



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 parental rights
affected by proposed Title IX rule.**

Dear Secretary Cardona:

Title IX makes one demand: “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.” 20 U.S.C. § 1681(a). Nothing in the text of that act addresses, much less impinges upon, the rights of parents to direct the upbringing of their children. If adopted, however, the Department of Education’s proposed rule would have profound negative consequences for parental rights across the nation.

Indeed, the proposed rule wrongly expands the scope of the statute’s coverage to include a prohibition against discriminating on the basis of “gender” or “gender identity,” even though Title IX only proscribes discrimination “on the basis of sex.” The Department’s unilateral decision to redefine “sex” to include these new categories will have significant, far-reaching, and negative consequences for parents. The proposed rule will encourage every school that accepts federal financial assistance to hide important health information from students’ own parents and to cut parents out of critical decision-making with respect to choices that have profound and lifelong consequences for their children. In doing so, the rule portrays loving homes as potentially abusive and will create conflicts with other federal and state laws that protect parental rights. The proposed rule should be withdrawn.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. 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 contained in the 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”). IWLC and IWF submit these comments to highlight the ways in which the proposed rule *pits educational institutions against parents* and deputizes administrators and teachers to undermine parental prerogatives.

Redefining “Sex”

One of the proposed rule’s major faults is the way in which it redefines the term “sex.” Although Title IX proscribes only discrimination “on the basis of sex,” the proposed rule would “[a]rticulate the Department’s understanding that sex discrimination includes discrimination on the basis of,” among other things, “gender identity.” 81 Fed. Reg. 41,391. There is no basis in the text of the statute for stretching the term that far. To the contrary, Title IX and its accompanying regulations adopt a biological and binary definition of sex. *See* 20 U.S.C. § 1681(a); Doriane Lambelet Coleman, *Sex in Sport*, 80 Law and Contemp. Problems 63, 69 n.29 (2017). Indeed, immediately after prohibiting discrimination on the basis of “sex,” the statute goes on to refer to “both sexes,” 20 U.S.C. § 1681(a)(2), a phrase 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.¹

That redefinition of “sex” to include gender identity, particularly as it is applied in the proposed rule, would have significant negative consequences for parents across the nation, as described below.

¹ The statute likewise refers to “Men’s” and “Women’s” organizations, “the membership of which has traditionally been limited to persons of one sex,” 20 U.S.C. § 1681(a)(6)(B), and requires that, if opportunities “are provided for students of one

A. Keeping Parents in the Dark

The proposed rule is problematic, first and foremost, because of the information the Department would require schools to keep from parents. The Department states that schools may need to update their internal policies to reflect that students have the right to participate in educational activities consistent with their chosen gender identities. 87 Fed. Reg. 41,560–61. The Department points to two examples of such policies that are already in place, one from California’s Department of Education and the other from Washoe County School District (NV). *Id.* at 41,561. But neither of those policies respects the right of parents to be informed if their child has chosen a new gender identity or if a school is socially transitioning their child. To the contrary, both policies explicitly require schools to *hide* a child’s new identity from his or her parents.²

School districts have already justified such duplicity by citing the same flawed interpretation of Title IX advanced by the Department:

sex, opportunities for reasonably comparable activities shall be provided for students of *the other sex*,” *id.* § 1681(a)(8) (emphasis added). The Title IX regulations governing sport, which Congress expressly instructed the Department’s predecessor to pass, explicitly require institutions to “provide equal athletic opportunity for members of both sexes,” 34 C.F.R. § 106.41(c); allow schools to provide separate teams for males and females, *id.* § 106.41(b); and refer to members of “*the excluded sex*,” singular, *id.* (emphasis added).

² In California, for example, disclosing that a student identifies as transgender without the student’s permission “may violate California’s antidiscrimination law,” and “schools must consult with a transgender student to determine who can or will be informed of the student’s transgender status, if anyone, including the student’s family.” *School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions*, Cal. Dep’t of Educ., (last modified Sept. 16, 2021), <https://www.cde.ca.gov/re/di/eo/faqs.asp#accordionfaq>. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student’s parents. The Washoe County School District instructs school staff to hide students’ gender identities from parents “so as to not reveal, imply or refer to a student’s actual or perceived sexual orientation, gender identity, or gender expression.” *Administrative Regulation 5161 Gender Identity and Gender Non-Conformity – Students*, Washoe Cnty. Sch. Dist., 2 (last modified Apr. 3, 2019), <https://tinyurl.com/WashoeReg>.

- In Alaska, a school district used Title IX as a justification for socially transitioning a child against her parents' wishes.³
- A Chicago public school chose to treat a girl as a boy and override the parents' expressed wish to treat their daughter according to her biological sex, citing a similarly flawed interpretation by Obama administration.⁴
- In Michigan, a middle school instructed staff to hide a biological boy's new gender identity from his parents and told the media that "the district is mindful of and compliant with its obligations under Title IX laws."⁵
- School officials in Washington state recently gave an 11-year-old girl the choice to stay in the boys' cabin on an overnight field trip without talking to her mother first.⁶

Socially transitioning children is the first step in a process that often leads to medical transition, including irreversible surgeries. Teachers and school officials are not qualified to set children on such a path, and certainly should not be hiding children's transitions from parents, who have the fundamental right to direct the medical care, upbringing, and education of their offspring, *see, e.g., Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925), particularly where doing so serves only to drive a wedge between parents and emotionally vulnerable children.

This leads to our initial request: ***Please clarify how keeping an emotionally vulnerable child's social transition from his or her parents advances the anti-discrimination goals of Title IX or otherwise benefits students.***

Please clarify how keeping a child's social transition from his or her parents is consistent with the parents' right to direct the medical care and upbringing of their offspring.

³ Kelsey Bolar, *Public School, Mental Health Professionals Deceive Mom to Secretly Affirm Daughter*, *Indep. Women's Forum*, (Aug. 25, 2022), <https://www.iwf.org/identity-crisis-susie/>.

⁴ Jay Keck, *My Daughter Thinks She's Transgender. Her Public School Undermined My Efforts to Help Her*, *USA Today*, (Aug. 13, 2019), <https://tinyurl.com/2s3ap3zm>.

⁵ Michael Lee, *Michigan Middle School Hides Student's Transgender Status From Parents*, *FOX News*, (June 10, 2022), <https://tinyurl.com/2hx65mjk>.

⁶ Kaylee McGhee White, *Biden's New Title IX Rules Deputize Teachers to Override Parents on Gender Identity*, *N.Y. Post* (Aug. 15, 2022), <https://tinyurl.com/hja89m42>.

Please clarify whether the Department would regard it as “discriminatory” or a potential violation of Title IX for a school employee to notify parents about their child’s “gender transition” or new “gender identity.”

Please clarify the extent to which the Department would consider it “discriminatory” under Title IX to treat a child according to his or her biological sex in accordance with parental wishes if the child prefers a different “gender identity.”

B. Conflict with Other Laws

Another difficulty with the proposed rule is the way in which it conflicts with other state and federal laws, many of which explicitly recognize that parents have a fundamental right to know what is going on with their children at school. For example, the federal Family Educational Rights and Privacy Act guarantees parents’ “right to inspect and review the . . . education records” of their children. 20 U.S.C. § 1232g(a)(1)(A)–(B); *see also* 34 C.F.R. § 99.10.

In addition, several states have passed legislation explicitly protecting parental rights. *See Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, Fla. Governor Ron DeSantis (Mar. 28, 2022), <https://tinyurl.com/yxyzsk9u>. For example, Florida passed both a “Parents’ Bill of Rights” and a “Parental Rights in Education” law. *See* Parental Rights, FLA. STAT. § 1014.04. Other states, like Arizona, have statutorily reinforced and strengthened long-recognized parental rights vis-à-vis schools. *See* Associated Press, *Arizona Governor Signs Parental Rights Bill*, 12 News (Apr. 29, 2022), <https://tinyurl.com/5cnhph72>. The proposed rule in this respect is an egregious abridgement of parental rights against the explicitly expressed democratic wishes of the electorate in a growing number of states. *See Protecting Parental Rights at the State Level*, <https://parentalrights.org/states/>.

While the Department claims authority for the proposed rule to preempt these kinds of state laws, *see* 87 Fed. Reg. 41,404–405, it does not explain why the Department has the power to overrule state legislatures all over the country in this manner, particularly when the proposed rule is so clearly beyond the Department’s mandate

of enforcing the text of the 1972 statute, which nowhere mentions “gender identity” and says nothing about parental rights.

This analysis gives rise to an additional request: ***Please clarify whether the proposed rule would yield to the rights of parents as established by other federal and state laws. If not, under what circumstances would a school be able to deny parents their right to inspect and review their children’s records?***

C. Impact on Families of Children with Special Needs

The proposed rule imposes a particularly heavy burden on parents of children with special needs. There is a growing recognition that many children who experience gender dysphoria also experience various other comorbidities, such as autism spectrum disorders,⁷ ADHD,⁸ depression or anxiety,⁹ and eating disorders.¹⁰ Under the federal Individuals with Disabilities in Education Act (IDEA), many of these conditions entitle a student to an individualized education plan (IEP) designed to support the student’s education. In contrast to the proposed Title IX rule, IDEA requires that parents be included in the decision-making process when a plan is developed to determine how a school will address a child’s needs. 20 U.S.C. § 1414(d)(1)(B). The Department’s requirement that schools conceal a child’s chosen gender identity may come into conflict with the cooperative approach required in creating an IEP, which many children affected by the proposed rule may have. There is no reason for the Department to apply Title IX—which is silent on the subject of parental rights—in a way that runs headlong into the demands of the IDEA and parents’ right to control the upbringing of their offspring.

⁷ Laura Dattaro, *Largest Study to Date Confirms Overlap Between Autism and Gender Diversity*, Spectrum (Sept. 14, 2020), <https://tinyurl.com/3c4zhhp3>.

⁸ Morgan Mandriota, *Are People With ADHD More Likely to Question Their Gender Identity?*, PsychCentral (last updated May 2, 2022), <https://tinyurl.com/bd7ksv4c>.

⁹ Cecilia Dhejne et al., *Mental Health and Gender Dysphoria: A Review of the Literature*, 28 Int’l Rev. Psychiatry 44 (2016).

¹⁰ Walter Milano et al., *Gender Dysphoria, Eating Disorders and Body Image: An Overview*, 20 Endocrine, Metabolic & Immune Disorders Drug Targets 518 (2020).

As a result, we request: *Please clarify how the different approaches mandated by the proposed rule and the IDEA will be reconciled when a child has both an IDEA-mandated individualized education plan, which requires parental involvement in the decision-making process, and a Title IX-mandated gender support plan, which may prohibit disclosing a child’s chosen gender identity to his or her parents.*

Please clarify how the proposed rule will apply to gender dysphoric children with underlying conditions.

Please clarify whether the Department will encourage schools to evaluate gender dysphoric children for mental health challenges and/or potential eligibility for special education and related services prior to affirming a child’s stated gender identity.

D. Opt-Outs from Sex and Gender Ideology Lessons

Because the proposed rule frames gender ideology as an anti-discrimination issue, there is a real danger that schools will point to the rule as a basis for teaching children that they can be born in the wrong body, without allowing parents to opt their children out of such lessons. *See supra* note 6.

We therefore ask the agency: *Please clarify whether the Department’s proposed rule allows schools to deny parental opt-out rights with respect to lessons relating to sex and gender.*

E. Worrying Implications Regarding What Constitutes “Harm”

The proposed rule provides “that adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than de minimis harm on the basis of sex.” 87 Fed. Reg. 41,534. The rule also requires that schools take “prompt and effective action” to stop alleged harm. *Id.* at 41,572 (proposed § 106.44).

While no one thinks schools should turn a blind eye to bullying or harassment, by providing that the recognition of biological reality can constitute harm, the proposed rule opens the door to the argument that a child is unsafe or being mistreated at home

if his or her parents do not “affirm” a chosen gender identity. Indeed, the fear that a parent may lose custody if he or she decides not to immediately affirm a minor child’s claimed identity, but rather to let things play out through watchful waiting, is neither hypothetical nor hyperbole. Already, mothers like Jeanette Cooper have lost custody battles over their refusal to “affirm” their child’s new identity. *See* Kelsey Bolar, *Chicago Mother Loses Custody of her Daughter—For Insisting That her Daughter is a Girl*, Indep. Women’s Forum (Aug. 29, 2022), <https://www.iwf.org/identity-crisis-jeannette/>. By suggesting that a parent’s failing to treat a child’s chosen—and often temporary—gender identity as a biological fact causes harm to that child, the Department is creating a dangerous precedent with significant potential negative ramifications for parents and families, especially with the mandatory reporting laws that are in place to protect children from true abuse.

That leads to our final request: ***Please clarify whether the proposed rule is meant to provide that parents who do not affirm a child’s desire to explore or adopt new gender identities cause “harm” to their children.***

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IWF and IWLC respectfully request that the Department withdraw the proposed rule, which promises to undermine parental rights and drive a wedge between parents and their minor children.

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