

August 2, 2022

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Via <https://www.federalregister.gov>

Docket ID ED-2021-OCR-0166

Dear Secretary Cardona:

This letter presents comments on the Notice of Proposed Rulemaking “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” published by your department in the *Federal Register* on July 12, 2022. By assuming that the U.S. Supreme Court decision in *Bostock v. Clayton County* applies to Title IX of the Education Amendments of 1972, the U.S. Department of Education is misrepresenting the Court’s opinion.¹

Even worse, the policies that have ensued and will ensue from the rejection of biological sex in exchange for the ambiguous ideas of “sexual orientation and gender identity” are policies that reject the hard-earned rights of women in American law, culture, and education.² Furthermore, equating the unscientific definition of “gender” with biological sex puts women’s physical safety at risk. The proposed rule would also weaken parents’ consent concerning their children’s health care, while setting up potential conflicts with state laws. Finally, it would weaken due process protections for students on college campuses.

Lawmakers’ primary purpose in Title IX was to give women and girls equal opportunities in education. Records of the design and passage of Title IX clearly demonstrate that its intent was to remove barriers to education opportunity that women faced.³ Title IX’s provisions state: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”⁴ These amendments contain provisions for K–12 and postsecondary schools, not employment, which is the focus of Title VII of the Civil Rights Act.

The Court’s *Bostock* decision applies to Title VII, which protects Americans from employment discrimination. Thus, federal officials’ intention to replace “sex” with “sexual orientation” and “gender identity” not only misrepresents the biological differences between men and women, but it is also not based on an appropriate reading of the Court’s decision in *Bostock*. The opinion

¹ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

² Susan Ware, *Title IX: A Brief History with Documents* (Long Grove, IL: Waveland Press, 2007), <https://www.waveland.com/browse.php?t=645>.

³ See “Celebrating the 25th Anniversary of Title IX,” 143 Cong. Rec. 4218 (1997).

⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., Public Law No. 92-318, as amended by section 3 of Public Law No. 93-568, 88 Stat. 1855.

states that an employer cannot terminate an individual's employment solely because the individual chooses to "assume" a different "gender" than his or her biological sex.

Justice Neil Gorsuch wrote specifically in *Bostock* that Americans would be wrong to "worry that our decision will sweep beyond Title VII to other federal or state laws" because "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."⁵ Gorsuch went on to write: "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.'"

Thus, any further application of the Court's opinion in *Bostock* to other provisions in federal law, such as Title IX of the Civil Rights Act, is without warrant.

Second, replacing "sex" with "gender" puts minors at risk. School officials who allow students who assume a different "gender" to use sex-segregated spaces of their choice are allowing biological males to use female facilities, including bathrooms and locker rooms. This is obviously an invasion of girls' privacy and threatens their safety. Responding to complaints from parents, doctors and politicians in the United Kingdom have urged schools not to allow boys to use girls' bathrooms.⁶ Media reports quote parents saying that their school-aged daughters are refusing to attend school for fear that boys will see them in the bathroom. Reports of minor-age girls stating publicly that they do not want to take their clothes off in front of boys in a bathroom surfaced in Illinois, after a school board adopted a policy that allows boys to use girls' bathrooms.⁷

Furthermore, allowing individuals to use bathrooms of the opposite sex causes undue conflict between children. For example, boys (who did not report any gender confusion) in an Alaska school took advantage of the school's policy that allows opposite-sex bathroom access and posted messages online saying they intended to use the girls' bathrooms.⁸ A group of boys then attempted to enter a girls' bathroom, which resulted in a physical fight between a girl and a boy.⁹

⁵ *Bostock v. Clayton Cty.*, 140 S.Ct. at 1737.

⁶ Sanchez Manning, "Girls Are Skipping School to Avoid Sharing Gender Neutral Toilets with Boys after Being Left to Feel Unsafe and Ashamed," *Daily Mail*, October 7, 2019, <https://www.dailymail.co.uk/news/article-7542005/Girls-skipping-school-avoid-sharing-gender-neutral-toilets-boys.html>.

⁷ Mary Margaret Olohan, "High School Girl Chokes Up as Trans Student Rejoices Over Unrestricted Access to Bathrooms: 'My Privacy Is Being Invaded,'" *Daily Caller*, November 20, 2019, <https://dailycaller.com/2019/11/20/high-school-girl-trans-student-bathrooms/>.

⁸ Meagan Flynn, "Boys Stormed a Girls' Bathroom to 'Protest.' A Girl Got Expelled for Fighting Back, Family Says," *The Washington Post*, April 15, 2019, <https://www.washingtonpost.com/nation/2019/04/15/boys-stormed-girls-bathroom-protest-girl-got-expelled-kneeing-one-them-crotch-family-says/>, and Tasneem Nashrulla, "A High School Expelled a Girl for Kicking a Boy Who Entered the Girls' Bathroom to 'Protest' Against a Trans Student," *BuzzFeedNews*, April 15, 2019, <https://www.buzzfeednews.com/article/tasneemnashrulla/alaska-expelled-girl-kicking-boy-bathroom-transgender-protos>.

⁹ Fairbanks Star Borough School District, "UPDATED: North Pole High School Student Discipline," April 15, 2019, <https://web.archive.org/web/20190910091729/https://www.k12northstar.org/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=3780&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=498044&PageID=1>.

The girl did not want the boys in the girls' bathroom, and the boys were abusing the bathroom-access policy.

The replacement of "sex" with "sexual orientation and gender identity" in Title IX also supports the idea that biological males should be allowed to participate in female athletic competitions, which has resulted in injury to girls due to aggressive contact. In Guam, a boy assuming the opposite gender injured three girls in a rugby match. His participation was already a violation of the World Rugby Transgender Guidelines.¹⁰ In other physical contests, men have severely injured women. In 2018, a male mixed-martial-arts fighter claiming to be a woman competed against a female fighter and broke her orbital bone (eye socket). The male fighter later posted on social media: "And just so you know, I enjoyed it."¹¹

Joanna Harper, a competitive runner, consultant for the International Olympic Committee, medical doctor, and a biological male who competes as a female, said that "allowing [boys to compete in girls' athletics] with their serious testosterone-based advantage threatens the very fabric of women's sport."¹² World champion athletes who have supported LGBTQ rights, such as Martina Navratilova, have also argued that boys should not be allowed to compete in women's sports.¹³

Third, rewriting Title IX to replace "sex" with "gender" could weaken parents' consent for critical health decisions made about their children. Some schools are already withholding information about children changing their pronouns, names, and "gender."¹⁴ In New Jersey, for example, school officials do not have to receive parental consent before encouraging students to assume a different gender or telling them to seek medical treatment for gender dysphoria.¹⁵ In Kansas, Topeka Public Schools' "Guidelines for Transgender Students at School" states: "School personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others, including parents..."¹⁶ Chicago Public Schools'

¹⁰ Luke Gentile, "Transgender Rugby Player Slams Female Athletes, Coach Says Three Injured," *The Washington Examiner*, April 14, 2022, <https://www.washingtonexaminer.com/news/watch-transgender-rugby-player-slams-female-athletes-coach-says-three-injured>.

¹¹ Monique Curet, "Social Media Posts Misperceive Transgender MMA Fighter's Injuries to Opponents," PolitiFact, March 16, 2021, <https://www.politifact.com/factchecks/2021/mar/16/facebook-posts/social-media-posts-misperceive-transgender-mma-f/>, and Steven Rondina, "MMA Fighter Paints Her Opponent Red After Slashing Elbow, Violent Slam," Bleacher Report, March 24, 2018, <https://bleacherreport.com/articles/2766462-mma-fighter-paints-her-opponent-red-after-slashing-elbow-violent-slam>.

¹² Doug Robinson, "In Search of a Level Playing Field. How Male-to-Female Transgender Athletes Are Impacting Women's Sports," *Deseret News*, July 29, 2021, <https://www.deseret.com/2021/7/29/22584285/male-to-female-transgender-olympic-athletes-impact-womens-sports-president-biden-mike-lee-weigh-in>.

¹³ Rich McHugh, "Tennis Pro Martina Navratilova Weighs in on Trans Swimmer," NewsNation, March 17, 2022, <https://www.newsnationnow.com/us-news/sports/lia-thomas-upenn-transgender-swimmer-martina-navratilova/>.

¹⁴ Evan Gerstmann, "Court Enjoins School District from Withholding Information from Parents about Their Children's Gender Identity," *Forbes*, October 1, 2020, <https://www.forbes.com/sites/evangerstmann/2020/10/01/court-enjoins-school-district-from-withholding-information-from-parents-about-their-childrens-gender-identity/?sh=5330337048e9>.

¹⁵ Jonathan Butcher, "New Jersey Schools Want to Talk to Kids About Sex—and Keep it a Secret," Fox News, April 14, 2022, <https://www.foxnews.com/opinion/new-jersey-schools-phil-murphy-sex-education-jonathan-butcher>.

¹⁶ Topeka Public Schools, "Guidelines for Transgender Students at School," Regulation No. 8100-03, August 17, 2015, https://cdn5-ss11.sharpschool.com/UserFiles/Servers/Server_8252759/File/About%20Us/Policies%20and%20Regulations/8000

“Supporting Gender Diversity Toolkit” states the school district takes a “gender-affirming approach,” and lists among its resources for students the Broadway Youth Center, which provides medical services including “gender-affirming hormone therapy.” The toolkit makes clear that parents are not a necessary partner in the process: “If a student and/or a student’s parent(s)/guardian(s) does not desire a Student Administrative Support Team or Gender Support Plan, the Support Coordinator will work with the student and/or student’s parent(s)/guardian(s) (*if they are involved*) to coordinate gender-affirming supports without the aforementioned tools.”¹⁷ (Emphasis added.)

In 2019, Planned Parenthood announced it was opening 50 “Wellbeing Centers” in high schools across Los Angeles in partnership with the school district¹⁸ in order to provide contraception, “reproductive health” services, and “social/emotional well-being” resources to students.¹⁹ Students do not have to obtain parental consent to access such services in California. Planned Parenthood offices across the country offer “gender affirming care,”²⁰ though it is unclear whether such services are currently offered in Planned Parenthood’s school-based Wellbeing Centers. However, as one parent recounts, student communication with Planned Parenthood representatives provides easy access to such services. Students can text Planned Parenthood employees, who tell them how to make appointments for “gender-affirming care” and the nearest clinic for obtaining it.²¹

Moreover, although Planned Parenthood does not provide cross-sex hormones and therapy to children under the age of 16, the organization refers students of minor age to UCLA’s Gender Health Program.²² That program instructs children that chest binders, medications to suppress menstruation, voice therapy to change voice pitch, and hair removal are options that are “appropriate at any age,” and that hormone therapy options are “typically pursued in the teenage years.” The type of social transition that some schools support while leaving parents in the dark—which would likely be encouraged by rewriting Title IX to interpret “sex” to mean “gender”—is the entry point to pharmacological gender transition, which can then be the gateway to surgical transition. The UCLA office goes on to explain that options “typically pursued later in adolescence or adulthood” include “surgery to change the appearance and function of the genitals” and “surgery to remove reproductive organs (ovaries, uterus, testicles)”

[%20-%20Students/Reg%208100-03%20-%20Guidelines%20for%20Transgender%20Students%20at%20School.pdf](#).

¹⁷ Chicago Public Schools, “Supporting Gender Diversity Toolkit,” <https://www.cps.edu/globalassets/cps-pages/services-and-supports/health-and-wellness/healthy-cps/healthy-environment/lgbtq-supportive-environments/supportinggenderdiversitytoolkit2.pdf>.

¹⁸ Ariana Eunjung Cha, “Planned Parenthood to Open Reproductive Health Centers at 50 Los Angeles High Schools,” *The Washington Post*, December 11, 2019, <https://www.washingtonpost.com/health/2019/12/11/planned-parenthood-open-reproductive-health-centers-los-angeles-high-schools/>.

¹⁹ Los Angeles Unified School District, “Student Health and Human Services,” <https://achieve.lausd.net/Page/17773>.

²⁰ Planned Parenthood of Metropolitan Washington, DC, <https://www.plannedparenthood.org/planned-parenthood-metropolitan-washington-dc/patient-resources/gender-affirming-care>.

²¹ Brenda Lebsack, “Schools Conspire with Outside Groups Behind Parents’ Backs to Counsel Kids on Myriad Gender Choices,” *The Daily Signal*, February 2, 2022, <https://www.dailysignal.com/2022/02/02/schools-conspire-with-outside-groups-behind-parents-backs-to-counsel-kids-on-myriad-gender-choices/>.

²² Planned Parenthood Mar Monte, “Gender Affirming Hormone Therapy,” <https://www.plannedparenthood.org/planned-parenthood-mar-monte/patient-resources/gender-affirming-care>.

among other procedures.²³ Notably, the existing drugs that doctors are giving people for medical transitions are experimental. There are no rigorous studies using randomized control trials to document the effects of using hormone therapies and puberty blockers on minors who struggle to understand their sex.²⁴ Doctors are using these treatments without reliable evidence on the outcomes of these interventions.

According to Emily Bazelon in *The New York Times Magazine*, which obtained access to the World Professional Association for Transgender Health’s (WPATH’s) latest guidelines—which will be released to the public later this summer—researchers expressed concern about the current medical interventions that doctors are using on minors who are confused about their sex. Bazelon writes:

The final version of [WPATH’s] chapter said that because of the limited long-term research, treatment without a comprehensive diagnostic assessment “has no empirical support and therefore carries the risk that the decision to start gender-affirming medical interventions may not be in the long-term best interest of the young person at that time.”²⁵

Despite the lack of research, there is reason to believe that such interventions will become more common in K–12 school-based clinics, and that a rewriting of Title IX to redefine “sex” as “gender” would widen the information gap between parents and their children. Advocates of cross-sex hormones and puberty blockers see a clear connection between access to “gender-affirming” medical treatments and the Biden Administration’s proposed Title IX rewriting. As explained in the *Harvard Law Review*:

[L]ack of access to gender-affirming care continues to mitigate trans youths’ access to sex-segregated school bathrooms and locker rooms. The Biden Administration is expected to reinstate the Obama Administration’s 2016 Title IX guidance that required schools to allow students to use facilities consistent with their gender identities. Even so, there are reasons to think access to gender-affirming medical care is still relevant to determining trans youths’ access to such facilities. First, trans youth may be less comfortable coming out as transgender to their peers and school officials if they have not started medical transition. Second, school districts and courts may be more willing to accept in practice a trans student’s use of facilities consistent with their [sic] identified gender if they [sic] have provided evidence of being diagnosed with dysphoria or undergoing gender-affirming medical treatment.²⁶

²³ UCLA Gender Health Program, “Pubertal Blockers,”

https://www.uclahealth.org/sites/default/files/documents/Pubertal_Blocker_Patient_Information.pdf.

²⁴ Jay P. Greene, “Puberty Blockers, Cross-Sex Hormones, and Youth Suicide,” Heritage Foundation *Backgrounder* No. 3712, June 13, 2022, <https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide>, and Michael Biggs, “Puberty Blockers and Suicidality in Adolescents Suffering from Gender Dysphoria,” *Archives of Sexual Behavior*, Vol. 49, No. 7 (October 2020), pp. 2227–2229, <https://doi.org/10.1007/s10508-020-01743-6>.

²⁵ Emily Bazelon, “The Battle Over Gender Therapy,” *The New York Times Magazine*, June 15, 2022, <https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html>.

²⁶ “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors,” *Harvard Law Review*, Vol. 134, No. 6 (April 2021), <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>.

In some cases, schools are putting children on this path without parental consent, cutting parents out of the decision-making process, so that by the time parents are involved in medical interventions it is too late to reverse course. Moreover, parents are often threatened with the emotional blackmail of hearing that their child may be susceptible to suicide if they do not allow such a gender transition to progress. By excluding parents from these essential conversations, schools are not acting as partners to parents.

Furthermore, new and more rigorous research than has previously been conducted finds that access to cross-sex hormones and puberty blockers *increases* teen suicide rates. A study by our Heritage Foundation colleague Jay Greene finds that easing minors' access to cross-sex interventions is associated with a 14 percent increase in the adolescent suicide rate. As Greene concludes, "Rather than facilitating access by minors to these medical interventions without parental consent, states should be pursuing policies that strengthen parental involvement in these important decisions with life-long implications for their children."²⁷

Rewriting Title IX to reinterpret "sex" to mean "gender" would further erode parents' decision-making authority about their children's health while supporting policies that could do long-term harm to children.

Fourth, the proposed rule change also conflicts with state laws that require students to participate on sports teams with others of the same sex, and restrict bathroom and locker room access to individuals of the same sex.²⁸ As a result of this regulatory change, federal officials would coerce state and local officials to change their policies and threaten federalism. Some state lawmakers have prohibited individuals who assume a different "gender" from using restrooms of the opposite sex, for example. This federal policy change is not based on science but on ideology, and it threatens state sovereignty through a regulatory adjustment to one of the most significant civil rights laws in the federal code.

Some federal departments and agencies, such as the Food and Nutrition Service in the U.S. Department of Agriculture (USDA), have already disregarded the rulemaking process and issued guidance stating that school officials must adopt policies that are unsafe for women, such as the bathroom, locker room, and athletic policies described here.²⁹ The USDA is threatening to withhold federal money for school meals, such as from the National School Lunch Program and the School Breakfast Program, from schools that do not adopt the Administration's unscientific, ideologically driven agenda on "gender." Federal officials created these meal programs to help children from low-income families who would otherwise not have food to eat. The Biden Administration is now threatening to withhold taxpayer resources for meals if a school does not adopt the Administration's false interpretation of the Supreme Court's *Bostock* decision.

²⁷ Greene, "Puberty Blockers, Cross-Sex Hormones, and Youth Suicide."

²⁸ See, for example, Maria Caspani, "South Carolina Governor Signs Transgender Sports Ban," Reuters, May 17, 2022, <https://www.reuters.com/world/us/south-carolina-governor-signs-transgender-sports-ban-2022-05-17/>, and Matt Lavietes, "Oklahoma Governor Signs Transgender Sports Ban," NBC News, March 30, 2022, <https://www.nbcnews.com/nbc-out/out-politics-and-policy/oklahoma-governor-signs-transgender-sports-ban-rca22210>.

²⁹ News release, "USDA Promotes Program Access, Combats Discrimination Against LGBTQI+ Community," U.S. Department of Agriculture, May 5, 2022, <https://www.fns.usda.gov/news-item/usda-0100.22>.

Finally, the proposed rule change would reverse regulatory changes led by former U.S. Secretary of Education Betsy DeVos. In 2020, after reviewing 124,000 comments to the *Federal Register* for that proposed change, the Education Department ruled that sexual harassment and sexual assault violated the law and equated to sex discrimination.³⁰ This rule change restored the “beyond a reasonable doubt” standard of proof in sexual assault cases on college campuses, along with due process protections for the accused. Research from our Heritage colleague Sarah Parshall Perry documents that more than 800 cases of wrongful accusations were filed against universities in the past decade. In half of the cases that progressed through state court systems, the courts ruled against the universities.³¹ There is no evidence that students need or would benefit from a return to a previous version of Title IX regulations that created a lower standard of proof in sexual assault cases and did not afford the accused due process rights.

There is no scientific basis for changing “sex” to “sexual orientation and gender identity” in Title IX of the Civil Rights Act. Such a change misrepresents the U.S. Supreme Court’s opinion in *Bostock*, threatens the American system of federalism, removes important due process protections for students in higher education, and puts girls and women in danger of physical harm. Existing hormone treatments, such as puberty blockers, are experimental medical interventions. Research has not demonstrated the effects and long-term outcomes of these treatments, standard practice for other drugs. The Administration should abandon this change immediately across all departments.

Sincerely,

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³⁰ U.S. Department of Education, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” Final Rule, *Federal Register*, Vol. 85, No. 97 (May 19, 2020), p. 30026, <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

³¹ Sarah Parshall Perry, “Title IX Revision Fails Women and Law,” Heritage Foundation *Legal Memorandum*, forthcoming, 2022.