UNITED STATES COMMISSION ON CIVIL RIGHTS

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The Honorable Kevin McCarthy
Speaker of the House of Representatives
2468 Rayburn House Office Building
Washington, D.C. 20515-0520

March 3, 2023

Dear Mr. Speaker:

We write as four members of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, to urge you to hold hearings regarding the Biden Administration's deformation of Title IX of the Education Amendment of 1972 ("Title IX").

The Department of Education's Office for Civil Rights ["OCR"] claims that the Supreme Court's decision in *Bostock v. Clayton County* requires that Title IX's prohibition on sex discrimination be interpreted to prohibit discrimination on the basis of sexual orientation or gender identity. OCR has issued draft regulations that would codify this interpretation.[1] OCR's interpretation of Title IX will require schools to allow students to access intimate facilities (such as bathrooms, locker rooms, and showers) that align with their gender identity rather than their biological sex.[2] OCR's interpretation will also require schools to allow biological boys to compete in sports against biological girls.[3] In this letter, we explain more fully why OCR's interpretation is a misreading of both Title IX and *Bostock*.

Some recent history is in order here: Even prior to the *Bostock* decision, the May 13, 2016 Dear Colleague Letter from Catherine E. Lhamon and Vanita Gupta (the "Transgender Guidance") set out the U.S. Department of Education's Office for Civil Rights' transgender policy.[4] It advised schools that receive federal funding that Title IX requires them to assign anatomical and chromosomal boys who "identify" as girls to the bathrooms, locker rooms, and showers reserved

[1] "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," Office for Civil Rights, Department of Education, 87 FR 4139, July 12, 2022, https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf.
[2] In the preamble to the proposed rulemaking, OCR favorably references the withdrawn Title IX guidance. "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," Office for Civil Rights, Department of Education, 87 FR 41390, 41395, July 12, 2022.
[3] The Department claims in the preamble to the proposed regulations that it does not determine in this rulemaking whether sports teams should be separated by biological sex. Yet nowhere in the text of the proposed regulations does it state that athletics are exempted from its new interpretation of "sex discrimination." Furthermore, the fact that it specifically invokes state laws involving transgender students as a motivating factor for this rulemaking strongly suggests that it will enforce this rule to require schools to allow students to participate in athletics based on their gender identity rather than their biological sex. This is discussed later in this letter at pages 5-6.
[4] *Dear Colleague Letter on Transgender Students*, U.S. Department of Education Office for Civil Rights, May 13, 2016, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

for girls. It also advised schools that anatomical and chromosomal girls who "identify" as boys must be assigned to the bathrooms, locker rooms, and showers reserved for boys.

This was and remains a gross misreading of Title IX. For that reason, the Transgender Guidance was withdrawn on February 22, 2017. The current proposal would re-establish this policy by regulation.

Title IX forbids federally funded education programs or activities from engaging in sex discrimination. Its key provision 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 ….[5]

Sex is the only basis for discrimination that Title IX forbids. ***If it isn't sex discrimination, it isn't forbidden by Title IX.***

Title IX contains an important exception:

> [N]othing contained herein shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes.[6]

The U.S. Department of Health, Education, and Welfare created rules to implement Title IX. Among them is a rule (the "1975 Regulation"), which was signed into law by President Gerald Ford, pursuant to 20 U.S.C. § 1682, which requires Presidential approval for Title IX rules. Congress understood in 1972 that political accountability was particularly important in potentially controversial areas of the law. It wanted to ensure that with Title IX the President could be held accountable for the actions of the bureaucracy charged with implementing it.

The 1975 Regulation reads:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.[7]

If 20 U.S.C. § 1686 had never existed, it would have been possible for ***any*** boy (not just one who "identifies" as a girl) to point to the girls' showers and say, "If I were a girl, I would have been allowed to use the girls' shower. But since I am a boy, I am not. That's sex discrimination!"

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[5] 20 U.S.C. § 1681(a).
[6] 20 U.S.C. § 1686.
[7] 34 C.F.R. § 106.33.

And the boy would have been right. It would have been sex discrimination. Indeed, it *is* sex discrimination. But it is sex discrimination that is explicitly authorized by the law. (And for good reason we might add.)

The same is true for girls. If 20 U.S.C. § 1686 had never existed, it would have been possible for ***any*** girl (not just one who "identifies" as a boy) to point to the boys' showers and say, "If I were a boy, I would have been allowed to use the boys' showers. But since I am a girl, I am not. That's sex discrimination!" But, again, it is sex discrimination that is explicitly authorized by the law.

Note that the 1975 Regulation is simply an interpretation of 20 U.S.C. § 1686. And it is a simple and obvious interpretation of that provision. We have searched the internet for a single example of a school between the years 1972 and 1975 (i.e., the years after Title IX's passage, but before the 1975 Regulation was promulgated) that was confused into thinking that Title IX prohibited it from having separate bathrooms, locker rooms, or showers for boys and girls. They recognized that Title IX contained an exception for what otherwise would have been sex discrimination.

As *Bostock v. Clayton County* makes clear, Title VII of the Civil Rights Act of 1964 is about sex discrimination.[8] By extension, the same is true for Title IX. *Bostock* did not hold that when Title VII says "sex," it really means "sex or sexual orientation or gender identity." It held Title VII is about sex discrimination. It reasoned thusly: *Plaintiff Stephens is an anatomical and chromosomal man who prefers to be treated as a female and to adopt the clothing and mannerisms generally associated with being female. Stevens was fired. If Plaintiff Stephens had been an actual female who preferred to be treated as a female and adopted the clothing and mannerisms generally associated with being female, she would not have been fired. That's sex discrimination!*

And so it is. Since there was nothing in Title VII that creates an exception that would be applicable to Plaintiff Stephens' situation, the Court held that Title VII had been violated.

Notably, the Court did not hold that Plaintiff Stephens actually *is* a woman. If it had so held, it would have spoiled Plaintiff Stephens' argument. Title VII doesn't forbid discrimination between different categories of women (transgender vs. cisgender) and it doesn't forbid discrimination between different categories of men (transgender vs. cisgender). Plaintiff Stephens won the case precisely because he is a man and not a woman.

Applying the logic of *Bostock* to bathrooms, locker rooms, and showers yields a different result from that in *Bostock* itself. Suppose a hypothetical "transgender girl" says: *I am an anatomical and chromosomal boy who "identifies" as a girl and am not allowed to use the showers reserved*

[8] 140 S.Ct. 1731 (2020).

for girls. If I were a girl who "identifies" as a girl, I would have been able to use the girls' showers. That's sex discrimination! The one and only proper response to that argument is:

Yes, you are right. That's sex discrimination. But it is a form of sex discrimination that is expressly authorized by 20 U.S.C. § 1686 and by the 1975 Regulation, so it is not a violation of Title IX. Moreover, your argument proves too much. If it is sex discrimination to exclude you from the girls' facilities, then it's sex discrimination to exclude ***any*** *boy from the girls' facilities, whether transgender not. If it's sex discrimination for one, then it's sex discrimination for all.*

The hypothetical "transgender girl" could reply: *No, no, no. You don't understand! Despite my male anatomy and my XY chromosomes, I really am a girl. I should be assigned to use the girls' facilities. That's sex discrimination!* But that argument is misguided. That may be discrimination (given that every time a person is treated differently from another person, for good reason or bad, that literally fits the definition of discrimination). But it isn't sex discrimination. Treating these two different kinds of girls differently is discrimination based on gender identity, not sex. Title IX is about sex discrimination.

And, of course, the same *Bostock*-based rationale would apply to the case of a "transgender boy" (i.e. an anatomical and chromosomal girl who "identifies" as a boy). It may be a form of sex discrimination to prohibit her from using the boys' facilities. But it is a form of sex discrimination that is expressly permitted by 20 U.S.C. § 1686 and the 1975 Regulation. And if she really is a "boy" in some meaningful way, then it isn't sex discrimination at all.

This is a logic puzzle. The Transgender Guidance failed that logic puzzle. It purported to be an interpretation of Title IX, but in fact it was inconsistent with Title IX and its regulations.

OCR's current proposal also flunks the logic puzzle. Regulations put through the notice and comment procedure can overrule previous regulations. But they can't overrule the statute itself. The statute—20 U.S.C. § 1686—explicitly and unambiguously authorizes schools to separate intimate facilities by sex. Congress could repeal that through further legislation if it wants to. But it cannot be done through executive rulemaking.

Note that Title IX does not ***mandate*** separate facilities for males and females. It simply permits them. If an individual school decides it prefer to separate bathrooms, locker rooms, and showers on some other basis, it certainly can. For example, there may be no reason for a school to want to divide students into groups based on their surname's first letter, but no law forbids alphabetical discrimination. Consequently, no regulation would be necessary to authorize separate facilities on that basis.

Under Title IX, properly interpreted, schools are free to separate students by gender identity for bathroom, locker room and shower assignment if that is what the schools choose. Since gender identity discrimination qua gender identity discrimination is not directly prohibited or otherwise addressed by the law, no regulation granting special permission to assign facilities on that basis is necessary. Schools have flexibility.

This is not a trivial point. Dealing with a transgender student can be a delicate matter. For example, sometimes, in a local school administrator's judgment, the best thing may be to do exactly what the Transgender Guidance insisted (and the current proposal will insist) upon: Let the student use the intimate facilities assigned to the sex he or she identifies with. Sometimes the students who must share their facilities with a member of the opposite sex do not mind.

But in many cases, this solution will cause serious problems. The students who are forced to share their facilities with a member of the opposite sex may well be traumatized, and their trauma matters too. If the transgender student is relatively indifferent and the members of his or her actual sex are supportive, the best thing may be to have the student remain with them. In yet other cases, having him or her use an individualized facility or a facility set aside for faculty may be the best solution. ***Every case is different***.

It is also worth noting that the Supreme Court explicitly did not extend its interpretation of Title VII's prohibition on sex discrimination to Title IX or to bathroom access. Justice Gorsuch wrote:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.[9]

The Office for Civil Rights has gone far beyond *Bostock's* requirements.

The important point is that Title IX does not require schools to allow transgender students to access intimate facilities that do not correspond to their biological sex. In *Adams v. School Board of St. John's County*, the Eleventh Circuit recently held as much. It wrote:

> Title IX prohibits discrimination on the basis of sex, but it expressly permits separating the sexes when it comes to bathrooms and other living facilities. When we read "sex" in Title IX to mean "biological sex," as we must, the statutory claim

[9] Bostock v. Clayton C'ty, 140 S.Ct. 1731, 1753 (2020).

> resolves itself. Title IX's implementing regulations explicitly allow schools to "provide separate toilet . . . facilities on the basis of [biological] sex." 34 C.F.R. § 106.33. The School Board does just that. Because the School Board thus acts in accordance with Title IX's bathroom-specific regulation, its decision to direct Adams – who was born, and enrolled in the School District as, a female – to use the female bathrooms is consistent with Title IX's precepts.[10]

We believe the same approach must apply to athletic teams. It has always been recognized that separation by sex in sports is authorized by 20 U.S.C. § 1686. For decades, no one—including the U.S. Department of Education—dreamed that it was not permissible. Instead, strong efforts were made to ensure that resources devoted to girls' sports would be equal to those devoted to boys'. Crucially, if a court were to hold that separation of athletic teams by sex is *not* authorized by 20 U.S.C. § 1686, it would mean that separate teams for boys and girls are not permissible at all and that *all* boys must be allowed to join the girls' team and that *all* girls must be allowed to join the boys' team.

Title IX's current regulations explicitly permit separate teams.[11] In doing so, it confirms that 20 U.S.C. § 1686 authorizes such.

B.P.J. v. West Virginia State Board of Education, a decision of the Southern District of West Virginia, agrees that athletic teams separated by biological sex are permissible. It wrote:

> There is no serious debate that Title IX's endorsement of sex separation in sports refers to biological sex. Nevertheless, B.J.P. argues that transgender girls are similarly situated to cisgender girls, and therefore their exclusion from girls' teams is unlawful discrimination. But as I have already discussed, transgender girls are biologically male. Short of any medical intervention that will differ for each individual person, biological males are not similarly situated to biological females for purposes of athletics. And, despite her repeated argument to the contrary, transgender girls are not excluded from school sports entirely. They are permitted to try out for boys' teams, regardless of how they express their gender.[12]

We should note that OCR's current rulemaking includes no revisions to the regulation permitting sex separation in athletics. It does, however, promise to address this issue in a future rulemaking.[13] That does not mean that separate teams for biological girls and biological boys are safe for the time being. In OCR's view, it is likely not necessary for it to issue a new rule to

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[10] Adams v. Sch. Bd. of St. John's C'ty., 57 F.4th 791, 815 (11th Cir. 2022).
[11] 34 C.F.R. § 106.41. This regulation starts from the uncontroversial position that separate athletic teams are permissible and proceeds to detail the many dimensions along which they must be equal.
[12] B.P.J. v. W.Va. State Bd. of Ed., 2023 WL 111875 (S.D.W.Va. 2023).
[13] 87 FR 41537-41538.

require schools to allow biological boys on girls' athletic teams. OCR can simply pursue enforcement actions and allow outside groups to do so without ever formally changing the regulations governing athletics. In the preamble to this rulemaking, OCR notes that it withdrew a letter issued under the previous administration that warned an athletics association that allowing biological boys to compete on girls' teams would violate Title IX.[14]

Assistant Secretary Catherine Lhamon is well aware of the limits of *Bostock*, the statutory exceptions in Title IX, and the existing regulations. However, she is ideologically committed to promoting gender identity over biological sex, and the interests of transgender students over the interests of other students. The Transgender Guidance she issued during her Obama-era stint at OCR predated *Bostock*. It even predated the Supreme Court's grant of certiorari in *Bostock*.[15] It is therefore disingenuous for her to claim that *Bostock* requires these new regulations. She would have, and will, pursue her preferred policy regardless of the statute or court decisions.

We therefore urge you to hold hearings on Title IX and sex separation in sports teams and intimate living facilities. Although we do not believe it is necessary, it might be useful for Congress to pass an amendment to Title IX specifying that schools may separate athletic teams and intimate living facilities by *biological* sex and prohibiting any federal agency from issuing regulations to the contrary.

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[14] 87 FR 41536-41537.

> In 2020, in a letter subsequently archived and marked not for reliance, the Department asserted in the context of an enforcement case that permitting transgender girls to participate on a girls' athletics team denied cisgender girls athletic benefits and opportunities in violation of Title IX. See Revised CIAC Letter at 3-4. Then, in January 2021, in a letter subsequently withdrawn and marked not for reliance, the Department interpreted its Title IX regulations to require that a recipient rely on a student's "biological" sex in circumstances in which sex separation or sex-specific treatment is permitted under Title IX and these regulations, based on the argument that this was "the ordinary public meaning of the term 'sex' at the time of Title IX's enactment," that the original implementing regulations included provisions acknowledging "physiological differences between the male and female sexes," and that this has been "OCR's longstanding construction" of the term. . . .
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> The Department has reevaluated its approach to Title IX's application to discrimination based on gender identity after reviewing and considering the scope of Title IX's nondiscrimination mandate, interpretations of Federal courts, public feedback, and the standards OCR has long applied to evaluate compliance with current § 106.41. The Department's further review confirms that the interpretations articulated in statements such as the Rubinstein Memorandum and Revised CIAC Letter are inconsistent with the text and purpose of the Title IX statute and regulations.
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> Contrary to assertions made in 2020 and January 2021, the Department does not have a "long-standing construction" of the term "sex" in Title IX to mean "biological sex." The text of the statute and current regulations do not resolve this issue; neither the statute nor the regulations define "sex," purport to restrict the scope of sex discrimination to biological considerations, or even use the term "biological." The Department does not construe the term "sex" to necessary be limited to a single component of an individual's anatomy or physiology.

[15] The Transgender Guidance was promulgated in 2016. The Supreme Court granted certiorari in *Bostock* in 2019.

We strongly believe that transgender students, like all students, should be treated with dignity and respect. But we do not believe that schools subject to Title IX are required to ignore the needs of other students.

It is our sincere hope that this brief summary encourages further discussion on how we can stop the Biden Administration's radical and legally unsupported proposals to change Title IX. If you have any questions or would like to discuss this matter further, please contact Commissioner Kirsanow's special assistant Carissa Mulder at *cmulder@usccr.gov*.

Sincerely,

Peter Kirsanow
Commissioner

Gail Heriot
Commissioner

J. Christian Adams
Commissioner

Stephen Gilchrist
Commissioner