Submitted via www.regulations.gov under DOE-HQ-2025-0016

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, Docket Number DOE-HQ-2025-0016

To Whom It May Concern:

I am writing on behalf of the Students' Civil Rights Project at Public Justice. Public Justice is a nonprofit legal advocacy organization that takes on the biggest systemic threats to justice of our time–abusive corporate power and predatory practices, the assault on civil rights, and the destruction of the earth's sustainability. Public Justice's Students' Civil Rights Project combines high-impact litigation with other advocacy tools to combat discrimination in schools. We strive to create systemic change so all students can learn and thrive, and to secure justice for students who are denied educational opportunities based on their race, national origin, ethnicity, or sex, including sexual orientation, gender identity, and gender expression. We represent students at all stages of litigation, including pre-suit negotiations, litigation in trial courts, appeals, and oppositions to cert petitions.

This is a **significant adverse comment** opposing the direct final rule (DFR), "Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance."[1] This DFR would rescind critical parts of the Department of Energy (DOE)'s regulations implementing Title IX of the Education Amendments of 1972 (Title IX), namely 10 C.F.R. § 1042.450, that provide opportunities for all students—but especially women and girls—to play sports. This regulation requires schools to allow students who are members of the sex for which athletic opportunities have previously been limited (typically women and girls) to try out for a sex-separated sports team that is unavailable to them, excluding contact sports. This regulation is crucial to increase sports participation for all students, but especially women and girls who have historically been denied opportunities to play. Indeed, if this DFR goes into effect, schools could effectively ban women and girls from playing non-contact sports (for example, baseball, tennis, swimming, badminton, bowling, etc.) by offering a team only for men or boys with no corresponding women's or girls' team.

This DFR is also an unlawful and inappropriate use of DFRs. DFRs can be proposed only to make routine or "noncontroversial" changes to federal regulations to expedite the rulemaking process. However, DOE is wrong to assert that the changes in this DFR are "noncontroversial"

[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 "Title IX DFR"].

because they would curtail substantive civil rights of women and girls to access equal athletic opportunities, which undermines the spirit and purpose of Title IX.

For these reasons, and as explained in more detail below, **we urge DOE to withdraw the DFR that would rescind Section 1042.450**.

I. DOE's use of a DFR to rescind 10 C.F.R. § 1042.450 is unlawful under the Administrative Procedures Act and bypasses review required by Executive Orders 12250 and 12866.

DFRs are meant only for "routine or uncontroversial matters" where no adverse comments are anticipated. This DFR is neither routine nor uncontroversial: in fact, rescinding this civil rights protection would result in significant harm to students by robbing them of opportunities to play sports, as discussed below. Thus, this DFR violates the Administrative Procedure Act ("APA") by forgoing the typical notice-and-comment rulemaking process.

In 1980, DOE first published its own final Title IX regulations[2] addressing protections against sex discrimination in educational programs or activities operated by recipients of federal financial assistance.[3] The DOE's regulations mirrored the Department of Education's Title IX regulations, which were finalized in 1975 after Congressional review, indicating legislative approval for these Title IX protections.[4] DOE now seeks to rescind its Title IX regulation—a regulation that was adopted decades ago through the notice-and-comment rulemaking process, which promoted transparency by allowing public participation and required careful consideration of public comments. If the DOE's longstanding Title IX rule is to be changed in substance, then under the APA, it must be amended through the same process, not through the expedited DFR process.[5]

Although there is a "good cause" exception to the typical notice and comment rulemaking process,[6] this DFR does not qualify for it. To qualify for the "good cause" exception, the APA requires an agency to state in its Federal Register notice why it has determined there is good cause to bypass the typical notice-and-comment rulemaking process.[7] Yet, DOE did not offer any basis for why it did not need to engage in the notice-and-comment process, stating only that the regulation it rescinds—a regulation that promotes equal athletic opportunities—is

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[2] 45 Fed. Reg. 40514, *available at* https://www.govinfo.gov/content/pkg/FR-1980-06-13/pdf/FR-1980-06-13.pdf.

[3] 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.

[4] 40 Fed. Reg. 24137, available at https://www.govinfo.gov/content/pkg/FR-1975-06-04/pdf/FR-1975-06-04.pdf.

[5] The Supreme Court has stated unequivocally that 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." *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)).

[6] 5 U.S.C. § 553.

[7] *Id.* at § 553(b).

unnecessary. Given the public interest in protecting against sex discrimination, no "good cause" exists for bypassing notice-and-comment.

Moreover, E.O. 12250 requires the Attorney General to review and approve certain proposed and final civil rights rules promulgated by federal agencies, including rules to implement and enforce Title IX.[8] However, the DOE failed to obtain the Attorney General's review and approval of this DFR.[9]

Any rule change must also comply with E.O. 12866, which requires the Office of Information and Regulatory Affairs to review a "significant regulatory action"—meaning "any regulatory action that is likely to result in a rule 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."[10] This DFR is a significant regulatory action[11] that would, by removing athletic opportunities from women and girls, have a direct impact on the lifetime earnings and financial well-being of millions of women and girls.[12] It also creates an inconsistency with the over 20 federal agencies that have Title IX regulations with a parallel rule regarding the right to try out for single-sex teams, and it would constitute a significant departure from longstanding legal interpretations of Title IX, raising novel issues and policy concerns about equity and fairness for women and girls in sports.

Although the government should never seek to limit people's rights or to take away tools that protect people from discrimination, they *absolutely* shouldn't be making such major changes without engaging in the appropriate regulatory process.

II. Rescinding 10 C.F.R. § 1042.450 would cause substantial harm to women and girls by eliminating equal opportunities to participate in sports.

By removing a right that would provide more opportunities to play for women and girls, the DFR would cause substantial harm. 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

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[8] Exec. Order No. 12,250, § 1-101.

[9] 20 U.S. § 1682; 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.

[10] Exec Order No. 12,866, § 3(f), 58 Fed. Reg. 190 (Oct. 4, 1993).

[11] *Id.* at § 6(a). *See also* Off. of Management 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.

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

and higher levels of self-esteem.[13] 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 has been especially important for women and girls, who 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 than boys do to play[14]—with these disparities being even higher for women and girls of color.[15]

DOE asserts Section 1042.450 needs to be rescinded because it "ignores differences between the sexes."[16] In addition, DOE states that the rescission is necessary to align with Trump's anti-trans sports ban executive order,[17] which it claims promotes "fairness" and "safety" for women and girls.[18] Yet, that executive order unlawfully discriminates against transgender women and girls by banning them from playing on women and girls' sports teams.[19] The anti-trans sports ban executive order also makes sports less safe and fair for women and girls by inviting invasive scrutiny of any woman or girl who does not conform to sex-based stereotypes.[20] DOE's rationale also assumes that masculinity is associated with athleticism and strength and femininity with weakness, which are the same stereotypes historically used to exclude women and girls from athletic opportunities, and which Title IX was enacted to stop.[21] Further, the Trump administration's anti-trans sports ban executive order does nothing to actually protect women's and girls' rights to play sports; it does not provide more opportunities to play sports—as Section 1042.450 does—nor does it provide more resources for women and girls' teams to mitigate the extreme unequal treatment they face compared to men and boys' sports teams.

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[13] Nat'l Coalition for Women and Girls in Education, *supra* note 36, 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).

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

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

[16] Title IX DFR at 20786.

[17] Exec. Order No. 14201, 90 Fed. Reg. 9279 (Feb. 5, 2025).

[18] Title IX DFR at 20786.

[19] This executive order is discriminatory and contrary to the Equal Protection Clause and Title IX, which several federal courts have held make anti-trans sports bans and bathroom bans unlawful. *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).

[20] *See* National Women's Law Center, *The "Protection for Women and Girls in Sports Act" Reinforces Sexism and Abuse in Sports,* (Jan. 13, 2025), https://nwlc.org/the-protection-of-women-and-girls-in-sports-act-reinforces-sexism-and-abuse-in-sports/.

[21] Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 85–86, 88 (2023).

III. Conclusion

In conclusion, DOE's attempt to use a DFR to rescind 10 C.F.R. § 1042.450 is unlawful. In attempting to rescind this regulation, DOE contradicts its own rationale of increasing "fairness" for women and girls, as this regulation has been a major pathway for ensuring their participation in sports that they would otherwise not have the ability to play. Eliminating this regulation will in fact exacerbate barriers to playing. Accordingly, **we urge DOE to withdraw this DFR**. Thank you for considering this significant adverse comment.

Sincerely,

Patrick Archer
Legal Fellow
Students' Civil Rights Project
Public Justice