Submitted via regulations.gov

June 16, 2025

Chris Wright, Secretary
U.S. Department of Energy
c/o David Taggart
Office of the General Counsel
1000 Independence Avenue SW
Washington, DC 20585

Re: Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance, 90 Fed. Reg. 20786, Docket ID DOE-HQ-2025-0016

Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 90 Fed. Reg. 20788, Docket ID DOE-HQ-2025-0025

Dear Secretary Wright:

The National Women's Law Center ("NWLC") appreciates this opportunity to submit an **adverse comment** on the two direct final rules[1] ("DFRs") issued by the U.S. Department of Energy ("DOE") to amend its regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"). Because both Title IX DFRs are procedurally deficient and would undermine students' civil rights, we urge DOE to withdraw them.

NWLC is a nonprofit organization that has worked for over fifty years to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded in 1972—the same year Title IX was enacted—NWLC has participated as counsel or amicus in all major Title IX cases before the Supreme Court. NWLC is committed to eradicating all forms of sex discrimination in school, including sex-based

[1] Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance, 90 Fed. Reg. 20786 (May 16, 2025), https://www.federalregister.gov/documents/2025/05/16/2025-08557/nondiscrimination-on-the-basis-of-sex-in-sports-programs-arising-out-of-federal-financial-assistance [hereinafter "Athletics DFR"]; Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 90 Fed. Reg. 20788 (May 16, 2025), https://www.federalregister.gov/documents/2025/05/16/2025-08594/rescinding-regulations-related-to-nondiscrimination-on-the-basis-of-sex-in-education-programs-or [hereinafter "Affirmative Action DFR"].

harassment and discrimination faced by women and girl athletes, LGBTQI+ students, pregnant and parenting students, and women and girls of color and with disabilities.

Congress passed Title IX over fifty years ago to address sex discrimination that prevented women and girls from securing equal educational opportunity. Title IX is clear: "No person" should be subject to sex discrimination in any education program or activity receiving federal financial assistance.[2] This important mandate requires educational environments to be free of discrimination, including discrimination based on sex stereotypes that have harmed women and girls for decades. Because federal resources cannot be used towards sex discrimination in education programs or activities, Title IX authorizes federal agencies, like DOE, that provide financial assistance to education programs and activities, to promulgate regulations implementing Title IX. DOE provides over $2.5 billion annually through research grants to over 300 colleges, universities, and research institutions.[3] DOE also provides financial support to schools and research institutions to develop new energy-efficient technologies, encourage historically underrepresented groups' entry into Science, Technology, Engineering, and Mathematics ("STEM") fields, and make infrastructure updates. Across scores of entities, DOE has a responsibility to ensure that its funding is used in compliance with federal anti-discrimination laws, including Title IX.

Yet, DOE is attempting to rescind longstanding regulations, which would undermine Title IX protections for students. DOE proposes to rescind 10 C.F.R. § 1042.450 through DFR "Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance" ("Athletics DFR"). Section 1042.450 expands athletic opportunities for students who have had limited opportunities to play—usually, women and girls—by requiring schools to permit those students to try out for a single-sex sports team where a team of that particular sport is unavailable for their sex, unless it is a contact sport.[4]

DOE also proposes to rescind 10 C.F.R. § 1042.110(b) through DFR "Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" ("Affirmative Action DFR"). Section 1042.110(b) addresses longstanding sex-based barriers to educational opportunities for women and girls in fields where they are underrepresented, such as in STEM. It allows schools to "take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex" even in the absence of a finding of sex discrimination.[5] DOE's effort to sweep away decades-long civil rights protections through these two DFRs (collectively, "Title IX DFRs") while bypassing required procedures is not only unlawful, but deeply troubling.

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[2] 20 U.S.C. § 1681.
[3] *See* Dep't of Energy, *Department of Energy Overhauls Policy for College and University Research, Saving $405 Million Annually for American Taxpayers* (Apr. 11, 2025), *available at* https://www.energy.gov/articles/department-energy-overhauls-policy-college-and-university-research-saving-405-million.
[4] 10 C.F.R. § 1042.450.
[5] 10 C.F.R. § 1042.110(b).

Our comment first explains how the Title IX DFRs are procedurally deficient and violate the Administrative Procedure Act ("APA") by attempting to skirt the required notice-and-comment rulemaking process. It is both unprecedented and unacceptable to exploit DFRs—meant to expedite the rulemaking process for "routine or uncontroversial matters"—to eliminate civil rights protections. In addition, the Title IX DFRs fail to comply with the required approval processes for certain regulations laid out in Executive Orders ("EOs") 12250 and 12866.

Second, both DFRs would deny equal access to opportunities, causing significant harm to students and undermining their civil rights. Substantively, rescinding 10 C.F.R. § 1042.450 would undermine athletic opportunities for women and girls. Moreover, rescinding 10 C.F.R. § 1042.110(b) would damage schools' ability to address longstanding sex-based inequities in educational opportunities faced by women and girls. In this respect, both DFRs are antithetical to Title IX's broad purpose to ensure women and girls can access athletic and educational opportunities free from sex-based discrimination.

For these reasons, further explained in this adverse comment, we urge the DOE to withdraw the two Title IX DFRs.

I. DOE's attempt to amend its Title IX regulations through DFRs is procedurally deficient and an inappropriate use of DFRs.

The Title IX regulations that DOE is seeking to rescind were adopted pursuant to notice-and-comment rulemaking under the APA, which required careful consideration of a range of views and comments. In 1978, DOE issued its Notice of Proposed Rulemaking ("NPRM") implementing various nondiscrimination statutes, including Title IX of the Education Amendments of 1972.[6] Mirroring in large part the Department of Education's Title IX regulations that were finalized after Congressional review in 1975[7]—indicating legislative approval of these protections—DOE published its own final Title IX regulations in 1980[8] to address protections against sex discrimination in educational programs or activities operated by recipients of federal financial assistance.[9]

Since that time, countless students have relied on these regulations to access equal opportunities. If these longstanding rules are to be changed in substance—and here, they should not be—then they must be amended through the notice-and-comment process. As the Supreme Court stated

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[6] 43 Fed. Reg. 53658, *available at* https://www.govinfo.gov/content/pkg/FR-1978-11-16/pdf/FR-1978-11-16.pdf ("The proposed DOE regulation is comprehensive in nature and encompasses . . . Title IX of the Education Amendments of 1972.").

[7] 40 Fed. Reg. 24137, *available at* https://www.govinfo.gov/content/pkg/FR-1975-06-04/pdf/FR-1975-06-04.pdf.

[8] 45 Fed. Reg. 40514, *available at* https://www.govinfo.gov/content/pkg/FR-1980-06-13/pdf/FR-1980-06-13.pdf.

[9] 10 C.F.R. § 1040. After notice and comment on a proposed Title IX common rule by the Department of Justice and other agencies, 64 Fed. Reg. 58567, a final common Title IX rule for various agencies was published on August 30, 2000. 65 Fed. Reg. 52858. DOE replaced its previous regulations with provisions of this common rule in 2001. *See* 66 Fed. Reg. 4627.

unequivocally, the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[10]

Here, the brazen attempt to bypass notice-and-comment rulemaking to substantively amend decades-old Title IX regulations violates the APA and is procedurally deficient under governing executive orders. It is also unprecedented and unacceptable to exploit the DFR process—meant for "routine or uncontroversial matters"—to eliminate civil rights protections. Lastly, the DFRs are procedurally deficient because they sidestep approval processes required by Executive Orders 12250 and 12866. We address each of these procedural defects in turn below.

A. The Title IX DFRs violate the APA and deviate from DOE's prior uses of DFRs.

The APA requires DOE, like all federal agencies, to engage in a multi-step process for issuing agency rules to implement and interpret statutes.[11] This process, called notice-and-comment rulemaking, promotes transparency and public participation, ensuring that interested parties have an opportunity to provide feedback and potentially influence the final versions of rules. The process is essential to helping agencies make better-informed decisions about regulations and building public trust in the regulatory process.

To formulate, amend, or repeal a rule, the APA requires agencies to (1) issue an NPRM to describe the proposed rule, the legal authority behind it, and opportunities for public participation; (2) provide opportunity for public comment, allowing interested parties to submit data, views, or arguments; (3) consider all relevant, timely-submitted comments and develop the final rule; and (4) publish the final rule with a preamble responding to all significant issues raised in the comments.[12]

There are statutory exemptions to the APA's notice-and-comment procedures, including for rules dealing with the military or foreign affairs functions,[13] rules relating to certain management or personnel,[14] or when there is "good cause" to forgo notice-and-comment because undergoing the full process would be "impracticable, unnecessary, or contrary to the public interest."[15] DFRs have historically been allowed under the "good cause" exemption for when the traditional rulemaking process is "unnecessary."[16] Though as scholars have observed, "the Achilles heel in

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[10] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[11] 5 U.S.C. § 553.
[12] *Id.* at §§ 553(b)–(d).
[13] *Id.* at § 553(a)(1) (exempting rules involving "a military or foreign affairs function of the United States").
[14] *Id.* at § 553(a)(2) (exempting rules involving "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts").
[15] *Id.* at § 553(b)(3)(B).
[16] Administrative Conference of the United States, *Public Engagement in Agency Rulemaking Under the Good Cause Exemption* (Dec. 17, 2024), *available at* https://www.acus.gov/document/public-engagement-agency-rulemaking-under-good-cause-exemption.

the legal case for direct final rulemaking has always been the fact that the APA does not explicitly authorize the procedure."[17]

Decades ago, when the Administrative Conference of the United States ("ACUS") initially recommended the use of DFRs, it explained that they should be used where "the rule is noncontroversial," meaning the rule is expected to "elicit no significant adverse comment."[18] ACUS's recommendation was based on law professor and administrative law expert Ronald M. Levin's 1995 report to the Conference, in which he also wrote that "[i]f even one person files an adverse comment or notice, the agency must withdraw the rule" to then undergo the normal notice-and-comment process.[19] Indeed, there is ample precedent for agencies withdrawing DFRs after receiving adverse comments on the proposed rule changes.[20]

Interpreting the APA's "good cause" exemption to traditional notice and comment rulemaking, ACUS explains that such rulemaking would be "unnecessary" when a rule is "a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[21] Here, the Title IX DFRs cannot be justified under that exemption. First, for it to apply, the Federal Register notice must include a finding of good cause and a brief statement explaining why there is good cause to bypass the traditional notice-and-comment rulemaking process.[22] Here, the agency made no attempt to assert any basis for finding "good cause" to sidestep the notice-and-comment process.[23] This is unsurprising—since no good cause exists for rescinding

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[17] Ronald M. Levin, *The D.C. Circuit Undermines Direct Final Rulemaking*, YALE J. ON REG., *available at* https://www.yalejreg.com/nc/the-d-c-circuit-undermines-direct-final-rulemaking-by-ronald-m-levin/.
[18] 60 Fed. Reg. 43108, 43112 (Aug. 18, 1995).
[19] Ronald M. Levin, *supra* note 17 (article prepared as a report for the Administrative Conference of the United States (ACUS), which then adopted a recommendation regarding direct final rulemaking on June 15, 1995); *Procedures for Noncontroversial and Expedited Rulemaking*, ACUS Recommendation No. 95-4, 60 Fed. Reg. 43110 (1995).
[20] *See, e.g.*, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments; Correction; Withdrawal of Direct Final Rule, 90 Fed. Reg. 13084 (2025) [hereinafter "Hazardous and Solid Waste Management System DFR"] (Environmental Protection Agency withdrawing a DFR that received 816 comments); Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Partial Withdrawals of Findings of Failure To Submit State Implementation Plan (SIP), 90 Fed. Reg. 1903 (2025) [hereinafter "Excess Emissions DFR"] (Environmental Protection Agency withdrawing a DFR that received 6 comments); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018); *Sw. Pennsylvania Growth All. v. Browner*, 144 F.3d 984, 987 (6th Cir. 1998); *Sierra Club v. U.S. E.P.A.*, 99 F.3d 1551, 1554 n.4 (10th Cir. 1996).
[21] Administrative Conference of the United States, *supra* note 16.
[22] 5 U.S.C. § 553(b).
[23] "Low rates of lawsuits challenging good cause assertions" makes it difficult to clearly determine what constitutes proper invocation of the exemption. *See* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237 (2021). However, at a minimum, agencies have historically provided at least *some* explanation supporting their finding of good cause for why the typical rulemaking procedures are "unnecessary," of which there is no such finding here. *See, e.g.*, *Jifry v. FAA*, 370 F.3d 1174, 1178-80 (D.C. Cir. 2004) (D.C. Circuit upholding a Federal Aviation Administration rule invoking the good cause exception in the wake of September 11, 2001 to automatically suspend certain noncitizen pilots' flying certificates upon notice by the Transportation Security Administration that those pilots posed a security threat, where the agency argued that it needed to act swiftly to avoid further terrorist acts).

longstanding civil rights protections, and through an expedited DFR process no less. As explained further below, given the significance of these protections, rescinding them could not (and should not) be considered "routine" or "insignificant in nature and impact," and it is certainly not "inconsequential" to the public.

Some agencies, including DOE, have used DFRs appropriately to expedite noncontroversial or routine rules where no adverse comments are anticipated. For example, DOE has previously used DFRs to make technical changes, such as updating its federal claims-collection standards to conform with other agencies.[24] When bypassing the typical notice-and-comment rulemaking process with a DFR, DOE has previously explained why its DFRs have been noncontroversial.[25] Indeed, in some of its prior DFRs, DOE has even provided an explicit path for switching to the typical notice-and-comment process in the Federal Register notice, should its expectation that there be no significant adverse comments prove incorrect.[26]

Both the Athletics DFR and the Affirmative Action DFR could be nothing further from "noncontroversial." Eliminating crucial civil rights protections for women and girls in sports is deeply controversial, as is hindering schools' ability to address longstanding inequities in educational opportunities for women and girls. If there were any reasonable question about just how controversial both DFRs are, we note that DOE has already received thousands of public comments as of June 16, 2025, with comments on the Athletics DFR totaling 2,105 [27] and comments on the Affirmative Action DFR totaling 8,281.[28] Past DFRs have been withdrawn after drawing far fewer comments, with as few as six comments serving as another agency's basis for withdrawing a rule.[29]

B. DOE failed to comply with EO 12250 and Department of Justice regulations to submit the DFRs to the Attorney General for review.

Under Title IX, "no . . . [implementing] rule, regulation, or order," including proposed and final rules, issued by a federal agency "shall become effective unless and until approved by the President."[30] In 1980, through EO 12250, the President delegated this authority to "approv[e] rules, regulations, and orders of general applicability" concerning implementation and enforcement of various nondiscrimination laws, including Title IX, to the Attorney General.[31] The Department of Justice ("DOJ") reaffirmed this authority in a 2018 guidance stipulating that "DOJ review and approval [is] *always* required" (emphasis in original) for "[r]egulations

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[24] *See* Collection of Claims Owed the United States, 68 Fed. Reg. 48575, 48576 (Aug. 14, 2003) [hereinafter "Collections of Claims DFR"].
[25] *See, e.g.*, Collections of Claims DFR at 48,576; Weatherization Assistance Program for Low-Income Persons, 71 Fed. Reg. 35775, 35775 (June 22, 2006); Defense Priorities and Allocations System, 73 Fed. Reg. 10980, 10981 (Feb. 29, 2008) [hereinafter "Defense Priorities DFR"].
[26] Defense Priorities DFR, 73 Fed. Reg. at 10981 (Feb. 29, 2008) (noting "in the event that significant adverse comments are filed, DOE has prepared a notice of proposed rulemaking proposing the same amendments," which it simultaneously published in the Federal Register).
[27] Athletics DFR.
[28] Affirmative Action DFR.
[29] *See* Excess Emissions DFR. *See also* Hazardous and Solid Waste Management System DFR.
[30] 20 U.S. § 1682.
[31] Exec. Order No. 12,250, § 1-101, 45 Fed. Reg. 72995 (Nov. 4, 1980).

implementing Title IX . . . that are new or are amending or repealing previously issued regulations in whole or in part."[32]

DOE has failed to certify that it submitted the Title IX DFRs to DOJ for review. Accordingly, because DOE did not indicate that it complied with its obligations to obtain approval by the Attorney General of both Title IX DFRs,[33] they must be withdrawn.[34]

C. DOE cannot skirt review mandated by EO 12866 because the Title IX DFRs constitute "significant regulatory action."

Rescinding these Title IX regulations through DFRs also sidesteps the appropriate review process set out in EO 12866, which requires OIRA to review "significant regulatory actions."[35] "Significant regulatory actions" include any regulatory actions that may "[h]ave an annual effect on the economy of $100 million or more or adversely affect [the economy] in a material way," "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency," or "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."[36]

The Office of Management and Budget's ("OMB") 1993 guidance on implementing EO 12866 explains that, to assess whether a given regulatory change warrants OIRA review, *agencies* must indicate expressly whether or not the change meets the definition of "significant regulatory action" and must provide "information sufficient to confirm the characterization of 'significant' or 'not significant.'"[37] Here, however, contrary to the OMB's 1993 guidance, the DFRs indicate that *OIRA*, not DOE, determined that the DFRs do not constitute a significant regulatory action, without further explanation why.[38] Not only must DOE comply with its obligations under EO 12866, as set out in the OMB guidance, it must satisfy its obligations with an analysis, beyond a conclusory statement, of whether the proposed changes constitute a "significant regulatory action," as defined by EO 12866, and as determined by *DOE*.

Had DOE engaged in this analysis, as required, it would have found that both Title IX DFRs qualify as significant regulatory actions in all respects. The following analyzes in turn how each Title IX DFR falls within the definition of a significant regulatory action.

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[32] U.S. Dep't of Just., *Regulatory Clearance Role Under Executive Order 12250 Infographic* (Apr. 2018), *available at* https://www.justice.gov/crt/page/file/1366476/dl?inline.
[33] Indeed, DOE sought DOJ's review and approval of its rulemaking and explicitly noted compliance with EO 12250 in a past DFR finalizing its Title IX regulations. *See* 66 Fed. Reg. 4627 ("This final rule has been reviewed by the Attorney General in accordance with the provisions of Executive Order 12250.").
[34] *See, e.g.*, *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90, 98–99 (1994) (holding that obtaining Department of Justice approval "after-the-fact" of an agency action was not sufficient).
[35] Exec. Order No. 12,866, § 6(a), 58 Fed. Reg. 190 (Oct. 4, 1993) [hereinafter, "EO 12866"].
[36] *Id.* at § 3(f).
[37] U.S. Off. of Mgmt. and Budget, *Guidance for Implementing E.O. 12866*, 5–6 (Oct. 12, 1993), *available at* https://bidenwhitehouse.archives.gov/wp-content/uploads/legacy_drupal_files/omb/assets/inforeg/eo12866_implementation_guidance.pdf.
[38] Athletics DFR at 20787; Affirmative Action DFR at 20789.

1. **Rescinding § 1042.450 constitutes significant regulatory action under EO 12866 such that OIRA review is required.**

The Athletics DFR constitutes a significant regulatory action because it is likely to have a materially adverse effect on the U.S. economy. As explained further in Part II.A below, research shows a direct relationship between offering athletic opportunities to women and girls and lifelong indicators of success, including educational attainment and school retention.[39] Playing sports, in turn, has a direct impact on the lifetime earnings and financial wellbeing of millions of girls and women.[40] Rescinding § 1042.450 would undermine the ability of schools to ensure equal athletic opportunities for women and girls, cutting off these benefits and ultimately materially impacting the workforce and economy. The government is better positioned than the public to fully investigate and understand the costs that will flow from these proposed regulatory changes, yet no analysis was conducted.

Second, the Athletics DFR constitutes significant regulatory action because it creates a major inconsistency between DOE's Title IX regulations and those of the over 20 federal agencies that have longstanding parallel provisions regarding the right to try out for single-sex teams.[41] Rescission of this protection will likely create legal confusion for schools subject to differing agency interpretations of Title IX—which further underscores why DOJ's EO 12550 review is critical to ensuring alignment between federal agencies in their enforcement of this critical law.

Third, the Athletics DFR constitutes significant regulatory action because it raises novel policy concerns about women and girls' access to athletic opportunities. Rescinding § 1042.450 would undo decades of Title IX interpretation, raising questions about how DOE funding recipients will effectuate Title IX's purpose to ensure women and girls are afforded equal opportunities to play. The serious limits on access to athletic opportunities faced by women and girls are outlined further below in Part II.A, which explains that women and girls are given substantially fewer opportunities to play than men and boys.[42] Because of these disparities, eliminating the requirement that schools allow them to try out for sports that would otherwise be unavailable to them would disproportionately harm women and girls.

2. **Rescinding § 1042.110(b) constitutes significant regulatory action under EO 12866 such that it requires review by OIRA.**

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[39] Nat'l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education*, 41–42 (2017), *available at* https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf.

[40] *Id.* at 42 ("The lessons of teamwork, leadership, and confidence that girls and women gain from participating in athletics can help them after graduation as well as during school. A whopping 94% of female business executives played sports, with the majority saying that lessons learned on the playing field contributed to their success. Former female athletes also earn an average of 7% more in annual wages than their non-athlete peers.").

[41] 65 Fed. Reg. 52858.

[42] Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), *available at* https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women.

First, like the Athletics DFR, the Affirmative Action DFR constitutes significant regulatory action because it is likely to have a materially adverse effect on the U.S. economy. As explained further in Part II.B below, research shows that women are significantly underrepresented among those receiving STEM bachelor's degrees required for many of the highest-paying occupations, which contributes to the persistence of the gender wage gap.[43] Rescinding § 1042.110(b) would undermine schools' ability to proactively address longstanding sex-based discrimination in educational opportunities faced by women and girls, further materially impacting the workforce and economy. The government is better positioned than the public to fully investigate and understand the costs that will flow from these proposed regulatory changes.

Second, like the Athletics DFR, the Affirmative Action DFR constitutes significant regulatory action because it creates a major inconsistency between DOE's Title IX regulations and those of the more than twenty federal agencies that have longstanding parallel provisions regarding the measures schools can take to address gender disparities in their educational programs.[44] Rescission of § 1042.110(b) will likely create legal confusion for schools subject to differing agency interpretations of Title IX. EO 12550 review of the Affirmative Action DFR is therefore critical to ensure there is alignment between federal agency enforcement of this critical law.

Third, the Affirmative Action DFR constitutes significant regulatory action because it raises novel policy concerns about women and girls' access to educational opportunities. In addition to undoing decades of Title IX interpretation, the Affirmative Action DFR would remove access to educational programs and activities for women and girls that seek to remedy disparities caused by historical sex-based discrimination in education. Additionally, as explained further below in Part II.B, the Affirmative Action DFR creates broader policy implications around equity in schools that would disproportionately harm women and girls seeking to participate in gender conscious educational programming that seek to increase their participation in fields where they are underrepresented. For example, women remain significantly underrepresented among recipients of STEM bachelor's degrees required for many of the highest-paying occupations,[45] and in 2023, women made up only 28% of the STEM workforce[46]—which contributes to the persistence of the gender wage gap. Removing this affirmative action protection will remove incentives for schools to address this significant underrepresentation of women and girls in STEM fields and likely exacerbate these disparities.

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[43] *See* The Conference Board, *Policy Backgrounder: The Continuing Gender Wage Gap* (Apr. 25, 2024), https://www.conference-board.org/pdfdownload.cfm?masterProductID=50517; *The STEM Labor Force: Scientists, Engineers, and Skilled Technical Workers* (May 30, 2024), *available at* https://ncses.nsf.gov/pubs/nsb20245/executive-summary.

[44] 65 Fed. Reg. 52858.

[45] Policy Backgrounder: The Continuing Gender Wage Gap, *supra* note 43.

[46] MIT, *The Gender Gap in STEM: Still Gaping in 2023*, https://professionalprograms.mit.edu/blog/leadership/the-gender-gap-in-stem/.

II. DOE's Title IX DFRs would result in significant harm to women and girls by robbing them of opportunities to play sports and to participate in fields where they are underrepresented.

The Title IX DFRs would result in serious harm to all students, and especially to women and girls, who attend educational institutions that receive DOE funding[47] by weakening their right to access equal athletic and educational opportunities.

A. Rescinding § 1042.450 threatens to undermine athletic opportunities for women and girls.

The Athletics DFR would rescind 10 C.F.R. § 1042.450,[48] the purpose of which is to expand athletic opportunities for students who have had limited opportunities to play, usually women and girls. Section 1042.450 does so by requiring schools to allow students to try out for a single-sex sports team where a team of that particular sport is unavailable for their sex, unless it is a contact sport. This provision has functioned to expand opportunities for women and girls by allowing them to try out for sports teams at their school that are only available to boys, like baseball.[49]

Section 1042.450 exists because playing sports is a crucial part of a student's education, including for women and girls. It is well documented that sports participation is linked to higher grades and scores on standardized tests and increased graduation rates, as well as lower rates of depression and higher levels of self-esteem.[50] Accordingly, requiring schools to provide athletic opportunities to students by permitting them to try out for a team otherwise unavailable to them is crucial to ensuring they receive the full benefits of an education. This requirement has been especially important for women and girls, who still face pervasive discrimination and inequity in sports. For example, college women have almost 60,000 fewer opportunities to play than men, and high school girls have *over 1 million* fewer opportunities[51]—with these disparities being even higher for women and girls of color.[52]

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[47] DOE provides federal financial assistance to a wide variety of recipients, through funding for university laboratories, traineeships for graduate students, equipment, research and development, public education in energy, and more. 10 C.F.R. pt. 1040, Appendix A.

[48] Athletics DFR at 20786.

[49] Shefali Luthra, *Teen girls on their school baseball teams don't need a league of their own*, THE 19TH (Apr. 16, 2021), https://19thnews.org/2021/04/teen-girls-baseball-teams-gender-equity-sports/ (describing the experiences of three high school girls who got the chance to try out for—and play on—their high schools' boys' baseball team "thanks to gender equity protections from the federal Title IX rule"). *See also* Nat'l Federation of State High School Associations, *High School Athletics Participation Survey: Competition at the High School Level in the 2023-24 School Year*, 1 (2024), https://www.nfhs.org/media/7213111/2023-24-nfhs-participation-survey-full.pdf (showing that 1,372 high school girls played baseball on boys' teams across the U.S. during the 2023-2024 school year).

[50] Nat'l Coalition for Women and Girls in Education, *supra* note 39, at 41–42; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. of Sport Management 349, 349–50 (2013).

[51] Women's Sports Foundation, *supra* note 42.

[52] Nat'l Women's Law Ctr., *Finishing Last: Girls of Color and School Sports Opportunities*, 1 (2015), https://nwlc.org/resources/finishing-last.

1. **DOE's rescission of § 1042.450 is based on harmful and offensive myths about women and girls.**

DOE cites President Trump's discriminatory and unlawful EO banning transgender women and girls from sports[53] as the basis for rescinding § 1042.450. In targeting § 1042.450 for rescission, though, the Trump administration is cutting off its nose to spite its face. It is so focused on attacking transgender women and girls that it is willing to sacrifice opportunities for all women and girls to play if it means eliminating even the remote possibility that trans students get to play. The administration's focus on § 1042.450 is all the stranger because this regulation has not even been used to determine eligibility for sex-separated teams—instead, it serves to increase athletic opportunities for the sexes that were previously limited.

In addition to the EO, the DOE cites "safety," "fairness," and so-called "differences between the sexes"[54] as reasons to rescind § 1042.450. These tired, sexist, and anti-trans dog whistles are often used to justify banning trans women and girls from sports on the grounds that they are necessarily bigger, faster, and stronger than cis women and girls. These beliefs, however, are based not in truth, but in biological essentialist myths about women and girls—in other words, harmful and archaic stereotypes that traits like strength and athleticism are "inherently" masculine and while weakness is "inherently" feminine.[55] These are the very same sexist assumptions about women's and girls' talents and capabilities that were historically used to deny them athletic opportunities—precisely the problem Title IX was enacted to fight[56]—and one this DFR would revive.[57] As an organization committed to fighting for women's rights, NWLC finds it alarming that this administration is so intent on harming trans students that it is willing to eliminate a regulation that has long been instrumental in providing greater athletic opportunities to all women and girls—and that it is using harmful stereotypes about women and girls to justify doing it.

Moreover, the executive order on which this DFR relies is discriminatory, violates the Equal Protection Clause and Title IX, and is contrary to federal court decisions addressing access to sex-separated spaces, such as sports teams, locker rooms, and bathrooms for transgender

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[53] Exec. Order No. 14,201, 90 Fed. Reg. 9279 (Feb. 5, 2025).
[54] Athletics DFR at 20786.
[55] Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 85, 88 (2023).
[56] *Id.* at 86.
[57] This DFR is also inconsistent with the reality that playing sports often involves co-ed competition. DOE ignores the examples of women and girls playing on men's and boys' teams without incident, such as examples of women and girls playing and trying out for men's and boys' baseball teams. Nat'l Federation of State High School Associations, *supra* note 49; Shefali Luthra, *supra* note 49; Alanis Thames, *Women's baseball players could soon have a league of their own again*, THE INDEPENDENT (Nov. 13, 2024), https://www.independent.co.uk/news/world/americas/ap-wnba-mlb-united-states-deloitte-b2646418.html. DOE also ignores the fact that there are sports that are co-ed by default, such as fencing. *See* Miles Klee, *'My entire life is political': trans fencer attacked by conservative outrage machine speaks out*, ROLLING STONE (Apr. 12, 2025), https://archive.fo/sVgvw.

students.[58] It also contravenes the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), holding that discrimination on the basis of sex necessarily includes discrimination on basis of sexual orientation and *gender identity*, which federal courts have applied to Title IX, including in the context of school sports.[59]

2. Rescinding § 1042.450 will do nothing to meet DOE's stated goals of increasing fairness and safety for women and girls.

Far from enhancing "fairness," rescinding § 1042.450 will only harm the women and girls it purports to protect and undermine the civil rights of all students. Section 1042.450 has helped to increase opportunities for women and girls to play sports, and as explained above, stark inequities remain in opportunities offered to women and girls to play. It is nonsensical, then, to remove this provision in the name of ensuring fairness for women and girls. If DOE wants to ensure women and girls receive fair opportunities to play, it already has a pathway to do so—vigorous enforcement of women and girls' civil rights, including through § 1042.450, to ensure they have the same opportunities to play as men and boys do.

Rescinding § 1042.450 also does not promote "safety" in sports. Virtually all athletic endeavors inherently involve some risk of injury. The only way this DFR promotes "safety" is by forcing women and girls out of sports altogether—a result not intended by Title IX. Should DOE consider regulations to promote safety in sports, it could, through the notice and comment process, require schools to provide equitable resources towards women's and girls' sports to mitigate injuries. For example, schools can and should ensure that coaches have access to adequate resources to properly train women and girl athletes on playing safely and complying with the rules of their sport, incorporate protective gear into uniforms, and perform consistent maintenance and inspection of equipment and facilities.

In short, this DFR would undermine, rather than promote, fairness and safety for women and girl athletes.

B. DOE should not rescind § 1042.110(b) because it undermines schools' ability to address longstanding inequities in education that harm women and girls.

For decades, Title IX has allowed educational institutions to "take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex" even in the absence of a finding of discrimination on the basis of

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[58] *See, e.g.*, *Doe v. Horne*, 115 F.4th 1083 (9th Cir. 2024); *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024); *B.P.J. v. West Virginia State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024); *Grimm v. Gloucester Cty. Schl. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017); *A.M. v. Indianapolis Public Sch.*, 617 F. Supp. 3d 950 (S.D. In. 2022). In recognition of this, multiple lawsuits have been filed in federal courts in the last few months challenging this executive order as unlawful under the Equal Protection Clause and Title IX. *See, e.g.*, *Tirrell v. Edelblut*, 2025 WL 1454204 (D.N.H. Feb. 2025); *Minnesota v. Trump*, 2025 WL 25-CV-01608 (D. Minn. Apr. 2025).

[59] *See, e.g.*, *Horne*, 115 F.4th 1083; *B.P.J.*, 98 F.4th 542; *A.C. v. Metropolitan Sch. District of Martinsville*, 75 F.4th 760 (7th Cir. 2023), cert. denied, 144 S. Ct. 683 (2024); *Grimm*, 972 F.3d 586.

sex.[60] This protection has helped increase the participation of women and girls in areas where they are underrepresented due to historical discrimination, such as in access to the STEM fields. Under leadership from both political parties, the federal government has recognized that, despite progress in gender equity and growing interest in computer science, mathematics, engineering, and statistics among both women and men, underrepresentation of women in STEM fields persists.[61]

DOE's DFR "Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," would delete 10 C.F.R. § 1042.110(b), which would undermine recipients' ability to proactively address longstanding sex-based inequities in educational opportunities faced by women and girls.

1. DOE's rescission of § 1042.110(b) is based on an incorrect premise that the provision is unnecessary.

DOE justifies rescinding § 1042.110(b) by deeming it "unnecessary."[62] This is simply untrue. Section (b) is necessary because it enables schools to address ongoing underrepresentation of women, and girls in certain fields. In contrast to Section (a), which *requires* recipients of federal funding who have discriminated on the basis of sex to take remedial action to overcome the effects of such discrimination, section (b) *permits* recipients to take affirmative action consistent with law to address limited participation of a particular sex, even in the absence of a specific finding of discrimination by the agency or other factfinder.

The reality is that we have not yet "overcome the effects of conditions that resulted in limited participation" of women and girls in certain education programs and gender gaps in certain areas remain significant.[63] For example, in STEM, there continues to be a large disparity between the percentage of men and women working in the field: in 2023, women made up only 28% of the STEM workforce.[64] Without proactive efforts to recruit more people who have been underrepresented in STEM, some fields will face potentially devastating shortfalls in degree holders.[65] Addressing women and girls' equal participation in STEM could not only bolster innovation and growth in those spheres, but it is also an economic necessity that contributes to increasing the GDP ("Gross Domestic Product").[66] The Bureau of Labor Statistics

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[60] 34 C.F.R. § 106.3(b).

[61] *See*, *e.g.*, U.S. Govt. Accountability Office, *Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX* (July 2004), *available at* https://www.gao.gov/assets/gao-04-639.pdf; U.S. Dep't of Educ., Off. of Civ. Rts. & Off. of Career, Technical, and Adult Educ., *Dear Colleague Letter on Gender Equity in Career and Technical Education*, 2 (2016), *available at* https://www.ed.gov/media/document/dear-colleague-letter-gender-equity-career-and-technical-education-35073.pdf.

[62] Affirmative Action DFR at 20788.

[63] 34 C.F.R. § 106.3(b).

[64] *The Gender Gap in STEM: Still Gaping in 2023*, *supra* note 46.

[65] *See* U.S. Dep't of Commerce, *Women in STEM: Representation Matters* (Mar. 21, 2024), *available at* https://www.commerce.gov/news/blog/2024/03/women-stem-representation-matters.

[66] *The Gender Gap in STEM: Still Gaping in 2023*, *supra* note 46; McKinsey and Company, *Here's Why We Need More Women and Girls in STEM*. (Feb. 11, 2023), https://www.mckinsey.com/featured-insights/themes/heres-why-we-need-more-women-and-girls-in-stem.

("BLS") anticipates continued growth in employment in STEM occupations, increasing 10.4% over the next ten years—significantly outpacing non-STEM occupations growing 3.6%.[67] Currently, the U.S. is unable to meet this rapidly growing demand,[68] making investment in increasing women and girls' participation in STEM fields all the more essential.

Women remain significantly underrepresented among those receiving STEM bachelor's degrees required for many of the highest-paying occupations, which is a major contributor to the persistence of the gender wage gap.[69] And, in graduate degrees, women make up only 38% of the master's degrees and 36% of doctorate degrees in five STEM categories.[70] In engineering and engineering technologies graduate degrees, women made up 29% of master's degrees and 27% of doctorate degrees.[71] The U.S. National Science Foundation's latest Science & Engineering Indicator report revealed that in 2021, while 24% of the overall U.S. workforce held a STEM occupation, only 18% of women did—meaning that women's representation was three-fifths that of male workers.[72]

Despite the persistent underrepresentation of women and girls in certain education programs, like STEM, DOE asserts that § 1042.110(b), which is intended to increase participation, is unnecessary because it "contains no substantive right or obligation but rather grants permission."[73] DOE, however, misunderstands the value of § 1042.110(b). In stating what is permissible, the regulation makes clear that Title IX creates no bar to affirmative action. Rescinding the rule, however, would create confusion concerning whether affirmative action remains lawful. Rather than risk losing funding, educational programs that rely on federal funds may simply end their affirmative action programs, which would result in fewer opportunities for women and girls.

2. Affirmative action is an effective tool to counter underrepresentation and continue increasing women and girls' participation in fields where they are underrepresented.

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[67] *See* U.S. Bureau of Labor Statistics, *Employment in STEM Occupations* (Apr. 18, 2025), https://www.bls.gov/emp/tables/stem-employment.htm.
[68] The Conference Board, *Women in STEM: Closing the Gender Gap* (Mar. 20, 2025), https://www.conference-board.org/research/ced-policy-backgrounders/women-in-stem-closing-the-gender-gap.
[69] *Policy Backgrounder: The Continuing Gender Wage Gap*, *supra* note 43.
[70] *See* Nat'l Women's Law Ctr., *Select STEM graduate degrees awarded by field of study and gender, 2021-2022* (2025). Calculations using U.S. Department of Education, National Center for Education Statistics, Integrated Postsecondary Education Data System, Table 318.30: Bachelor's, master's, and doctor's degrees conferred by postsecondary institutions by sex of student and field of study. STEM degrees were identified to fall under 5 large degree categories: biological and biomedical sciences, computer and information sciences and support services, engineering and engineering technologies, mathematics and statistics, and physical sciences and science technologies.
[71] *Id.*
[72] U.S. National Science Foundation, *The STEM Labor Force: Scientists, Engineers, and Skilled Technical Workers* (May 30, 2024), https://ncses.nsf.gov/pubs/nsb20245/executive-summary.
[73] *Id.*

Section (b) of 10 C.F.R. § 1042.110 is crucial to counteract long-standing and deeply entrenched sexist realities that have limited participation of women and girls in certain fields, particularly STEM. Schools must be permitted to take steps to correct gender inequities, even when existing disparities have not been traced to specific instances of unlawful discrimination. This measure corrects for the effects of discrimination that have led to systemic disparities, including the impact of stereotypes, unconscious bias, structural barriers, and lack of role models.

Stereotypes and entrenched gender norms mean that many individuals still associate certain fields with masculine qualities, dissuading girls and women from pursuing certain careers (including construction, certain STEM fields, automotive service, electrical work, piloting, firefighting, etc.).[74] Moreover, structural barriers, such as outright discrimination in hiring,[75] lack of family-friendly policies,[76] and rampant workplace harassment and discrimination also contribute to the underrepresentation of women in these fields.[77] Women and girls have also had difficulty in finding role models and mentors when considering entering these fields in the first place.[78] Further, there continues to be unconscious biases that disadvantage women and girls, impacting hiring decisions, grant funding, and promotions.[79]

When women enter the workforce, they frequently face certain pressures that men typically do not. Women are more likely to take on primary family responsibilities on top of working full-time jobs.[80] They often face pregnancy discrimination[81] and are more likely to deal with sexual harassment[82] and other forms of sex discrimination. Research suggests that sexual harassment is

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[74] *See The Gender Gap in STEM: Still Gaping in 2023*, *supra* note 46.
[75] Stephanie Mabel Kong et al., *Reducing gender bias in STEM*, 1 MIT SCIENCE POLICY REV. 55, 55 (2020), *available at* https://www.researchgate.net/publication/343770759_Reducing_gender_bias_in_STEM#pf7.
[76] *Id.* at 58.
[77] *See, e.g.*, Pew Research Center, *Women and Men in STEM Often at Odds Over Workplace Equity* (Jan. 9, 2018), https://www.pewresearch.org/social-trends/2018/01/09/women-and-men-in-stem-often-at-odds-over-workplace-equity/; Kesluk Silverstein, Jacob & Morrison, P.C., *Do STEM Jobs Have a Gender Discrimination Problem?* (describing a $19.5 million settlement of a gender discrimination claim that women were given fewer promotions and paid less than male workers), https://www.californialaborlawattorney.com/blog/do-stem-jobs-have-a-gender-discrimination-proble/.
[78] *See* Jenny Bird & Ismael Mourifié, *Why might women not pursue a career in STEM?* (Apr. 28, 2025), https://artsci.washu.edu/ampersand/why-might-women-not-pursue-stem-career-ismael-mourifie#:~:text=Another%20hypothesis%20involves%20gender%20profiling,STEM%20education%2C%20effectively%20profiling%20herself.
[79] *See* Stephanie Mabel Kong, *supra* note 75 at 1, 3; Nicole Boivin et al., *Overcoming gender bias in STEM*, 45 SCI. & SOCIETY 483, 483–84 (2024), *available at* https://www.sciencedirect.com/science/article/pii/S147149062400108X.
[80] *See* Maggie Germano, *Women Are Working More Than Ever, But They Still Take On Most Household Responsibilities* (Mar. 27, 2019), *available at* https://www.forbes.com/sites/maggiegermano/2019/03/27/women-are-working-more-than-ever-but-they-still-take-on-most-household-responsibilities/.
[81] *See* Stephanie Mabel Kong, *supra* note 75; Joan C. Williams & Jessica Lee, *It's Illegal, Yet It Happens All the Time* (Sept. 28, 2015), *available at* https://www.chronicle.com/article/its-illegal-yet-it-happens-all-the-time/.
[82] NASEM, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (June 2018), *available at* https://www.ncbi.nlm.nih.gov/books/NBK519457/.

a "particularly significant problem for women working in male-dominated STEM fields."[83] Giving women supportive environments in college and graduate school to talk about and discuss how to address these challenges helps women thrive once they graduate.[84]

Allowing affirmative efforts to address underrepresentation in education is crucial, including at the early stages of education. School clubs, extracurriculars and programs that focus on mentorship and training for women and girls—especially women and girls of color—in STEM fields help combat race- and sex-based stereotypes and provide role models, allowing students to believe that they belong in underrepresented fields. These clubs and programs launch students with skills, opportunities, and resources to lead at school, and ultimately enter the workforce.

In fact, DOE has previously recognized the importance of having such programs, stating that Title IX helps to secure "a clean energy future by closing the gender gap in math and science."[85] As DOE notes, its Title IX protections are critical to "ensure that the recruitment, retention, training and education practices at the school are inclusive for both men and women."[86]

III. Conclusion

DOE's Title IX regulations are crucial to ensuring that all women and girls can access the full benefits of an education, including opportunities to play sports and participate in fields of study in which they have historically been underrepresented. This is what Title IX's core mandate of ensuring equal access to the benefits of any education program or activity has required for decades. Yet DOE is unlawfully attempting to rescind its longstanding Title IX regulations at 10 C.F.R. §§ 1042.450 and 1042.110(b), and through a procedurally deficient process no less. Rescinding these regulations through direct final rulemaking is not only impermissible, it frustrates the public's ability to weigh in when such crucial rights are at stake.

For the reasons outlined in this adverse comment and all others DOE may receive, we urge DOE to withdraw its Title IX DFRs. While women and girls have come far since Title IX's enactment in 1972, the unfortunate reality is that inequality persists, and these Title IX protections in education are demonstrably still needed.

Should you have any questions, please contact Hunter Iannucci, Counsel, Education & Workplace Justice, at hiannucci@nwlc.org, or Josia Klein, Counsel, Education & Workplace Justice, at jklein@nwlc.org.

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[83] Nayeli Stopani Barrios, et al., *The challenge of gender bias: experiences of women pursuing careers in STEM* (Apr. 8, 2022), *available at* https://www.unr.edu/nevada-today/blogs/2022/the-challenge-of-gender-bias-in-pursuing-stem-careers.

[84] *See* Nat'l Women's Law Ctr., *Making the Case: Gender-Conscious Programs in Higher Education* (Nov. 2020), *available at* https://nwlc.org/resource/making-the-case-gender-conscious-programs-in-higher-ed/.

[85] U.S. Dep't of Energy, *Title IX: More Than Just Sports* (June 23, 2011), *available at* https://www.energy.gov/articles/title-ix-more-just-sports.

[86] *Id.*

Sincerely,

Gaylynn Burroughs
Vice President, Education & Workplace Justice

Shiwali Patel
Senior Director of Safe and Inclusive Schools

Hunter Iannucci
Counsel, Education & Workplace Justice

Josia Klein
Counsel, Education & Workplace Justice