

September 30, 2024

VIA ELECTRONIC MAIL
U.S. Department of Education
Office of the Executive Secretariat
FOIA Service Center
400 Maryland Ave. SW, LBJ 7W106A
Washington, D.C. 20202-4536
EDFOIAManager@ed.gov
ATTN: FOIA Public Liaison

Re: FOIA REQUEST: Records Regarding the 2023 Title IX Athletics Rule
(DFI FOIA No. 100-10-24)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies, Inc. (“DFI”) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. For the benefit of the public, DFI’s mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

I. Background of the Title IX Athletics Rule

Congress enacted Title IX of the Education Amendments of 1972 (“Title IX”) to prevent sex-based discrimination in any education program or activity receiving federal financial assistance, with certain statutory exceptions.¹ Importantly, in prohibiting discrimination on the basis of sex in education programs and activities, the law recognizes that there are circumstances in which, in light of biological differences between males and females, sex-separated activities and spaces are appropriate—for instance, in social organizations like fraternities and sororities; housing; and, as recognized in the law’s implementing regulations since 1975, sex-separated athletics teams for activities involving competitive skill or bodily contact.²

Fifty years after Title IX’s enactment, the Biden Administration is attempting to rewrite the law by executive fiat to turn this common-sense, statutory obligation on its head.

¹ 20 U.S.C. § 1681 *et seq.*

² *See* 34 C.F.R. § 106.41(b).



On July 12, 2022, President Biden’s Department of Education (the “Department” or “ED”) issued a notice of proposed rulemaking (the “Title IX NPRM”) to amend Department regulations implementing Title IX.³ Among other things, the NPRM ignored the ordinary meaning of Title IX and the purpose of the statute in protecting educational opportunities based on biological sex by prohibiting discrimination on the basis of “gender identity” and preventing schools from denying to any persons the ability to participate in education programs or activities on the basis of their “gender identity”—including in athletics, intimate spaces, and any other activities or spaces separated on the basis of biological sex to protect opportunities (and safety) for women and girls.⁴ In response to the NPRM, the Department received over 240,000 comments from the public,⁵ which is, to DFI’s knowledge, a record in the history of administrative rulemaking by ED.

On April 13, 2023, the Department proposed another NPRM (the “Athletics NPRM”) that, if promulgated, would deal another massive blow to the promise of Title IX for equal opportunities for women and girls in education.⁶ In the Athletics NPRM, the Department proposed to amend its longstanding Title IX rules with respect to athletics to prohibit federally funded schools from applying sex-based criteria to limit or deny students the ability to participate on a sports team in line with their “gender identity,” unless the school is able to show that the criteria, “for each sport, level of competition, and grade or education level,” is “substantially related to the achievement of an important educational objective” and “minimize[s] harms” to students excluded from such team on the basis of their biological sex.⁷ The proposal would thus place a heavy burden on the school to show, in the case of every sport at every age and every skill level, that its sex-based criteria excluding biological males from participating in women’s and girls’ sports served sufficiently important objectives to satisfy the Department. In response to the Athletics NPRM, the Department received 156,000 comments from the public during a mere 30-day comment period.⁸

³ U.S. 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. 41390 (July 12, 2022).

⁴ *Id.* at 41571.

⁵ U.S. Dep’t. of Educ., *Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Regulations.gov (July 12, 2022) <https://shorturl.at/t87TE>.

⁶ U.S. 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. 22860 (Apr. 13, 2023).

⁷ *Id.* at 22891.

⁸ U.S. Dep’t. of Educ., *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 Athletic Teams*, Regulations.gov (Apr. 13, 2023) <https://shorturl.at/OkWU1>.



On April 29, 2024, the Department published the final version of the Title IX NPRM it had proposed in 2022.⁹ These regulations (the “Final Rule”) continue to ignore the meaning and context of Title IX by conflating discrimination on the basis of sex with discrimination on the basis of “gender identity” under the statute. In response to public comments on its NPRM—including DFI’s submission—the Department specified in part of the Final Rule that schools can separate the sexes regardless of “gender identity” in athletics programs and in “living facilities” (which it narrowly defined only to include housing and not bathrooms, locker rooms, and showers).¹⁰ Because the Final Rule still prohibits discrimination on the basis of “gender identity” in all federally funded school programs and activities¹¹—including athletics programs—and based on the Biden Administration’s current litigation positions, the Department clearly continues to understand that Title IX, before and after the publication of the Final Rule, prohibits policies that categorically exclude biological males from women’s and girls’ sports teams.¹² Federal courts have enjoined the Department from enforcing the Final Rule in 26 states and certain other educational institutions in 24 states and the District of Columbia.¹³

Since issuing its unlawful Final Rule, the Department has quietly put its Athletics NPRM “on ice.” When it announced the Final Rule on April 19, 2024, the Department stated that its “rulemaking process is still ongoing for” the Athletics NPRM in light of its receipt of “over 150,000 public comments, which by law must be carefully considered.”¹⁴ On July 5, 2024, when the White House’s Office of Management and Budget published the administration’s Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions, the agenda did not include the Athletics NPRM.¹⁵ To DFI’s knowledge, the Department has never offered any other public statements regarding the removal of the Athletics NPRM from its list of regulatory priorities or explained whether it intends to publish a final rule in the future.

The public deserves an explanation regarding the Department’s apparent U-turn with regard to a proposed rule that it described only last year as necessary “to advance Title IX’s longstanding goal of ensuring equal opportunity in athletics” and to “provide much needed clarity for students,

⁹ U.S. Dep’t of Educ., *Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474 (Apr. 29, 2024).

¹⁰ *Id.* at 33887.

¹¹ *Id.* at 33886.

¹² See *B.P.J. v. West Virginia State Board of Education*, Statement of Interest (S.D. W.V. 2021) <https://shorturl.at/NGAmL>.

¹³ See, e.g., Katherine Knott, *How Biden’s Title IX Reform Became a Legal Morass*, Inside Higher Ed (Aug. 1, 2024) <https://shorturl.at/ZMqfB>.

¹⁴ U.S. Dep’t of Educ., Press Release, *U.S. Department of Education Releases Final Title IX Regulations, Providing Vital Protections Against Sex Discrimination* (Apr. 19, 2024) <https://tinyurl.com/4hdkkzrj>.

¹⁵ Office of Management and Budget, *Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions* (Department of Education) (July 5, 2024) <https://tinyurl.com/y4nanj9b>.



parents, and coaches.”¹⁶ In particular, the public has a right to know why the Biden Administration removed the Athletics NPRM from its regulatory agenda and which outside groups the Department consulted on that decision.

DFI thus seeks certain records and information related to the formation and revision of ED’s Title IX regulatory policies regarding athletics.

Requested Records

DFI requests that ED produce the following records within twenty (20) business days as required by statute:

1. All communications and correspondence, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, and other documentation, referencing in any way the Department’s proposed Title IX athletics rule published on April 13, 2023, between ED officials (see Custodians, *infra*) and the following entities from May 16, 2023, through the date the search is conducted:
 - a. National Women’s Law Center (“NWLC”)
 - b. American Civil Liberties Union (“ACLU”)
 - c. ACLU Women’s Rights Project
 - d. Advocates for Youth
 - e. American Association of Community Colleges
 - f. American Association of University Women (“AAUW”)
 - g. American Atheists
 - h. American Oversight
 - i. Association of Title IX Administrators (ATIXA)
 - j. Atlanta Women for Equality
 - k. Augustus F. Hawkins Foundation
 - l. Brandeis Feminist Sexual Ethics Project
 - m. Brookings Institution
 - n. California Women’s Law Center
 - o. Center for American Progress
 - p. Clearinghouse on Women’s Issues
 - q. Coalition of Labor Union Women
 - r. Council of the Great City Schools
 - s. Democracy Forward Foundation

¹⁶Department of Education, FACT SHEET: U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams (April 6, 2023) <https://shorturl.at/obdNP>.



- t. Educational Campuses, LLC
- u. Equal Rights Advocates
- v. Every Voice Coalition
- w. Feminist Majority Foundation
- x. Girls, Inc.
- y. Illinois Lieutenant Governor’s Council on Women and Girls
- z. Institutional Compliance Solutions
- aa. interAct Advocates for Intersex Youth
- bb. Jakara Movement
- cc. Japanese American Citizens League
- dd. Know Your IX
- ee. KWH Law Center for Social Justice and Change
- ff. L.L. Dunn Law Firm, PLLC
- gg. Ladder Consulting
- hh. Lathrop GPM
- ii. Legal Momentum
- jj. Legal Voice
- kk. Maryland Women’s Heritage Center
- ll. National Alliance for Partnerships in Equity (“NAPE”)
- mm. National Association of School Psychologists
- nn. National Association of School Psychologists LGBTQIA Youth Committee
- oo. National Center for Parent Leadership, Advocacy, and Community Empowerment (“National PLACE”)
- pp. National Center for Transgender Equality
- qq. National Center for Youth Law
- rr. National Collegiate Athletic Association (NCAA)
- ss. National Council of Jewish Women
- tt. National Organization for Women
- uu. National School Boards Association
- vv. National Urban League
- ww. National Women's Political Caucus
- xx. Not Without Black Women
- yy. OutNebraska
- zz. Parent-Child Center
- aaa. Religious Exemption Accountability Project
- bbb. Society of American Law Teachers (SALT)
- ccc. Southwest Women’s Law Center
- ddd. Student Civil Rights Project at Public Justice
- eee. Title IX Solutions, LLC
- fff. Women’s Media Center
- ggg. Women’s Law Project



hhh. Women's Sports Foundation
iii. YWCA USA

Custodians

The search for records described in Item 2 should be limited to “ED officials” within the Office of the Secretary, Office for Civil Rights, Office of Legislation and Congressional Affairs, and Office of the General Counsel, who are classified as any of the following or referenced with the following job titles:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SES” (Career Senior Executive Service)
- e. “SC” (Schedule C Confidential or Policymaking Positions)

Statutory Disclosure Requirements

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor if ED (1) created or obtained the requested materials, and (2) is “in control of the requested materials at the time the FOIA request [was] made.”¹⁷ Upon request, ED must “promptly” make the requested records available to the requester.¹⁸ Notably, covered agency records include materials provided to ED by both private and governmental organizations.¹⁹ Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures to be followed,²⁰ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²¹ In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”²²

Upon receipt of this request, ED has twenty business days to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the

¹⁷ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

¹⁸ 5 U.S.C. § 552(a)(3)(A).

¹⁹ *Id.* at 144.

²⁰ 5 U.S.C. § 552(a)(3)(A)(i).

²¹ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²² 5 U.S.C. § 552(a)(3)(B).



reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.²³

Consistent with FOIA guidelines, DFI requests the following regarding the provision of the requested records:

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian’s files by the custodian or representations by that likely custodian, but should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian’s possible deletion or modification of responsive records.
- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED’s business operations. Responsive records include official business conducted on unofficial systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and should promptly and fully acquire and preserve those records as ED’s official records. Such unofficial systems include, but are not limited to, governmental business conducted by employees using personal emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or X which was formerly known as Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack. Failure to identify and produce records responsive to this request from such unofficial systems would constitute a knowing concealment by ED calculated to deflect its compliance with FOIA’s requirements.
- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a “record” and avoiding unnecessarily omitting portions of potentially responsive records as they may provide important context for the requested

²³ 5 U.S.C. § 552(a)(6)(A)(i).



records (e.g., if a particular email is clearly responsive to this request, the response to the request should include all other emails forming the email chain, to include any attachments accompanying the emails).

- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by ED, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA”²⁴ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the nondisclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIH format on a USB drive. If it helps speed production and eases ED’s administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33 and 34 C.F.R. § 5.32(b)(1)(ii), DFI requests a waiver of all fees associated with this FOIA request for agency records.

Disclosure of the requested records is in the public interest.

Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI.

The disclosed materials are likely to contribute significant information to the public’s understanding of the Title IX Final Rule and Athletics NPRM that are highly relevant to the interests of American students, families, teachers, and taxpayers. Disclosure of the requested

²⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



materials will illuminate ED's policies and planning considerations. Further, the requested information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

Provision of the requested records will not commercially benefit DFI (a nonprofit, nonpartisan organization interested in the transparency of ED operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in ED's operations and governance.

DFI will review and analyze the requested records and make the records and analyses available to the general public and other interested groups through publication on DFI's website and social media platforms such as Facebook and X, which was formerly known as Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation's largest news providers in February 2022, a March 2022 analysis of DOJ policies distributed by a leading news magazine, and multiple widely published analyses and news stories involving recent ED policy announcements regarding the student loan repayment program and Title IX proposed rulemaking). DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums.

Federal law makes clear that when the disclosure is in the public interest and the information contained within the disclosed records is not primarily in the commercial interests of the requester (here, DFI), statutory fee waiver is appropriate.

DFI is a representative of the news media.

In addition to the fee waiver request based upon the public interest, DFI also requests a fee waiver on the basis that DFI is a **representative of the news media**, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.32(b)(1)(ii).

FOIA (as amended) provides that a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience."²⁵ DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI may provide its analyses to the general public and other interested audiences through publication on DFI's website and social media platforms such as Facebook and X formerly known

²⁵ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



as Twitter. DFI personnel also frequently appear as guests or panelists to offer commentary and analyses on radio and television news programs and in various other public forums.

As a qualified non-commercial public education and news media requester with demonstrated ability to review and analyze publicly-available information and to provide insight regarding that information, DFI is thus entitled to a fee waiver under FOIA as a representative of the news media.

Conclusion

DFI appreciates ED's prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding the Department's decision not to proceed with the Athletics NPRM, which is of tremendous interest to students, families, and schools.

Please contact me immediately if DFI's request for a fee waiver is not granted in full.

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at martha.astor@dfipolicy.org or (321) 390-2707.

Sincerely,

Martha A. Astor
Counsel, Litigation
Defense of Freedom Institute
for Policy Studies