

April 4, 2022

Ms. Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: U.S. Department of Education's Pending Title IX Rulemaking

Dear Assistant Secretary Lhamon:

We write on behalf of 26 diverse organizations united by a deep concern about the Department of Education's ("ED" or "Department") decision to propose rules to rewrite its regulations implementing Title IX of the Education Amendments of 1972, as amended ("NPRM"). The Department has announced that the NPRM will be consistent with two Executive Orders from President Biden directing ED to reconsider its Title IX rule issued on May 19, 2020 (the "2020 Rule")¹ and to revisit past policies and guidance indicating that Title IX does not prohibit discrimination on the basis of gender identity or sexual orientation.² We understand that ED transmitted the text of the NPRM to the Office of Management and Budget on February 17, 2022, and that ED intends to publish the proposed rule in April of 2022.³

An historic regulation, the 2020 Rule recognizes for the first time that sexual harassment, including sexual assault, constitutes unlawful sex discrimination. The 2020 Rule also provides important provisions ensuring due process in campus grievance proceedings, protecting free speech and academic freedom, and clarifying an institution's entitlement to a religious exemption under Title

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020).

² U.S. Department of Education, Statement of Regulatory Priorities, at 6, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_1800_ED.pdf.

³ See U.S. Department of Education, Statement by U.S. Department of Education Assistant Secretary for Civil Rights Catherine E. Lhamon on Title IX Update in Fall 2021 Unified Agenda and Regulatory Plan, Dec. 10, 2021, <https://www.ed.gov/news/press-releases/statement-us-department-education-assistant-secretary-office-civil-rights-catherine-lhamon-title-ix-update-fall-2021-unified-agenda-and-regulatory-plan>.

IX. In contrast to previous administrations, the 2020 Rule also holds public elementary and secondary schools accountable for sexual harassment, including sexual assault, an acutely important change given the epidemic of sexual assault by teachers and staff on students in our nation's public schools. It is critical that the Department preserve the 2020 Rule; in any event, there is simply no need for regulatory action at this time.

To date, neither the White House nor ED has pointed to any plausible reason why it might be necessary to amend the 2020 Rule. There has been no indication that this framework, in its brief existence, has proven unworkable, and to this point litigation over the regulation has gone favorably for the government, despite the many attempts seeking judicial abrogation of the 2020 Rule. Discarding this framework will produce a whiplash effect for educational institutions that have only recently adjusted their procedures to implement the 2020 Rule and contribute to massive uncertainty among students, faculty members, and others regarding their rights in the Title IX grievance process. Hastily dispatching this carefully balanced process will only serve to devalue the core American principles of due process of law, freedom of speech and religion, academic freedom, and equal treatment on the basis of sex that lie at the heart of the 2020 Rule.

Indeed, the 2020 Rule requires institutions to observe fundamental principles of due process when investigating and adjudicating allegations of sexual harassment. The regulations require schools to treat all parties fairly, conclude grievance processes in a reasonably prompt time frame, and apply a presumption that the respondent is not responsible for the alleged conduct until the decision-maker determines responsibility.⁴ In light of the long-term, consequential impacts a determination of responsibility could have on the respondent, the 2020 Rule allows schools to require the decision-maker to use a clear and convincing evidence standard in reaching a determination, rather than the less-demanding preponderance of the evidence standard used in civil suits.⁵ Schools must offer both parties written notice of the allegations and give them the opportunity to submit relevant evidence and review and challenge evidence submitted by others.⁶ Trained Title IX personnel, free from bias and conflicts of interest in the proceeding, must consider this evidence objectively without prejudging the facts or making credibility determinations on the basis of a person's status as complainant or respondent.⁷

With reference to postsecondary institutions and reflecting the absolute importance of cross-examination in the search for the truth in adversarial proceedings, the 2020 Rule provides for each

⁴ 85 Fed. Reg. 30,026, 30,575 (May 19, 2020).

⁵ *See id.* (requiring Title IX coordinators to “[s]tate whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard”).

⁶ *Id.* at 30,576.

⁷ *Id.* at 30,575.

party’s advisor—but not the party—to ask the other party and any witnesses relevant questions while shielding complainants against inappropriate questions about prior sexual behavior.⁸ In sum, the 2020 Rule requires a fair process, equality in treatment, and impartial decision-making for parties to Title IX procedures. We strongly urge the Department to retain these common-sense protections.

At the same time, the 2020 Rule for the first time imposes legally binding requirements that, upon receiving notice of a sexual harassment allegation, schools must immediately reach out to the reported victim and offer educational supportive measures to protect safety, deter harassment, or promote educational access. These supportive measures must be offered regardless of whether the reported victim, or the school’s Title IX Coordinator, ever files a formal complaint that initiates an investigation. In other words, the 2020 Rule requires schools to provide support for complainants, while refraining from premature punishment of respondents, thereby ensuring that using Title IX to deter sexual harassment is consistent with both the purpose of Title IX’s non-discrimination mandate, as well as the constitutional protections and fundamental fairness Americans expect.

In addition to bolstering due process protections for parties in Title IX proceedings, the 2020 Rule constructs strong guardrails to prevent the abuse of the Title IX process to chill protected speech and constrain academic freedom. While recognizing for the first time that schools have a legal obligation to respond promptly to reports of sexual harassment and offer appropriate support to alleged victims,⁹ the 2020 Rule follows U.S. Supreme Court precedent¹⁰ by shielding speech and expressive conduct from Title IX enforcement unless a reasonable person would find it so severe, pervasive, and objectively offensive that it denies a person equal educational access.¹¹ In this way, the regulations recognize that schools must not use the Title IX grievance process to punish people merely for exercising their right to free speech in an academic context, even when such speech is offensive. It is important to note that this standard only applies to speech and expressive conduct, not to *quid pro quo* harassment or sexual assault.¹² We call on the Department to demonstrate its commitment to freedom of speech and academic freedom by retaining this narrowly and carefully drawn definition of expression that may result in sanctions against individuals.

We further urge the Department not to modify or abrogate the regulation concerning the exemption from Title IX for institutions controlled by a religious organization.¹³ The 2020 Rule provides

⁸ *Id.* at 30,577.

⁹ *Id.* at 30,574.

¹⁰ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

¹¹ 85 Fed. Reg. 30,026, 30,574 (May 19, 2020).

¹² *Id.*

¹³ 85 Fed. Reg. 59,916, 59,980–59,981 (Sept. 23, 2020).

valuable guidance to a faith-based institution wishing to exercise its right to a religious exemption without unnecessary and burdensome filing requirements. It is difficult to see what benefits would flow from ending a rule offering greater clarity and less burden to an educational institution that seeks to claim an exemption to which it is already entitled as a matter of law. We are concerned that the administration’s ultimate aim is to place additional, needless, and undue regulatory burdens on faith-based institutions that wish to claim such an exemption.

Finally, we are alarmed by the administration’s extremist position that ED should extend Title IX, by regulatory fiat, to prohibit discrimination on the basis of gender identity and that simply acknowledging a student’s sex, and providing certain services and activities separately but comparably to each sex, could constitute unlawful discrimination. Such a view completely ignores the language and structure of Title IX.¹⁴ Indeed, the very text of Title IX demonstrates an understanding that “sex” is male or female—binary and biological.¹⁵ Underscoring this understanding of “sex,” the statute expressly authorizes separation based on male or female “sex” in certain circumstances.¹⁶ Along these lines, Title IX expressly allows for certain single-sex educational institutions and organizations¹⁷ and does not prohibit educational institutions “from maintaining separate living facilities for the *different* sexes.”¹⁸ Longstanding Department regulations also permit such programs to “operate or sponsor separate teams for members of *each* sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport” and requires universities to consider male or female sex in allocating athletic scholarships.¹⁹

Adding gender identity as a nondiscrimination category under Title IX is particularly disturbing to those of us who have cheered the great progress that has occurred in women’s sports since the passage of Title IX nearly fifty years ago. Such a move would unquestionably damage athletic opportunities for women in schools, colleges, and universities and wreak havoc on Title IX’s requirement to establish and maintain a level playing field for women in athletics. Should ED add gender identity to Title IX’s protections, schools would have no choice but to allow biological men

¹⁴ Any notion that *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), extends to Title IX is entirely unpersuasive and countered by *Bostock’s* own language. The Supreme Court expressly limited its decision in *Bostock* to Title VII; the Court was painstakingly clear that *Bostock* does not affect the meaning of “sex” as that term is used in Title IX. *Bostock*, 140 S. Ct. at 1753.

¹⁵ 20 U.S.C. § 1681(a)(2) (describing how an institution may change “from . . . admit[ting] only students of one sex to . . . admit[ting] students of both sexes”).

¹⁶ 20 U.S.C. § 1681(a)(6)(B) (referring to “Men’s” and “Women’s” associations and organizations for “Boy[s]” and “Girl[s],” “the membership of which has traditionally been limited to persons of one sex”).

¹⁷ 20 U.S.C. § 1681(a)(1)-(9).

¹⁸ 20 U.S.C. § 1686 (italics added).

¹⁹ 34 C.F.R. §§ 106.41(b) (italics added) and 106.37(c).

to participate on women’s sports teams, causing biological women to lose positions on athletic teams, opportunities to compete, prizes, and scholarships, as well as risk bodily harm in certain sports. This development would turn on its head Title IX—a statute that Congress has made clear creates and protects opportunities for biological women in athletics.²⁰ As any other interpretation would exceed the Department’s statutory authority under Title IX, any policy regarding the extension of Title IX to gender identity must emerge through the legislative process, not rulemaking.

We strongly urge the Department to set aside its Title IX rulemaking and to allow institutions to continue their efforts to comply with the 2020 Rule.

Sincerely,

James C. Blew
Co-founder
Defense of Freedom Institute for Policy Studies

Gene Hamilton
General Counsel
America First Legal Foundation

Chad Wolf
Executive Director and Chief Strategy Officer
America First Policy Institute

Dan Morenoff
Executive Director and Secretary
American Civil Rights Project

²⁰ Sex Discrimination Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484.

Devon Westhill
President and General Counsel
Center for Equal Opportunity

Vernadette Broyles
President and General Counsel
Child and Parental Rights Campaign

David Nammo
Executive Director
Christian Legal Society

Colleen Holcomb
President
Eagle Forum

Max Eden
Author of *Why Meadow Died* (Post Hill, 2019)

Ryan T. Anderson
President
The Ethics and Public Policy Center

Meg Kilgannon
Senior Fellow for Education Studies
Family Research Council

David Hacker
Vice President of Litigation & Senior Counsel
First Liberty

Kevin Roberts
President
The Heritage Foundation

Jessica Anderson
Executive Director
Heritage Action for America

Inez Stepman
Senior Policy Analyst
Independent Women's Forum

Jennifer C. Braceras
Director
Independent Women's Law Center

Carrie Lukas
Vice President
Independent Women's Voice

Bethany Kozma
Founder and CEO
Keystone Policy

Tiffany Justice
Co-founder
Moms for Liberty

William E. Trachman
General Counsel
Mountain States Legal Foundation

Kaitlyn Schiraldi
Associate Attorney
Mountain States Legal Foundation

Yael Levin-Sheldon
Chief Communications Officer
No Left Turn in Education

Nicole Neily
President
Parents Defending Education

Ashley Jacobs
President
Parents Unite

Kimberly S. Hermann
General Counsel
Southeastern Legal Foundation

Cherise Trump
Executive Director
Speech First

Rick Esenberg
President/General Counsel
Wisconsin Institute for Law & Liberty