

Once More with Feeling: Department of Education Releases Second Title IX Rule—and Fails Again

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KEY TAKEAWAYS

The Department of Education’s Title IX athletics rule violates the principles of fundamental fairness and equal opportunity on which the law itself was founded.

In promulgating rules, agencies must respect the manifest intent of Congress, procedural restraints, and the delicate balance of state–federal power.

This Administration is attempting to weight the scales in support of gender identity over biological sex—and render null and void the enacted laws of 22 states.

Title IX of the Education Amendments of 1972¹ (Title IX) prohibits sex discrimination in any federally funded education program. A civil rights statute of a mere 37 words, it has long been considered a feminist triumph and has paved the way for equal educational opportunity for women who were historically disenfranchised from higher education, scholastic athletic programs, scholarship opportunities, and more.²

But in a sweeping exercise of administrative fiat, the U.S. Department of Education (the department) unveiled a proposed Title IX rule on July 12, 2022 (2022 rule)³ that promised to upend the law’s entire scheme by, among other things, expanding Title IX’s sex discrimination prohibition to prohibit discrimination based on gender identity.⁴

At that time, the department promised it would separately consider a rule to address “whether and

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how” the department should amend its current athletics regulation and “the question of what criteria, if any, recipients should be permitted to use to establish students’ eligibility to participate on a particular male or female athletics team.” That proposed rule, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletics Teams,”⁵ was published on April 13, 2023 (2023 rule or proposed rule).

In its newest Title IX rule, the department sets out a standard that would govern a recipient’s adoption or application of sex-related criteria limiting or denying a student’s eligibility to participate on a male or female athletic team consistent with that student’s self-proclaimed gender identity. The department’s proposed regulatory standard governing athletics is no minor modification of federal law. It is a significant change from decades of Title IX’s application, and it promises to create a bureaucratic nightmare for any educational institution to which it applies. The proposed rule would ostensibly “clarify” Title IX’s application to such sex-related criteria and reiterate the obligation of schools and other educational recipients (schools) of federal financial assistance from the department that adopt or apply such criteria to do so in a manner that is consistent with Title IX’s nondiscrimination mandate.

Unfortunately, rather than clarifying Title IX’s application to sex-based criteria in athletics, the proposed rule complicates it. And though the proposed rule has been billed as a “compromise,”⁶ it is anything but. Rather, it obscures the plain text of Title IX’s long-standing athletics regulation with vague terms, an unworkable standard, and a guaranteed conflict with contrary state laws—and it balances the equities against the very girls and women who were at the heart of Title IX’s passage.

For these reasons and more, the proposed rule must be withdrawn.

The Proposed Rule

Title IX’s mandate is simple:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.⁷

Under Title IX’s current athletics regulation, originally promulgated in 1980,⁸ educational institutions may “operate or sponsor separate teams for members of each sex where selection for such teams is based upon

competitive skill or the activity involved is a contact sport.” The department avers, however, that the current athletics regulation is not “sufficiently clear” to ensure Title IX’s nondiscrimination requirement is satisfied. The department states that the proposed rule “would provide needed clarity” and “would not affect a recipient’s discretion” to offer sex-specific teams based on competitive skill or for contact sports. This assertion ignores the plain letter of Title IX and its implementing regulations.

The department’s proposed rule⁹ states:

(b)(2) If a recipient adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their **gender identity**, such criteria must, **for each sport, level of competition, and grade or education level:**

- (i) Be **substantially related** to the achievement of an **important educational objective**; and
- (ii) **Minimize harms** to students whose opportunity to participate on a male or female team consistent with their **gender identity** would be limited or denied.

Consistent with the policy aims of the Biden White House,¹⁰ the department has conflated “sex” with “gender identity” in its proposed Title IX athletics rule. Its rule would bar schools from adopting or enforcing policies that categorically ban transgender students from participating on teams consistent with their gender identity, but it offers what appears to be a compromise.

Exception. That exception allows “in some instances, particularly in competitive high school and college athletic environments, some schools [to] adopt policies that limit transgender students’ participation.” Further, the department requires that there be a “direct, substantial relationship” between a recipient’s objective and the means used to achieve that objective. A school’s athletic participation criteria cannot rely on “overly broad generalizations” about the talents, capacities, or preferences of male and female students.

The department argues that “very few female student-athletes are transgender,” and “transgender students do not necessarily have greater physical or athletic ability than cisgender students that would affect cisgender students’ equal opportunity to participate.” According to the department, therefore, criteria that “assume all transgender girls and women possess an unfair physical advantage over cisgender girls and women in every sport, level of competition, and grade or education level” would rely on an

impermissible generalization—and, therefore, cannot be an “important educational objective.”¹¹

Physical Advantage. Such a cavalier dismissal of the demonstrable physical advantages that biologically male students have over biologically female students ignores the extensive weight of evidence. Even testosterone suppression therapy does not meaningfully change the faster muscle twitch response, greater bone density, greater muscle mass, and higher lung capacity that biological boys possess when compared to girls. Such physiological distinctions, which give biological males a decided, if not overwhelming, advantage¹² over females in athletic competition, cannot be suppressed. And they provide the imperative for the original Title IX athletics rule that was adopted decades ago.

For example, in a study¹³ by two Duke University Law School professors, comparing Olympic champion sprinter Allyson Felix’s 400-meter lifetime best of 49.26 to that of men and boys around the world, the pubescent and adult males of all ages outperformed her more than 15,000 times in 2017 alone. To envision these competitive advantages in real time, one need look no further than “Lia” (formerly Will) Thomas, who last year clinched the 500-meter freestyle National Collegiate Athletic Association swimming championship for the women’s team at the University of Pennsylvania. During his two years of competing on the men’s swimming team at that university, however, Will Thomas had been ranked a less-impressive 462nd in the nation among his male peers.¹⁴

Further, as stated in the Preamble to the Title IX Final Rule, published by the Department of Education on May 19, 2020:¹⁵

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

Educational Objectives. As for what the department would consider “important educational objectives” sufficient to pass muster under its proposed rule, it says that “ensuring fairness in competition and prevention of sports-related injury” are examples. The examples provided by the

department that *are not* important educational objectives, however, constitute a longer list:

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

While other “important educational objectives” must exist, the department fails to identify them. Instead, it proposes to leave their identification and the determination of their “substantial relation” to a school’s athletic criteria (while minimizing harm to transgender athletes) up to each school—under threat of federal funding loss.

Based on the department’s cited authority interpreting “sex” to include “gender identity,” and consistent with the Biden Administration’s expansive approach to federal protections based on one’s “gender identity,” the rule promises nothing short of a bureaucratic nightmare for schools that find the protection of girls and women athletes to be an “important educational objective.”

Sex-Based Criteria Under Title IX

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

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

22878—Whether any alternative approaches to the Department’s proposed regulation would better align with Title IX’s requirement for a recipient to provide equal athletic opportunity regardless of sex in the recipient’s athletic program as a whole.¹⁶

A better “alternative approach” to the department’s proposed rule would be to permit Title IX’s application to the athletic programs of federally funded schools according to the plain letter of the statute and its attendant regulations by maintaining sex separation in athletic contests. Such an approach ensures the clarity the department seeks; avoids the costs sure to arise from redrafting school policies, negotiating athletic association regulations, and defending against litigation; and protects the hard-won gains of the women’s movement in leveling the educational playing field.¹⁷

In 1971, Connecticut judge John Clark Fitzgerald proclaimed: “Athletic competition builds character in our boys. We do not need that kind of character in our girls.”¹⁸ It was comments like these that helped fuel the groundswell of support for the protection of women’s educational opportunities during the waning days of the sexual revolution. It took a House and Senate Conference Committee several months to work through the more than 250 differences between the House and Senate versions of education bills until Title IX and the provision against sex discrimination was born. Congress had ample opportunity to expand the provision against sex discrimination to include gender identity or transgender status but chose not to do so.¹⁹

The Department’s Erroneous Reliance on *Bostock*

As justification for its proposed athletics rule, the department cites to the Supreme Court’s 2020 opinion *Bostock v. Clayton County*²⁰ and two executive orders (EOs): (1) EO 13988, “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation”;²¹ and (2) EO 14021 “Ensuring an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.”²² Taken together, the department believes these citations prove that the proposed rule is consistent with Title IX’s text, history, and purpose.

Nothing could be further from the truth.

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

In his majority opinion in *Bostock*, Justice Neil Gorsuch began, “We proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.”²³ At no point did the majority substitute sex for gender identity. Instead, the Court noted, “An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because *it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.*”²⁴

The Court’s opinion continued by addressing behaviors generally expressed by each sex:

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. *Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.... But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex.* Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.²⁵

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

Specifically, the Court wrote:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.”²⁶

The Court’s Title VII precedent supports the proposition that relying in even small part on an individual’s underlying biological sex (as with the case of sexual orientation or transgender status) is prohibited within an employment setting.

Title VII v. Title IX. Yet, unlike Title VII, a “sex-prohibitive” anti-discrimination law, Title IX differs significantly in its text, purpose, operation, and in certain of its applications, including athletics. It is “sex-affirmative,” requiring consideration of a student’s biological sex in a set of limited exceptions. A sex binary—male v. female—is the foundation upon which the entire statute’s operation rests. Title IX’s use of the words “both” and “either” to address educational disparities within its regulations reinforces the understanding that there are only two sexes, and that the opportunities for both must be equal under the law. Not only does the long-standing Title IX athletics regulation permit schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport,” it also instructs universities to consider male or female sex in their distribution of athletic scholarships.²⁷

Under the department’s reading of *Bostock*,²⁸ however, any school receiving direct or indirect federal funding would not only have to open all athletic teams to students based on gender identity, but it would have to alter any associated athletic spaces—such as locker rooms and overnight housing accommodations for sports teams. Such a dangerous interpretation sacrifices the safety, privacy, and equality of girls and women to appease a pet policy agenda, without any demonstrated necessity. It also overlooks the extensive congressional record on Title IX’s purpose, the law’s specific provision of separate spaces to protect the privacy and safety of girls and women—those for whom the law was passed—and ignores the Supreme Court’s restriction of its holding in *Bostock* to Title VII alone.²⁹

Title IX leveled the educational playing field for girls and women, has increased women’s participation in high school sports 10 times over,³⁰ and was hailed as a feminist triumph when it was enacted into law in 1972. In high school athletics alone, the rate of girls’ participation in 2016 was more than 10 times what it was prior to Title IX’s passage—representing an increase of over 1,000 percent.³¹

But in a painful twist of irony, the same law that once provided a platform for female advancement is set to be sacrificed to a political agenda under the guise of “equality.” Under the Department of Education’s Title IX athletics rule, the sex discrimination of old is new again.

Regulatory Shortcomings: Harms and Process

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

22888–Are the requirements in the proposed regulation clearly stated? And does the proposed regulation contain technical terms or other wording that interferes with their clarity?³²

A thorough response to this question requires addressing the department’s underlying assumptions in turn.

The Proposed Rule’s Harms Outweigh Its Benefits. The department claims two benefits of the proposed rule: (i) “providing a standard to clarify Title IX obligations for recipients that adopt or apply sex-related eligibility criteria”; and (ii) “protecting students’ equal opportunity to participate on male and female teams consistent with Title IX.” Without the proposed rule, the department claims “some students may suffer harm as a result of being unable to gain the benefits associated with equal opportunity to participate on athletic teams at school” because participation on a team inconsistent with a student’s gender identity is “not a viable option for many students.”³³

The rule states:

There is also evidence suggesting that allowing transgender children to socially transition (*i.e.*, present themselves in everyday life consistent with their gender identity) is associated with positive mental health outcomes for those children... [and] ensuring that transgender students have the opportunity to participate on male or female teams consistent with their gender identity can be part of a transgender student’s social transition and is thus a crucial benefit to those students’ health and well-being.³⁴

However, the rule is devoid of reference to any potential harm certain to be experienced by women and girls who may find themselves with a diminished ability to obtain athletic records, championships, athletic scholarships, or even playing time due to the inclusion of a biological male on their sports team.

Indeed, the department has clearly weighted the scales in its proposed rule against the interests of biological girls and women.³⁵ Under threat of loss of federal funding and with no concrete calculus to utilize when determining eligibility for athletics—in addition to stressing that harms to participation for transgender students must be minimized and that “broad assumptions” about “cisgender” student athletic abilities are illegitimate—the department has all but made the decision for schools while misleadingly portraying its proposed rule as one aimed at “increasing flexibility.”

A Hobson’s Choice Emerges. Schools subject to the proposed rule can: (1) lose federal funding by keeping girls and women’s sports separated by sex, as intended by the drafters of Title IX; or (2) subject themselves to the risk of substantial personal injury judgments by allowing participation on women’s athletic teams based on gender identity.³⁶

The department estimates that the cost to recipients over 10 years would be in the range of \$23.4 million to \$24.4 million (or, approximately \$2.4 million per year), a notably low estimate considering the number of schools that currently receive federal funding.³⁷ Moreover, the estimate fails to account for how much time would be required to evaluate and recalibrate existing athletic policies and any training that would be required on new policies that are ultimately enacted. Despite this, the department has unilaterally concluded that the benefits of its proposed rule “far outweigh the costs.”

The Department’s Authority to Regulate Athletics. It is highly questionable whether the department is acting within the scope of its authority in promulgating the Title IX athletics rule at all.³⁸

In 1974, Congress passed an amendment to Title IX introduced by Senator Jacob Javits (R-NY),³⁹ which directed the U.S. Department of Health, Education, and Welfare (HEW) to issue a regulation that contained, “with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.”⁴⁰ The amendment made it perfectly clear that Congress intended Title IX to cover athletics for both sexes at all federally funded schools.

The HEW thereafter promulgated all final regulations—including the regulation on athletics—to implement Title IX in 1975. These were to go into effect “unless the Congress shall, by concurrent resolution, find that the standard, rule, regulation, or requirement is inconsistent with the act from

which it derives its authority and disapprove such standard, rule, regulation, or requirement.”⁴¹ According to the congressional record, the purpose was to determine “if the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood.”⁴²

Extensive hearings and debate specifically on the athletics regulation followed, and interested stakeholders submitted substantial evidence and testimony.⁴³ The clear determination was that the regulation writers had indeed understood Title IX the same way Congress had: Athletics were to be included within Title IX’s provisions.

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

At its creation in 1979, the Department of Education then assumed responsibility for enforcement of Title IX,⁴⁴ adopting the Title IX regulations promulgated by the HEW—including the athletics regulation—virtually unchanged.⁴⁵

The Department Violates the Administrative Procedure Act. Assuming, for the sake of argument, the department even possesses the authority to regulate athletics, the proposed rule fails to meet its regulatory burden under the Administrative Procedure Act (APA),⁴⁶ which governs all agency rulemaking.

In all APA rulemaking, agencies are required to “engage in reasoned decision-making, and...to reasonably explain...the bases for the actions they take and the conclusions they reach.”⁴⁷ All agency actions are presumptively reviewable and will be set aside if they are “arbitrary” or “capricious.”⁴⁸ To wit:

[A] rule is arbitrary and capricious if (1) the agency “has relied on factors which Congress has not intended it to consider”; (2) the agency “entirely failed to consider an important aspect of the problem”; (3) the agency’s explanation “runs counter to the evidence before the agency”; or (4) the explanation “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁴⁹

Although reviewing courts are not entitled to “substitute [their] own judgment for that of the agency,”⁵⁰ neither are courts permitted to “rubber stamp” agency actions. Instead, courts “must ensure that the agency considered all of the relevant factors.”⁵¹

The department is not entitled to base its regulation on “unsupported speculation,” but instead must provide some “factual basis for this belief” that transgender athletes are being restricted from athletic participation in federally funded schools.⁵² And the department does little, even in the abstract, to explain permitting transgender scholastic athletes to participate according to their gender identity, rather than biological sex. Its “conclusory statements” about the need for the rule “do not suffice to explain the [department’s] decision.”⁵³

The department has divorced the 2023 proposed rule on athletics from the larger proposed rule on Title IX of July 2022.⁵⁴ But a proposed rule on one portion of Title IX, without reference to the remainder of that same law, and the failure to address the interrelatedness or intended cooperation of both proposed rules raises the specter of a violation under the APA. For example, the 2022 rule asserts that “separation based on gender identity is more than a de minimis harm” and therefore constitutes unlawful sex discrimination under Title IX. But it is unclear how such a “de minimis harm” standard applies (or does not apply) to the 2023 proposed rule. In certain instances, both rules might even conflict.

By way of illustration, a college is, under the 2022 rule, required to keep all bathrooms gender-neutral to prevent sex discrimination on the basis of “gender identity.” But a college may, in the “important educational interest” of preventing injuries, keep its college sports sex-separated under the 2023 proposed rule that solely addresses athletics. Under this scenario, are schools to conclude that the department is unconcerned with the privacy interests of young women—but sometimes interested in preventing their injuries because preventing injuries can constitute an “important educational interest”? Such a seeming contradictory scheme once again leaves schools to “figure it out,” and smacks of an APA violation: a rule that is not the result of “reasoned decision making,” and that has all the hallmarks, as discussed below, of being both “arbitrary” and “capricious.”

The proposed rule has other weaknesses, not the least of which is that it is populated with vague and undefined terms that may be interpreted differently by different schools—such as “important” or “substantial.” The department requires that schools must assess all athletic criteria separately for each sport, level of competition, and grade or education level, but

clarifies that in elementary and middle school, for example, criteria that categorically exclude all transgender girls and women from participating on any female athletic teams cannot satisfy the proposed regulation. As a result, young women progressing through elementary and middle schools, and eventually into high schools, would begin their athletic journeys by playing with and against biological boys, only to switch to all-girls teams in high school and beyond.⁵⁵ The mental, physical, and educational impacts (on both boys and girls) of such a requirement are not addressed in the proposed rule and likely have not even begun to be assessed.

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

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

Federalism Concerns and State Impact

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

22891—Federalism: Executive Order 13132 requires the Department to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. “Federalism implications” means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulation—§ 106.41(b)(2)—may have federalism implications. We encourage State and local elected officials to review and provide comments on this proposed regulation.⁵⁶

Currently, 22 states have policies restricting transgender students from playing on teams aligning with their gender identities.⁵⁷ While there is no explicit preemption language in the proposed Title IX rule, it is clearly intended to preempt state laws banning athletic participation according to gender identity.⁵⁸ The department does not possess *carte blanche* authority to invalidate whatever state law it pleases.

Preemption. To begin, a regulation that expressly pre-empts state law is inherently dubious; if an agency purports to wield the power to supplant valid state laws, it should be able to ground its assertion in clear statutory language demonstrating that Congress, in fact, gave the agency that power. A state's inherent sovereignty to legislate in the area of education should not be lightly displaced; if it must be, it should be by Congress, legislating under an express constitutional power, and not an administrative agency. Agencies have only the authority given to them by Congress; they cannot impose mandates of "vast economic and political significance" that lack clear statutory authority.⁵⁹

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

Unilateral Invalidation of State Law. The outcome of a finalized rule—the *de facto* unilateral invalidation of the duly enacted laws of 22 states—would be nothing short of extraordinary. The department's strong-arming of states and schools through unilateral statutory expansion is even more egregious considering the U.S. Supreme Court's recent reassertion in *Cameron v. EMW Women's Surgical Center, P.S.C.* that "[p]aramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law."⁶⁰ A state's "opportunity to defend its laws in federal court" and to exercise its sovereign power to enact laws governing its own citizens "should not be lightly cut off."⁶¹ After all, "a State 'clearly has a legitimate interest in the continued enforceability of its own statutes.'"⁶²

With such a conflict between the law in 22 states and this proposed federal regulation, federalism concerns abound. The Supreme Court has continually expressed a commitment to the sovereign dignity of the states, particularly on matters such as education that are not among the limited and enumerated powers delegated to the federal government and are therefore reserved for the states under the 10th Amendment.⁶³

Conclusion

When agencies seek to enact transformative regulations, they must respect the manifest intent of Congress, the procedural restraints imposed by the APA, and the delicate balance of state–federal power. The Department of Education has plainly failed to do so in this instance. The Biden

Administration's overhaul of a decades-old education law and its proposed implementation of an athletics regulation are both unnecessary and, for the reasons stated herein, legally deficient. In proposing that each school interpret the department's athletic eligibility criteria as it sees fit—while weighting the scales in support of gender identity over biological sex and rendering the duly enacted laws of 22 states null and void—the proposed rule falls under its own weight.

To open women's scholastic sports to biological males would destroy educational athletic opportunities and guarantee unfair outcomes. The Department of Education's Title IX athletics rule violates the principles of fundamental fairness and equal opportunity on which the law itself was founded. Those principles must prevail over arguments for the inclusion of biological men in women's sports if women's sports are to exist at all.

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Endnotes

1. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, Pub. L. 92–318, as amended by Pub. L. 93–568, § 3, 88 Stat. 1855.
2. See *Celebrating the 25th Anniversary of Title IX*, 143 CONG. REC. H4218 (June 23, 1997): “The House Education and Labor Committee had a large body of evidence of discrimination against girls and women in our education system. Since I came to the Congress and the committee in 1965 the committee had been involved in hearings related to equal educational opportunities for girls and women. We scrutinized textbooks which only portrayed successful men, admissions policies which excluded women from graduate and professional schools, and vocational education courses.”
3. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106).
4. The department proffered *Bostock v. Clayton County*, S. Ct. 1731 (2020), and the Supreme Court’s determination that “sex discrimination” within the scope of employment under Title VII of the Civil Rights Act of 1964 also included discrimination on the basis of sexual orientation and transgender status as its rationale to similarly expand Title IX’s prohibition against sex discrimination in education to transgender status as well. But in doing so, it ignores the extensive congressional record on Title IX’s purpose, the law’s specific provision of separate spaces to protect the privacy and safety of girls and women—those for whom the law was passed—and ignores the Supreme Court’s restriction of its holding in *Bostock* to Title VII alone. See, discussion of *Bostock*, pp. 6–8, *infra*. For a more fulsome discussion of the department’s misguided *Bostock* application, see Sarah Parshall Perry, “The Department of Education’s Intended Revision of Title IX Fails Regulatory and Civil Rights Analyses.” HERITAGE FOUND. LEGAL MEMORANDUM, No. 305, June 22, 2022, available at: <https://www.heritage.org/civil-rights/report/the-department-educations-intended-revision-title-ix-fails-regulatory-and-civil#>.
5. Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (Apr. 13, 2023) (to be codified at 34 C.F.R. pt. 106).
6. Biana Quilantam, *Education Department Unveils Title IX Transgender Sports Eligibility Rule*, POLITICO, <https://www.politico.com/news/2023/04/06/education-department-unveils-title-ix-transgender-sports-eligibility-rule-00090894>.
7. Title IX, *supra* note 1.
8. 34 C.F.R. § 106.41 (2023).
9. See 88 Fed. Reg. 22860, *supra* note 5 (emphasis added). According to the department, the proposed rule was informed by the current Title IX regulation governing single-sex classes (34 C.F.R. § 106.34) and Equal Protection Clause case law and is “consistent” with Title IX’s nondiscrimination prohibition and the framework of the current athletics regulations.
10. On January 20, 2021, in one of his first official acts as President, Joe Biden issued Executive Order 13988 on “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.” Executive Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021). The order evinced the President’s intent to expand all statutory prohibitions on “sex discrimination” to include discrimination based on “sexual orientation” and “gender identity” by directing every federal government agency to review all “agency actions” that might prohibit such sex discrimination.
11. The American public disagrees. A recent Gallup poll proved that 69 percent of Americans favor competitive athletes playing only on sports teams that match their birth gender (up seven points from 2021), and only 26 percent favor athletic participation according to gender identity (down eight points from 2021). See Jeffrey Jones, *More Say Birth Gender Should Dictate Sports Participation*, GALLUP, June 12, 2023, available at: https://news.gallup.com/poll/507023/say-birth-gender-dictate-sports-participation.aspx?utm_source=google&utm_medium=rss&utm_campaign=syndication#:~:text=--%20A%20larger%20majority%20of,%25%2C%20down%20from%2034%25.
12. See Independent Women’s Forum, “Competition: Title IX, Male-Bodied Athletes, and the Threat to Women’s Sports,” 2nd ed., 2022, available at: https://www.iwf.org/wp-content/uploads/2023/06/IWLC_CompensationReport_2ndEdition.pdf; Andrew Lathan, *Physiological Differences Between Male and Female Athletes*, HOUSTON CHRONICLE (June 28, 2018), available at: <https://work.chron.com/physiological-differences-between-male-female-athletes-20627.html>.
13. Doriane Lambelet Coleman and Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE CTR. FOR SPORTS LAW & POL’Y (2018), available at <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf>.
14. Associated Press, *Penn Swimmer Lia Thomas Becomes First Trans Athlete to Win Division I National Title*, SPORTS ILLUSTRATED (March 17, 2022), available at: <https://www.si.com/college/2022/03/17/lia-thomas-first-trans-athlete-national-championship-swimmer>. See also Hank Berrian, “Her Rankings... Have Bounced From #462 As A Male To #1 As A Female”: 16 Lia Thomas Teammates Sign Letter Asking Penn Not To Sue NCAA, Bar Thomas From Competing, DAILY WIRE (February 24, 2022), <https://www.dailywire.com/news/her-rankings-have-bounced-from-462-as-a-male-to-1-as-a-female-16-lia-thomas-teammates-sign-letter-asking-penn-not-to-sue-ncaa-bar-thomas-from-competing>.
15. U.S. Dep’t. of Educ., Off. for Civ. Rts., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Rule, 85 Fed. Reg. 30,178 (May 19, 2020).
16. 88 Fed. Reg. 22860, 22875, 22878, 34 C.F.R. 106 (2023).
17. See *Celebrating the 25th Anniversary of Title IX*, 143 Cong. Rec. 4218 (1997), *supra* note 2.

18. Connecticut high school student Susan Hollander sued Hamden High School in 1970 for not offering a girl's cross-country team and being denied the chance to run with the boys' team. Judge John Clark Fitzgerald dismissed the lawsuit in 1971 with the now-infamous phrase that accelerated congressional momentum toward passage of Title IX. See SUSAN WARE, *Introduction: Title IX: Thirty-Seven Words that Changed American Sports, in TITLE IX: A BRIEF HISTORY, WITH DOCUMENTS* (Boston: Bedford/St. Martins, 2007), pp. 1–31.
19. Title IX's origins lay incontrovertibly in the women's movement, as evidenced by the extensive congressional record indicating its mission to equalize educational opportunities for women. *Id.*
20. *Bostock*, 140 S. Ct. 1731 (2020), *supra* note 4.
21. Executive Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).
22. Executive Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021). The department also cites *A.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *14 (S.D. Ind. July 26, 2022), *vacated as moot*, (S.D. Ind. Jan. 19, 2023); *Hecox v. Little*, 479 F. Supp. 3d 930, 943, 988 (D. Idaho 2020), *appeal argued*, No. 20–35815 (9th Cir. Nov. 22, 2022); and *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618–19 (4th Cir.), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021); 2022 WL 2951430, at *7–11. All three cases relied erroneously on the same *Bostock* analysis as the department. But the department is also forced to wrestle with *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc), in which a panel of the 11th Circuit Court of Appeals determined that a school board's policy of separating school bathrooms based on biological sex did not violate Title IX or Equal Protection principles. The department distinguishes *Adams* by arguing that the court's failure to consider "the distinct sex-based harms that such [transgender] students suffer from...exclusion" from bathroom use in accordance with their gender identity is contrary to the Department of Justice's conclusions on Title IX. But here, the department picks favorites and elevates the "sex-based harms" of transgender students when denied their choice of bathroom over those of female students when forced to share bathrooms with biological males. This partisanship continues throughout the department's proposed rule. Earlier in 2023, the State of West Virginia applied to the U.S. Supreme Court to vacate an injunction from the 4th Circuit Court of Appeals on its sex-separated sports law in *B.P.J. v. W. Va. State Bd. of Educ.*, No. 23–1078 (4th Cir. Feb. 22, 2023), *Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit, W. Va. State Bd. of Educ. v. B.P.J.*, No. 22A800 (U.S. Mar. 9, 2023). While appearing by all accounts to be the right judicial vehicle for consideration of the issues imbedded in the 2023 rule, the Supreme Court declined to vacate the injunction against the state law. In so doing, it left unanswered—for the time being—the question of how the extant interpretation of Title IX might weigh against a state's legitimate interest in protecting the educational interests of girls and women. See, *W. VA. et al. v. B.P.J.*, No. 22A800, 598 U.S. _____ (2023) (Alito, J. dissenting).
23. *Bostock*, 140 S. Ct., at 1739.
24. *Id.* at 1741 (emphasis added).
25. *Id.* at 1741–1742 (emphasis added).
26. *Id.* at 1737.
27. 34 C.F.R. §§ 106.41(b) and 106.37(c).
28. In both the 2023 proposed rule and the Title IX rule of July 2022. See note 2, *supra*.
29. Without realizing it, the department has implicitly conceded that *Bostock* does not apply. By providing the *option* of adopting sex-specific criteria and allowing a *balancing of interests* for "important educational objectives," the department recognizes that sports (as in Title IX) and employment (as in Title VII) are inherently different. By conceding also that males and females are "unique," this, too weakens the department's application of *Bostock*: Such a characterization considers the unique strengths and abilities of both sexes—something impermissible under a *Bostock* rationale or any reading of Title VII.
30. WARE, *TITLE IX: A BRIEF HISTORY WITH DOCUMENTS* vi, 23 (2007), *supra* note 18.
31. Amy S. Wilson, *45 Years of Title IX: The Status of Women's Intercollegiate Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N (2017), <http://www.ncaapublications.com/productdownloads/TitleIX-45.pdf>.
32. 88 Fed. Reg. 22860, 22888, 34 C.F.R. 106 (2023).
33. 88 Fed. Reg. 22860, 22871. As support for this premise, the department quotes two cases which erroneously relied on *Bostock* as discussed previously at notes 4 and 23, *supra*. See, e.g., *A.M.*, 2022 WL 2951430, at *11 (describing a policy that prohibited students from participating on teams consistent with their gender identity as "punish[ing]" those students); *Hecox*, 479 F. Supp. 3d at 977 ("Participating in sports on teams that contradict one's gender identity is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical" (internal quotation marks and citation omitted)). While the department seems to believe that two incidents create a national pattern of "many students" being denied the "viable option" to compete according to their gender identities, it does not provide further support for this premise.
34. 88 Fed. Reg. 22860, 22879–2280. The department's representation that social transitions benefit the health and well-being of transgender students is easily dispatched. Social transitions are often the first step toward gender-specific medical interventions, and suicide occurs at a similar rate at all stages of transition in gender-dysphoric populations, from pretreatment assessment to post-transition follow-up. For those who have ultimately undergone inpatient gender-reassignment procedures, the suicide rates, psychiatric morbidities, and mortality rates remain markedly elevated above the background population. By claiming that social transitions—such as athletic participation based on gender identity—strengthen the well-being of students, the department may actually be arguing for the hastening of a mental health crises in America's federally funded schools. See, e.g., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. OF TRANSGENDER HEALTH, 51, S75–6; Diane Ehrensaft et

- al., *Prepubertal Social Gender Transitions: What We Know; What We Can Learn—A View from a Gender Affirmative Lens*, 19 INT'L J. OF TRANSGENDERISM 251 (Mar. 9, 2018), <https://www.tandfonline.com/doi/abs/10.1080/15532739.2017.1414649?journalCode=wijt20> (explaining that “social transitioning” is “often, although not always, the first action a transgender person takes to align with their internal sense of themselves as a gendered person”); see also Nat'l Health Serv. (England), *Interim Service Specification for Specialist Gender Dysphoria Services for Children and Young People* 11–12 (Oct. 20, 2022), https://www.engage.england.nhs.uk/specialised-commissioning/gender-dysphoria-services/user_uploads/b1937-ii-interim-service-specification-for-specialist-gender-dysphoria-services-for-children-and-young-people-22.pdf (noting that social transitioning “should not be viewed as a neutral act” but rather “as an ‘active intervention’ because it may have significant effects on the child or young person in terms of their psychological functioning”); Stephen B. Levine *et al.*, *Reconsidering Informed Consent for Trans-Identified Children, Adolescents, and Young Adults*, J. OF SEX & MARITAL THERAPY (Mar. 17, 2022), <https://www.tandfonline.com/doi/full/10.1080/0092623X.2022.2046221> (“The minority stress theory as the sole explanatory mechanism for co-occurring mental health illness has also been questioned in light of the evidence that psychiatric symptoms frequently predate the onset of gender dysphoria.... Other clinicians recognize the limits of gender-affirmative care and are aware that youth with underlying psychiatric issues are likely to continue to struggle post-transition”); Wiepjes CM *et al.*, *Trends in Suicide Death Risk in Transgender People: Results from the Amsterdam Cohort of Gender Dysphoria Study (1972-2017)*, ACTA PSYCHIATRICA SCANDINAVICA (Feb. 16, 2020), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/acps.13164> (finding that suicides occur at a similar rate at all stages of transition, from pretreatment assessment to post-transition follow-up).
35. The department’s failure to conduct studies on the physical and psychological impact experienced by girls when playing with or against biological boys before proposing the rule argued for the extension of the comment period to at least 90 days. But despite repeated requests from multiple organizations and Members of Congress to do just that, the department flatly declined an extension. A discussion of the research evidencing the value in sex-separated educational opportunities, including athletics, is beyond the scope of this *Legal Memorandum*.
36. Injuries sustained by girls and women during athletic contests with transgender athletes are not the stuff of mere speculation. Significant bodily harm to young women in sporting events with transgender athletes is already well-documented. See, e.g., Paulina Dedaj, *High School Volleyball Player Says She Suffered Concussion After Being Injured by Trans Athlete, Calls for Ban*, FOX NEWS (Apr. 21, 2023), <https://www.foxnews.com/sports/high-school-volleyball-player-says-suffered-concussion-being-injured-trans-athlete-calls-ban>; Max Sherry, *Local Football League Under Fire After Transgender Athlete Injures Female Player*, SPORT BIBLE (Apr. 17, 2023), <https://www.sportbible.com/football/league-under-fire-after-transgender-athlete-injures-female-player-609233-20230403>; Holt Hackney, *Professor Maintains that Trans Athletes Causing Serious Injuries to Girls*, SPORTS L. EXPERT BLOG, (Dec. 22, 2022), https://sportslawexpert.com/2022/12/12/professor-maintains-that-trans-athletes-causing-serious-injuries-to-girls/?utm_source=rss&utm_medium=rss&utm_campaign=professor-maintains-that-trans-athletes-causing-serious-injuries-to-girls.
37. The department indicates that the number of federal funding recipients subject to Title IX’s provisions include approximately 17,600 local school districts and over 5,000 postsecondary institutions. See U.S. Dep’t of Educ., Off. for Civ. Rts., *Title IX and Sex Discrimination* (2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html. Using the Department of Education’s own figures, the allocation of \$24 million over 10 years (or \$2.4 million/annually) for the Title IX rule’s implementation across 22,600 recipients subject to Title IX, the department has estimated implementation costs of \$106.19 per school. This pittance does not pass the smell test.
38. Some scholars have so argued. See, e.g., Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11 (2003) <http://scholarship.law.marquette.edu/sportslaw/vol14/iss1/21>.
39. The Javits Amendment was a direct response to a contemporaneous proposal from Senator John Tower (R-TX) to exempt revenue-producing sports from determinations of Title IX compliance. Representative Patsy Mink (D-HI), a prime sponsor and author of Title IX, clarified that the athletics regulation correctly interpreted Congress’ intent to include sports within the reach of equal educational opportunity and contended that critics were simply “rearguing their opposition to the law itself rather than to the substance of the regulations.” See, *Hearing on H. Con. Res. 330 Before the House Subcomm. on Equal Opportunities of the Comm. on Educ. & Labor*, 94th Cong., 58 (1975). Senator Tower’s proposal was rejected, Senator Javits’ Amendment was adopted, and the final Title IX rule—including athletics—was adopted in 1975.
40. Sex Discrimination Act of 1974, Pub. L. No. 93–380, § 844, 88 Stat. 484.
41. 20 U.S.C. § 1232(d)(1).
42. *Sex Discrimination Regulations: Hearings Before the House Subcomm. on Postsecondary Educ. of the House Comm. on Educ. & Labor*, 94th Cong. 1 (1975) (statement of Rep. O’Hara, Chair of the Subcommittee).
43. See *id.*; *Hearing on H.R. Con. Res. 330 Before the House Subcomm. on Equal Opportunities of the Comm. on Educ. & Labor*, 94th Cong. (1975); *Prohibition of Sex Discrimination: Hearings Before the Senate Subcomm. on Educ. of the Comm. on Labor & Pub. Welfare*, 94th Cong. (1975).
44. 20 U.S.C. § 3441(a)(3) (2000).
45. Department of Education Organization Act, 45 Fed. Reg. 30,802 (May 9, 1980) (later codified at 34 C.F.R. pt. 106.41).
46. 5 U.S.C. § 551 *et seq.*
47. *Bhd. of Locomotive Eng’rs & Trainmen v. Fed. R. R. Admin*, 972 F.3d 83, 115 (D.C. Cir. 2020) (quoting *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891, 1905, 207 L.Ed.2d 353 (2020)) (cleaned up).
48. *Regents of the Univ. of California*, 140 S. Ct. at 1905; 5 U.S.C. § 706(2)(A).
49. *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 934 F.3d 649, 663 (D.C. Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

50. *Am. Bankers Ass'n*, 934 F.3d at 663 (internal quotation marks omitted).
51. *Oceana, Inc. v. Ross*, 920 F.3d 855, 863 (D.C. Cir. 2019).
52. See *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 83 (2d Cir. 2020).
53. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016).
54. See *supra* note 3.
55. This, of course, assumes that the school can prove that maintaining sex-segregated teams is an "important educational objective" sufficient to dodge a Title IX complaint and avoid the heavy hand of the department's intervention.
56. 88 Fed. Reg. 22890, 34 C.F.R. 106 (2023).
57. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans, accessed April 28, 2023.
58. The Biden Administration has repeatedly emphasized its commitment to "combatting" what it calls "legislative attacks on transgender kids at the state level." See White House, *Fact Sheet: Biden-Harris Administration Advances Equality and Visibility for Transgender Americans* (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/fact-sheet-biden-harris-administration-advances-equality-for-transgender-americans/>.
59. *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).
60. *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1011 (2022).
61. *Id.*
62. *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986)).
63. U.S. CONST. amend. XIV: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."