

CONCERNED
WOMEN *for* AMERICA

September 10, 2022

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
Washington, DC 20202

Dear Secretary Cardona,
Comment RE: Docket ID # ED-2021-OCR-0166

On behalf of the hundreds of thousands of women I represent as CEO and President of Concerned Women for America (CWA), I am writing in strong opposition to the proposed Title IX rule (Rule) titled “Nondiscrimination on the Basis of Sex in Educational Programs and Activities Receiving Federal Financial Assistance” (Docket ID # ED-2021-OCR-0166).

This Rule imposes radical viewpoints on matters related to sexuality and gender through civil rights laws that were intended to ensure equality of opportunity for women. It’s extreme and illegitimate mandates redefining sex discrimination will do nothing short of create chaos and unconstitutional dictates on schools, students, and society at large. Through this Rule, the U.S. Department of Education (Department) seeks to impose a conflicting, unworkable, and weaponized system of requirements and responsibilities on recipients under an expansive and unlimited scope of sex discrimination and “sex-based harassment” which vastly exceeds its statutory authority, constitutional legitimacy, or administrative capacity. In its voluminous preamble, the Department attempts to legitimize this hurricane of policy change on pinheads. The propose changes will hurt the very people the law is intended to protect: women.

CWA questions entirely the proposed repeal of the Final Rule issued in May 2020 which recognizes for the first time that sexual harassment, including sexual assault, constitutes unlawful sex discrimination, and advances appropriate due process in campus proceedings. Where is the evidence that the 2020 Rule is not working? What are the objective criteria the Department used to make a determination that it must be repealed and replaced? What are the costs associated with this reversal of implementation to educational entities? What are the costs to the federal government?

The impact of directing federal agencies to spend countless hours of time and resources without justification, thus throwing school policy into chaos, is economically and administratively significant. Before a further drop of ink is penned on this Rule, the Office for Civil Rights has an obligation to justify the legitimacy, the impact, and the cost of proceeding with a new rulemaking altogether. The 2020 Rule was finalized after a rigorous process accounting for hundreds of thousands of public comments. The Office for Civil Rights should be focused on fully implementing and enforcing the 2020 Rule, not replacing it.

Most certainly, the Department should not be gutting the very foundation of Title IX and the meaning of “sex” with the vague, undefined, subjective category of “gender identity” thus stripping women of vital protections under civil rights law. Mandating a new form of discrimination against women and girls is an

affront to our dignity and humanity. Being male and female is an unchangeable fact of the natural world that differentiates human beings from conception. It is part of our genetic makeup. Any physical anomaly, a disorder of sexual development, is a rare defect that does not change the binary differentiation of the sexes. This Rule hinges discrimination not on immutable biological sex, but on a fabricated, self-declared standard of perception or desire to be the opposite or some variation of a self-conceived identity.

Forcing a new interpretation of sex under Title IX is a direct threat to every woman and girl in America. What this Rule does in practice is nothing less than erase our status and protections as female. There is an inherent and insurmountable conflict in the scope and application of sex discrimination proposed in this Rule that disproportionately harms biological women and girls. It is already happening today: female students are being assaulted in school restrooms; female athletes are forced to surrender their sex-based privacy in the locker room and lose their rightful opportunities in their own sports.

A wholesale reinvention of the meaning of the protected class of sex under this Rule requires the Department to answer these questions: What is the quantifiable mental and emotional turmoil and physical risk to female students at every level of education who must accept males in their sex-separated spaces? What is the harm to female students who are now forced to compromise their dignity and vulnerability to novel interpretations of sex discrimination that deny them basic protections based on being created female? The Department must fully evaluate these questions and be able to provide relevant data on the impact of this monumental change to Title IX that no longer interprets sex as a binary, biological reality. You must be able to prove that it will not negatively impact equal opportunities nor impose harm, including disproportionately, to students of the female sex.

This Rule will straitjacket every educational program and activity to abide by its direct assault against our daughters and to perpetuate an insidious gender ideology that socializes students to believe they can be "born in the wrong body." The women of CWA object to this Rule in the strongest of terms, and we urge the Department to suspend this rulemaking.

In addition to these devastating consequences for female students, the substantial impacts, conflicts, and questions it raises for recipients and all responsible for complying could fill volumes. This comment is far from exhaustive. The Department has an obligation to recognize the actual effects of this Rule which turns the fundamental meaning of discrimination based on sex upside down. It cannot merely impose its preferred policy agenda on American educational institutions.

The Proposed Rule is Illegitimate *(Note: Bolded text is copied from the Rule.)*

The statute does not explicitly reference distinct forms of sex discrimination, such as discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity, or discrimination taking the form of sex-based harassment. Although it does not address these specific applications, the Supreme Court made clear in 1982 that "if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." (N. Haven Bd. of Educ., 456 U.S. at 521).

The Department makes an erroneous attempt to justify its authority. The Rule's claim that the Supreme Court's "scope that its origins dictate" confers such a sweeping unbounded scope must be challenged. For 50 years, sex discrimination under Title IX has been based on a foundational understanding of sex as

male and female. Female sex embodies related functions of pregnancy and lactation. How can the Department claim that the Supreme Court justifies that the “origins” of Title IX dictate “gender identity” as a category, when it categorically erases equal protection for female students which was the basis for Title IX enactment? Where specifically does the Supreme Court confer legitimacy for the Rule’s scope that a person’s self-declared “gender identity” constitutes “the scope that its origins dictate”?

The legitimacy of this Rule could fail entirely on this distorted application of Title IX’s true origin and intent.

Nothing in congressional statute or statutory interpretation by the U.S. Supreme Court has changed the meaning of sex under Title IX. The Department of Education has no legitimate authority to rewrite this federal civil rights law to redefine the immutable characteristic of sex to mean “gender identity” and thus force women to comply with allowing males who declare themselves women or girls to have access to sex-separated schools, facilities, scholarships or athletic programs designated for women or girls.

Justice Ruth Bader Ginsburg wrote the opinion in a landmark women’s equality case declaring that sex-based classifications are sometimes permissible because certain “differences between men and women” are “enduring” (*United States v. Virginia*, 518 U.S. 515, 533 (1996)). Justice Ginsburg understood the innate, physiological differences between being men and women and declared them “enduring.”

The Department’s Notice of Interpretation effective June 22, 2021, prohibiting discrimination on the basis of sexual orientation and “gender identity” claims *Bostock* “reasoning.” That interpretation and this proposed rule are in direct conflict with the Ginsburg standard in *United States v. Virginia* and set up an impossible conflict giving any male’s perceived claims about being a woman elevated protections over biological women.

Justice Ginsburg even pursued this question during oral argument in *Harris Funeral Home v. EEOC*: She asked, “Does it violate Title IX” to allow a male who has transitioned to play on the female team? The answer given by the ACLU emphasized that Title IX is a completely different statute with different standards.

You explicitly state that in *Bostock*, the Supreme Court “declined to resolve the parties’ dispute concerning the definition of “sex” under a civil rights law prohibiting discrimination on the basis of sex.” If that is the case, what gives the Department the authority to define sex under Title IX in a manner that has no basis in statute or the Supreme Court? *Bostock* gives no reasonable basis to confuse sex with “gender identity” under Title IX. Using its “reasoning” is illegitimate.

What the Supreme Court has ruled as recently as June 2022 is that legislating is the job of Congress, not the Executive Branch, therefore any rulemaking that goes beyond the scope of statute written by Congress is a violation of the Constitution’s separation of powers. How do you justify this legislative rulemaking in light of the decision in *West Virginia v. EPA*?

The proposed Scope of sex discrimination has no limits and imposes unbounded obligations that have not been defined, calculated or justified

§ 106.10 Scope. Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

The Department expressly states that the new categories of sex discrimination listed in Section 106.10 would not be exhaustive, as evidenced by the use of the word “includes.” You must answer these questions: How are recipients expected to know their obligations and responsibilities if the Department has no intent to limit its application? What is the objective basis for determining what to include or exclude? Since there are no definitions for “sexual orientation” or “gender identity” categories, what claims of sex-based discrimination or harassment might be included, for example, pedophilia as a sexual orientation? two spirit as a gender identity? transhuman identity (i.e., “furries”) as a “gender nonconforming” identity? Without clear, exhaustive categories and objective criteria for obligations and enforcement, this Rule falls on its own weight as entirely arbitrary and capricious.

Shamefully, the very protections of Title IX that were enacted to prohibit discrimination and advance equality of opportunity for female students are turned against them in the scope of this Rule. Allowing any gender feeling to overrule biological fact amounts to erasing our sex completely. “Gender identity” does not equal sex. Therefore, it should never be used to undermine Title IX protections for women. “On the basis of sex” as stated in Title IX should be based solely on the immutable genetic, anatomical fact of being male or female – not on gender perceptions.

Biology is not bigotry. As women, we expect that the sex discrimination protections of Title IX passed into law 50 years ago will continue to protect our safety, privacy, and opportunities based on our objective female status - as its origins intended. Whatever objective you have for “inclusion” must not be accomplished on the backs of natal women.

Threats to physical security, assault and rape, loss of athletic opportunity all have demonstrable disproportionate mental, physical and economic impacts on women, and by extension federal, state and local agencies and schools. The law enforcement response this will demand as female students are faced with physical threats, the loss of equal opportunity and benefits based on immutable sex, and the legal chaos it creates should be calculated and quantified. These short and long-term costs should not be underestimated. Biological men identifying as women are already claiming women’s trophies, records, scholarships and “female firsts”; girls are facing the mental and physical wounds of being assaulted by boys given free access to women’s spaces, and the emotional trauma of facing blatantly unfair competition. Look no further than Loudoun County, Virginia, or the University of Pennsylvania.

Title IX’s broad prohibition on discrimination ‘on the basis of sex’ under a recipient’s education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming.

The Department is requiring recipients to comply with multiple forms of self-declared “identities” that can be perceived, claimed or altered at any time. What is the definition of transgender? Cisgender? Nonbinary? Queer? Asexual? Gender-conforming or non-conforming? What objective, definitive source empirically catalogs these identities? These socially-constructed terms are entirely undefined, ever-changing and require no proof, diagnosis, or ongoing intent. None of these terms has ever been used in Title IX. Recipients cannot understand their obligations under this rule without clearly defined, non-circular, and objective classifications.

For entities to comply with the explicit and implicit obligations under the “broad prohibition on discrimination ‘on the basis of sex,’” interpreted in this Rule, the Department must clarify: How are recipients to keep up to date with evolving forms of gender expression? How must recipients adjudicate between a claim of perceived “gender identity” discrimination and the right of another student to freedom of expression and belief about the verifiable truth of human biology? Students’ rights to traditional sex-separated facilities, programs and activities as required under Title IX? Are female students required to accept any male in their locker rooms, restrooms, and dorm rooms? What about women’s rights to privacy and protection which have been upheld time and again by the courts? These questions are not rhetorical; they are reasonable, practical, and essential for the Department to answer in justifying the novel requirements imposed otherwise the discrimination described in the Rule is arbitrary and capricious.

§ 106.31(a)(2) ... 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.

In accordance with the newly conceived requirements under Section 106.31 (a), the Department must answer these questions to clearly define the criteria and methods by which a determination of the subjective category of “gender identity” can be made: What is the definition of “gender identity” under this Rule? Is it a dysphoria? Is it a disorder? Does it require a diagnosis? Who makes the determination? What is the proof required for a recipient to comply with a claim of “gender identity” that is inconsistent with or other than a student’s biological sex? Many who thought they were transgender at one point, later discover they really were not and return to identifying with their biological sex. How is a recipient expected to make determinations between one and the other? Failure to clearly define the criteria and methods for determining “gender identity” render this Rule arbitrary and capricious.

Does the Department agree or disagree that “gender identity” constitutes a disability under the Americans with Disabilities Act as a Fourth Circuit Court of Appeals panel recently concluded?

Because Section 106.31 (a)(2) establishes an unprecedented, newly-conceived standard of “more than de minimus harm” for the new category of “gender identity,” the Department must answer these questions regarding this standard or this Rule is arbitrary and capricious: What policies and practices are required in order to comply with the mandate against subjecting a person to “more than de minimus harm” on the basis of “gender identity”? Use of facilities? Use of any self-declared name even if not legally recognized? Use of self-declared personal pronouns? What is the definitive source of such “pronouns” that recipients are obligated to acknowledge? Under what circumstances?

How does the “more than de minimus harm” mandate account for age-appropriate instruction? What is the obligation of recipients to instruct and require compliance of students regarding new categories of sexual orientation and “gender identity” under this Rule?

How does the Rule specifically account for court decisions which have protected students’ and instructors’ rights to free speech and conscience against mandates requiring compliance with viewpoints regarding sexual orientation or “gender identity”? (e.g. *Meriwether v. The Trustees of Shawnee State University*, *Perlot v. Green*).

What is the Department's proof based on objective, long-term, evidence-based research methodologies that preventing participation consistent with "gender identity" subjects a person to "more than de minimus harm"? This question must be answered with objective, verifiable data if the Rule stands any legitimacy. Citing non-U.S. and substantially-disputed World Professional Association for Transgender Health standards, prevailing "gender affirming" standards of care which themselves are leading to serious, irreversible harm and regret, controversial U.S. medical association position statements, or studies based on unscientific survey data is not sufficient. Not when you are upending decades of women advancements.

The Department must answer this related question in order to provide a clear and convincing basis for this sweeping new standard that mandates a recipient's actions as it relates to "gender identity": What is the scientific and objective proof that gender affirmation through social transition and participation in educational programs and activities according to "gender identity" will not lead to further harm to that individual as well as to others? The tragic suicide of Yaeli Martinez was aided and abetted by California's Arcadia School district, [who admitted](#) they, "aggressively pursued the implementation of inclusive, gender-affirming laws, policies and supportive services for LGBTQ+ youth."

The Florida Department of Health conducted an exhaustive review of so-called standards of "gender affirming care" and issued guidelines based on the lack of conclusive evidence and the potential for long term, irreversible effects harming children. Specifically, the guidelines state that social gender transition should not be a treatment option for children or adolescents.

Does the Department intend to accept liability for students treated according to the Rule's mandate who, as a result, proceed to medical treatments that cause irreversible damage including sterility? Does the Department condone that progression and expect recipients to support and even facilitate it? Based on its exhaustive review of medical studies and expert opinion, Florida's guidelines include that unless a child was born with a verifiable disorder of sexual development, no minor under age 18 should be prescribed puberty blockers or hormone therapy. The Food and Drug Administration has issued new warnings on the use of puberty blockers for their adverse effects of brain swelling and loss of vision. Florida is correct in taking a cautious stance on the use of these potent drugs and recognizing how socialization in schools is contributing to the rapid rise of their use. From 2017-2021 in Medicaid alone the use of puberty blockers by children in Florida increased 270% and treatment with testosterone increased 166%. By contrast, behavioral therapy for gender dysphoria rose 63% proving a complete mismatch in treating the underlying causes and allowing for normal maturation to assist children identifying as other than their biological sex.

Would this Rule require recipients in Florida to ignore research-based state guidelines?

We have already seen how treating "gender identity" claims of certain students according to a standard of "more than de minimus harm" has a disparate impact on a greater number of other students, especially women and girls. To overrule 50 years of the understood binary definition of sex under Title IX, the Department must provide a full analysis of the impact of overturning sex-based protections. What is the Department's justification for overruling the sex-based rights of female students?

The Department's sweeping standard imposed here requires analysis both ways. Students who are forced to comply with a self-perceived identity that is scientifically untrue, forcing them to lie about a student's actual sex, also face harm. The Department cannot impose a Title IX mandate on sex

discrimination without calculating the cost to all students impacted. To impose this unprecedented, unstatutory, arbitrary and capricious standard requires the Department to prove there is no harm to other students.

Because this Rule could easily lead to an avalanche of new claims of sex-based discrimination or related liability based on the sweeping, unlimited scope and application of this mandate under Sections 106.10 and 106.31 (a)(2), the Department must calculate the economic cost to recipients who will be liable for complying with this “gender identity” mandate, assisting in the socialization of gender transition, and even faced with the liability of being an accomplice when students later regret the consequence of their “gender identity.” The Rule provides no such analysis. Recently a school district in Kansas lost a lawsuit when a teacher sued for being forced by administrators to deceive parents about their child’s “gender identity.” This is proof of the legal jeopardy this rule proposed to inject in the educational system across America.

Overall, how does the Department fully justify a nationwide mandate to require schools to conform to a professed “gender identity” when socialization leads to harmful and irreversible medical procedures, followed by serious long term health consequences, including sterility, and even higher incidences of suicide decades later? What is the explicit obligation of recipients to support and participate in the controversial and destructive practice of “gender affirming care” that leads children to procedures damaging healthy bodies? By requiring that students are treated according to “gender identity,” the Department is obligating recipients to perpetuate a deception about a student’s sex and forcing other students to comply. Why is a condition of “gender identity” disorder not treated as a mental health crisis that is handled outside the educational program or activity, not as part of it?

The Department has an extremely high bar to clear to justify a complete reversal of the foundational understanding of sex under Title IX, and its extreme application of the new scope of sex discrimination required in this Rule. The burdens imposed by these additional obligations cannot be ignored.

Furthermore, the Rule’s claim of harm in connection with an expressed “gender identity” sets up conflict with parents. Is it the intent of the Department that the rights of parents to direct the social and emotional well-being of children be undermined in this Rule? If not, what are the safeguards to ensure that recipients do not socialize children in secret, including by calling them different names at school, act without consent and in contradiction to parents, and report parents to enforcement agencies?

Despite the claim, athletics are not exempt

The indefensible extremism and far-reaching impact of this radical rewrite of Title IX is exposed by the very fact that the Department tries to deflect the impact on female athletics under Section 106.41.

The Department asserts that an additional rulemaking on “the question of what criteria, if any, recipients should be permitted to use to establish students’ eligibility to participate on a particular male or female athletics team” will be forthcoming. In and of itself, this should cause this Rule to be stopped in its tracks. There is no way to untangle the significance of these proposed changes and their direct impact on athletics. This Rule should not be allowed to move forward absent a full and coherent accounting of all proposed changes to Title IX, including athletics. Athletics is a cornerstone of the responsibility of educational institutions achieving equality of opportunity on the basis of sex. Women’s sports are a central part of the purpose of Title IX dictated by its origins.

The Biden Administration has already concluded, and issued a notice of interpretation, that athletic participation is based on “gender identity.” Nothing in this Rule repeals that guidance, nor the statements of interest in related federal court cases laying out the de facto policy of this Administration.

The Department has failed in its duty to investigate the serious civil rights complaint file by my organization on March 17, 2022, against the University of Pennsylvania (UPenn). Ignoring this case is proof of the Department’s position. The harassment and discrimination that female swimmers at UPenn faced this year is indefensible and unconscionable. Schools are required to uphold U.S. law, not the policies of the NCAA or Biden Administration erroneous interpretation. This Rule should not proceed without an explicit limitation that women’s athletics are for female athletes only if the Department truthfully intends to have it not apply to athletics.

Unless an exemption to athletics is explicit in this Rule, recipients surely will be expected to follow the stated position in the Departments of Justice and Education’s filing of its Statement of Interest against West Virginia’s law protecting women’s sports for female athletes. That Statement claims that Title IX does not permit West Virginia to have a law limiting participation in sports designated for women and girls to biologically female athletes.

Furthermore, the Rule does nothing to exempt obligations of imposing a radical, undefined and unbound category of “gender identity” under proposed Section 106.31(a)(2). The caveat of male and female participation in athletics contradicts the Rule’s sweeping claim that not accepting “gender identity” subjects a person to “more than de minimus harm” and, therefore, constitutes sex discrimination and grounds for sex-based harassment claims.

Assumptions are not good enough. If it is the Department’s intention to exempt changes to athletic programs, including all-sex-based facets of these programs including facilities, locker rooms, travel, and housing, then this rulemaking must include language specifying a full and complete exemption, not a passing reference. All educational institutions receiving federal financial assistance must understand that nothing in Title IX today gives them the authority to allow males to compete in sports designated for females. In fact, doing so would constitute a violation of Title IX, and the Department’s Office for Civil Rights should be in the business of enforcing the law now. The fact that the Department itself has promulgated an interpretation struck down by a federal court for its illegitimacy makes this all the more relevant. Anything less than defending the rights of female athletes under Title IX is perpetuating the injustice of inaction and causing more than de minimus harm to female student athletes at every level.

The Rule proposes to repeal Section 106.41(d) which eliminates a date for compliance. The justification here is that the date is outdated, but it is not replaced by any period for complying which means that any interpretation of this section from the date of a final rule will take effect immediately. This will impose significant burdens on schools to conform with requirements that will be immediately enforceable to athletics.

The Department cannot have it both ways. Either male/female sex is the foundation for the basis of sex, or it’s not. Including “gender identity” overrules male and female sex and is in direct conflict with the foundational intent of Title IX’s meaning of “on the basis of sex.” The Rule does nothing to justify this change or address the substantial chaos and harm it will inflict in education and athletics as written.

Teachers are required to be government informants

Under proposed § 106.44(c)(1), an elementary school or secondary school would be obligated to require any employee who is not a confidential employee to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

The requirement that an employee who “has information about conduct that may constitute sex discrimination” is obligated to report this conduct to the Title IX coordinator imposes substantial obligations on teachers and administrators that must be clarified as relates to the Rule’s new unlimited scope of sex discrimination. What is the type of “conduct that may constitute sex discrimination” as it relates to “gender identity”? What actions in particular? Would addressing a student according to actual male and female sex constitute sex discrimination if the student self-identifies otherwise? What about prohibiting a male student from using the girls’ restroom? Who decides if this “identity” at any given time is legitimate? Is any instance of “misgendering” conduct that constitutes discrimination and must be reported to the Title IX coordinator? How is the Title IX coordinator expected to adjudicate these claims if the Rule is not limited to or exhaustive of defined areas of potential discrimination? The Rule gives no guidance on this obligation making any enforcement arbitrary and capricious.

This requirement is nothing short of an impossible set up for schools and for teachers who are working to educate their students and not be trapped in an endless web of socially-constructed identities and activist demands that impose new burdens and liabilities on them. How does the Department expect any school to pay for the endless training required or operate under the liability that any teacher is expected to tattle on another for any conduct that may be perceived by another as discriminatory or inflicting some subjective standard of harm?

This mandate is nothing less than a weaponization of sexual and gender ideology forced on elementary and secondary schools using teachers as enforcers against each other. It is shameful that the Department seeks to use schools and teachers as their pawns to advance an ideological agenda distracting them from the primary academic function they are expected to fulfill.

What is the reach of “federal financial assistance”?

Section 106.2 includes a definition of “federal financial assistance.” The broad interpretation of this definition could have very far-reaching impacts. Recent Title IX district court rulings in Maryland and California classify tax-exempt status as federal financial assistance. It is imperative that the Department answer the following questions as this will determine the scope of entities affected by the Rule: Does the Department agree with the interpretation in these cases that federal financial assistance under Title IX includes tax-exempt status? Does the Department consider tax exempt status federal financial assistance under the proposed rule’s definition of Title IX? Is tax-exempt status federal financial assistance “extended by a law administered by the Department”? Would this apply to the National Collegiate Athletic Association?

What is the meaning of “services of federal personnel” in the definition of federal financial assistance? Does it include services of Internal Revenue Service personnel? If so, what kind of services? What about the U.S. Department of Health and Human Services? The U.S. Department of Agriculture? The U.S. Department of Justice?

The proposed rule fails to provide clarity to the meaning and reach of: “*Federal financial assistance* means any of the following, when authorized or extended under a law administered by the

Department.” In light of these recent federal court decisions, the proposed rule must address this question and clarify its meaning to avoid unintended or inconsistent interpretations.

Does “Pregnancy or Related Conditions” require abortion compliance?

In Section 106.2, the Department has revised the definition of “pregnancy or related conditions” which includes termination of pregnancy. Does the definition of “termination of pregnancy” include abortion? Unless the meaning of “termination of pregnancy” does not include abortion, this rule raises serious questions for recipients that must be clarified:

If the definition does include abortion, why is that not clarified? What is the responsibility of recipients to prevent discrimination on the basis of “termination of pregnancy as it relates to abortion? What is the responsibility for accommodation?

The Department must answer these questions about the application and reach of the meaning of “pregnancy or related conditions” and its inclusion of “termination of pregnancy” under this Rule as they will determine the manner in which the definition is implemented in practice:

What is the responsibility of recipients as a matter of sex-based discrimination and harassment? Are recipients required to support, facilitate, refer for abortion services? What would a recipient be required to teach on the subject? Would a recipient’s opposition to abortion constitute sex discrimination? Would expressing a viewpoint that opposes abortion constitute sex-based harassment? Would any campus-based program or activity which advocates for the protection of unborn human life be considered sex-based harassment?

Title IX’s current abortion neutrality clause is not sufficient to cover the myriad of new requirements that could arise in defining “termination of pregnancy” as part of the broad, unlimited scope of prohibiting sex-based harassment under Section 106.10.

CWA strongly opposes this Rule and its implication for weaponizing a pro-abortion agenda through education institutions that would silence pro-life viewpoints and require accommodation of abortion.

Does “Parental Status” allow schools to act in loco parentis?

Section 106.2 proposes a new definition of “parental status” that includes “in loco parentis.” The Department must clarify the limits of this category in connection with its possible interpretation across the entire Rule.

The Department must answer these questions about the application and reach of the meaning of “in loco parentis” under this Rule as they will determine the manner in which the definition is implemented in practice: Does the definition of parental status empower any recipient or person acting on behalf of a recipient to seek the “trust” of a minor regarding the minor’s sexual practice or gender identity? Does not affirming a child’s “gender identity” constitute sex discrimination? Does not affirming a student’s gender identity constitute child abuse or neglect? Does the rule give authority to act “in loco parentis” if parents request the school not treat their child according to expressed “gender identity”? Does the requirement in 106.31(a)(2) that mandates not treating students according to their self-declared “gender identity” would cause “more than de minimus harm” give schools or teachers the authority to

act “in loco parentis?” What long-term studies and empirical data support this radical conclusion that would have such extreme disruptive consequences in a child’s life and relationship with parents?

CWA strongly opposes any school acting in place of parents in directing the social, emotional, or physical well-being of students regarding their actual or expressed identity. The American people strongly reject this, too, as we have seen in recent months. This definition paves a path to empower teachers or school administrators to usurp the role of parents in protecting their children from the harms of gender ideology and school-based sexualization. Whereas a clear and limited understanding exists regarding schools operating “in loco parentis” in the case of reporting child abuse or neglect, the construct of this Rule’s scope of sex-based harassment and position of this Administration are grounds for concern. Could a recipient declare that parents refusing to have the school conform to a minor child’s self-declared identity are committing “child abuse or neglect” and seize this as grounds for acting “in loco parentis” against the parent’s judgment? This is not hypothetical. Parents today are suing schools for acting in their place in accommodating gender identity claims. Studies show most children grow out of the discomfort about their sex if their bodies are allowed to mature naturally through puberty, but the psychological, emotional and familial ruptures of this profound government intrusion into their lives are completely unknown.

Under this Rule would schools not willing to abide the “gender identity” craze risk non-compliance as a matter of sex-based harassment or discrimination? Will this Rule be yet another way for the government to target religious organizations and schools, like it did for years to the Little Sisters of the Poor? Again, we are not talking hypotheticals here. Such abuses are to be expected under these types of extraordinary, rash, and poorly crafted directives.

The Department seeks comments on the intersection between the proposed Title IX regulations and FERPA.

The Department must follow and enforce the Family Educational Rights and Privacy Act (FERPA). Apparently, this is not happening because schools are using “gender support plans” or related tactics condoned by your Department to withhold information from parents. Some are not seeking parental involvement or consent in matters concerning sexuality and “gender identity” [and being sued](#) (e.g., *Parents Defending Education v. Lin-Mar School District*) when schools keep students’ information in teacher files instead of student records.

Because of the substantial challenge to “gender identity” policies in schools today, this Rule has significant implications as a mandate for all Title IX recipients. The Department must answer these questions: Does the Rule expect schools to use “gender support plans” like the one [recommended by Gender Spectrum](#)? Can these plans be used without the knowledge, involvement, and/or consent of parents? Does the Rule require it? What are the obligations of school personnel to communicate with parents and make all student information available upon request? The Rule’s requirements for treatment of students “gender identity” must be made crystal clear otherwise this Rule is arbitrary and capricious.

Rightfully, school districts today [are being sued](#) (e.g., *Doe v. Madison Metropolitan School District*) for influencing students on matters of sexuality and “gender identity” and withholding information from parents. This Rule should expressly prohibit, not perpetuate, the misguided policies of schools interfering with and overruling fundamental parental rights and prohibit any action or interference of an

educational institution that creates conflict between parents and their students regarding sexuality and gender expression.

The purpose and intent of FERPA law must dictate obligations in this Rule. Families have the right to know what school administrators and teacher keep in any file concerning their children – all are educational records if they are kept by the school. Schools have an obligation to be fully transparent.

The Protection of Pupil Rights Amendment which requires that parents consent to any surveys before they are given and can opt out must be upheld as well. Such a survey is also a student record, and parents should have access to these records as well under FERPA.

The women CWA represents oppose any interpretation or confusion of this Rule that condones the use of so-called “gender support plans” to social transition a child. No actions pertaining to a student’s sexual orientation or gender identity should be taken by schools and certainly not without parental knowledge and consent. Harassment or intimidation on the basis of sex that comes in the form of bullying parents about their child’s sexual or gender identity or through record keeping or withholding of information must be explicitly prohibited in this rule.

Flawed analysis of impact to small businesses and other laws

What exactly does this Rule require of a small business for accommodating claims on the basis of “sexual orientation” or “gender identity” that reach beyond the narrow ruling of *Bostock* related to hiring and firing employees? What does this Rule require of recipients in refereeing the competing claims to sex discrimination it imposes with such a broad and sweeping scope?

The Rule has not come close to estimating the cost to small businesses as obligated under the Regulatory Flexibility Act. The Rule imposes new and costly burdens on small businesses by requiring compliance with a new definition of sex discrimination and sex-based harassment that is unlimited in scope and requires adjudicating inherent conflicts between the rights of female students on the basis of biological sex and those claimed on the basis of “gender identity” - a term which has no definition, limitation or proof. Any boy or man can claim identity as a girl or woman.

Legal fees alone for any one case could far exceed the insufficient accounting of cost cited to a local educational agency in the Rule. Add to this the additional responsibility and liability of exposing recipients to violations of the First Amendment rights of teachers and students with forced “gender identity” mandates and interfering with the fundamental rights of parents and this Rule’s costs far exceed any benefits. Court cases across the country (e.g., *Vlaming v. West Point School Board*, *Ricard v. USD 475 Geary County Schools School Board Members*) prove this Rule which mandates sex discrimination is no longer based on the foundational meaning of sex could expose any small business to untold levels of liability. The Department has produced no legitimate analysis of the substantial burden that small businesses will face under this unjustified, ill-conceived and illegitimate rewrite of Title IX.

The effect of this Rule does not stop at the schoolhouse door. The Rule directly impacts statutes incorporating Title IX. The Department has an obligation under this rulemaking to consider how the broad scope and application will interact with and affect other federal laws. In particular, what is the expected cost and impact of this novel and sweeping rewrite of sex discrimination to: 42 U.S.C. §300w-7(a)(2), 42 U.S.C. § 708(a)(2), 42 U.S.C. § 300x-57(a)(2), 42 U.S.C. § 18116, 42 U.S.C. § 300x-57(a)(2), 20

U.S.C. § 1231e(b)(2), 42 U.S.C. § 10406(c)(2)(B)(i), 20 U.S.C. § 1066c(d), 42 U.S.C. § 12635(a)(1), 42 U.S.C. § 5057(a)(1), 20 U.S.C. § 7914, 29 U.S.C. § 3248?

Conclusion

Male and female sex biologically determined is the only relevant, objective interpretation of Title IX's on the basis of sex.

This illegitimate, unauthorized Rule overturns immutable biological facts about the binary nature of sex in addition to 50 years of protecting women on the basis of sex. The Rule's unlimited scope of sex discrimination and explicit and implicit mandates are arbitrary and capricious because they expand recipient obligations without clarifying meaning or accounting fully for the inevitable conflicts, impacts and costs to recipients, covered entities, and female students.

CWA opposes fully the illegitimate rewrite of Title IX in its entirety. Such action would itself be prejudicial against women, producing an untold number of adverse effects to their safety and dignity. It is tragic that the Department already has wasted thousands of man hours distracted from its mission to implement and enforce existing law and defend women from sex discrimination.

This Rule is nothing short of an executive power grab advanced by an ideological agenda that a majority of Americans oppose. In direct violation of the Administrative Procedures Act, the Department is legislating through these rules. There is no corner of an educational program or activity that will not be impacted, in addition to many other existing programs that incorporate Title IX by statute. The very act of overruling the reality of sex-based differences – male and female – as the guidepost for sex discrimination with an undefined subjective category of “gender identity” and an untouchable “more than de minimus” standard literally erases the meaning and objective standard of “on the basis of sex” under Title IX.

Covid-19 created chaos for schools forced to comply with shifting mandates, vague criteria, and a refusal to follow the science. The damage to children's lives and learning is even more clear today as they return to school this year. This Rule will throw schools into chaos multiple times greater and harm children for similar but much more insidious reasons. Students today are being harmed and deceived by an ideology that confuses identity with reality and the truth about being male and female. Despite the claim that this Rule clarifies the law, there is no justification for the administrative activism behind it which has already been struck down in federal district court. Formalizing a process which will lead to the same result of legislative rulemaking that literally dismantles the meaning of sex would be nothing less than a rejection of the origins of Title IX law, an erroneous application of *Bostock*, and a violation of the rights of women burdening recipients with arbitrary, capricious and costly new mandates. There is no legitimate and defensible justification for proceeding with this Rule. It must not stand.

Sincerely,



Penny Young Nance
CEO and President
Concerned Women for America