

**Congress of the United States**  
**Washington, DC 20515**

April 12, 2022

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

Dear Secretary Cardona,

We write to you to express serious concern regarding the Department of Education's plan to issue a proposed rule reinterpreting the prohibition on sex-based discrimination under Title IX of the Education Amendments of 1972 to include "sexual orientation" and "gender identity." This policy sets the stage for the elimination of female sports, threatens students' privacy and safety, and reverses decades of hard-won progress and accomplishments by and for girls and young women. We ask you to withhold this rulemaking and rescind any related policy guidance.

On December 10, 2021, the Department of Education announced it will use its rulemaking authority to enforce Title IX's prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity, which would apply to any educational program or activity offered by a recipient of Federal financial assistance. Using this misguided interpretation, the Department provides several hypothetical scenarios that would constitute discrimination under Title IX and thereby be subject to investigation by the agency, including prohibiting a biologically male student who identifies as female from using the girls' restroom or trying out for a girls' sports team.<sup>1</sup> The Department justifies its position by incorrectly relying on the Supreme Court's decision in *Bostock v. Clayton County*.

However, the Court's actual holding in *Bostock* strictly stated, "employers are prohibited from firing employees on the basis of homosexuality or transgender status."<sup>2</sup> In response to concerns the Court's decision could be broadened to apply to a wide range of federal statutes prohibiting sex discrimination, the Court made clear it was not addressing other laws such as Title IX and went to great lengths to point that out.

As the Justices wrote:

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

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<sup>1</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>

<sup>2</sup> *Bostock v. Clayton County*, 590 U.S. \_\_ (2020) at 30.

the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.”<sup>3</sup>

In addition to *Bostock*, the Department is also bound by the Court’s previous holdings in cases specifically related to sex-based distinctions that demand the equal treatment of women and ensure they are not discriminated against, such as *Frontiero v. Richardson*<sup>4</sup> and *U.S. v. Virginia*.<sup>5</sup> Both cases make clear the inherent physical differences and immutable characteristics between biological men and women, while reinforcing sex classifications “may not be used, as they once were... to create or perpetuate the legal, social, and economic inferiority of women.”<sup>6</sup>

The policy the Department intends to enforce blatantly ignores *Bostock*’s initial premise that “sex” in Title VII is understood according to its ordinary meaning of biological distinctions between male and female, the Court’s clear limitation of its holding, and decades of precedent on sex-based distinctions in the law. This is an obvious attempt to expand the agency’s jurisdiction far beyond its legal and constitutional limits.

Every student should be treated with dignity and respect; however, to alter Title IX in this way has and will continue to result in widespread, invidious discrimination against women. Since its inception in the Obama Administration’s 2016 “Dear Colleague” letter, this policy has undermined the remarkable strides women and girls have made toward educational equality. By forcing schools to open private spaces, including restrooms, locker rooms, and housing accommodations, as well as athletic programs to individuals based on their self-identification of gender rather than biological fact puts students’ privacy, safety, dignity, and competitive opportunity at risk.

We have already seen the undeniable negative impact of gender identity policies on women’s sports. In the 2017, 2018, and 2019 Connecticut high school track seasons, two biological males identifying as female won 15 girls’ state championship titles, broke 13 individual meet records, and superseded girls in over 85 higher-level competition spots. In 2019, CeCe Telfer, competing for NCAA Division II Franklin Pierce University, was the first biological male to win a national title in women’s sports, placing first in the 400-meter hurdles. <sup>7</sup>

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<sup>3</sup> *Bostock v. Clayton County*, 590 U.S. \_\_\_ (2020) at 31.

<sup>4</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)(“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”)

<sup>5</sup> *U.S. v. Virginia*, 518 U.S. 515, 533-534 (1996). (“Physical differences between men and women, however, are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’... ‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’...to ‘promot[e] equal employment opportunity,’... to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were...to create or perpetuate the legal, social, and economic inferiority of women”) (emphasis added) (internal citations omitted).

<sup>6</sup> *U.S. v. Virginia*, 518 U.S. 515 (1996) at 534.

<sup>7</sup> A subsequent civil rights complaint against Franklin Pierce University for sex discrimination filed by Concerned Women for America was resolved by the Department of Education’s Office for Civil Rights as a violation of Title IX. FPU was required to discontinue its policy of allowing biological males identifying as women to compete in women’s sports.

Most recently, on March 17, 2022, Lia Thomas, a biologically male swimmer who had previously competed for three seasons on the University of Pennsylvania's men's team, won the NCAA Division I national championship in the 500-meter freestyle, beating two Olympic medalists and finishing 1.75 seconds ahead of the second-place swimmer, Emma Weyant. The science is clear: biological males have significant physical advantages that cross-sex hormones and other gender transition procedures do not and cannot erase. Allowing males to compete in female sports will continue to marginalize women and girls' achievements, block their opportunities to advance, and will ultimately eliminate women's sports as we know them.

Title IX was enacted to provide women and girls with a right to equal opportunities to obtain an education and pursue excellence in athletics. The Department of Education's unilateral rewrite in service of a misguided gender ideology violates both the letter and the spirit of this law, and we request the Department withhold and rescind any related rulemaking, guidance, or fact sheet.

In addition, we request responses to the following questions:

1. What legal justification does the Department of Education rely on for its expansion of the term "sex" in longstanding federal law to include sexual orientation and gender identity?
  - a. What reading of *Bostock v. Clayton County* supports such action?
2. What specific rulemaking authority does the Department of Education use to reinterpret the prohibition on sex-based discrimination under Title IX of the Education Amendments of 1972 to include "sexual orientation" and "gender identity?"
3. Is the department aware of the proven competitive advantage of biological males over females based on unalterable underlying biological characteristics?
4. Has the Department considered alternative modifications of education policy for students with transgender status short of expanding "sex" to include gender identity?
5. What communications from the White House support the Department's action on Title IX?
6. With what stakeholders, individuals, law firms, non-profits or other organizations has the Department met to discuss the expansion of Title IX's definitions to include sexual orientation and gender identity?
7. How will the Department handle the resulting claims of discrimination under Title IX that will arise from young women and girls who are denied equal educational opportunities in violation of the statute?

We thank you for your timely response and look forward to the immediate end of this unlawful and damaging policy.

Sincerely,

*Vicky Hartzler*

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Vicky Hartzler  
Member of Congress

*Virginia Foxx*

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Virginia Foxx  
Representative

*Elise M. Stefanik*

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Elise M. Stefanik  
Member of Congress

*Jim Banks*

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Jim Banks  
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*Mike Johnson*

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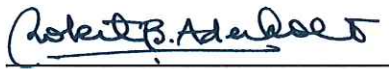
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