BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION

In re: *Petition of American Sports Council and Pacific Legal Foundation to Repeal the 1979 Policy Interpretation of Title IX, 44 Fed. Reg. 71,413*	Submitted via Regulations.gov Docket No. ED-2023-OGC-0071

PETITION TO REPEAL 1979 POLICY INTERPRETATION OF TITLE IX, 44 FED. REG. 71,413

Joshua P. Thompson, Cal. Bar No. 250955
Caleb R. Trotter, Cal. Bar No. 305195
Alison E. Somin, Va. Bar No. 79027
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
JThompson@pacificlegal.org
CTrotter@pacificlegal.org
ASomin@pacificlegal.org
Counsel for American Sports Council and Pacific Legal Foundation

TABLE OF CONTENTS

INTRODUCTION 1

INTEREST OF PETITIONERS 3

BACKGROUND 4

REASONS FOR REPEAL 6

I. Using Proportionality to Guide Decisions Conflicts with Title IX and Results in Sex-Based Quotas That Violate the Equal Protection Clause 6

A. Title IX does not countenance "substantial proportionality" 6

B. Using proportionality to create sex-based quotas violates the Equal Protection Clause 8

II. The 1979 Policy Interpretation Is an Invalid Agency Guidance Document ... 11

CONCLUSION 15

INTRODUCTION

In 2021, the University of Minnesota discontinued its longstanding men's gymnastics, tennis, and indoor track and field teams. *Ng v. Bd. of Regents of Univ. of Minn.*, 64 F.4th 992, 995 (8th Cir. 2023). At the same time, it chose not to fill roster spots left vacant by graduating students on various women's teams. *Id.* The primary rationale for the University of Minnesota's opportunity-eliminating decisions was an effort to balance its proportion of male and female athletes with the sex-based proportion of its student body. *Id.* Similarly, in 2018, two Minnesota high school boys were denied the opportunity to try out for their respective schools' competitive dance teams because boys were historically overrepresented in athletics. *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 998, 1001 (8th Cir. 2019). Neither are isolated events. *See, e.g.*, *California Baptist University Restructures Lancer Athletics; Discontinues Three Athletic Programs Ahead of Big West Entry* (Jan. 2, 2026);[1] Nick Dugan, *ETSU Athletics to make additional changes to comply with Title IX*, WJHL (June 28, 2023);[2] Bailey Glasser LLP, *Male & Female Student-Athletes Win Historic Title IX Sex Discrimination Settlements with Clemson University* (Apr. 22, 2021).[3] And where universities fail to achieve proportional balance for their teams, they inevitably face lawsuits by students challenging a school's compliance with Title IX. *See, e.g.*, *Niblock v. Univ. of Ky.*, 165 F.4th 460, 463 (6th Cir. 2026).

---

[1] https://cbulancers.com/news/2026/1/2/general-california-baptist-university-restructures-lancer-athletics-discontinues-three-athletic-programs-ahead-of-big-west-entry.
[2] https://www.wjhl.com/sports/college-sports-2/etsubucs/etsu-athletics-to-make-additional-changes-to-comply-with-title-ix/.
[3] https://www.baileyglasser.com/news-male-and-female-student-athletes-win-historic-title-ix-settlement-clemson-university.

In fact, while women's collegiate teams have increased by 60% or more since 1990, men's teams have experienced an overall decrease since the Department of Education's 1979 Policy Interpretation of Title IX, 44 Fed. Reg. 71,413, with "Olympic sports" hardest hit. *See* Anne C. Marx, et al., *The Financial Impact of Eliminating a NCAA Division I Men's Sport on the Athletic Budget: Is Title IX to Blame?*, 16.1 J. of Intercollegiate Sport (2023). For example, in the early 1980s, there were over 100 NCAA men's gymnastics teams. With the recent elimination of the century-plus-old University of Minnesota team, that number has dwindled to 12. Likewise, as of 1975, there were more than 150 NCAA Division I men's wrestling programs. As of 2025, there are only 79. In men's tennis, as of 1990, 93% of NCAA Division I programs maintained teams, with that percentage dropping to 71% by 2020. Ross Dellenger & Pat Forde, *A Collegiate Model in Crisis: The Crippling Impact of Schools Cutting Sports*, Sports Illustrated (Jun. 11, 2020).[4] And in men's swimming, only 37% of NCAA Division I programs have teams, down from more than half in 1990. *Id.*

While the steep decline in sports teams for men cannot entirely be blamed on Title IX, there is a stark difference between growth of women's teams and the drop in teams for men that finances and student interest cannot explain. That result does not comport with Title IX's promise of equal opportunity and antidiscrimination. *See* 20 U.S.C. § 1681(a) ("No person . . . 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 . . . .").

[4] https://www.si.com/college/2020/06/11/college-sports-program-cuts-ncaa-olympics.

The trouble stems from the Department of Education's "1979 Policy Interpretation of Title IX," 44 Fed. Reg. 71,413 (Dec. 11, 1979). Turning Title IX's antidiscrimination mantra on its head, the Policy Interpretation promises to assure compliance with Title IX if "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 44 Fed. Reg. at 71,418. In other words, compliance with an antidiscrimination statute can be accomplished by implementing strict sex-based quotas. Because of the relative certainty that numerical quotas provide school administrators, "substantial proportionality" rules the day in Title IX compliance efforts—and has done so for over 40 years.

Even though the Policy Interpretation was never the correct interpretation of Title IX, validly enacted, or constitutional, it has persisted. This must end. Petitioners respectfully request that the Department of Education rescind or repeal the "1979 Policy Interpretation of Title IX."

INTEREST OF PETITIONERS

American Sports Council (ASC) is a national coalition of coaches, athletes, parents, alumni, and fans who are devoted to preserving and promoting the student athlete experience. Founded in 2002, ASC has comprehensive, hands-on experience working with sports programs threatened with termination. ASC is also the leading national, multisport coalition devoted to the preservation of collegiate and scholastic athletic teams.

Pacific Legal Foundation (PLF) is the nation's oldest public interest legal foundation that seeks to vindicate the principles of individualism, property rights, and separation of powers. Consistent with these goals, PLF attorneys have litigated multiple cases involving the right to equal protection under the law in school athletics. *See, e.g.*, *D.M. by Bao Xiong*, 917 F.3d at 998, 1001; *Ng*, 64 F.4th at 995; *F.L. v. S.D. High Sch. Activities Ass'n*, No. 18-4038-KES (D. S.D. 2018) (case dismissed following favorable settlement); *Am. Sports Council v. U.S. Dep't of Educ.*, 850 F.Supp.2d 288 (D.D.C. 2012).

BACKGROUND

Congress enacted Title IX of the Education Amendments of 1972 to prohibit sex discrimination in any educational program or activity that receives federal financial assistance. 20 U.S.C. § 1681(a). That prohibition applies to "interscholastic, intercollegiate, club or intramural athletics" by preventing institutions from excluding individuals from athletics on the basis of sex. 34 C.F.R. § 106.41(a). Thus, the rule under Title IX is that opportunities to participate in school-sponsored athletics cannot be denied to someone due to his or her sex.

Title IX's rule does not categorically bar recipients of federal funding from considering sex in making athletics decisions. To assist schools with determining whether their students enjoy equal opportunity to participate in athletics, federal regulations enumerate ten factors to consider, including "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c).

In 1979, the Department of Health, Education, and Welfare (HEW)[5] published the innocuously titled "1979 Policy Interpretation of Title IX." The Policy Interpretation, which includes what is known as the "three-part test," *see* 44 Fed. Reg. at 71,418, was intended to assist schools in complying with 34 C.F.R. § 106.41(c). For example, the first prong of the test considers "whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 44 Fed. Reg. at 71,418.

Yet rather than serve as a helpful nonbinding guidance document, the three-part test—and its "substantial proportionality" prong in particular—have upended Title IX and school athletics nationwide.[6] *See* 20 U.S.C. § 1681(b). Proportional balance rules the day despite unequivocal statutory language that Title IX shall not "be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist . . . ." *Id.* Rather than follow the statutory text, all too often school administrators have sought to comply with Title IX by eliminating and reducing teams, with men's Olympic sports bearing the brunt of the damage.

[5] After HEW was divided into separate departments in 1979, the Department of Education maintained the 1979 Policy Interpretation.

[6] While the three-part test expressly applies only to intercollegiate athletics, it has routinely been applied to all levels of school athletics, including at the high school level.

REASONS FOR REPEAL

I. Using Proportionality to Guide Decisions Conflicts with Title IX and Results in Sex-Based Quotas That Violate the Equal Protection Clause

The Department should repeal or rescind the 1979 Policy Interpretation because it flagrantly flouts Title IX and the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

A. Title IX does not countenance "substantial proportionality"

In considering the three-part test, courts have held that Title IX does not require compliance with the 1979 Policy Interpretation's proportionality prong. To hold otherwise would perversely turn the anti-discrimination statute into one mandating sex-based quotas. Such an application of Title IX would also require ignoring the statute's express language that its demand for equal opportunity does not

> require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in [athletics], in comparison with the total number or percentage of persons of that sex [enrolled in the institution.]

20 U.S.C. § 1681(b). *See also Niblock*, 165 F.4th at 463 (Title IX "does not require proportional representation of students on sports teams"); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) ("Title IX does not require proportionality"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir. 1993) ("a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment . . . ."); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (*Cohen I*)

(being out of proportion is not a per se violation of Title IX's prohibition against sex discrimination); *Cohen v. Brown University*, 101 F.3d 155, 175–76 (1st Cir. 1996) (*Cohen II*) (rejecting university's view that proportionality prong of three-part test creates quotas); *Kelley v. Bd. of Trustees*, 35 F.3d 265, 271 (7th Cir. 1994) (Policy Interpretation does not "mandate statistical balancing."). Therefore, notwithstanding the three-part test, proportionality is not a legal requirement for institutions receiving federal funding. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 383 F.3d 1047, 1048 (D.C. Cir. 2004) (Department "policy interpretations are not binding regulations. They do not carry the force of law, and [institutions] are not bound to follow the policy interpretations.").

Nevertheless, colleges and universities, high school athletic associations and their members, and the media have regularly and routinely framed substantial proportionality as required under Title IX. Aggrieved students even routinely bring court actions against their schools for failing to attain or maintain substantial proportionality. *See, e.g.*, *Niblock*, 165 F.4th at 463. Some have succeeded. *See, e.g.*, *Balow v. Mich. St. Univ.*, 24 F.4th 1051 (6th Cir. 2022).

But the Supreme Court and numerous other courts have consistently held that a lack of proportionality is insufficient to demonstrate actionable discrimination under the civil rights laws. *See Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (noting the Court's rejection of allegations of racial discrimination when allegations only based on lack of statistical proportionality); *Main Line Paving Co. v. Bd. of Educ., Sch. Dist. of Philadelphia*, 725 F. Supp. 1349, 1363 (E.D. Pa. 1989) (government must

"detail the cause of th[e] disparity" or "say for certain that it was caused by gender discrimination, rather than other conditions in the general economy"); *Saunders v. White*, 191 F.Supp.2d 95, 132 (D.D.C. 2002) (government must articulate how "raw data should be interpreted and the reasons why it supports" a classification); *Mallory v. Harkness*, 895 F. Supp. 1556, 1559 (S.D. Fla. 1995) (invalidating sex-based quota where government "did not positively identify any discriminatory policy or practices" and pointed solely to disparities). Indeed, statistical disparities may result from any number of factors, including the individual preferences, needs, and choices of the students involved. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (race-based contracting quota "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population") (citing *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)). Consistent with Title IX, the 1979 Policy Interpretation cannot therefore require sex-based proportionality.

B. Using proportionality to create sex-based quotas violates the Equal Protection Clause

Even though under Title IX the 1979 Policy Interpretation cannot properly require sex-based proportionality, as discussed in the numerous examples above the frequent invocation of the Interpretation to mandate proportionality has led to schools singling out the overrepresented sex and reducing opportunities for members of that group—rather than increasing opportunities for the underrepresented sex—to come into compliance with Title IX. But such sex-based actions cause institutions

to "expressly discriminate[] . . . on the basis of gender, [and are] subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971)); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny).

The justifications most likely to be offered by an institution for reducing opportunities for an "overrepresented" group are compliance with Title IX and remediation for past discrimination against members of the other sex. Neither would withstand scrutiny.

First, as noted, Title IX's rule is that opportunities to participate in intercollegiate athletics cannot be denied on the basis of sex. 20 U.S.C. § 1681(a); 34 C.F.R. § 106.41(a). And any suggestion that Title IX requires universities to single out a particular sex for more (or fewer) opportunities, contradicts Title IX's express text that it not "be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in [athletics] . . . ." 20 U.S.C. § 1681(b). The unequivocal language of Title IX forecloses sex-based proportionality.

The 1979 Policy Interpretation cannot—and does not—require a contrary conclusion. In addition to the questions surrounding the three-part test's general validity discussed below, an agency guidance document cannot be read to contradict the express text of the statute it purports to interpret. Further, more recent agency

clarifications of the test, as well as case law interpreting the test, outweigh any interpretation that statistical proportionality is required. *See, e.g.*, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003)[7] ("[I]t is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams."); *see also Kelley*, 35 F.3d at 271 (Policy Interpretation does not "mandate statistical balancing."); *Cohen II*, 101 F.3d at 175–76 (rejecting university's view that proportionality prong of three-part test creates quotas).

Second, singling out members of one sex and limiting their opportunities does not remedy discrimination against members of the opposite sex; it is in no way even related to that interest. Simply, denying one sex the opportunity to compete due to a lack of proportionality does nothing to increase opportunities for the other sex.

Fundamentally, denying individuals the opportunity to compete so that statistical proportionality is achieved creates impermissible sex-based quotas. Thus, decisions that deny athletic opportunity to members of one sex in order to achieve statistical proportionality are unlikely to survive scrutiny under the Equal Protection Clause. For these reasons, the Department should expressly affirm the requirements of equal opportunity under Title IX by repealing or rescinding the 1979 Policy Interpretation as inconsistent with statutory (and constitutional) requirements.

---

[7] https://www.ed.gov/sites/ed/files/about/offices/list/ocr/title9guidanceFinal.pdf.

II. The 1979 Policy Interpretation Is an Invalid Agency Guidance Document

Independent of its inconsistency with the statutory text of Title IX and the Fourteenth Amendment, the 1979 Policy Interpretation was also invalidly issued. Article I, Section 1 of the U.S. Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." That is, it is Congress's duty to legislate, and it is the executive branch's duty to enforce the laws passed by Congress. Congress may nonetheless delegate some of its legislative authority to executive branch agencies to issue rules. When issuing such valid and binding rules pursuant to Title IX, the Department of Education must follow both the Administrative Procedure Act (APA) and the procedural requirements of Title IX. 5 U.S.C. § 553(b); 20 U.S.C. § 1682.

To issue rules binding on private parties, the APA generally requires federal agencies to follow notice and comment rulemaking procedures: "General notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. § 553(b), and the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." *Id.* § 553(c). Notice and comment rulemaking serves to ensure transparency and due deliberation before an agency issues a final rule that binds the public. As a Brookings Institution report said:

> The basic premise of notice-and-comment requirements is that even though the Executive Branch employs specialists with deep and specific knowledge, those specialists are not experts in how a given policy may affect a specific market, industry, activity, or person. Comments help

> make sure that the government is getting it right—or alert it when it's not—by providing information that challenges the government's assumptions where they're inaccurate and to help the government understand what the right assumption would be. As former OIRA administrator Cass Sunstein wrote, "Democratization of the regulatory process, through public comment, has an epistemic value. It helps to collect dispersed knowledge and to bring it to bear on official choices."

Adam Looney et al., *How to effectively comment on regulations*, Brookings Institution, November 2022.[8]

The APA nonetheless contains exceptions to the general notice and comment requirement for "interpretative rules" and "general statements for policy." 5 U.S.C. § 553(b)(4)(A). Because an interpretative rule is an interpretation of an existing statute, it cannot create new duties or rights not specified in the statute itself. "[A]n agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment." *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

The APA does not define the term "general statement of policy," but the Department of Justice has relied on the "working definition" that general statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency propose[d] to exercise a discretionary power." Dep't of Justice Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947). By definition, an agency cannot use its discretion to exercise a power that it is not directly granted by statute.

[8] https://www.brookings.edu/wp-content/uploads/2018/08/ES_20180809_RegComments.pdf.

The Department of Education identifies the 1979 Policy Interpretation as a guidance document rather than a binding rule. As former EPA General Counsel E. Donald Elliot has put it, administrative law proceeds from the premise that "an agency's action is what it says it is." *Re-Inventing Rulemaking*, 41 Duke L.J. 1490, 1490 (1993). Accordingly, if an agency labels a document a general statement of policy—or, presumably, an interpretative rule—courts should treat it as such. The Department in fact identifies the 1979 Policy Interpretation on its Policy Guidance Portal website as one of several notices of interpretation.[9] Notices of interpretation, or guidance documents, "lack the force and effect of law, unless expressly authorized by law or as incorporated into a contract."[10]

Because the 1979 Policy Interpretation purports to require proportional sex balance, it has gone beyond Title IX's express text and cannot be a mere interpretative rule. Yet to be a binding rule instead, the Policy Interpretation would have to be signed by the President or a valid designee. Because it was not, the 1979 Policy Interpretation is not a binding rule either.

When the Department issued a 1996 Policy Clarification reaffirming the validity of the three-part test while elaborating on its proper application, it arguably could have cured the signature problem and made the three-part test a binding rule. But, as is explained further below, because the 1996 Clarification is not presidentially signed nor promulgated pursuant to notice and comment rulemaking procedures, it

---

[9] *Civil Rights Policy Guidance*, U.S. Dep't of Educ. https://www.ed.gov/laws-and-policy/civil-rights-policy-guidance (last visited Mar. 13, 2026).

[10] *DoD Regulation Program*, U.S. Dep't of Defense, https://open.defense.gov/Regulatory-Program/Guidance-Documents/ (last visited Mar. 13, 2026).

is not a binding rule either. The 1996 reissuance therefore cannot transform the 1979 Policy Interpretation into a validly issued binding rule.

Because Congress understood that rules interpreting civil rights statutes could prove particularly controversial, it added two unusual procedural safeguards to ensure that Title IX rulemakers would be held democratically accountable. The first—a legislative veto—is almost certainly unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983). But the second—a requirement that any rules an agency promulgates under Title IX must be personally signed by the President—remains in force: "No such rule, regulation or order shall become effective unless and until approved by the President." 20 U.S.C. § 1682. Title IX's drafters copied the language of this requirement near-verbatim from Title VI, 42 U.S.C. § 2000d, Title IX's twin statute that prohibits race, color, and national origin discrimination by federal funding recipients.

While Title VI's text speaks for itself, statements made during the floor debate confirm that ensuring democratic accountability was the purpose of this section. Rep. Basil Lee Whitener lamented the power Title VI gave to a "faceless bureaucrat in the multitude of agencies downtown" and feared it would "place unbridled discretion" in the hands of "some functionary in an agency." *See* Alison Somin, *Presidential Signature Requirements as a Tool for Enforcing Democratic Accountability*, 21 Geo. J.L. & Pub. Pol'y 463, 465–67 (2023) (summarizing legislative history). In response, Rep. John Lindsay introduced an amendment because "the rulemaking power is so important . . . that the Chief Executive should be required to put his stamp of

approval on such rules and regulations." 110 Cong. Rec. 2499 (1964). This authority was later delegated to the Attorney General—a legally questionable move given Title IX's text and the emphasis Congress put on making sure that the President personally sign rules to ensure democratic accountability. *See generally* Somin, *supra*; Presidential Succession and Delegation in Case of Disability, 5 U.S. Op. Off. Legal Couns. 91 (O.L.C.), 1981 WL 30883 (Apr. 3, 1981).

Setting aside for the moment the lawfulness of the delegation generally, neither the President nor the Attorney General ever signed the 1979 Policy Interpretation. Because the 1979 Policy Interpretation was not signed, it cannot be a binding rule. *See also Nat'l Wrestling Coaches*, 383 F.3d at 1048 (1979 Policy Interpretation is nonbinding). The 1996 Clarification, which repromulgated the three-part test, cannot be a binding rule either because it also was not signed by either the President or the Attorney General. Given that the 1979 Policy Interpretation is not a binding rule, and is instead a mere guidance document, the Department can—and should—rescind or repeal it.

CONCLUSION

To ensure equal opportunity in school athletics, the Department can and should repeal or rescind the 1979 Policy Interpretation.

DATED: March 17, 2026.

Respectfully submitted,

/s/ Caleb R. Trotter
Caleb R. Trotter, Cal. Bar No. 305195
Joshua P. Thompson, Cal. Bar No. 250955
Alison E. Somin, Va. Bar No. 79027

Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
CTrotter@pacificlegal.org
JThompson@pacificlegal.org
ASomin@pacificlegal.org
Counsel for American Sports Council and Pacific Legal Foundation