Do With It?*, 53 St. Mary's L. J. 1093 (2022)
15. ADF, *Allen v. Millington*, (D. Vt.), Complaint
16. *Tennessee v. United States Dep't of Educ.*, 615 F. Supp. 3d 807, 833 (E.D. Tenn. 2022) (opinion).
17. *Tennessee v. United States Dep't of Educ.*, *World* op-ed.
18. *Tennessee v. United States Dep't of Educ.*, *FOX* op-ed.
19. *Tennessee v. United States Dep't of Educ.*, Intervention Order.
20. *Tennessee v. United States Dep't of Educ.*, Intervention Complaint.
21. *Tennessee v. United States Dep't of Educ.*, Exhibit A to Intervention Complaint.
22. *Tennessee v. United States Dep't of Educ.*, Exhibit B to Intervention Complaint.
23. *Tennessee v. United States Dep't of Educ.*, Exhibit C to Intervention Complaint.
24. *Tennessee v. United States Dep't of Educ.*, Opposition to Motion to Dismiss.
25. *Tennessee v. United States Dep't of Educ.*, State Appellees Brief.
26. *Tennessee v. United States Dep't of Educ.*, Intervenors-Appellees Brief Part 1
27. *Tennessee v. United States Dep't of Educ.*, Intervenors-Appellees Brief Part 2
28. *Tennessee v. United States Dep't of Educ.*, Intervenors-Appellees Brief Part 3
29. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of Thomas More Society
30. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of Institute for Faith and Family
31. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of Defense of Freedom Institute for Policy Studies

32. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of American Civil Rights Project
33. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of Foundation for Moral Law
34. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of LONANG Institute
35. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of Mountain States Legal Foundation
36. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of Southeastern Legal Foundation
37. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of State of Texas
38. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of America First Legal Foundation
39. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of America First Legal Foundation Exhibit
40. *Tennessee v. United States Dep't of Educ.*, Amicus Brief of Women's Liberation Front
41. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (Eleventh Circuit en banc decision),
42. *Adams v. Sch. Bd. of St. Johns Cnty.*, Amicus Brief of ADF for Drs. Miriam Grossman et al.
43. *Barrett v. State*, No. DV-21-581-B (Mont. 18th Jud. Dist.), *appeal docketed*, No. DA 22-0586 (Mont. October 13, 2023) (ADF amicus brief)
44. *A.M. v. Indianapolis Pub. Schs.*, No. 22-2332, *appeal dismissed* 2023 WL 371646 (7th Cir. Jan. 19, 2023) (ADF amicus brief filed Sept. 13, 2022)
45. *A.M. v. Indianapolis Pub. Schs.*, No. 22-2332, *appeal dismissed* 2023 WL 371646 (7th Cir. Jan. 19, 2023) (Alabama amicus brief filed Sept. 13, 2022)
46. *B. P. J. v. W. Virginia State Bd. of Educ.*, *FOX* op-ed (March 2023)
47. *B. P. J. v. W. Virginia State Bd. of Educ.*, *Herald-Dispatch* op-ed
48. *B. P. J. v. W. Virginia State Bd. of Educ.*, *CNSNews* op-ed
49. *B. P. J. v. W. Virginia State Bd. of Educ.*, *National Review* op-ed
50. *B. P. J. v. W. Virginia State Bd. of Educ.*, *Daily Signal* op-ed
51. *B. P. J. v. W. Virginia State Bd. of Educ.*, *FOX* op-ed (January 2023)
52. *B. P. J. v. W. Virginia State Bd. of Educ.*, Intervention Motion
53. *B. P. J. v. W. Virginia State Bd. of Educ.*, Armistead Declaration
54. *B. P. J. v. W. Virginia State Bd. of Educ.*, Intervention Order
55. *B. P. J. v. W. Virginia State Bd. of Educ.*, Brown Expert Report
56. *B. P. J. v. W. Virginia State Bd. of Educ.*, Cantor Expert Report
57. *B. P. J. v. W. Virginia State Bd. of Educ.*, Carlson Expert Report
58. *B. P. J. v. W. Virginia State Bd. of Educ.*, Levine Expert Report

59. *B. P. J. v. W. Virginia State Bd. of Educ.*, Intervenor MSJ Memo
60. *B. P. J. v. W. Virginia State Bd. of Educ.*, Intervenor MSJ Opposition
61. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Janssen
62. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Adkins
63. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Safer
64. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Fry
65. *B. P. J. v. W. Virginia State Bd. of Educ.*, Intervenor Reply Brief on MSJ
66. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Carlson
67. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Brown
68. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Cantor
69. *B. P. J. v. W. Virginia State Bd. of Educ.*, Memo on excluding testimony of Levine
70. *B. P. J. v. W. Virginia State Bd. of Educ.*, Supplemental Expert Report of Brown
71. *B. P. J. v. W. Virginia State Bd. of Educ.*, Supplemental Expert Report of Carlson
72. *B. P. J. v. W. Virginia State Bd. of Educ.*, Order and Opinion
73. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appellees' Stay Response and Appendix Part 1 (4th Cir. 2023)
74. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appellees' Stay Response and Appendix Part 2 (4th Cir. 2023)
75. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appellees' Stay Response and Appendix Part 3 (4th Cir. 2023)
76. *B. P. J. v. W. Virginia State Bd. of Educ.*, Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023)
77. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appendix to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023) Part 1
78. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appendix to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023) Part 2
79. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appendix to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023) Part 3

80. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appendix to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023) Part 4
81. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appendix to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023) Part 5
82. *B. P. J. v. W. Virginia State Bd. of Educ.*, Appendix to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023) Part 6
83. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Female Athletes (U.S.)
84. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of States (U.S.)
85. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Women's Liberation Front (U.S.)
86. *B. P. J. v. W. Virginia State Bd. of Educ.*, Reply supporting Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit (U.S. 2023)
87. *B. P. J. v. W. Virginia State Bd. of Educ.*, Supreme Court Opinion
88. *B. P. J. v. W. Virginia State Bd. of Educ.*, Defendant-Appellees' Response Brief (4th Cir. 2023)
89. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Female Olympic Rowers
90. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of International Consortium on Female Sport (ICONS)
91. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of 25 Athletic Officials and Coaches
92. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Concerned Women for America
93. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Women's Declaration International USA
94. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of 17 States
95. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Defense of Freedom Institute for Policy Studies
96. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of 78 Female Athletes, Coaches, Sports Officials, and Parents of Female Athletes
97. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Independent Women's Law Center
98. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Institute for Faith and Family
99. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Thomas More Society

100. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Parents Defending Education
101. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of Public Advocate of the United States
102. *B. P. J. v. W. Virginia State Bd. of Educ.*, Amicus Brief of 22 Business Executives
103. *D.N. v. DeSanctis*, Case No. 0:21-cv-61344-RKA (S.D. Fla. 2021), ADF Soule Intervention Motion
104. *D.N. v. DeSanctis*, Case No. 0:21-cv-61344-RKA (S.D. Fla. 2021), Soule Declaration
105. *D.N. v. DeSanctis*, Case No. 0:21-cv-61344-RKA (S.D. Fla. 2021), Amicus Brief of States
106. *D.N. v. DeSanctis*, Case No. 0:21-cv-61344-RKA (S.D. Fla. 2021), Amicus Brief of ADF for Soule on Motion to Dismiss
107. *Faith Action Ministry Alliance, dba, Grant Park Christian Academy v. Fried*, Complaint
108. *Faith Action Ministry Alliance, dba, Grant Park Christian Academy v. Fried*, Motion for Preliminary Injunction
109. *Faith Action Ministry Alliance, dba, Grant Park Christian Academy v. Fried*, Joint Motion to Stay
110. *Faith Action Ministry Alliance, dba, Grant Park Christian Academy v. Fried*, Dismissal
111. USDA Religious Exemption Letter
112. *Hecox v. Little*, *Post-Register* op-ed
113. *Hecox v. Little*, *National Review* op-ed
114. *Hecox v. Little*, *FOX* op-ed
115. *Hecox v. Little*, Summary
116. *Hecox v. Little*, Fairness in Women's Sports Act
117. *Hecox v. Little*, ADF Female Athletes' Motion to intervene
118. *Hecox v. Little*, Kenyon Declaration
119. *Hecox v. Little*, Marshall Declaration
120. *Hecox v. Little*, Mitchell Declaration
121. *Hecox v. Little*, Levine Affidavit
122. *Hecox v. Little*, Brown Affidavit
123. *Hecox v. Little*, Memo Opposing Preliminary Injunction
124. *Hecox v. Little*, Intervention Order
125. *Hecox v. Little*, Opening Appellate Brief of Intervenors
126. *Hecox v. Little*, Amicus Brief of Sandra Bucha, et al.
127. *Hecox v. Little*, Amicus Brief of Medical Professionals

128. *Hecox v. Little*, Amicus Brief of States
129. *Hecox v. Little*, Amicus Brief of US-
130. *Hecox v. Little*, Amicus Brief of US- Withdrawal
131. *Hecox v. Little*, Amicus Brief of Women's Human Rights Campaign – USA
132. *Hecox v. Little*, Amicus Brief of Women's Liberation Front
133. *Hecox v. Little*, Appellate Reply Brief of Intervenors
134. *Neese v. Becerra*, Amicus Brief of ADF for Three Female Athletes
135. *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425, at *10 (N.D. Tex. Nov. 11, 2022), Opinion
136. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, *FOX* op-ed (June 2022)
137. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, *FOX* op-ed (Jan. 2022)
138. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, *Newsweek* op-ed
139. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, *World* op-ed
140. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, *FOX* op-ed (Oct. 2022)
141. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Title IX complaint with OCR
142. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Brown Expert Declaration supporting Title IX complaint with OCR,
143. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, OCR, Investigation Letter
144. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, OCR Letter of Impending Action
145. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, OCR Revised Letter
146. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Complaint
147. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, DOJ Statement of Interest
148. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Preliminary Injunction Motion and Brief
149. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, DOE Withdrawal Letter
150. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Appellate Brief
151. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, En Banc Order
152. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, En Banc Opening Brief
153. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of Institute for Faith and Family
154. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of Ray Hacke
155. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of 21 Athletic Officials and Coaches of Female Athletes
156. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of 23 States

157. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of 40 Business Executives
158. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of 73 Female Athletes, Coaches, Sports Officials, and Parents of Female Athletes
159. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of Thomas More Society
160. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of Concerned Women for America
161. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of Defense of Freedom Institute for Policy Studies
162. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of Female Olympic Rowers
163. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of International Consortium on Female Sport (ICONS)
164. *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, Amicus Brief of Parents Defending Education
165. Ed Whelan, *Transgender Bathroom/Sports Claims Are Underinclusiveness Challenges*, (Jan. 18, 2023)
166. USA Swimming, 2021-2024 National Age Group Motivational Times, Long Course Meters (Oct. 10, 2020)
167. World Athletics, *Eligibility Regulations For Transgender Athletes* (Version 2.0, approved by Council on March 23, 2023, and coming into effect on March 31, 2023)
168. Gregory A. Brown Ph.D., Professor of Exercise Science, Physical Activity and Wellness Laboratory, Department of Kinesiology and Sport Sciences, University of Nebraska Kearney & Tommy Lundberg Ph.D., Assistant Senior Lecturer, Department of Laboratory Medicine, Division of Clinical Physiology, Karolinska Institute, Stockholm, SWE, *Should Transwomen be allowed to Compete in Women's Sports?: A view from an Exercise Physiologist*, Sport Policy Center,
169. ADF amicus brief, *Loper-Bright Enterprises v. Raimondo*, No. 22-451 (U.S.)
170. *Facing Foster Care in Alaska v. HHS*, No. 21-cv-00308, ECF No. 41 (D.D.C. June 17, 2022), Remand Motion
171. *Facing Foster Care in Alaska v. HHS*, No. 21-cv-00308, Exhibit to Declaration of Renee Cooper, HSAG, Summary of Comments–Final Report (June 17, 2022)
172. *Facing Foster Care in Alaska v. HHS*, No. 21-cv-00308, Final Order (June 28, 2022)