

“Women’s Sports on the Chopping Block”
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Statement for the Record



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Chairwoman McClain, Ranking Member Porter, and distinguished Members of the subcommittee:

Good afternoon. My name is Sarah Parshall Perry* and I am a Senior Legal Fellow in the Edwin Meese III Center for Legal & Judicial Studies at the Heritage Foundation.

I am also former senior counsel to the Assistant Secretary for Civil Rights at the Department of Education, a former varsity athlete, and the mother of a girls' varsity athlete. The issue we're here today to discuss is near to my heart, and I commend the Committee for holding a hearing on such an important topic.

The sex discrimination of old is new again.

Within education, one law—Title IX of the Education Amendments of 1972¹—should stand as a bulwark against sex discrimination. It provides the assurance that in all federally funded school programs, young men and women will be provided equal opportunities.² But an expansive rulemaking on Title IX is currently underway at the U.S. Department of Education (“Department”), which provides for the participation of men in women’s scholastic sports. This is sex discrimination par excellence.

Properly classified, what we’re discussing today is an athletic scandal. It doesn’t involve East German Olympians swimming their way to glory by winning gold medals and setting world records via an elaborate, organized doping system.³ It doesn’t involve Russian figure skaters winning Olympic gold and later testing positive for hormone and metabolic modulators.⁴ This scandal is bigger: an athletic fraud of unprecedented proportions perpetrated by the federal government on American students. This fraud turns the obvious physical distinctions between the sexes into nothing more than the myths of a bygone era, while expecting female athletes to simply look the other way.

Title IX, a civil rights statute of a mere 37 words, has guaranteed sex equality in all federally funded education programs for more than 50 years. Long considered the crowning achievement of the feminist movement, it paved the way for equal educational opportunity for women who were historically disenfranchised from higher education, scholastic athletic programs, scholarship opportunities, and more.⁵ Title IX’s origins lay incontrovertibly in the women’s movement, spurred by statements like those made by a federal judge in 1971 who famously declared: “Athletic competition builds character in our

¹ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., Pub. L. 92–318, as amended by Pub. L. 93–568, § 3, 88 Stat. 1855. It states: “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.”

² Drawn from Title IX’s athletics regulations at 34 C.F.R. §§ 106.41, Title IX requires that educational institutions may not discriminate based on sex in athletics programs or activities. Three basic categories guide schools facing Title IX athletics obligations: proportional financial assistance (i.e., scholarships) for both sexes, equivalent benefits and opportunities for both sexes, and effective accommodation of the interest and abilities of both sexes. See, Title IX and Athletics: Legal Basics, Congressional Research Service, February 9, 2023, available at: <https://www.everycrsreport.com/reports/IF12325.html>.

³ International Swimming Hall of Fame, 2021, <https://ishof.org/the-east-german-doping-machine/>, accessed on Nov. 28, 2023.

⁴ Wallace, A. and Giambalvo, E., “A timeline of Russia’s state-sponsored Olympic doping scandal,” Washington Post, Nov. 11, 2022. <https://www.washingtonpost.com/sports/olympics/2022/02/11/russia-olympics-doping-scandal/>.

⁵ See, Celebrating the 25th Anniversary of Title IX, 143 Cong. Rec. H4218 (June 23, 1997): “The House Education and Labor Committee had a large body of evidence of discrimination against girls and women in our education system. Since I came to the Congress and the committee in 1965 the committee had been involved in hearings related to equal educational opportunities for girls and women. We scrutinized textbooks which only portrayed successful men, admissions policies which excluded women from graduate and professional schools, and vocational education courses.”

boys. We do not need that kind of character in our girls.”⁶ The extensive congressional record indicates Title IX’s mission was to equalize educational opportunities for women. But if the Biden Administration has its way, that guarantee of equality will evaporate.

The Department of Education’s Office for Civil Rights has proposed changes to Title IX via two upcoming rules⁷ that promise to be nothing short of catastrophic to that long-recognized assurance of a level educational playing field.⁸ The latter of the two rules governs criteria⁹ for athletic participation in federally funded schools and has been billed by the Department as a “compromise” between the athletic interests of women and those of transgender-identified men. It is anything but.

Instead, it’s a self-refuting¹⁰ tangle of considerations that offers a bureaucratic nightmare for any educational institution to which Title IX applies. It doesn’t “clarify” Title IX’s application to sex-based criteria in athletics as the Department purports. It complicates it. The rule departs from decades of Title IX’s application to scholastic athletics, obscures the plain text of Title IX’s long-standing athletics regulation with vague terms, an unworkable standard, and a guaranteed conflict with the contrary laws of 23 states, and balances the equities against the very girls and women who were at the heart of Title IX’s passage. It impressively manages to do all this while also violating constitutional and civil rights, as well as administrative law. And—the coup de grace—there is a strong argument that can be made that the Department lacks the authority to promulgate an athletics rule in the first place.¹¹

⁶ Connecticut high school student Susan Hollander sued Hamden High School in 1970 for not offering a girl’s cross-country team and being denied the chance to run with the boys’ team. Judge John Clark Fitzgerald dismissed the lawsuit in 1971 with the now-infamous phrase that accelerated congressional momentum toward passage of Title IX. See Susan Ware, Introduction: Title IX: Thirty-Seven Words that Changed American Sports, in *Title IX: A Brief History, with Documents* (Boston: Bedford/St. Martins, 2007), pp. 1–31.

⁷ See, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106); and Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (Apr. 13, 2023) (to be codified at 34 C.F.R. pt. 106).

⁸ As support for both proposed rules, the department proffered *Bostock v. Clayton County*, S. Ct. 1731 (2020), and the Supreme Court’s determination that “sex discrimination” within the scope of employment under Title VII of the Civil Rights Act of 1964 also included discrimination on the basis of sexual orientation and transgender status as its rationale to similarly expand Title IX’s prohibition against sex discrimination in education to transgender status as well. But in doing so, it ignores the extensive congressional record on Title IX’s purpose, the law’s specific provision of separate spaces to protect the privacy and safety of girls and women—those for whom the law was passed—and ignores the Supreme Court’s restriction of its holding in *Bostock* to Title VII alone. In fact, it took a House and Senate Conference Committee several months to work through the more than 250 differences between versions of education bills until Title IX was born. Congress had ample opportunity to expand the provision against sex discrimination to include gender identity or transgender status but chose not to do so. For a more fulsome discussion of the department’s misguided *Bostock* application, see Sarah Parshall Perry, “The Department of Education’s Intended Revision of Title IX Fails Regulatory and Civil Rights Analyses.” Heritage Found. Legal Memorandum, No. 305, June 22, 2022, available at: <https://www.heritage.org/civil-rights/report/the-department-educations-intended-revision-title-ix-fails-regulatory-and-civil#>.

⁹ The department’s proposed rule states:

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

(i) Be substantially related to the achievement of an important educational objective; and

(ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

¹⁰ For a discussion of the myriad ways the latter Title IX and its predecessor, promulgated in June 2022 conflict with one another, see Sarah Parshall Perry, “Once More with Feeling: Department of Education Releases Second Title IX Rule—and Fails Again.” Heritage Found. Legal Memorandum, No. 338, August 9, 2023, available at: <https://www.heritage.org/education/report/once-more-feeling-department-education-releases-second-title-ix-rule-and-fails>.

¹¹ See, e.g., Jocelyn Samuels and Kristen Galles, In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity, 14 Marq. Sports L. Rev. 11 (2003), available at:

But we dare not forget Title IX's original motivating principle: equality.

Males have greater lung capacity, larger hearts, more bone density, and more muscle mass—advantages which allow them to jump higher, throw further, run and accelerate faster, and punch harder than females. One recent study¹² revealed that in the sports where upper body strength dominates, males possess more than a 50% athletic advantage over their female counterparts.¹³ This athletic gap emerges around age 12 when males experience a 20-fold boost in testosterone.¹⁴ In a study by two Duke University Law School professors, comparing Olympic champion sprinter Allyson Felix's 400 meters lifetime best of 49.26 to that of men and boys around the world, the pubescent and adult males of all ages outperformed her more than 15,000 times in 2017 alone.¹⁵ To envision these competitive advantages in real time, we need look no further than "Lia" Thomas who clinched the 500-meter freestyle NCAA swimming championship for the women's team at the University of Pennsylvania after competing for two years on the men's swimming team. While swimming as "Will" Thomas, he had ranked a less than impressive 462nd in the nation.¹⁶

<http://scholarship.law.marquette.edu/sportslaw/vol14/iss1/21>.

In 1974, Congress passed an amendment to Title IX introduced by Senator Jacob Javits (R-NY), which directed the U.S. Department of Health, Education, and Welfare (HEW) to issue a regulation that contained, "with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports." See, Sex Discrimination Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484. The amendment made it perfectly clear that Congress intended Title IX to cover athletics for both sexes at all federally funded schools. The HEW thereafter promulgated all final regulations—including the regulation on athletics—to implement Title IX in 1975. These were to go into effect "unless the Congress shall, by concurrent resolution, find that the standard, rule, regulation, or requirement is inconsistent with the act from which it derives its authority and disapprove such standard, rule, regulation, or requirement." 20 U.S.C. § 1232(d)(1). According to the congressional record, the purpose was to determine "if the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood." See, Sex Discrimination Regulations: Hearings Before the House Subcomm. on Postsecondary Educ. of the House Comm. on Educ. & Labor, 94th Cong. 1 (1975) (statement of Rep. O'Hara, Chair of the Subcommittee).

Extensive hearings followed, and the clear determination was that the regulation writers had indeed understood Title IX the same way Congress had: athletics *were* to be included within Title IX's provisions. Congress utilized its express opportunities in 1974 (with adoption of the Javits Amendment) and 1975 (with hearings confirming the athletics regulation's meaning and the congressional intent behind the Javits Amendment) to decide whether the proposed athletics regulation had properly reflected its intent. By adopting the Javits Amendment and holding hearings that reflected the regulation's applicability specifically to female inclusion in athletics, Congress divested the department of any further authority to create or alter existing athletics regulations. At its creation in 1979, the Department of Education then assumed responsibility for enforcement of Title IX, adopting the Title IX regulations promulgated by the HEW—including the athletics regulation—virtually unchanged.

¹² Hilton, E. N., & Lundberg, T. R. (2021). Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage. *Sports Medicine* (Auckland, N.Z.), 51(2), 199–214.

¹³ Jeremy S. Morris, Jenna Link, James C. Martin, David R. Carrier. Sexual dimorphism in human arm power and force: implications for sexual selection on fighting ability. *The Journal of Experimental Biology*, 2020; 223 (2): jeb212365.

¹⁴ Marnee J. McKay, Jennifer N. Baldwin, Paulo Ferreira, Milena Simic, Natalie Vanicek, Joshua Burns, Reference values for developing responsive functional outcome measures across the lifespan, For the 1000 Norms Project Consortium, *Neurology Apr* 2017, 88 (16) 1512-1519.

¹⁵ Doriane Lambelet Coleman and Wickliffe Shreve, Comparing Athletic Performances: The Best Elite Women to Boys and Men, DUKE CTR. FOR SPORTS LAW & POLY (2018), available at <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf>

¹⁶ Associated Press, "Penn Swimmer Lia Thomas Becomes First Trans Athlete to Win Division I National Title," *Sports Illustrated*, March 17, 2022, available at: <https://www.si.com/college/2022/03/17/lia-thomas-first-transathlete-national-championship-swimmer>. See also, Hank Berrian, "'Her Rankings ... Have Bounced From #462 As A Male To #1 As A Female': 16 Lia Thomas Teammates Sign Letter Asking Penn Not To Sue NCAA, Bar Thomas From Competing," *Daily Wire*, February 24, 2022, available at <https://www.dailywire.com/news/her-rankings-havebounced-from-462-as-a-male-to-1-as-a-female-16-lia-thomas-teammates-sign-letter-asking-penn-not-to-sue-ncaabar-thomas-from-competing>.

These physiological distinctions are now resulting in real, bodily harm to female athletes forced to compete with transgender-identified men.¹⁷

In high school athletics alone, the rate of girls' participation in 2016 was more than 10 times—an increase of over 1,000 percent—what it was prior to Title IX's passage.¹⁸ Because of Title IX, women now constitute over 56% of American college students and 42% of all high school athletes.¹⁹ And one study demonstrated that 94% of senior female executives have played competitive scholastic sports.²⁰ Title IX successfully changed the lives of girls and young women in America by broadening their educational horizons, which in turn, has set them up for career success in later life. Eliminating young women's athletic opportunities would likely negatively impact their long-term professional opportunities as well, ultimately resulting in market effects that are hard to quantify and have yet to be studied.

Title IX and its implementing regulations contain a set of limited, sex-affirmative exceptions. These exceptions permit schools to take sex into account to address imbalances in admissions, academic programming, and sports. A sex binary—male v. female—is the foundation upon which the entire statute's operation rests. Title IX's use of the words “both” and “either” to address educational disparities within its regulations reinforces the understanding that, at least for the purpose of interpreting Title IX, there are only two sexes, and that the opportunities for both must be equal under the law.²¹

¹⁷ Injuries sustained by girls and women during athletic contests with transgender athletes are not the stuff of mere speculation. Significant bodily harm to young women in sporting events with transgender athletes is already well-documented. See, e.g., Paulina Dedaj, High School Volleyball Player Says She Suffered Concussion After Being Injured by Trans Athlete, Calls for Ban, Fox News (Apr. 21, 2023), <https://www.foxnews.com/sports/high-school-volleyball-player-says-suffered-concussion-being-injured-trans-athlete-calls-ban>; Max Sherry, Local Football League Under Fire After Transgender Athlete Injures Female Player, Sport Bible (Apr. 17, 2023), <https://www.sportbible.com/football/league-under-fire-after-transgender-athlete-injures-female-player-609233-20230403>; Holt Hackney, Professor Maintains that Trans Athletes Causing Serious Injuries to Girls, Sports L. Expert Blog, (Dec. 22, 2022), https://sportslawexpert.com/2022/12/12/professor-maintains-that-trans-athletes-causing-serious-injuries-to-girls/?utm_source=rss&utm_medium=rss&utm_campaign=professor-maintains-that-trans-athletes-causing-serious-injuries-to-girls; Richard Pollina, High school girls' field hockey player loses teeth, injured by shot from male opponent, New York Post, November 4, 2023, available at: <https://nypost.com/2023/11/04/news/massachusetts-high-school-field-hockey-player-loses-teeth-after-shot-from-male-on-womans-team/>.

¹⁸ Dr. Amy S. Wilson, National Collegiate Athletic Association, 45 Years of Title IX: The Status of Women's Intercollegiate Athletics (2017), available at: https://www.ncaa.org/sites/default/files/TitleIX45-295-FINAL_WEB.pdf.

¹⁹ Am'n Ass'n of Univ. Women, Title IX: Leveling the Playing Field, <https://www.aauw.org/issues/education/title-ix/> (accessed 11/29/23). However, this same study revealed that still, more than 1.13 million boys participate in high school sports than girls, reflecting both less institutional support for female athletic programs and less available athletic opportunities for girls—even after Title IX's passage.

²⁰ Why Female Athletes Make Winning Entrepreneurs, ESPN-W and EY (2017), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/entrepreneurship/ey-why-female-athletesmake-winning-entrepreneurs.pdf

²¹ Again, critics may offer *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) and the Supreme Court's expansion of “sex discrimination” within the scope of employment discrimination under Title VII of the Civil Rights Act of 1964 to include discrimination based on sexual orientation and transgender status as a reason to similarly expand Title IX's prohibition against sex discrimination to transgender status. However, in his opinion for the majority in *Bostock*, Supreme Court Justice Neil Gorsuch began: “We proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.” *Bostock* at 1739. From there, the Court noted, “An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741. The Court's Title VII precedent supports the proposition that relying at least in part on an individual's biological sex (as with the case of sexual orientation or transgender status) is prohibited within an employment setting. However, unlike Title VII, which is a sex- “prohibitive” anti-discrimination law, Title IX differs significantly in its text, purpose, operation, and in certain of its applications including athletics, and is “sex-affirmative,” *requiring* consideration of a student's biological sex.

As stated in the Preamble to the Title IX Final Rule, published by the Department of Education on May 19, 2020²²:

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

These biological distinctions provide the imperative for Title IX. It would be ironic and wrong to enable biological males who declare themselves to be women based on their own sense of a wholly subjective, malleable, and evolving gender identity to obtain an unfair and discriminatory advantage over biological women whose immutable, unchanging sex has been recognized for decades as worthy of protection under well-established federal law.

A 2022 Washington Post poll found that 55% of Americans are opposed to allowing biological men and boys to compete with women and girls in high school sports, and 58% opposed to it for college and professional sports.²³ The same poll found that more than two-thirds of Americans (68%) say that boys identifying as girls would have a competitive advantage over other girls if they were allowed to compete with them in youth sports. Caitlyn Jenner is a biological male and a celebrated former Olympian (a gold medal decathlete, in fact) who competed in track and field under the name “Bruce Jenner.” Though Caitlyn came out as transgender in 2015 and identifies as a woman, the former athlete recently spoke out against allowing transgender athletes who were born male to compete on girls’ sports teams.²⁴ Twenty-three states now bar biological males from competing in women’s scholastic sports based on their self-professed “gender identity.”²⁵ The World Athletics Council has also excluded the participation of biological males from women’s international sporting events.²⁶

The nation agrees: separating school sports by biological sex is not a radical notion.

Transgender students are entitled to enjoy all aspects of American education in the same way students of every race, sex, creed, national origin, and religion do. This is the guarantee ensured by federal law. But they do not belong in spaces where the law has spoken unambiguously on distinct, long-standing, sex-specific protections for women and girls within the field of competitive sports. Critics may send up a hue and cry of bigotry—but that would be a misconstruction of the original language of Title IX as

²² U.S. Dep’t. of Educ., Office for Civil Rights, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Rule, 85 Fed. Reg. 30,178 (May 19, 2020).

²³ Tara Bahrapour, Scott Clement, and Emily Guskin, “Most Americans oppose trans athletes in female sports, poll finds,” Washington Post, July 22, 2022, available at <https://www.washingtonpost.com/dc-mdva/2022/06/13/washington-post-umd-poll-most-americans-oppose-transgender-athletes-female-sports/>.

²⁴ Adam Shaw and Brooke Singman, “Caitlyn Jenner Opposes Boys Who Are Trans Playing Sports on Girls’ Teams in School, Says It Is Unfair,” May 2, 2021, Fox News, available at <https://www.foxnews.com/politics/caitlyn-jenneropposes-transgender-sports-girl-teams>.

²⁵ Movement Advancement Project, “Equality Maps: Bans on Transgender Youth Participation in Sports,” available at https://www.lgbtmap.org/equality-maps/sports_participation_bans. Accessed 11/29/2023.

²⁶ Sean Ingle, “World Athletics Council excludes transgender women from female events,” The Guardian, March 23, 2023, available at: <https://www.theguardian.com/sport/2023/mar/23/world-athletics-council-excludestransgender-women-from-female-events>.

discriminatory, a misconstruction of criticisms regarding physiological advantage as hatred. I urge this chamber not to fall victim to the increasingly strong grasp of cancel culture and the woke zeitgeist.

Disagreement is not bigotry, especially when it will deprive biological females of the opportunity to excel in sports, and the confidence and lifechanging experiences that come with that competition. Recognizing settled physiological distinctions—as they have been from time immemorial—does not amount to discriminatory conduct. The entire canon of American civil rights law exists to protect the interests of all Americans, not to elevate certain Americans to superior, privileged positions over others. The tenets of our anti-discrimination laws have long stood on the firm foundation of immutability—those characteristics that the U.S. Supreme Court has affirmed time and again as owing to nothing more than “accident of birth.”²⁷

While some might argue for the inclusion of their “chosen” characteristics (self-identification, for example) as worthy of protection in this civil rights law, the Supreme Court has never recognized such a standard—not even in *Bostock v. Clayton County*.²⁸ Indeed, to do so would throw the entirety of the Court’s equal protection jurisprudence into question and require the overhaul of landmark civil rights laws that were the product of cultural conflict, and intense congressional debate and deliberation. Such laws cannot be changed with the simple sweep of a pen.

Title IX requires educators to see women as they see men and secures the educational equality of both. But when biological boys are glibly classified as “girls,” the feminist gains of the past 50 years are eviscerated. When men in women’s swimsuits can steal women’s national swimming titles, the battle to maintain women’s equal educational and athletic opportunities becomes impossible. Womanhood cannot be achieved by puberty blockers or cross sex-hormones. It is an immutable, biological, chromosomal reality that cannot be overcome and is deserving of the continued protection that Title IX provides.

If a few months of hormone suppression and a self-declaration of womanhood are enough to allow a biological male to compete as a woman, what, after all, was the women’s liberation movement for? The principles of fundamental fairness and equal opportunity embodied in Title IX’s longstanding application must prevail over arguments for the inclusion of males as females.

The future of women’s sports depends on it.

²⁷ The landmark sex equality case relying on immutability was *Frontiero v. Richardson*, 411 US 677, 686 (1973) (“Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena...Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’”)(internal citations omitted).

²⁸ See FN 7, *supra*.