



September 12, 2022

Secretary Miguel A. Cardona
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave., SW
Washington, DC 20202

Docket No: ED-2021-OCR-0166

Re: Comment of Independent Women's Law Center and Independent Women's Forum regarding the separation of powers and constitutional violations in the Department of Education's proposed Title IX rule.

Dear Secretary Cardona:

Congress passed Title IX in 1972 to outlaw sex discrimination in education. The mandate of that law is clear: recipient institutions may not discriminate against individuals “on the basis of sex.” 20 U.S.C. § 1681(a). Nowhere does the statute mention “gender” or “gender identity.” Yet the Department of Education has issued a notice of proposed rulemaking entitled, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” set forth at 87 Federal Register 41,390 (“the proposed rule”), which expands Title IX to include those new categories. These departures from the statutory text constitute a brazen assault on the separation of powers and on the power of Congress to legislate. The proposed rule should be withdrawn.

Independent Women’s Law Center and Independent Women’s Forum

Independent Women’s Law Center (IWLC) is a project of Independent Women’s Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate on legal, social, and economic policy issues. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and the rights of women and girls.

IWLC and IWF strongly oppose the proposed rule and submit these comments to highlight specific *separation of powers issues* it poses.

Separation of Powers

The Department’s proposed rule is problematic, first and foremost, in its total disregard for the Constitution’s separation of powers. Our Constitution is clear: only the people’s representatives—not unelected bureaucrats—have the authority to make law. See Erin Hawley, *Placing the Administrative State in Constitutional Context*, Indep. Women’s Forum (2016), <https://tinyurl.com/IWFAdminBrief>. The proposed rule would usurp that power, both by (1) rewriting Title IX to include new categories of discrimination, and (2) requiring to recipients to punish conduct that takes place outside the scope of their programs. Congress did not regulate such a broad swath of conduct. And absent a delegation from Congress, the Department is powerless to do so. See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

As recently as June 2022, the Supreme Court reiterated the importance of the constitutional separation of powers, holding that executive agencies may *not* adopt regulations that go beyond the scope of the statutes written by Congress. *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2608 (2022) (in “extraordinary cases” of “economic and political significance,” and particularly when the agency uses “unheralded” or new authority, the agency must be able to point to a clear statement from Congress) (quotation marks omitted).

This case is not even close. Here, not only is there no clear statement from Congress; Congress has repeatedly considered similar language and chosen not to make it law. Title IX prohibits discrimination “on the basis of sex,” 20 U.S.C. § 1681(a). ***But the Department’s proposed rule goes far beyond sex discrimination.*** In fact, it

turns a simple anti-discrimination statute into a labyrinth of revisionist mandates governing every facet of public and private education from kindergarten through graduate school. Among other things, the rule guts due process and free speech on college campuses, impermissibly expands the scope of recipient liability, deputizes teachers and school officials to indoctrinate minors and undermine parents, and forces female athletes to compete against and share locker rooms with men.¹ In short, the rule is fundamentally flawed and should be withdrawn in its entirety.

A. Re-Definition of Sex

“Sex” is not a synonym for “gender,” nor is it a synonym for “gender identity.” The three terms are distinct and carry different legal significance. *See* Jennifer C. Braceras, *Legal Policy Focus: Sex is Better Than Gender*, Ind. Women’s Forum (Aug. 2022), <https://tinyurl.com/IWFDefinitions>. “**Sex**” is a scientific term that refers to either of the two categories of individuals (male or female) that occur in many species. “**Gender**” is a term borrowed from grammar that refers to cultural expectations regarding females and males. In other words, “gender is to sex as feminine is to female and masculine to male.”² “**Gender identity**” refers to how a person perceives him or herself. While “sex” is biologically determined, “gender” is culturally determined, and “gender identity” is subjectively determined.³

By its express terms, Title IX bars discrimination only “on the basis of sex.” It does not prohibit discrimination on the basis of “gender” or “gender identity.”⁴ Congress

¹ *See* Ind. Women’s Forum, Comment Letter Regarding Free Speech Concerns with Proposed Rule Redefining Unlawful Harassment under Title IX (Sept. 12, 2022); Ind. Women’s Forum, Comment Letter Regarding the Lack of Due Process Under Proposed Title IX Rule (Sept. 12, 2022); Ind. Women’s Forum, Comment Letter Regarding Parental Rights Under Proposed Title IX Rule (Sept. 12, 2022); Ind. Women’s Forum, Comment Letter Regarding Women’s Sports Under Proposed Title IX Rule Prohibiting Gender Identity Discrimination (Sept. 12, 2022).

² *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

³ Michael Robillard, *The Incoherence of Gender Ideology*, Quillette (Aug. 4, 2021), <https://quillette.com/2021/08/04/the-incoherence-of-gender-ideology/>.

⁴ The word “sex” as used in the statute cannot be interpreted to encompass “gender” or “gender identity.” Both the statute and previously adopted regulations repeatedly refer to “both sexes,” *see, e.g.*, 20 U.S.C. § 1681(a)(2); 34 C.F.R. § 106.21(c)(4), a phrase

is, of course, free to amend Title IX to include these additional categories. But to date it has not done so. On the contrary, it has considered several bills that would do just that (including the Equality Act), but it has not passed any of them.⁵

Nor is there any judicial precedent requiring the Department to prohibit discrimination on the basis of additional categories not mentioned in the statute. The Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), neither authorizes nor compels this result. *Bostock* never considered, much less determined, the proper definition of "sex" under Title IX. Even in interpreting Title VII, the *Bostock* Court declined to define the term, instead proceeding under the assumption that "sex" "refer[s] only to biological distinctions between male and female." *Id.* at 1739; *see id.* at 1746-47 ("agree[ing] that homosexuality and transgender status are distinct concepts from sex"); *id.* at 1736 (indicating an understanding that the trans-identified employee belongs to "a different sex" than the one with which the employee identifies). Under *Bostock*, sex and gender identity simply are not equivalent.

In any event, *Bostock* addressed only the question of workplace hiring and firing under Title VII. It did not purport to consider whether sex-specific workplace dress codes or single-sex workplace bathrooms or locker rooms are permissible under that statute. And it certainly didn't purport to interpret Title IX. *See Bostock*, 140 S. Ct. at 1753 (limiting decision to employment under Title VII); *Pelcha v. MW Bancorp., Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (*Bostock's* holding "extends no further than Title VII").

that would make no sense if the term "sex" were being used to describe the range of identifications included within the concept of gender identity.

⁵ *See, e.g.*, The Equality Act, H.R. 5, 117th Cong. (as passed by the House, Feb. 25, 2021) (proposing to prohibit discrimination based on gender identity); Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2021, S. 2186, 117th Cong. § 3(7)(D) (as introduced in the Senate, June 23, 2021) (proposing to include "gender identity" in the definition of sex); Student Non-Discrimination Act of 2018, H.R. 5374, 115th Cong. (as introduced in the House, Mar. 21, 2018) (proposing to prohibit discrimination based on gender identity in public schools); Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (as introduced in the Senate, Feb. 10, 2015) (same); Student Non-Discrimination Act of 2013, H.R. 1652, 113th Cong. (as introduced in the House, Apr. 18, 2013) (same); Student Non-Discrimination Act of 2011, S. 555, 112th Cong. (as introduced in the Senate, Mar. 10, 2011) (same); Student Nondiscrimination Act of 2010, H.R. 4530, 111th Cong. (as introduced in the House, Jan. 27, 2010) (same).

Nor is there any merit to the suggestion that *Bostock*'s reasoning should “automatically apply in the Title IX context.” *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). Indeed, by “applying *Bostock* to Title IX, the Department [has] overlooked the caveats expressly recognized by the Supreme Court and created new law.” *Tennessee v. U.S. Dep’t of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *21 (E.D. Tenn. July 15, 2022). This it must not do.

This analysis leads to our first request: ***Please clarify how the proposed rule can be reconciled with the statutory text adopting a binary view of sex.***

Please also clarify the authority under which the Department claims the right to redefine the term “sex” to include terms Congress has declined to include in the statute.

B. Liability for conduct outside the scope of Title IX

To constitute discrimination “under” an education program or activity, the recipient must have substantial control over *both* the harasser and the context in which the known harassment occurs. The proposed rule’s more expansive approach substantially deviates from the statute in ways not contemplated by Congress and, in so doing, violates the separation of powers.

In enacting Title IX, Congress conditioned federal funds on a school ending its *own* discriminatory conduct, not eliminating every sexist opinion, thought, or action taken by members of the campus community. Accordingly, the Supreme Court has held that the statute limits private causes of action based on employee or peer misconduct “to circumstances wherein the recipient exercises substantial control over *both* the harasser and the context in which the known harassment occurs.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999) (emphasis added). “Only then can the recipient be said to ‘expose’ its students to harassment or ‘cause’ them to undergo it ‘under’ the recipient’s programs.” *Id.* Where, for example, sexual misconduct “occurs during school hours and on school grounds,” then “the misconduct is taking place ‘under’ an ‘operation’ of the funding recipient.” *Id.* at 646. Only this type of behavior—misconduct the school is witnessing and, by its inaction, blessing—constitute violations of Title IX.

The proposed rule would adopt an extra-statutory test that changes the terms of the deal that Congress executed with the institutions receiving federal funds. For example, under proposed § 106.11, the Department states that “conduct that occurs under a recipient’s education program or activity includes but is not limited to . . .

conduct that is subject to the recipient's disciplinary authority." 87 Fed. Reg. at 41,571 (proposed § 106.11). In other words, the proposed rule would punish schools for conduct that does not occur "under" an education activity but rather that involves an individual the recipient *could* reprimand. The proposed rule thus expands a recipient's responsibilities beyond what the statute will bear. The Supreme Court adopted a two-prong test to define when harassment occurs under Title IX, requiring the institution to have control over the situation *and* control over the harasser. The proposed rule only requires one.

In addition, the Department states that "[a] recipient has an obligation to address a sex-based hostile environment under its education program or activity, *even if* sex-based harassment contributing to the hostile environment occurred *outside the recipient's education program or activity*." 87 Fed. Reg. at 41,571 (proposed § 106.11) (emphasis added). This, again, means that the Department is threatening to punish schools for conduct it does not control. That problem is magnified because the determination whether there is a hostile environment is a "fact-specific inquiry," on which the schools have no statutory guidance. 87 Fed. Reg. at 44103. Faced with these vague terms and broad potential liability, schools have every incentive to punish conduct that does not, in fact, violate the terms of the statute.

That is not the deal that Congress clearly and unambiguously offered schools. And recipient institutions cannot lawfully be held to these new requirements. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (holding that, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," and "[t]here can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it").

Please clarify the source of the Department's authority to bypass the requirements of Title IX as set forth in Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999).

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IWF and IWLC respectfully request that the Department withdraw the proposed rule.

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