THE EQUAL PROTECTION PROJECT
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Via Federal eRulemaking Portal

Alejandro Reyes
Director, Program Legal Group
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW, Room PCP-6125
Washington, DC 20202

Re: 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" (Docket ID No. ED-2022-OCR-0143)

Dear Director Reyes:

The Equal Protection Project (EPP) of the Legal Insurrection Foundation (LIF) submits this letter comment to the U.S. Department of Education ("Department") in opposition to "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams," Docket ID No. ED-2022-OCR-0143 (the "Proposed Rule")[1] because of its deleterious impact on the rights of female student athletes.

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[1] 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 (proposed Apr. 13, 2023).

LIF is a Rhode Island tax-exempt charitable corporation that promotes and educates the public, among other things, on the protection of constitutional rights in education. As such, LIF has legal expertise in and an abiding interest in the negative impact the Proposed Rule will have on fundamental constitutional and legal rights of all Americans, but especially female student athletes, who may themselves be subject to discrimination and harm due to the Proposed Rule.

For the reasons set forth below, EPP strongly opposes the Proposed Rule because (i) the Proposed Rule lacks legal justification, as *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) cuts against, rather than in favor of, the Proposed Rule, (ii) the science underpinning the inclusion of transgender athletes on women's sports teams clearly indicates that such inclusion is patently unfair to female athletes, and (iii) the major questions doctrine strongly suggests that such a massive change to interscholastic and intercollegiate sports, which would be the inevitable result of the Proposed Rule, should be legislated by Congress, not imposed unilaterally by a federal administrative agency.

Title IX's Impact on Women's Sports

Title IX states, in pertinent part, that "[n]o 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).

And although Title IX itself nowhere expressly mandates any effect regarding school sports, Title IX brought about a "revolution" in female intercollegiate and interscholastic athletics. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J. L. Reform 13, 15 (2000). "Fewer than 300,000 female students participated in interscholastic athletics in 1971. By 1998–99, that number exceed 2.6 million, with significant increases in each intervening year. To put these numbers in perspective, since Title IX was enacted, the number of girls playing high school sports has gone from one in twenty-seven, to one in three." *Id.*

This is important not only for the physical health of the female student-athletes benefitting from Title IX's clarion call for equality between the sexes, but also because "[g]irls who play sports stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead." Beth A. Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Female Athletes the Same Funding as Men*, World Econ. F. (Aug. 25, 2016), https://www.weforum.org/agenda/2016/08/sustaining-theolympic-legacy-women-in-sports-and-public-policy/. "[R]esearch shows stunningly that 94[] percent of women C-Suite executes today played sport[s], and over half played at a university level." *Id.*

Indeed, "being engaged in sports 'inculcate[s] the values of fitness and athleticism for lifelong health and wellness' and 'impart[s] additional socially valuable traits including teamwork, sportsmanship, and leadership, as well as individually valuable traits including goal setting, time management, perseverance, discipline, and grit.'" *Adams by & through Kasper v.*

Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 820–21 (11th Cir. 2022) (Lagoa, J., specially concurring) (quoting Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 87–88 (2020)).

The Negative Impact the Proposed Rule Will Have on Women's Sports

Despite the undisputed benefits that Title IX has conferred upon female student athletes, the Proposed Rule threatens to undermine these very benefits by very subtly but profoundly changing the regulations implementing Title IX.

The section of the Federal Regulations implementing Title IX's imperative to not discriminate on the basis of sex, 34 C.F.R. § 106, entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," directly addresses the school sports context, in the following way.

34 C.F.R. § 106.41, entitled Athletics, currently reads, 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 by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient 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.

This regulation clearly allows schools to provide separate men's/boys' and women's/girls' sports teams for all contact sports and for any sports competitive skill is required for selection to a team. Which is, of course, exactly what schools do. The Proposed Rule changes this scheme simply but dramatically.

The Proposed Rule would re-number subsection (b) of 34 C.F.R. § 106.41 as subsection (b)(1), and add the following subsection (b)(2):

> (2) If a recipient [of federal funds] 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.

The problems with the Proposed Rule are legion. LIF explains three in detail here.

I. *The Proposed Rule Lacks Adequate Legal Basis*

First, the Notice of Proposed Rulemaking cites the United States Supreme Court's opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) as supporting the Proposed Rule.[2] But *Bostock*, which held that an employer firing someone because of their status as transgender violates Title VII, has nothing to do with Title IX. This is clear in two ways: from the text of the opinion, and from common sense.

Bostock expressly stated that its reach is limited to the Title VII employee firing realm, and extends no further:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. . . . 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. . . . 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.'

Bostock, 140 S. Ct. at 1753. The Court could not have been clearer on this point.

As a matter of common sense, the "employment firing" and "inclusion in a women's sports team" contexts are very nearly opposites, and one can agree completely with the result in *Bostock* and simultaneously, and completely logically and compatibly, disagree with the Proposed Rule.

For example, it makes perfect sense that it should be as illegal to fire someone for being transgender, who is otherwise perfectly performing the duties of their job, as it is to fire someone for being a woman. Neither status, as a transgender person or a woman, has any impact on one's job performance in most jobs, and so firing such a person for that reason alone must be, or at least most likely is, the result of naked prejudice or bias. This the law prohibits, and arguably rightly so.

But it does not therefore mean that transgender women, *i.e.*, people who were born male but identify as women, especially those who have undergone no hormone therapy or other treatment whatsoever, should be allowed on women's sports teams. Disallowing that would *NOT* be the result of naked prejudice or bias, as it would in the employment context, but would rather be based on science, *i.e.*, the inherent physical differences between male and female athletes, as will be explained in the next section.

[2] 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, 22862 (proposed Apr. 13, 2023).

Therefore, *Bostock's* reach should *NOT* extend to Title IX, not only because it said it doesn't, but also because its logic does not extend that far. There is no difference between women and men who identify as women in the employment context; there *IS* in the sports context. The Department, therefore, should not rely on *Bostock* as buttressing the Proposed Rule. It does not.

II. *The Proposed Rule Defies Science, and Common Sense*

Second, the Proposed Rule defies simple fairness because the physical differences between males and females, especially those that contribute to athletic success, are stark and all in the male's favor, as every athletic metric shows.

For example, males have larger hearts than females, which helps to pump blood to the muscles more efficiently, males have larger lungs than females, which helps to oxygenate the blood, and males have about a 12% higher concentration of hemoglobin than females, which helps to transport oxygen in the blood. As a result, males have better aerobic capacity than females. Jennifer C. Braceras *et al.*, Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports, at 17, *available at https://www.iwf.org/wp-content/uploads/2021/09/COMPETITION_FINAL.pdf.* Grown males are, on average, 4.5 inches taller and have longer, larger, and denser skeletal structures than grown females, grown males tend to have greater bone mass, even after taking body size into account, and in some parts of the body, males have different bone geometry than females. As a result, male and female bodies have different biomechanics, with the female body "set up to produce less force in running, jumping and throwing." *Id.* (quoting Andrew Langford, Sex Differences, Gender, and Competitive Sport, QUILLETTE (Apr. 5, 2019)).

This shows up on the athletic field, most notably in world records. For example, the men's world record in the 200-meter dash is over two seconds faster than women's world record (19.19 seconds to 21.34 seconds), and the men's world record in 500-meter speed skating is two and three quarters of a second faster (33 .61 seconds to 36.36 seconds). And it's not just speed. The men's pole vault world record is over one meter higher (or incredibly over 44 inches higher) than the women's world record (6.18 meters to 5.06 meters), and the men's weightlifting world record is over 100 kilograms greater than the women's world record (447 kg to 335 kg, or almost 250 pounds greater). *Id.* at 22.

For one to expect women to successfully compete with men who possess these overwhelming physical attributes simply defies science, and common sense. Even those males who undergo hormone therapy possess undeniable advantages unavailable to women. For example, there are "over 3000 genes that contribute to muscle differences between human males and females," and "[g]enetic differences, of course, cannot be eliminated by reducing testosterone." *Id.* at 28. "Moreover, many of the changes brought about by increased levels of testosterone during male puberty (such as changes to skeletal architecture) are permanent and unalterable by testosterone reduction later in life. Testosterone suppression will not, for example, make a person shorter or reduce a person's wingspan." *Id.* Moreover, hormone therapy does not reduce bone density, and does not reduce muscle size to female levels. *Id.* at

28. Males undergoing extensive hormone therapy also retain significant advantages in muscle strength, endurance, and speed. *Id.* at 28-29.

In sum, males simply will outperform females in sports. This makes it fundamentally unfair for them to compete on the same sports teams.

III. *Congress, Not the Department of Education, Should Enact the Proposed Rule, if Desired*

Lastly, the Proposed Rule violates the major questions doctrine. This doctrine, as Justice Gorsuch succinctly explains, holds that "'important subjects ... must be entirely regulated by the legislature itself,' even if Congress may leave the Executive 'to act under such general provisions to fill up the details.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 42–43 (1825)). The major questions doctrine is "vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *Id.* (quoting The Federalist No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton)). Indeed, "[p]ermitting Congress to divest its legislative power to the Executive Branch would 'dash [the] whole scheme,'" *id.* at 2618 (quoting *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J., concurring)), and would result in legislation "becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him." *Id.* (citing S. Breyer, Making Our Democracy Work: A Judge's View 110 (2010) ("[T]he president may not have the time or willingness to review [agency] decisions")).

The major questions doctrine applies "when an agency claims the power to resolve a matter of great 'political significance,'" *id.* at 2620 (quoting *NFIB* v. *OSHA*, 142 S. Ct. 661, 665 (2022)), "or end an 'earnest and profound debate across the country.'" *Id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)). Each of these reasons applies here.

In *West Virginia*, the EPA wanted to impose a so-called Clean Power Plan (CPP), which would have forced coal and gas-powered electricity generation power plants "to cease operating altogether," fundamentally transforming the American economy. *Id.* at 2612. The Supreme Court held that "each of the signs the Court has found significant in the past is present here, making this a relatively easy case for the [major questions] doctrine's application." *Id.* at 2621. The same is true here.

The Proposed Rule would impose a default requirement on all recipients of federal funding that transgender athletes participate on sports teams according to their gender identity, not their gender at birth. To depart from the default rule, a school would have to justify it based on its decision being "substantially related to the achievement of an important educational objective," and, the school would have to "minimize harms to [transgender] students" who were denied access to a sports team of their chosen gender. But the Proposed Rule provides precious little guidance on what an "important educational objective" is, how a school's decision might "substantially relate[]" to that objective, or even how to "minimize harms" to transgender

students and so comply with the Proposed Rule. As a result, there can be no doubt that schools across the land will integrate transgender students into sports teams consisting of members of the opposite birth sex, so as not to run afoul of the Proposed Rule.

This would result in a sea change in intercollegiate and interscholastic sports, which is undoubtedly "of great 'political significance.'" *W. Virginia*, 142 S. Ct. at 2620 (quoting *NFIB v. OSHA*, 142 S. Ct. at 665). Moreover, there is a nationwide "earnest and profound" raging debate occurring "across the country" at this very moment. *Id.* (quoting *Gonzales*, 546 U.S. at 267–68).

Recently, former collegiate athlete Riley Gaines spoke at San Francisco State University, and simply for speaking her mind on transgender athletes' participation in women's sports, was assaulted and unlawfully detained for three hours by protestors.[3] Incidents like this, but fortunately less extreme in nature, are happening nationwide every day as citizens speak their mind and are challenged over their views on transgender athlete participating in women's sports.

In a situation like this, as in *West Virginia v. EPA*, the major questions doctrine intrudes to caution the Department of Education from taking this major question out of Congress' hands and imposing its own desired solution.

<u>Conclusion – The Proposed Rule Should Be Rejected</u>

For the foregoing reasons, the Equal Protection Project of the Legal Insurrection Foundation recommends that the Department reject the Proposed Rule and preserve the existing rule as is.

Respectfully Submitted,

/William A. Jacobson/

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[3] Natasha Chen and Cheri Mossburg, *Former college swimmer says she was assaulted at an event opposing the inclusion of trans women in women's sports*, CNN (Apr. 9, 2023, 7:59 AM), https://www.cnn.com/2023/04/07/us/former-ncaa-swimmer-riley-gaines-assault-san-francisco-state-university/index.html.