

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave., SW
Washington, D.C. 20202

Dear Secretary Cardona,

Family Policy Alliance is a leading national organization representing hundreds of thousands of Americans who support protecting opportunities and privacy for women and girls.

We are writing to urge the Department of Education to withdraw the Department’s proposal, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” RIN 1870-AA16.

The Proposed Rule

First, we would like to specifically address the implications of the Department’s proposal to redefine “sex” in Title IX.

By redefining “sex” in Title IX, the Department would force schools across the country to face an impossible situation—comply with a lawless reinterpretation of Title IX and put the safety and privacy of their students at risk, or protect their students and risk losing hundreds of millions of dollars in federal funding.

As the Department is aware, executive agencies are not permitted to redefine a federal statute. Rather, legislative power is vested in the Legislative Branch.¹ Redefining federal law through the regulatory process bypasses the legislative process and ignores the original legislative intent. The original intent of Title IX was not to encompass claims of discrimination based on gender identity. Tellingly, the text of Title IX itself explicitly allows educational institutions to maintain “separate living facilities for the different sexes,” indicating binary, biological sex.² Separating the sexes based on legitimate biological and anatomical differences—especially in the context of bathrooms, locker

¹ U.S. Const. art. I, § 1.

² 20 U.S.C. § 1686.

rooms, and showers—has a been consistent with Title IX and other federal nondiscrimination statutes for decades.

A reinterpretation of Title IX finds no basis in law or procedure. It appears that the Department of Education is attempting to use the enforcement power of the Executive Branch to enforce a law that simply does not exist, and it further appears they are operating outside the bounds of authority granted to the Executive Branch by Article II of the United States Constitution.

Further, the Legislative Branch enacted Title IX to ensure that our young girls would have equal access to educational opportunities, as the Department of Justice points out on its website.³ Congress clearly recognized binary, biological sex in passing Title IX and aimed to correct past inequalities for the female sex. It would be ironic for the Biden Administration to attempt to thwart the very purpose of that law by forcing biological females to once again compete against biological males for positions on athletic teams, educational opportunities, and awards and recognitions. A reinterpretation of “sex” would render Title IX devoid of purpose.

Even worse than operating outside of constitutional authority, a redefinition of “sex” threatens the ability of schools to provide an educational environment that protects the privacy and safety of their children. By redefining “sex,” the Department will be telling children that their objections to seeing the opposite sex in a state of undress in a vulnerable location such as a bathroom or locker room, regardless of intentions, is “discrimination.” This redefinition will also force schools charged with the responsibility to protect their students to instead place them at risk of becoming another voiceless statistic—too afraid or intimidated to speak up. As a family-centered organization, we simply cannot accept our children becoming voiceless victims.

Last year, parents were outraged when they discovered two girls were sexually assaulted in Loudoun County, Virginia. These incidents were a direct result of policies that include the idea of “gender identity” as encompassed by the term “sex,” a similar policy the

³ “...Title IX began its congressional life in earnest when an amendment was introduced in the Senate by Senator Birch Bayh of Indiana, who explained that its purpose was to combat ‘the continuation of corrosive and unjustified discrimination against women in the American educational system.’ 118 Cong. Rec. 5803 (1972).” Title IX Legal Manual, U.S. Dept. of Justice (accessed May 1, 2022), <https://www.justice.gov/crt/title-ix#II>.

Department of Education is scheduled to propose. The Department's proposal sets the stage for more Loudoun County tragedies in every public school nationwide.

***Bostock* Misinterpretation**

Second, we would like to address the misapplication of the United States Supreme Court's ruling in *Bostock v. Clayton County*.

The statute implicated in the *Bostock* decision was Title VII. The Supreme Court explicitly excluded other laws, such as Title IX, from consideration, as Justice Gorsuch stated in the [*Bostock v. Clayton County* majority opinion](#).⁴ The Court clearly stated the following:

*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.*** (Emphasis added).⁵

With this statement, the U.S. Supreme Court has clearly not addressed any other issue beyond Title VII. Therefore, they have not addressed Title IX and the Department of Education should not misapply this ruling in the Department's regulatory actions.

The Proposed Rule Is Out of Step with the American People

We would like to remind the Department of the incredible momentum of efforts to save girls' sports across the country. A total of 18 states have protected female athletes in their states: Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, South Dakota, Tennessee, Texas,

⁴ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

⁵ *Id.* at 31.

Utah, and West Virginia. Eight other states have considered Save Girls' Sports legislation this year alone.

This legislation acknowledges this simple truth: women and men are different. By pursuing these baseless rules, the Administration will be attempting to override the will of the people, as expressed in their legislatures, in each of these 18 states.

The strong support of these efforts shows not just the opinions, but the actions, of Americans across the country who are determined to protect opportunities for females. If the Department chooses to move forward with a proposal to redefine “sex” in Title IX, it will receive strong opposition from the American people.

Guidance and Rules

We acknowledge the Department’s claims that sports will be addressed separately. However, this attempt to downplay a losing political issue for this Administration will not only fail in the future, but it is an insult to the intelligence of the American people now.

In June of 2021, the U.S. Department of Justice and this Department issued “Confronting Anti-LGBTQI+ Harassment in Schools.” on Title IX. The guidance states in part:

On her way to the girls’ restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys’ restroom or nurse’s office because her school records identify her as “male.” Later, the student joins her friends to try out for the girls’ cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her, “those are the district’s policies.”⁶

This guidance indicates that the Department’s Office of Civil Rights intends for its interpretation of “sex” to include “gender identity” as it relates to pronouns, restroom facilities, and sports. But the Department also claims the current proposed rule does not apply to sports. Is the Department planning to revoke this guidance? The Department

⁶ U.S. Department of Justice and U.S. Department of Education Office of Civil Rights, *Confronting Anti-LGBTQI+ Harassment in Schools* (Washington, DC., June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

cannot pick and choose its application of “sex” in a federal statute. We have no reason to believe the Department will not apply its redefinition of “sex” in all instances.

Moreover, girls are already suffering because of this guidance. In August of this year, a group of cheerleaders locked themselves in a room to protect themselves after a male cheerleader identifying as a female allegedly assaulted one of the girls.⁷ The event took place at a cheerleading camp held at Ranger College after midnight.

Under the current guidance, the male cheerleader had access to the girls’ dorm. And if school personnel or staff told him to leave, the school would have been under an investigation, if not worse, by the U.S. Department of Justice and this Department’s Office of Civil Rights. The guidance has blatant disregard for the young women who were subjected to alleged violence, physical danger, victim-shaming and emotional fear.

Under this proposed rule, this incident would not be remedied. In fact, we heartbreakingly realize it will only continue to get worse for girls across the country. We urge this Department to completely revoke the harm of this proposed rule and its guidance.

Sports and Title IX

It is critically important for us to address the implications of this proposed change to Title IX in girls' sports.

Every girl should have the chance to compete on a level playing field. In today’s world, that means one that is reserved just for girls. Males naturally possess physical advantages over females. This natural advantage can result in them winning titles, scholarships, and other opportunities that should be reserved for girls.

⁷ Lee, M. (2022, July 31). *Trans cheerleader kicked out of camp after allegedly choking a female teammate*. Fox News. Retrieved August 1, 2022, from <https://www.foxnews.com/us/trans-cheerleader-kicked-camp-allegedly-choking-female-teammate>.

Again, as stated above, the Department cannot attempt to create separate meanings of “sex” in a federal statute. We have no other reason to believe the current proposed rule and application of “sex” to sports will be separate.

To be clear, women and girls still face challenges in sports in places like the NCAA, even with current Title IX protections. The nation recently watched with dismay as a male swimmer was awarded first place in an NCAA Women’s Swimming Championship event. In this event, the NCAA forced women to compete with a male, and girls everywhere lost. America’s girls deserve better.

During last year’s “March Madness,” Americans were appalled when they found out female athletes were given inadequate workout rooms, and hardly any media attention. The NCAA publicly apologized last year for denying women reasonable access to proper equipment and facilities.⁸

But if the Department of Education redefines “sex” in Title IX, in any part, they won’t just need to apologize for low-grade equipment and fewer TV cameras for women and girls. They will be allowing men into their locker rooms and hotel rooms when they travel- regardless of the supposed separation between the rules. We pray that the Department stops degrading America’s girls to be this Administration’s political pawns.

Human Life, Religious Liberty, and Title IX

We would like to address this proposed rule’s implication on unborn children, mothers, and the will of the people as expressed in their state’s laws.

This proposed rule seems expressly designed to hijack Title IX to create abortion sanctuaries in federally funded colleges and universities by requiring them to provide abortion or lose their federal funds. The proposed rule redefines “discrimination based on sex” to include “termination of pregnancy,” thereby requiring colleges and universities to make abortion accessible for their students. This would be forced even in

⁸ Deliso, Meredith. "NCAA Apologizes to Women's Basketball Players for Weight Room Disparity." ABC News. March 19, 2021. Accessed June 09, 2021.
<https://abcnews.go.com/Sports/ncaa-apologizes-womens-basketball-players-weight-room-disparity/story?id=76563430>.

states where the people have expressed their will through the state legislature and protected unborn life by significantly limiting abortion. Besides being unconstitutional, the administration would be unwise to so blatantly thumb its nose at the people and their express will, just to cost them expensive but frivolous litigation.

If this weren't concerning enough, the rule does not include a carveout for religious schools or universities. Instead, it attempts to require them to violate their sincerely held religious beliefs about the sanctity of human life or else forfeit the federal money they and their students rightfully receive. This makes the rule doubly unconstitutional on this count. No student or school should have to choose between their sincerely held religious beliefs and the funds their hard work and intellectual acumen have earned them.

Finally, science has concluded that life begins at the moment of conception—there is no “right” to “termination of a pregnancy,” and the proposed rule’s effort to conflate ending the life of a human being with sex discrimination is an insult to life everywhere, but especially to those who have experienced real discrimination because of their sex. It is demeaning to women to suggest that their success rests on their ability to sacrifice the lives of their own children. Linking abortion to educational opportunity is beyond the scope of Title IX, the Constitution, and human decency.

Curriculum and Parental Rights Concerns

Finally, we want to address how this proposed rule is likely to affect parental rights and curriculum in schools.

The rule states that “[B]iological distinctions between male and female” are “presumptively a form of prohibited sex discrimination.” This opens the door to potential Title IX discrimination claims evolving from such instances as “misgendering,” the notion that one has the right to be referred to by their “chosen” gender instead of their biological sex. It would also allow for claims to be brought for the use of biologically accurate pronouns instead of one’s “chosen” pronouns. Both these examples are of constitutionally protected speech that follows the science by adhering to biological reality. This rule would put Title IX at odds with the First Amendment, causing legal confusion and frivolous, costly litigation from a needless conflict of laws.

Additionally, it would allow for Title IX claims in the event that a scholarship specifically designated for women remains reserved for women over the objections of a male who

identifies as female. This is yet another example of how the many valuable opportunities Title IX has afforded women and girls will be threatened by this proposed rule change. Through this change, Title IX will undo the many benefits Title IX itself has granted women.

The proposed rule also facilitates classroom instruction in sexual orientation and gender identity in order to “reduce discrimination on the basis of sex.” Sexually-based subjects ought to be reserved for parents to speak with their children about—especially young children and certainly not without parental permission.

Beyond curriculum concerns, this language also facilitates the disturbing trend of school employees “socially transitioning” children behind parents’ backs, again under the guise of reducing sex discrimination. It is appalling that a public school employee, whose salary is paid by tax dollars, would have the hubris to withhold critical mental and physical health information about a student from that student’s parents.

Parents have the exclusive right to direct the upbringing of their children. Many states have taken legislative action to secure those rights, the best of which specifically require parental opt-in for sexual education and guarantee parental access to all school records on their children, preventing illegal behind-the-back transitioning. Is the Administration’s position that parents should be kept in the dark on matters related to their children’s health, education and well-being?

Conclusion

In conclusion, we urge the Department to withdraw its proposal to redefine the term “sex” in Title IX. In light of the recent 50th Anniversary of Title IX, we urge the Department to remember America’s millions of girls and women in high school and college. Remember their privacy, safety, dignity, and opportunities that are currently at risk because of this Department’s proposal. We urge the Department to consider the future generations of girls who deserve the same benefits and protections of Title IX as the women who have enjoyed them for the last 50 years. The future of American women is at stake.

Sincerely,

Craig DeRoche
President & CEO