

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE BOARD OF EDUCATION OF
THE CITY SCHOOL DISTRICT OF
THE CITY OF NEW YORK,

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION,
LINDA MCMAHON, in her capacity as
Secretary of the United States Department of
Education, CRAIG W. TRAINOR, in his
capacity as Acting Assistant Secretary for Civil
Rights, and LINDSEY
M. BURKE, in her capacity as Deputy Chief of
Staff for Policy and Programs,

Defendants.

Case No. 25-cv-8547 (AS)

**NOTICE OF CONSENT MOTION OF DEFENSE OF FREEDOM INSTITUTE
FOR POLICY STUDIES FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that the Defense of Freedom Institute for Policy Studies (“DFI”) respectfully moves for leave to file the attached brief, as *amicus curiae*, in support of Defendants’ cross-motion for summary judgment and in opposition to Plaintiff’s Motion for Summary Judgment. Counsel for Plaintiff and Defendants have advised undersigned counsel that they consent to the filing of this brief.

I. DISTRICT COURTS HAVE AUTHORITY TO ACCEPT AMICUS BRIEFS

Federal district courts possess the inherent authority to accept *amicus* briefs to assist in their proceedings. *Goldstein v. Hochul*, No. 22-cv-8300 (VSB),

2022 U.S. Dist. LEXIS 255685, at *7-8 (S.D.N.Y. Oct. 19, 2022) (citing *Onondaga Indian Nation v. State of New York*, No. 97-CV-445, 1997 U.S. Dist. LEXIS 9168, at *4 (S.D.N.Y. June 25, 1997)). Though “[t]here is no governing standard, rule, or statute prescribing the procedure for obtaining leave to file an *amicus* brief in the district court” typically, a court will allow a brief where they aid the court in understanding an issue and offer insights which have not been offered by the parties. *Id.* at 8. See also *SEC v. Ripple Labs, Inc.*, No. 20 CIV. 10832 (AT), 2021 U.S. Dist. LEXIS, at *14 (S.D.N.Y. Oct. 4, 2021). In addition, the brief of *amicus curiae* should be timely. *Goldstein*, 2022 U.S. Dist. LEXIS at *3-4.

Amicus serve the court “in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may make a proper decision.” *Newark Branch, NAACP v. Harrison*, 940 F.2d 792, 808 (3d Cir. 1991).

Proposed *amicus curiae* DFI is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending freedom and opportunity for every American family, student, entrepreneur, and worker, as well as to protecting their civil and constitutional rights at school and in the workplace. Founded by former senior leaders of the U.S. Department of Education (the “Department”), DFI contributes its expertise to policy and legal debates concerning the proper scope and interpretation of Title IX.

DF has participated as *amicus curiae* in many cases addressing the rights of biological girls and boys in the education context, including in cases concerning the Title IX issue central to this litigation. *See, e.g., United States v. Skrmetti*, 605 U.S. 495 (2025); *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. Of Educ.*, 158 F.4th 732 (6th Cir. 2025); *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2023), *cert. granted*, 145 S. Ct. 2871 (U.S. July 3, 2025) (No. 24-38), *West Virginia v. B.P.J.*, 98 F.4th 542 (4th Cir. 2025), *cert. granted*, 2025 U.S. LEXIS 2661, (U.S. July 3, 2025) No. 24-43; *Tennessee v. Dep't of Educ.*, 104 F.4th 577 (6th Cir. 2024).

II. THE PROPOSED BRIEF PROVIDES SUPPLEMENTAL ANALYSIS OF THE ALLEGATIONS AND ASSERTIONS RAISED BY THE PARTIES BUT NOT BRIEFED

DFI has reviewed the briefs filed to date in this case in order to avoid unnecessary duplication of the parties' arguments. This case challenges the Department of Education's discontinuation of funding to New York City Magnet Schools. The Board of Education of the City School District of the City of New York claims that the Department of Education applied pretextual considerations in cutting funding to Magnet schools that were in violation of Title IX, arguing that the Department was not authorized to do so under the Administrative Procedures Act. 5 U.S.C. §§ 551-559.

DFI's brief is desirable given its experience and expertise in policy and litigation of pertinent issues. The participation of *amicus curiae* in a case provides an avenue for parties outside of the proceeding who have a special

interest to provide the court with legal contentions that illuminate key issues. *Zell/Merrill Lynch Real Estate Opportunities Partners Ltd. Partnership III v. Rockefeller Ctr. Properties*, No. 96 civ. 1445 (JFK), at * 11, 1996 U.S. Dist. LEXIS 3242 (S.D.N.Y. March 19, 1996); *see also Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1501 (S.D. Fla. 1991). DFI was founded by former senior leaders of the U.S. Department of Education. They have valuable insight and experience concerning the scope of powers of the Department and the Executive Branch. DFI possesses significant legal and policy expertise concerning the granting and funding systems of schools and the proper scope of Title IX. DFI has worked tirelessly to expand educational opportunities for all students, as well as on issues critical to public education. In sum, they offer vast experience and expertise on education reform, funding of educational institutions, and Executive Branch power.

DFI's brief is timely. Though *amicus curiae* briefs are not governed by the Federal Rules of Appellate Procedure, FRAP 29 is instructive and consistent with that rule, DFI moves for consent to file its brief seven days after the principal brief of the Defendants.

CONCLUSION

For the foregoing reasons, Amicus respectfully request this Court to grant this Motion for Leave to File this *Amicus Curiae* Brief.

Dated: January 21, 2026
Washington, DC

Respectfully submitted,

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**Pro Hac Vice to be sought*

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Dated: January 21, 2026
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Defense of Freedom Institute for Policy Studies submits the following statement of disclosure: DFI is a nonprofit 501(c)(3) corporation. DFI has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

Date: January 21, 2026
Washington, DC

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES..... iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT..... 4

 I. The Interpretation of Title IX Reflected in the EO’s is Entirely
 Consistent with Longstanding Interpretation of the Statute. 4

 A. On Its Face, Title IX Uses “Sex” Unambiguously to Mean
 Biological Sex..... 4

 B. Regulations Promulgated Under Title IX Confirm That “Sex”
 Refers to Biology..... 8

 C. Decades of Implementation of Title IX By the Department
 Confirm That “Sex” Refers to Biology..... 9

 II. The 2021 Interpretive Guidance is an Entirely Unreliable Authority
 for Understanding Title IX. 11

 III. Bostock Does Not Support NYCPS’s Interpretation of Title IX. 15

CONCLUSION 19

CERTIFICATE OF COMPLIANCE.....21

TABLE OF AUTHORITIES

Cases

A.C. v. Metro. Sch. Dist. of Martinsville,
75 F.4th 760 (7th Cir. 2023)..... 14, 15, 17, 18

Adams v. Sch. Bd. of St. Johns Cnty.,
57 F.4th 791 (11th Cir. 2022)..... 10, 11

Alabama v. Cardona,
7:24-cv-533-ACA, 2024 U.S. Dist. LEXIS 137759 (N.D. Ala. 2024) 14

Alabama v. Sec’y of Educ.,
No. 24-12444, 2024 U.S. App. LEXIS 21358 (11th Cir. Aug. 22, 2024) 16

Arkansas v. United States Dep’t of Educ.,
742 F. Supp. 3d 919 (E.D. Mo. 2024) 14

Bostock v. Clayton County,
590 U.S. 644 (2020) 3, 4, 11, 15, 16, 17, 18, 19

Cannon v. University of Chicago,
441 U.S. 677 (1979) 5

Carroll Indep. Sch. Dist. V. United States Dep’t of Educ.,
741 F. Supp. 3d 515 (N.D. Tex. 2024)..... 14

Doe v. Mukwonago Area Sch. Dist.,
796 F. Supp. 3d 536 (7th Cir. 2025)..... 19

D.P. v. Mukwonago Area Sch. Dist.,
No. 23-2568, 2025 U.S. App. LEXIS 16097 (7th Cir. June 30, 2025)..... 19

Frontiero v. Richardson,
411 U.S. 677 (1973) 5

Grimm v. Gloucester Cnty. Sch. Bd.,
972 F.3d 586 (4th Cir. 2020) 14, 15, 18, 19

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 7

Kansas v. United States Dep’t of Educ.,

739 F. Supp. 3d 902 (Dist. Kan. 2024)..... 14

King v. St. Vincent’s Hosp.,
502 U.S. 215 (1991) 6

Louisiana v. U.S. Dep’t of Educ.,
737 F. Supp. 3d 377 (W.D. La. 2024) 1

Louisiana v. U.S. Dep’t of Educ.,
No. 24-30399, 2024 U.S. App. LEXIS 17886 (5th Cir. July 17, 2024)..... 1

Louisiana v. U.S. Dep’t. of Educ.,
No. 3:24-cv-563-TAD, 2024 U.S. App. LEXIS 17866 (W.D. La. June 13, 2024)..... 1

MSP Recovery Claims, Series LLC v. Hereford Ins. Co.,
66 F.4th 77 (2d Cir. 2023) 5

Pennhurst State School and Hospital v. Halderman,
451 U.S. 1 (1981) 17

Perrin v. United States,
444 U.S. 37 (1979) 5

Soule v. Conn. Ass’n of Sch, Inc.,
90 F.4th 34 (2d Cir. 2024) 17

South Dakota v. Dole,
483 U.S. 203 (1987) 17

Southwest Airlines Co. v. Saxon,
596 U.S. 450 (2022) 5

State v. Cardona,
743 F. Supp. 3d, 1314 (W.D. Ok. 2024)..... 16

Tennessee v. Cardona,
737 F. Supp. 3d, 510, 558-59 (E.D. Ky. 2024)..... 16

Tennessee v. Cardona,
762 F. Supp. 615 (E.D. Ky. 2025)..... 13

Tennessee v. U.S. Dep’t of Educ.,
104 F.4th 577 (6th Cir. 2024)..... 12

Tennessee v. U.S. Dep’t of Educ.,

615 F. Supp. 3d 807 (E.D. Tenn. 2022).....	12
<i>Texas v. United States</i> , 201 F. Supp. 3d 810 (N.D. Tex. 2016).....	11
<i>Texas v. United States</i> , 740 F. Supp. 3d 537 (N.D. Tex. 2024);.....	14
<i>U.S. Dep’t of Educ. v. Louisiana</i> , 603 U.S. 866 (2024)	1
<i>United States v. Rowland</i> , 826 F.3d 100 (2d Cir. 2016).....	5
<i>United States v. Skrmetti</i> , 605 U.S. 495 (2025)	16, 19
<i>United States v. Virginia</i> , 518 U.S. 51 (1996)	7
<i>West Virginia v. B.P.J.</i> , 98 F.4th 542 (4th Cir. 2025), <i>cert. granted</i> , 2025 U.S. LEXIS 2661, (U.S. July 3) No. 24-43	17, 18
<i>Williams v. Sch. Dist. of Bethlehem</i> , 998 F.2d 168 (3d Cir. 1993).....	10
<i>Wis. Cent. Ltd. v. United States</i> , 585 U.S. 274 (2018)	5
 Constitutional Provisions	
U.S. Const. art. 1, § 8, Cl. 1	4
 Statutes	
20 U.S.C. § 1681(a)	2, 3
20 U.S.C. § 1681(a)(3)	7
20 U.S.C. § 1681(a)(5)	7
20 U.S.C. § 1681(a)(7)	7

20 U.S.C. § 1681(a)(8) 6, 7

20 U.S.C. § 1686..... 6

20 U.S.C. § 1689(a)(6) 6, 7

20 U.S.C. §§ 1681(a)(2) 6

Regulations

86 Fed. Reg. 117..... 12

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, 41,391 (Jul. 12, 2022) 13

Health, Educ., & Welfare, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (Dec. 11, 1979) 10, 12

U.S. Dep’t of Educ., *Establishment of Title and Chapters*, 45 Fed. Reg. 30,802 (May 9, 1980) 10

U.S. Dep’t of Health, Educ., & Welfare, *Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed. Reg. 24,128, 24,141 (June 4, 1975) 9

Other Authorities

118 Cong. Rec. 5803 (Feb. 28, 1972) 5

118 Cong. Rec. 5807 (Feb. 28, 1972) 7

Amy Howe, *Supreme Court appears likely to uphold transgender athlete bans*, SCOTUSblog (Jan. 13, 2026, 3:21 PM) 18

Ballotpedia [https://ballotpedia.org/SCOTUS_case_reversal_rates_\(2007_-_Present\)#2022](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)#2022) 18

Erwin Chemerinsky, *Whither Bostock?*, SCOTUSblog (Jan. 15, 2026, 10:30 AM) ... 18

Executive Order 14168 – *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* 90 Fed. Reg. 8615 (Jan. 20, 2025)..... 2

Executive Order 14190 – *Ending Radical Indoctrination in K-12 Schooling*; 90 Fed. Reg. 8853 (Jan. 29, 2025) 2

Executive Order 14201 – *Keeping Men Out of Women’s Sports* 90 Fed. Reg. 9279 (Feb. 5, 2025) 2, 13

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024)..... 1

Sex, *American Heritage Dictionary* (1969)..... 6

Sex, *Webster’s New World Dictionary* (1972) 6

Sex, *Webster’s Third New International Dictionary* (1966)..... 5

U.S. Dep’t of Educ, Office for Civil Rights, *Dear Colleague Letter: 35th Anniversary of Title IX* (June 22, 2007)..... 10, 11

U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, (May 13, 2016)..... 11

U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: On Transgender Students* (Feb. 22, 2017)..... 11

STATEMENT OF INTEREST

Amicus curiae the Defense of Freedom Institute for Policy Studies (“DFI”)¹ is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending and advancing freedom and opportunity in education for every American family, student, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school. DFI contributes its expertise to policy and legal debates concerning the proper scope and interpretation of Title IX. As part of that effort, DFI was co-counsel for Mississippi, Louisiana, Montana, and Idaho, along with the Attorneys General for those four states, in *Louisiana v. U.S. Dep’t of Educ.*, 737 F. Supp. 3d 377 (W.D. La. 2024), *aff’d*, No. 24-30399, 2024 U.S. App. LEXIS 17886 (5th Cir. July 17), *Dep’t of Educ. v. Louisiana, aff’d*, 603 U.S. 866, which challenged new regulations under Title IX published by the Department of Education (the “Department”) on April 29, 2024, *see Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the “2024 Regulations”). DFI’s leaders possess significant legal and policy expertise concerning the granting and funding systems of schools and the proper scope of Title IX.

¹ DFI submits this brief with the consent of all parties. *See* Fed. R. App. Proc. 29(a). DFI affirms that no party or counsel for any party authored this brief in whole or in part and that no one other than DFI or its counsel contributed any money intended to fund the preparation or submission of this brief.

DFI submits this brief in support of the Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment.²

SUMMARY OF ARGUMENT

This Court should not let NYCPS lead it down the primrose path to a conclusion based on administrative procedure that grossly misconstrues the underlying substantive law. The legal issue at the heart of NYCPS's claim is whether Title IX's prohibition on sex discrimination extends beyond biological sex to include gender identity. If not, the Guidelines are in direct conflict with federal law, and discontinuation of the MSAP grants was entirely justified. NYCPS's core contention that the prohibition does so extend runs counter to the great weight of both established and trending Title IX jurisprudence, and federal courts across the country have uniformly rejected it. This makes inevitable the end of MSAP grants to NYCPS as long as it maintains the Guidelines.

NYCPS ignores the more than 50 years over which Title IX has been interpreted the same way that the three Executive Orders issued in January 2025 (the "Executive Orders"³) do now. Both the text of 20 U.S.C. § 1681(a), as well as fundamental tenets of statutory construction, make clear that Title IX prohibits discrimination based on biological sex alone. Regulations implemented under Title IX, including the earliest ones (which remain in effect today), likewise understood

² Except where otherwise noted, the defined terms used herein have the same meanings as used in Defendants' memorandum in support of their summary judgment motion and opposition.

³ Executive Order No. 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* 90 Fed. Reg. 8615 (Jan. 20, 2025); Executive Order No. 14190, *Ending Radical Indoctrination in K-12 Schooling*; 90 Fed. Reg. 8853 (Jan. 29, 2025); and Executive Order No. 14201, *Keeping Men Out of Women's Sports* 90 Fed. Reg. 9279 (Feb. 5, 2025).

that Title IX bans discrimination based on biological sex. Further, Title IX, its regulations, and other federal interpretations establish that in certain situations, Section 1681(a) permits differential treatment based on physical differences between the two sexes.

Arguing that Section 1681(a) is not limited to biological sex, NYCPS relies on the 2021 Interpretive Guidance. However, the Interpretive Guidance is merely a guidance document from a prior administration which is now little more than a dead man walking, having been universally vacated in federal court and otherwise become superannuated. NYCPS is correct that the Executive Orders are “[i]n direct contradiction” with the Interpretive Guidance, Pls Mot. Summ. J. of Law, 12, Dkt. No. 52, but it is the 2021 interpretation that cuts against decades of Title IX jurisprudence and other federal interpretation of the statute.

Finally, the 2021 Interpretive Guidance’s formal title was “Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, [590 U.S. 644 (2020)]” and NYCPS’s claim ultimately turns on whether *Bostock* goes beyond Title VII to govern Title IX. Given that Title VII addresses employment relationships among adults in the workplace, while Title IX focuses on educating children in school, it is not surprising that many, if not most, federal courts have found that *Bostock* does not. It is hardly settled that *Bostock* applies to Title IX, and recent decisions, as well as a case currently pending before the Supreme Court, create

serious doubts about whether it does. In the meanwhile, a party relies on *Bostock* to interpret Title IX at its own peril.

The wisdom of the Guidelines is not at issue here, and Title IX does not prohibit NYCPS from adopting them. However, the condition that a recipient of funds under a federal statute not violate that same statute is consistent with well-settled jurisprudence under the Spending Clause, U.S. Const. art. 1, § 8, Cl. 1. Summary judgment for Defendants is warranted.

ARGUMENT

I. THE INTEPRETATION OF TITLE IX REFLECTED IN THE EO'S IS ENTIRELY CONSISTENT WITH LONGSTANDING INTERPRETATION OF THE STATUTE.

NYCPS contends that the three Executive Orders “purport[ed] to announce a new federal interpretation of Title IX,” Pls Mot. Summ. J. of Law, 12, Dkt. No. 52, and that the discontinuation of grants was “based on a novel interpretation of Title IX,” Complaint, ¶ 139, Dkt. No. 1; *see also* Pls Mot. Summ. J. of Law, 1-2, Dkt. No. 52 (“decision hinged solely on the government’s new approach to Title IX, as reflected in three Presidential Executive Orders that upend existing interpretations of federal civil rights law”). However, the EO’s did nothing “novel.” The understanding of Title IX set forth in the Executive Orders falls squarely in line with 50 years of statutory interpretation.

A. On Its Face, Title IX Uses “Sex” Unambiguously to Mean Biological Sex.

Motivated by the “corrosive and unjustified discrimination against women” in “all facets of education — admissions, scholarship programs, faculty hiring and

promotion, professional staffing, and pay scales,” 118 Cong. Rec. 5803 (Feb. 28, 1972) (Statement of Sen. Birch Bayh) — Congress enacted Title IX in 1972 “to avoid the use of federal resources to support [such] discriminatory practices,” *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979). To that end, Section 1681(a) provides, “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.” 20 U.S.C. § 1681(a).

Well-established tenets of statutory interpretation establish that Section 1681’s prohibition on discrimination relates to biological sex. When construing a statute, a court’s “job is to interpret the words consistent with their ‘ordinary meaning’ . . . at the time Congress enacted the statute.” *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). That means looking to dictionary definitions for discerning a word’s ordinary meaning, *United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016). and reading the word in context, “not in isolation,” *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022); *MSP Recovery Claims, Series LLC v. Hereford Ins. Co.*, 66 F.4th 77, 86 (2d Cir. 2023).

When Title IX was enacted, “sex” meant a person’s biological sex — male or female — which “is an immutable characteristic determined” at “birth.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.). Contemporaneous dictionaries establish this. See, e.g., *Sex*, *Webster’s Third New International Dictionary* 2081 (1966) (“one of the two divisions of organic esp. human beings respectively designated

male or female”); *Sex*, *Webster’s New World Dictionary* (1972) (“either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions”); *Sex*, *American Heritage Dictionary* 1187 (1969) (“a. The property or quality by which organisms are classified according to their reproduction functions. b. Either of two divisions, designated *male* and *female*, of this classification.”).

This ordinary meaning is further demonstrated through the “cardinal rule” that a statute must be read “as a whole.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). Throughout its provisions, Title IX indicates that “sex” means biological sex and refers to the two divisions of male or female. *See* 20 U.S.C. §§ 1681(a)(2) (referring to “one sex” and “both sexes”); *id.* § 1681(a)(8) (referring to “father-son or mother-daughter activities,” “one sex,” and “the other sex”). By contrast, the statute refers to “sexual orientation” and “gender identity” not as “sex” but as a separate “status.” *See id.* § 1689(a)(6) (directing that a sexual-violence task force be established and “develop recommendations on . . . inclusive approaches to supporting survivors, which include consideration of . . . lesbian, gay, bisexual, or transgender (commonly referred to as ‘LGBT’) status”).

Title IX also contains certain statutory exceptions that allow for differentiation based on biological sex in order to promote educational opportunities for women and girls. Title IX instructs, for example, that “nothing contained herein shall be construed to prohibit” institutions receiving federal funds “from maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686. This reflects the

congressional understanding that separating the sexes “where personal privacy must be preserved” is not discrimination. *See* 118 Cong. Rec. 5807 (Feb. 28, 1972) (Statement of Sen. Bayh) (explaining Title IX “permit[s] differential treatment by sex” when necessary, such as “in sport facilities or other instances where personal privacy must be preserved”). As another example, Title IX expressly allows a subset of institutions and programs receiving federal funds, such as traditional single-sex schools and certain religious schools, to remain limited to males or females. *See* 20 U.S.C. § 1681(a)(3), (5). It also allows for single-sex groups like sororities and fraternities, and permits single-sex activities like “Boys State” and “Girls State” conferences and “father-son or mother-daughter activities at an educational institution” as long as “opportunities for reasonably comparable activities” are “provided for students of the other sex.” *Id.* § 1681(a)(6)-(7), (8).

Differentiating between men and women based on biology is also not per se illegal discrimination as a constitutional matter. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (Equal Protection Clause recognizes that “[p]hysical differences between men and women . . . are enduring,” and that “[i]nherent differences’ between men and women . . . remain cause for celebration”).

Thus, Title IX recognizes that biological differences between the two sexes occasionally demand differentiation between them. Accordingly, Title IX prohibits recipients of federal funds from discriminating on the basis of biological sex, while also making clear that not all differential treatment based on sex constitutes such prohibited discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167,

174 (2005) (“discrimination means ‘less favorable’ treatment”).

B. Regulations Promulgated Under Title IX Confirm That “Sex” Refers to Biology.

The understanding that Title IX generally prohibits discrimination based on biological sex, but does not prohibit non-discriminatory differentiation in certain circumstances where necessitated by biological differences, is demonstrated by longstanding Title IX regulations, beginning with the initial ones promulgated under the statute in 1975 (the “1975 Regulations”).

The 1975 Regulations emphasize key aspects of Title IX’s general prohibition on sex discrimination in education programs and activities. First, the 1975 Regulations further show that sex discrimination means discrimination against someone based on his or her biological sex. *See, e.g.*, 40 Fed. Reg. at 24,132 (“women” and “men”); *id.* at 24,135 (“male and female teams”); *id.* at 24,135 (contrasting payment rates between “one sex” and the “opposite sex”); *id.* at 24,134 (prohibiting discrimination “against members of either sex”). Second, consistent with Section 1686’s allowance for “separate living facilities for the different sexes,” the 1975 Regulations underscore that not all separation based on sex is prohibited discrimination, permitting, among other things, “separate toilet, locker room, and shower facilities on the basis of sex” as long as “such facilities provided for students of one sex” are “comparable to such facilities provided for students of the other sex.” 40 Fed. Reg. at 24,141; *see, e.g., id.* at 24,141 (allowing the “separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major

activity of which involves bodily contact”); *id.* (allowing “[p]ortions of classes in elementary and secondary schools which deal exclusively with human sexuality” to be “conducted in separate sessions for boys and girls”). Third, the 1975 Regulations acknowledge that sometimes biological differences make differential treatment based on sex necessary to provide equal opportunities under Title IX. That is why, for example, the 1975 Regulations “requir[e] the use of standards for measuring skill . . . in physical education which do not impact adversely on members of one sex.” *Id.* at 24,132; *see also id.* (explaining that this requirement is necessary because certain standards “may be virtually out-of-reach for many more women than men because of the difference in strength between the average person of each sex”); *id.* at 24,141 (“Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.”).

C. Decades of Implementation of Title IX By the Department Confirm That “Sex” Refers to Biology.

For decades, Title IX has been implemented by the Department according to the statutory and regulatory understanding that “sex” refers to biology. *See, e.g.,* U.S. Dep’t of Health, Educ., & Welfare, *Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 45 C.F.R. Pt. 86) (allowing the “separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact”); U.S. Dep’t of Health, Educ., & Welfare, *Title IX of*

the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (“[A]thletic interests and abilities of male and female students must be equally effectively accommodated.”); *id.* (noting most institutions would need to develop “athletic programs that substantially expand opportunities for women to participate and compete at all levels”); *id.* at 71,415 (“Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities.”); U.S. Dep’t of Educ., *Establishment of Title and Chapters*, 45 Fed. Reg. 30,802, 30,960 (May 9, 1980) (reissuing regulations, including those allowing “separate housing on the basis of sex” and “separate toilet, locker room, and shower facilities on the basis of sex”); *id.* at 30,962 (allowing sex-specific teams and requiring “equal athletic opportunity for members of both sexes”); U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: 35th Anniversary of Title IX* (June 22, 2007) (the “June 2007 Dear Colleague Letter”) at 1 (“an education to all students, male and female, free of discrimination”). This approach — mandated by the statutory text — has proven immensely successful as female college attendance and athletic participation have skyrocketed. *See, e.g.*, June 2007 Dear Colleague Letter, at 1-2; *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818–19 (11th Cir. 2022) (en banc) (Lagoa, J., concurring); *see also Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993) (explaining “[a]thletic opportunities’ means real opportunities, not illusory ones,” which is why school districts attempt “to equalize the numbers of sports teams offered for boys and girls” as opposed to only allowing “girls to try out

for the boys' teams").

In accordance with Title IX's plain language and regulations, for decades and over the administrations of nine different presidents of both political parties, the Department and courts have all interpreted Title IX as prohibiting discrimination based on biological sex.⁴ *See, e.g., Adams*, 57 F.4th at 811, 815 (explaining Title IX's "purpose, as derived from its text, is to prohibit sex discrimination in education" and "sex" "mean[s] 'biological sex'"); June 2007 Dear Colleague Letter, at 1 (describing "the Department's longstanding construction of the term 'sex' in Title IX to mean biological sex). The Executive Orders fall squarely in line with the statutory text, lawful regulations promulgated thereunder, and decades of interpretation. In no way do they propose anything novel.

II. THE 2021 INTERPRETIVE GUIDANCE IS AN ENTIRELY UNRELIABLE AUTHORITY FOR UNDERSTANDING TITLE IX.

To counter the Department's substantive interpretation of Title IX as prohibiting only discrimination based on biological sex, NYCPS relies on the 2021 Interpretive Guidance. Pls Mot. Summ. J. of Law, 12, 28, Dkt. No. 52; Complaint, ¶¶ 72-73, 77, Dkt. No. 1. However, the Interpretive Guidance cuts against the decades of understanding of Title IX, and itself sets forth a novel position based on *Bostock*,

⁴ Before the 2021 Interpretive Guidance, the only break in this continuous line of interpretation was a May 2016 "Dear Colleague" letter that, for the first time, sought to redefine "sex" in Title IX to include "an internal sense of gender." *See* U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, at 1 (May 13, 2016) ("May 2016 Dear Colleague Letter"). However, immediately after the May 2016 Dear Colleague Letter issued, 22 states challenged it in federal court, and enforcement was promptly enjoined. *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016). The Department rescinded the May 2016 Dear Colleague Letter shortly thereafter. *See* U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: On Transgender Students* (Feb. 22, 2017).

which was decided only a year earlier and had nothing to do with Title IX. Even the Department recognized that the Guidance represented a change in its previous, long-held position. *See Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 842 (E.D. Tenn. 2022).

NYCPS also fails to mention that the legal status of the 2021 Interpretive Guidance is, at best, shaky. In bold, red ink besides the Interpretive Guidance's text, the Federal Register warns, "**A Federal court has 'vacate[d]' this document and 'enjoined' the Department from 'implementing or enforcing' this document against the state of Texas and its respective schools, school boards, and other public, educationally based institutions. *See State of Texas v. Cardona*, No. 4:23-cv-604 (N.D. Tex. June 11, 2024).**" Because the vacatur "is necessarily universal in scope," *Texas*, 743 F. Supp. 3d 824, 893 (N.D. Tex. 2024), the Interpretive Guidance should have no legal effect anywhere, including in this District.

In litigation separate from *Texas*, 20 additional states also challenged the 2021 Interpretive Guidance, and there, too, a court enjoined its enforcement against them. *See Tennessee*, 615 F. Supp.3d at 817 (citing 86 Fed. Reg. 117, at 32637). Affirming, the Sixth Circuit noted that the Guidance "adopted a new position" regarding the meaning of "sex" under Title IX. *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 597 (6th Cir. 2024).⁵ In light of this additional holding against the Guidance, the Federal Register's warning continues: "**Pursuant to a different Federal court order, the**

⁵ The 2024 Regulations acknowledged that enforcement of the Interpretive Guidance had been preliminarily enjoined by the *Tennessee* district court, but stated that the Department simply "disagree[d] with the conclusion and is appealing that ruling," 89 Fed. Reg. No. 83, at 33804; again, however, the Sixth Circuit rejected the appeal a short while later, *see Tennessee*, 104 F.4th at 597.

Department has been preliminarily ‘enjoined and restrained from implementing’ this document against the states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia. *See State of Tenn., et al. v. U.S. Dep’t of Educ.*, No. 3:21- cv-308 (E.D. Tenn.) (July 15, 2022).” And as another stake through the heart, Executive Order No. 14168 directed the Department to promptly rescind whatever remains of the Interpretive Guidance. 86 Fed. Reg. 117 at 32,367.

NYCPS tries to minimize the fate of the 2024 Regulations,⁶ which expanded on and formalized the 2021 Interpretive Guidance, but were subsequently struck down by federal courts across the country. NYCPS mentions in passing that “*Tennessee v. Cardona*, 762 F. Supp. [3d] 615, 627-628 (E.D. Ky. 2025) . . . vacated” the April 2024 Regulations, which had “codified the Department's understanding that sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” Complaint, ¶ 75, Dkt. No. 1.⁷ NYCPS omits, however, that *Tennessee* was just one of many lawsuits that successfully challenged the 2024 Regulations. *See, e.g.*,

⁶ Like the Interpretive Guidance, the notice for the 2024 Regulations acknowledged that the expanded meaning of “sex” “deviate[d] from some past agency statements on Title IX's coverage of discrimination based on . . . gender identity.” 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, 41,391 (Jul. 12, 2022).

⁷ Executive Order 14168 requires that the Department comply with *Tennessee’s* vacatur of the 2024 Regulations. *See* 90 Fed. Reg. 9279 at 1.

Kansas v. United States Dep't of Educ., 739 F. Supp. 3d 902 (Dist. Kan. 2024); *Texas v. United States*, 740 F. Supp. 3d 537 (N.D. Tex. 2024); *Carroll Indep. Sch. Dist. V. United States Dep't of Educ.*, 741 F. Supp. 3d 515 (N.D. Tex.2024); *Arkansas v. United States Dep't of Educ.*, 742 F. Supp. 3d 919 (E.D. Mo. 2024); *Alabama v. Cardona*, 7:24-cv-533-ACA, 2024 U.S. Dist. LEXIS 137759 (N.D. Ala. 2024) (collectively referred to as the “2024 Regulations Litigation”). And on an emergency application in two of those cases, the Supreme Court unanimously upheld the longstanding interpretation of Title IX:

Importantly, all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity.

Louisiana, 603 U.S. at 867. The results in the 2024 Regulations Litigation further reinforce the Title IX interpretation relied on for the discontinuation determination.

NYCPS argues that the discontinuation “contravenes the findings of several federal circuit courts that Title IX at the very least allows schools to permit transgender students to use facilities consistent with their gender, and in some cases actually requires such.” Complaint, ¶ 139, Dkt. No. 1, ¶ 139 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023)). However, *Grimm* and *A.C.* dealt only with transgender use of bathrooms, and the Guidelines go far beyond that to encompass all aspects of student life, including pronoun use, sports and physical education, curriculum, and more. See Decl. of Aviles-Ramos, 7-30, Dkt. No. 6-5. In addition, both cases held that requiring transgender students to use bathrooms corresponding

to their biology violated Section 1681(a), *see Grimm*, 972 F.3d at 618-19; *A.C.*, 75 F.4th at 771-72, so it is unclear how their (mis)interpretation of Title IX would “allow” anything else. Moreover, the two cases are not solid law, as indicated by the uniform rejection of the April 2024 Regulations by federal district and appellate courts across the country, as well as discussed further *infra*.

III. BOSTOCK DOES NOT SUPPORT NYCPS’S INTERPRETATION OF TITLE IX.

Like the 2021 Interpretive Guidance and 2024 Regulations, NYCPS cites *Bostock*, arguing that the discontinuation determination was based “on an interpretation of Title IX that is at odds with existing case law.” Pls Mot. Summ. J. of Law, 29, 30, Dkt. No. 52. By relying on *Bostock* to conclude that “sex” includes gender identity under Title IX, however, the Interpretive Guidance, 2024 Regulations, and NYCPS here all overreach in their reading of the case.

Bostock held that the prohibition in Title VII on employment discrimination “because of [an] individual’s . . . sex” included firing an employee “merely for being gay or transgender” because, under that statute’s text, biological “[s]ex plays a necessary and undisguisable role” in such decisions. *Bostock*, 590 U.S. at 652, 661, 682. However, both *Bostock* itself and subsequent caselaw make clear that its application beyond Title VII is questionable, at best.

First, *Bostock* was driven by a close reading of Title VII’s text, and the decision explicitly states that it does not apply to other legal prohibitions on sex discrimination. *See Bostock*, 590 U.S. at 681. *Bostock* nowhere purports to offer some fundamental insight about the nature of sex discrimination that would control

anywhere outside of Title VII. Rather, *Bostock* explicitly disclaims any broad reach, *see id.*, which the Supreme Court recently reaffirmed, *see United States v. Skrametti*, 605 U.S. 495, 519-20 (2025) (“We have not yet considered whether *Bostock*’s reasoning reaches beyond the Title VII context, and we need not do so here.”)⁸, and numerous courts have recognized its disclaimer, *see, e.g., Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (rejecting Age Discrimination Enforcement Act claim, stating “rule in *Bostock* extends no further than Title VII”). These include courts in the 2024 Regulations Litigation. *See, e.g., Tennessee v. Cardona*, 737 F. Supp. 3d, 510, 558-59, 571-72 (E.D. Ky. 2024); *Alabama v. Sec’y of Educ.*, No. 24-12444, 2024 U.S. App. LEXIS 21358, at *12-13 (11th Cir. Aug. 22, 2024); *State v. Cardona*, 743 F. Supp. 3d, 1314, 1324 (W.D. Ok. 2024); *Arkansas*, 742 F. Supp. 3d, at 938-39, 944-45; *Kansas*, 739 F. Supp. 3d, at 920-21; *Louisiana* 737 F. Supp. 3d at 397. And unlike the Interpretive Guidance and 2024 Regulations, *Bostock* assumed that under Title IX, “sex” meant biological sex. *See Bostock*, 590 U.S. at 655.

Second, and consistent with the Supreme Court’s disclaimer, a similar text-driven review of Title IX establishes that it differs from Title VII in material ways, making *Bostock* inapposite. *See Jackson*, 544 U.S. at 175 (Titles VII and IX are “vastly different” statutes) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-84 (1998)), *Bostock* interpreted specific statutory language addressing relationships among adults in the workplace in light of the specific factual circumstances before the Court, and its reasoning does not apply to circumstances far

⁸ In *Skrametti*, the Supreme Court upheld a Tennessee law prohibiting gender transition health care for minors. *See Skrametti*, 605 U.S. at 525-26.

afield from Title VII, like relationships among students and faculty in publicly-funded schools.

Third, while *Bostock* acknowledged that Title VII had not previously been applied to transgender discrimination, *see* 590 U.S. at 674, Title IX does not allow for such new and unexpected applications. Unlike Title VII, Title IX was enacted pursuant to Congress's Spending Clause authority, which creates an arrangement in the nature of a contract between the federal government and the recipient of federal funding. *See Soule v. Conn. Ass'n of Sch, Inc.*, 90 F.4th 34, 42 (2d Cir. 2024) (citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). The Clause requires that conditions on funding be made clear at the outset of the relationship, *see South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *Pennhurst*, 451 U.S. at 17), but the original and longstanding prohibition on biological sex discrimination only conflicts with the Guidelines. Thus, NYCPS is free to continue requiring compliance with its Guidelines but, under the Spending Clause, it is not entitled to Title IX funding to the extent that the Guidelines violate Title IX. *See Dole*, 483 U.S. at 407.

Whether *Bostock* governs Title IX is hardly settled law. Appellate judges have sought guidance from the Supreme Court, *see, e.g., A.C.*, 75 F.4th at 764 (“we assume that at some point the Supreme Court will step in with more guidance than it has furnished so far”), and such clarification seems likely to be forthcoming.

Most notably, earlier this month, the Supreme Court heard oral argument in *West Virginia v. B.P.J.*, which challenged on Title IX grounds a state law requiring

that girls' athletics be limited to biological girls. *West Virginia v. B.P.J.*, No. 24-43 (U.S. argued Jan. 13, 2026). Not only is the Title IX challenge widely expected to fail, *see, e.g.*, "Supreme Court appears likely to uphold transgender athlete bans," Amy Howe, *Supreme Court appears likely to uphold transgender athlete bans*, SCOTUSblog (Jan. 13, 2026, 3:21 PM), <https://www.scotusblog.com/2026/01/supreme-court-appears-likely-to-uphold-transgender-athlete-bans/>, but the application of *Bostock* to the statute also likely may be rejected, *see* Erwin Chemerinsky, *Whither Bostock?*, SCOTUSblog (Jan. 15, 2026, 10:30 AM), <https://www.scotusblog.com/2026/01/whither-bostock/> ("the oral argument gave the strong sense that a majority of the justices are likely to uphold the state laws, making even more salient the question of what will be left of *Bostock*"). At oral argument, Justice Gorsuch, who authored *Bostock*, specifically noted that Title IX's enactment pursuant to the Spending Clause distinguished it. *See* Supreme Court appears likely to uphold transgender athlete bans," *supra* Howe.

These same concerns about applying *Bostock* beyond Title VII weaken the legal foundation for *Grimm* and *A.C.*, which both relied on the case. *See Grimm*, 972 F.3d at 616; *A.C.*, 75 F.4th at 769-70. Again, the recent oral argument in *B.P.J.*, where the Fourth Circuit had relied on *Grimm*, *see* 98 F.4th at 563-64, presages an express admonition from the Supreme Court later this term that *Bostock* does not govern Title IX.⁹ *See Doe v. South Carolina*, No. 25-1787, 2025 U.S. App. LEXIS 20849, at

⁹ It also does not bode well for *B.P.J.* (or *Grimm*) that both are decisions from the most reversed circuit over the past three terms, with a 100% reversal rate. *See Ballotpedia* [https://ballotpedia.org/SCOTUS_case_reversal_rates_\(2007_-_Present\)#2022](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)#2022).

33-34 (4th Cir. 2025) (“The Supreme Court’s reasoning in [*B.P.J.*] will likely impact what, if anything, remains of *Grimm* for purposes of assessing public school bathroom policies that similarly designate single-sex bathrooms ‘based on biological sex determined at birth.’”).

Similarly, the Seventh Circuit has called *A.C.* into question because of the uncertain application of *Bostock* to Title IX. See *D.P. v. Mukwonago Area Sch. Dist.*, No. 23-2568, 2025 U.S. App. LEXIS 16097 (7th Cir. June 30, 2025) (sua sponte granting panel rehearing to consider whether *A.C.* should be overruled in light of *Skrmetti*) *D.P. v. Mukwonago Sch. Dist.*, No. 23-2568, (7th Cir. Aug. 26, 2025) (dismissed).¹⁰

CONCLUSION

For the foregoing reasons, as well as those set forth in the memorandum in support of the Department’s cross-motion for summary judgment and in opposition to Plaintiff’s motion for summary judgment, this Court should grant Defendants’ motion and deny NYCPS’s motion.

Dated: January 21, 2026
Washington, DC, 20004

Respectfully submitted,

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¹⁰ Before a decision on overruling *A.C.* was rendered, the appeal was mooted when the plaintiff voluntarily dismissed the preliminary injunction at issue. *Doe v. Mukwonago Area Sch. Dist.*, 796 F. Supp. 3d 536, 540-41 (E.D. Wis. 2025).

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CERTIFICATE OF COMPLIANCE

I, Martha A. Astor, counsel for *amicus curiae* Defense of Freedom Institute for Policy Studies certify, pursuant to Local Civil Rule 7.1, that the attached Brief is complies with the word-count limitations, the body is printed in twelve-point type, the footnotes are printed in ten-point type, and the Brief contains 5,173 words.

Date: January 21, 2026
Washington, DC

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