

# Splitting the Baby Worked for Solomon, but It Won't for Biden

*Flexibility of proposed rule on transgender participation in sports suggests biology matters*

By JOSHUA DUNN

QUESTIONS SURROUNDING the application of Title IX to transgender students have been roiling education politics for nearly 10 years. In 2016, the Obama administration tried to settle one aspect of the issue without public input by declaring in a Dear Colleague Letter that transgender students must be able to use bathrooms matching their gender identity. That effort only generated more conflict and was quickly rescinded under President Trump. The Biden administration not only essentially reinstated the Obama administration's rule, which is being challenged in court, but also is trying to expand its reach via proposed guidelines on transgender participation in athletics. While its approach on the latter is more cautious and more open to public input, it is unlikely to be any more successful.

In April 2023, the U.S. Department of Education proposed a rule that seems designed to satisfy no one and is sure to generate litigation. Instead of announcing via a Dear Colleague Letter that it would impose its standards by fiat, as the agency has often done, it offered a brief opportunity of 30 days for members of the public to comment. And comment they did, with more than 132,000 statements pouring in. The agency is expected to release a revised rule soon, but the volume of comments and the shifting political landscape are likely slowing the process.

The proposed rule says that “policies violate Title IX when they categorically ban transgender students from participating on sports teams consistent with their gender identity” but “that in some instances, particularly in competitive high school and college athletic environments, some schools may adopt policies that limit transgender students’ participation.” In short, you cannot exclude transgender athletes except when you can.

So, when can you limit transgender students’ participation? The proposed rule says that “one-size-fits-all policies that categorically ban transgender students” violate Title IX but appears to offer a sliding scale: restrictions in elementary school “would be particularly difficult to justify” but may be permissible in high schools and colleges. Schools, the administration conceded, need “flexibility to develop team eligibility criteria that serve important educational objectives, such as ensuring fairness in competition or preventing sports-related injury.” Beyond that it does not offer any real guidance. However, saying that fairness or safety could justify restricting access concedes that biological sex does in fact matter for athletic performance.

That concession has angered transgender advocates who say that excluding transgender athletes for any reason is unacceptable discrimination. Additionally, many have claimed that being biologically male does not confer any demonstrable athletic benefits. In the end, it is not surprising that the Biden administration did not accept that claim, since almost all conflicts about the fairness of transgender sports participation stem from biological males competing in female athletics.

Another often-raised concern is that women and girls playing contact sports face safety risks if they must compete against biological males who have transitioned. And questions about biological females competing in male sports seem to center around their safety rather than the safety of the other athletes.

Beyond safety, of course, there is the question of whether transgender participation deprives females of other opportunities. If transgender athletes consistently outperform other athletes, biological females could be denied the chance to win scholarships or succeed in athletic events. That is, in fact, the claim of four female high school athletes in Connecticut who

have challenged their state’s policy of allowing transgender athletes to compete in the category matching their self-identified gender. After being dismissed for lack of standing, that case is now under review by the entire Second Circuit Court of Appeals.

The Biden administration proposed rule also skirts a whole host of

other thorny issues, such as whether religious schools that participate in state athletic leagues could be excluded because they have religious objections to having their students play against transgender athletes. As the regulation is written, they would presumably have to compete against teams with transgender athletes or forfeit the opportunity to play in state-sanctioned leagues. The rule would also seem to compel females in all schools to share locker rooms with athletes with male reproductive anatomy.

The proposed rule drew a range of reactions, including complete disapproval from hardliners on both sides of the issue—those who want states to require students to compete based on their biological sex and those who want no restrictions on the ability of students to compete in the sex category they identify with.

Given the controversy surrounding the proposed rule—and Congressional disinterest in weighing in—it’s not hard to imagine the issue being decided by the U.S. Supreme Court. While one might expect the conservative majority to be unsympathetic to

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mandating transgender participation in female sports, Justice Neil Gorsuch did write the opinion in 2020's *Bostock v. Clayton County*, which was joined by Chief Justice John Roberts, finding that the word "sex" in Title VII of the Civil Rights Act of 1964 also protected workers from discrimination based on sexual orientation and gender identity. Since Title IX was written in 1972, also long before anyone could have imagined its application to transgender students, the *Bostock* ruling would seem to imply that sex should be interpreted the same under both laws. But the court might also declare that gender identity in athletic competition raises entirely different questions than in employment.

when testosterone is suppressed." Thus, transgender female athletes would almost inevitably have a competitive advantage in contact and non-contact sports relying on strength and speed, while in contact sports there would also be safety concerns. Those issues largely do not arise under Title VII.

However, the politics surrounding the issue are also changing. The fact that the Biden administration did not offer a categorical rule like Obama's did and allowed public comments indicates more than a little uneasiness, which could presage a further retreat. A recent Gallup poll found that the percentage of Americans who think that students should



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*Student athletes Alanna Smith, Chelsea Mitchell, Selina Soule, and Ashley Nicoletti have sued the state of Connecticut for its policy allowing transgender women to compete in sports with biological women. The Second Circuit Court of Appeals is reviewing their case.*

In fact, the proposed rule provides a roadmap for the court to do this. By admitting that biology does in fact matter for safety and fairness, the rule gives school districts extraordinary latitude to create regulations that would exclude transgender athletes. That is why it is so vague about what should guide the schools. And if a school district decides that it wants transgender students to participate in the category matching their identity, parents who oppose such a policy would have a powerful tool to fight back politically and legally. They might point to evidence from studies, such as one published in the journal *Sports Medicine*, showing that "the muscular advantage enjoyed by transgender women is only minimally reduced

play on teams that match their biological sex has risen to 69 percent today from 62 percent in 2021 and that only a minority of Democrats—47 percent—think that transgender students should be able to play on teams that match their gender identity. The looming presidential election could thus also be influencing the administration's delay. Ultimately, the Supreme Court might decide the matter—that is, unless politics decides it first.

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