

## MEMORANDUM FOR EO 12866 MEETING

FROM: Robert S. Eitel, President & Co-Founder  
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DATE: February 27, 2024

RE: Final Regulations on *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*  
RIN: 1870-AA16

This memorandum sets forth the concern of the Defense of Freedom Institute for Policy Studies (“DFI”) that U.S. Department of Education (“Department”) regulations interpreting Title IX of the Education Amendments of 1972 will require schools, colleges, and universities receiving Federal financial assistance to allow students to participate in school athletics based on their gender identity rather than biological sex.

On July 12, 2022, the Department published in the *Federal Register* a Notice of Proposed Rulemaking (“2022 NPRM”) (*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*).<sup>1</sup> Citing *Bostock v. Clayton Co.*,<sup>2</sup> the Department’s 2022 NPRM proposed to expand the scope of Title IX’s prohibition of sex-based discrimination at educational institutions receiving Federal financial assistance to include discrimination on the basis of “gender identity.”<sup>3</sup> Under the proposed regulations, a refusal by a school, college, or university to allow a biological male who identifies as a female (*i.e.*, the biological male’s “gender identity”) to use the women’s restroom or women’s locker room or to compete on the athletic teams associated with his “gender identity” would subject the educational institution to a potential civil rights investigation and loss of Federal funding (in addition to other civil penalties).

In the 2022 NPRM, the Department stated that the proposed regulations will not impact athletics (indicating that the Department intended to address the issue of gender identity and athletics in a future rulemaking effort).<sup>4</sup> Indeed, on April 13, 2023, the Department published in the Federal Register a Notice of Proposed Rulemaking (“2023 Athletics NPRM”) (*Nondiscrimination on the*

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<sup>1</sup> See <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

<sup>2</sup> 140 S. Ct. 1731 (2020).

<sup>3</sup> 34 C.F.R. § 106.10 (proposed).

<sup>4</sup> 87 Fed. Reg. 41537, 41538 (Jul. 12, 2022).



*Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams*).<sup>5</sup> When the Department submitted its draft final regulations arising from the 2022 NPRM for review in accordance with EO 12866, it held back the 2023 Athletics NPRM. At that time, a Department spokesman said, “The Department is still reviewing a second rule related to athletics, which was first proposed nine months after the first rule, and which received 150,000 public comments which by law must be carefully considered.” The Department apparently still contends that the regulations that it proposed in 2022 will not affect women’s and girls’ sports.

As proposed by the Department in its 2022 NPRM, the regulatory text does not support the contention that the expansion of the meaning of “on the basis of sex” to include gender identity will not impact athletics. Indeed, the Department’s current enforcement posture and litigation position on these issues demonstrate that these drastic changes are already underway.

A deeper analysis of the Department’s proposed regulatory text in the 2022 NPRM supports DFI’s view. The Department proposes adding a new provision at 34 C.F.R. § 106.10 to “clarify” that the scope of Title IX’s prohibition of discrimination on the basis of sex includes gender identity: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” Further, the 2022 NPRM would add a new provision at 34 C.F.R. § 106.31(a)(2) that declares that institutional policies or practices that prevent a person from participating in an education program or activity consistent with his or her gender identity subject that person to more than *de minimis* harm on the basis of sex – thereby exposing educational institutions to a possible Federal civil rights investigation and potential loss of Federal funding.<sup>6</sup>

Yet, despite statements in the 2022 NPRM that expanding Title IX to encompass gender identity will not affect athletics and that the Department will address that issue in future rulemaking (the 2023 Athletics NPRM), the Department proposes no changes to 34 C.F.R. § 106.41, the longstanding regulation which governs athletics under Title IX and permits separation of athletic teams based on (biological) sex. That provision states in pertinent part:

(a) *General.* No person shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered

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<sup>5</sup> 88 Fed. Reg. 22860 (Apr. 13, 2023).

<sup>6</sup> 34 C.F.R. § 106.31(a)(2) states in part: “In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than *de minimis* harm . . . . Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than *de minimis* harm on the basis of sex.”



by a recipient, and no recipient shall provide any such athletics separately on such basis.

(Italics added.)

Because the Department’s proposed 34 C.F.R. § 106.10 expands the scope of “on the basis of sex” to include gender identity and 34 C.F.R. § 106.41(a) bars discrimination in athletics on that basis, 34 C.F.R. § 106.41(a) by its terms would thus require educational institutions to allow biological males who identify as female to compete in women’s and girls’ athletics. Nothing in the 2022 NPRM’s proposed regulatory language limits the scope of proposed 34 C.F.R. § 106.10 only to areas outside of athletics, modifies current 34 C.F.R. § 106.41 to exclude gender identity discrimination from its prohibitions, or specifies that, with regard to sports, precluding athletes from participating consistent with gender identity does not constitute harm prohibited by proposed § 106.31(a)(2).

Other reasons support DFI’s skepticism about the Department’s contentions that the 2022 NPRM does not impact sex-separated athletics. As an enforcement and litigation matter, the future is now: the Biden administration is already enforcing and litigating its Title IX gender identity policies as they apply to athletics. Indeed, within days of taking office, the Biden Education Department *revoked and dismissed* the prior administration’s pending enforcement action against a secondary school athletic conference and six school districts in Connecticut arising from their failure to require separated sports teams based on biological sex.<sup>7</sup> The Department, together with the U.S. Department of Justice (“DOJ”), quickly followed that move with the publication in the *Federal Register* of a Notice of Interpretation (“NOI”) on June 22, 2021, declaring that the Department interprets Title IX’s prohibition of sex discrimination to encompass discrimination based on gender identity.<sup>8</sup> Further underscoring DFI’s concerns, DOJ and the Department filed a Statement of Interest in a Federal court case taking the position that Title IX and the Equal Protection Clause of the Fourteenth Amendment do not permit West Virginia to exclude biological males who identify as females from participating in single-sex sports restricted to females.<sup>9</sup> The administration has not changed its litigation posture on these issues.

The changes in the 2022 NPRM are also intended to preempt State laws that attempt to designate sports categories on the basis of sex rather than gender identity: Proposed 34 C.F.R. § 106.6(b) states that “[t]he obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement.” Although not directly related to athletics, the Department’s response following Florida’s March 2022 passage of the “Parental Rights in Education” law<sup>10</sup> is

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<sup>7</sup> OCR Case No. 01–19– 4025, *Conn. Interscholastic Athletic Conf. et al.* (Aug. 31, 2020).

<sup>8</sup> A Federal district court recently issued a preliminary injunction enjoining the NOI. *Tennessee v. U.S. Dept. of Education*, No. 3:21-cv-308 (E.D. Tenn. Jul. 15, 2022).

<sup>9</sup> *B.P.J. v. West Virginia State Board of Education*, Statement of Interest, 454–475 (S.D. W.V. 2021), <https://www.justice.gov/crt/case-document/file/1405541/download>.

<sup>10</sup> See <http://laws.flrules.org/2022/22>.



also instructive: Secretary Miguel Cardona threatened<sup>11</sup> the State of Florida with civil rights investigations and tried to intimidate other States by denouncing “a dangerous trend across the country” of States enacting laws designed to prevent the imposition of gender identity agendas in their schools, colleges, and universities.

Nothing in the NPRM’s proposed regulatory text protects, or allows States to protect, athletics that are separated on the basis of biological sex. Given the 2022 NPRM’s proposed text and the administration’s enforcement posture on the issue of gender identity in schools, DFI is concerned that State laws enacted to protect the rights of biological girls and women to compete in scholastic sports against other biological girls and women will provoke the Department’s investigative apparatus and related enforcement efforts. Positions taken by the U.S. Department of Justice on behalf of the Education Department underscore this concern. Left unchanged, the Department and various civil rights groups will certainly take the position that the agency’s application of Title IX to include “gender identity” will preempt State laws enacted to protect and ensure athletic opportunities for women and girls.

Public elementary and secondary schools receive about 8% of their funding from Federal agencies,<sup>12</sup> and Federal financial support for postsecondary educational institutions is nearly equal to State contributions (excluding student loans and tax expenditures).<sup>13</sup> Regardless of the level of support, the acceptance of Federal resources by schools, colleges, and universities opens them up to the possibility of civil rights investigations and litigation and the withholding of funding by the Department if they fail to abide by the Department’s view that Title IX encompasses gender identity. The administration should modify the proposed rule to remove “gender identity” from any final regulations and include language that specifically preserves the integrity of women’s and girls’ athletics.

If DFI can be of assistance, please contact us at [info@dfipolicy.org](mailto:info@dfipolicy.org).

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<sup>11</sup> Brooke Migdon, “Education Secretary says he will be ‘monitoring’ Florida’s new ‘Don’t Say Gay’ law for civil rights violations,” THE HILL (Mar. 29, 2022), <https://thehill.com/changing-america/respect/equality/600210-education-secretary-says-he-will-be-monitoring-floridas-new/>.

<sup>12</sup> See <https://www2.ed.gov/about/overview/fed/role.html>.

<sup>13</sup> See <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding>.