Testimony before the U.S. House Judiciary Committee
Subcommittee on the Constitution
"The Dangers and Due Process Violations of 'Gender-Affirming Care'"

May Mailman
Senior Fellow
Independent Women's Law Center
July 27, 2023

I am May Mailman, a senior fellow with the Independent Women's Law Center, the legal advocacy arm of Independent Women's Forum (IWF) and Independent Women's Voice (IWV). IWF is a 501(c)(3) nonprofit organization founded by women to foster education and debate about liberty, personal responsibility, and the limited reach of government. IWV is a 501(c)4) organization that fights for women by expanding support for policies that enhance freedom, opportunity, and well-being.

I am, most recently, Deputy Solicitor General and Director of the Tenth Amendment Center for the State of Ohio. There, I litigated cases and drafted comment letters to oppose the unconstitutional expansion of the federal administrative state, including successfully challenging the private sector vaccine mandate in the Supreme Court. The State of Ohio has written and joined multiple comment letters explaining the Biden Administration's lack of statutory authority to eliminate protections for women, girls, and parents.

I also served as a counsel in the White House from 2019 through 2021, where I focused on health care, immigration, education, and women's issues. My responsibilities included defining the appropriate, and often limited, reach of agency authority in these areas.

Finally, I am a mother to my 8-month-old daughter. I am testifying today in support of her future, her freedom, and her equal opportunity.

1. The aggrandizement of gender ideology over sex-based protections has claimed many victims.

My fellow panelists have discussed the pernicious effects of gender ideology on children who have been stripped of their futures, and parents who have been torn from their sacred rights and responsibilities.

I am here to address another way in which gender ideology destroys women and girls, by dissolving legal protections for women in athletics.

2. Women and girls should not have to seek accommodation to participate in women's sports.

Until recently, female student-athletes may have thought they were protected by Title IX of the Education Amendments of 1972. And they were.

Title IX is simple. It prohibits discrimination *on the basis of sex*[1] in any program or activity, including athletics, run by a school that accepts federal money (which is almost all of them).

Importantly, Title IX recognizes that providing equal opportunity can require recognizing inherent differences between the sexes.[2] For example, the statute expressly permits schools to maintain "separate living facilities for the different sexes."[3] It contains express exceptions for fraternities and sororities.[4] It makes exceptions for "the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and [other] voluntary youth service organizations" that "traditionally [have] been limited to persons of one sex."[5] It carves out "any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State

---

[1] Specifically, Title IX 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." 20 U.S.C § 1681.
[2] *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) ("Physical differences between men and women … are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'") (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).
[3] 20 U.S.C. § 1686.
[4] *Id*. § 1681(6)(A).
[5] *Id*. § 1681(6)(B).

conference, or Girls Nation conference."[6] And it permits "father-son or mother-daughter activities" provided that if they are offered "for students of one sex" they are offered "for students of the other sex" as well.[7]

So too in sports. When introducing Title IX, Senator Birch Bayh explained that Title IX would not "mandate[ ] the desegregation of football fields."[8] In recognition of the uniqueness of women and men when it comes to sports, Congress directed that Title IX's implementing regulations must include "reasonable provisions considering the nature of particular sports."[9]

For 50 years, the Title IX athletics regulation has explicitly permitted sex-based teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[10] And, the school must "provide equal athletic opportunity for members of both sexes."[11]

This has benefitted the women who for so long were locked out of athletic opportunities. When Title IX was enacted, about 294,000 girls participated in high school sports each year— compared to over 3.6 million boys.[12] By 2018, over 3.4 million girls were playing high-school sports.[13]

Unfortunately, in April 2023, the Department of Education proposed a rule that, if adopted, would flip Title IX on its head. The proposed rule would modify the athletic regulation to require that schools let students compete on teams consistent with their gender identity unless a particular school can demonstrate, to the satisfaction of the Department of Education, that this

[6] *Id*. § 1681(7)(A).
[7] *Id*. § 1681(8).
[8] 117 Cong. Rec. 30399, 30407 (1971).
[9] Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, 612 (1974).
[10] 34 CFR § 106.41(b).
[11] 34 CFR § 106.41(c).
[12] Women's Sports Foundation, 50 Years of Title IX (2022), https://bit.ly/3V66cHW.
[13] Ibid.; *see also* Nat'l Ctr. for Educ. Stat., Fast Facts for Title IX, https://bit.ly/3npc1DR ("The girls' high school participation rate is greater than 11 times what it was when Title IX was passed, an increase of more than 1,000 percent.").

policy would be unfair or unsafe to the particular students affected on a particular team.[14]

In other words, the proposed rule upends the default position that women's sports are for biological females and establishes a new default position that women's sports are for anyone who identifies as a woman.[15] Indeed, the Department has said outright that "[u]nder the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity."

Women will therefore be forced to rely on their schools hurdling a legal bar to participate in female-only teams. One might think this hurdle is low. Studies make clear that testosterone suppression can never completely eliminate the athletic advantage of males who have experienced puberty.[16]

But that scientific fact won't be enough. The rule prohibits high schools and colleges from concluding that, in general, biological males on women's teams puts female athletes at risk of injury and losing playing time, medals, and privacy. Rather, the school would need to prove to federal bureaucrats that allowing a biological male to compete on a woman's varsity team would be unfair or unsafe in *this* specific sport and with respect to *these* particular athletes.

Because the burden of litigating the issue places a significant burden on schools with limited budgets and resources, it is likely that many schools will choose the path of least resistance and simply allow all students to compete on athletic teams consistent with their gender identity.

This, in turn, places a disproportionate burden on female students, who are far more likely to be displaced by biological males, than on male students,

---

[14] The proposed rule states: "If a [school] 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." 88 Fed. Reg. at 22891.

[15] *See* Comment of Independent Women's Law Center and Independent Women's Forum regarding implications of the Department of Education's proposed Title IX rule, *available at* https://bit.ly/450dPDq.

[16] Independent Women's Forum, *Competition, Second Ed.*, *available at* https://bit.ly/3OvkfVZ.

who have little to fear from female bodies seeking opportunities on men's teams. As related to biological uniqueness in size and strength, it is also women, not men, who face the risks in private spaces like locker rooms.

3. The Department of Education has no authority to mandate schools adopt gender-identity-based athletics.

Even if it were a good idea to reduce educational opportunities for women, the Department of Education may not do so unless Congress authorized it. Congress has done no such thing.

The Department believes that the Supreme Court's decision in *Bostock v. Clayton County*,[17] "leads to the conclusion that Title IX prohibits discrimination based on … gender identity."[18] That is false.

In *Bostock*, the Supreme Court held that Title VII of the Civil Rights Act prohibits employers from "fir[ing] someone simply for being … transgender."[19] But *Bostock* dealt only with hiring and firing in the employment context under Title VII. As the *Bostock* majority noted, "[a]n individual employee's sex is not relevant to the selection, evaluation, or compensation of employees."[20] Athletics in education, however, are governed by a different statute: Title IX. And when it comes to athletics, sex is not only relevant: it is often dispositive.

The Supreme Court has made clear that "discrimination" in the legal sense involves treating "similarly situated" people differently.[21] As Title IX recognizes, however, different treatment of the sexes is warranted when it comes to athletics because the two sexes are not similarly situated. In fact, the original athletic regulation adopted in 1975 explicitly contemplates separate athletic teams for males and females. *Bostock*'s conclusion that employment discrimination against a trans-identified person "necessarily entails discrimination based on sex" under Title VII,[22] is simply inapplicable to the

[17] 140 S. Ct. 1731 (2020).
[18] 86 Fed. Reg. 32637 (June 22, 2021).
[19] *Bostock*, 140 S. Ct. at 1753.
[20] *Id*. at 1741 (internal quotation marks omitted).
[21] *Bostock*, 140 S. Ct. at 1740.
[22] Id. at 1747.

athletics governed by Title IX, where males and females are not similarly situated.[23]

In sum, Title IX provides no basis for the Department of Education to implement a coast-to-coast policy mandating gender-identity-based sports.

Local communities can, of course, implement solutions that accommodate trans-identified students, so long as those solutions accord with Title IX. Or, schools may reject federal funds and the obligations that attach. But we live in a nation of laws and not bureaucratic command. And that means the Department of Education must find its authority in the laws this legislative body considered and passed. It may not use gender ideology to twist a simple anti-discrimination statute into a statute that reduces opportunities for women.

Thank you.

[23] *See Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) ("Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition.").