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September 12, 2022

The Honorable Alejandro Reyes
Office of Civil Rights
U.S. Department of Education
400 Maryland Ave. SW, PCP-6125
Washington, D.C. 20202

Subject: **America's Future** Comments in Response to Notice of Proposed Rulemaking: "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," ED-2021-OCR-0166-0001

Dear Mr. Reyes:

These Comments presented in response to your Department's above-referenced Notice of Proposed Rulemaking ("NPRM") are being filed on behalf of **America's Future**, a nonprofit educational and legal organization, established in 1946, which is exempt from federal income tax under Internal Revenue Code § 501(c)(3). Among its missions is to conduct research and inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

INTRODUCTION

America's Future files these Comments to urge that the proposed rule never be adopted because it violates Title IX and exceeds any authority granted to the Department of Education by Congress. The radical redefinition of the word "sex" contained in the proposed rule runs directly counter to the text and history of Title IX. It is arbitrary and capricious because it constitutes a complete reversal of the Department's well-reasoned opinion in August 2020 that Title IX in fact prohibits the denial of opportunities to biological females by allowing biological males to monopolize opportunities intended to be preserved for biological females. It is predicated on the unscientific falsehood that people can choose their sex, and it violates the very nature of the Created Order.

COMMENTS

I. The text and history of Title IX make clear that it refers to "sex" as a binary term encompassing only biological male and female.

When Congress enacted Title IX in 1972, the only commonly understood meaning of "sex" was biological sex. In that same year, 1972, the United States explained to the Supreme Court that "sex, like race and national origin, is a visible and immutable biological characteristic." U.S. Br. at *15, *Frontiero v. Laird*, No. 71-1694, 1972 WL 137566 (U.S. Dec. 27, 1972). The U.S. Supreme Court determined that "sex" is "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

All popular dictionaries at that time defined "sex" as referring to the physiological distinctions between males and females. The dictionaries defined only two sexes and did so with reference to the reproductive functions of the two. Webster's Third Dictionary defined "sex" as "one of the two divisions of organic esp. human beings respectively designated male or female," or "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction."[1] Other contemporaneous dictionaries defined "sex" similarly. The Random House College Dictionary at 1206 (1973) defined sex as "1. either the male or female division of a species esp. as differentiated with reference to the reproductive functions. 2. The sum of the structural and functional differences by which male and females are distinguished." The American College Dictionary at 1109-10 (1970) defined "sex" as "1. The character of being either male or female . . . 2. The sum of the anatomical and physiological differences with reference to which the male and female are distinguished or the phenomena depending on these differences." The American Heritage Dictionary of the English Language at 1187 (1st ed. 1969) defined "sex" as "1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions, designated male and female, of this classification."

From 1972 until 2021, the Department of Education had never sought to define "sex" in any other way. There is no basis in the text or history of Title IX for the radical change sought by the Proposed Rule.

II. The chief patron of Title IX was clear that its purpose was to remedy disparities in educational opportunities which favored males over females.

In 1972, Congress passed Pub. L. No. 92-318, also known as Title IX of the Educational Amendments of 1972.[2] With certain limited exceptions, primarily for military and religious schools, the legislation provided quite simply:

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[1] Webster's New International Dictionary 2081 (3d ed. 1968).

[2] "Constitutional Amendments and Major Legislation," U.S. House of Representatives, available at https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Constitutional-Amendments-and-Major-Legislation/.

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[3]

The sponsor of the legislation in the Senate was Birch Bayh (D-IN). In his extensive remarks upon introducing the legislation, Senator Bayh made crystal clear his objective: to ensure that at federally funded educational institutions, that females have the same opportunities available to males. Senator Bayh condemned "corrosive and unjustified discrimination against women."[4] He specifically contrasted discrimination against women with discrimination against other minorities and made clear it was discrimination against women that the bill was designed to address. *Id*. He denounced stereotypes of females as "pretty things who go to college to find a husband … and finally marry, have children and never work again."[5] It is clear Sen. Bayh, and his legislation, were referring to biological females, not to 2022 concepts of "gender identity."

Senator Bayh denounced "discrimination against females on faculties and in administration…." *Id*. He repeatedly compared opportunities in education and employment between "males" and "females." *Id*. "I am concerned that in 1970 the percentage of the female population enrolled in college was markedly lower than the percentage of the male population…."[6] He noted that "many fields which are designated for females such as cosmetology or food handling are less technical and therefore less lucrative than fields such as TV repair and auto mechanics 'reserved' for males."[7] "It is of little comfort for women to know that they are encouraged to further their schooling but that … they will be earning far less than male colleagues for the rest of their lives."[8] Further, Senator Bayh expressly stated that "differential treatment by sex" would be permitted under his bill such as "in sports facilities or other instances where personal privacy must be preserved."[9]

It is clear that the furthest thing from the intent of the legislation was any suggestion of allowing biological males to invade the locker rooms and bathrooms of biological female students.

III. The Proposed Rule discards verified science in favor of political advocacy.

The Department's proposed regulation makes conclusory assertions that are divorced from true science. The Department asserts that "sex discrimination … include[es] … sexual orientation, and gender identity."[10] But the division of the human race into two sexes, male and female, is a scientific fact which, like gravity, defies political attempts to redefine reality. As two actual biologists explained:

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[3] 20 U.S.C. § 1681(a).
[4] 118 *Cong. Rec.* 5803.
[5] 118 *Cong. Rec.* 5804.
[6] 118 *Cong. Rec.* 5805.
[7] 118 *Cong. Rec.* 5806.
[8] 118 *Cong. Rec.* 5807.
[9] 118 *Cong. Rec.* 5807.
[10] 87 *Fed. Reg.* 41390 (July 12, 2022).

> To characterize this line of reasoning as having no basis in reality would be an egregious understatement. It is false at every conceivable scale of resolution. In humans, as in most animals or plants, an organism's biological sex corresponds to one of two distinct types of reproductive anatomy that develop for the production of small or large sex cells—sperm and eggs, respectively—and associated biological functions in sexual reproduction. In humans, reproductive anatomy is unambiguously male or female at birth more than 99.98% of the time…. No third type of sex cell exists in humans, and therefore there is no sex "spectrum" or additional sexes beyond male and female. Sex is binary.[11]

Another scientist explained: "the objective truth is that sex in humans is strictly binary and immutable, for fundamental reasons that are common knowledge to all biologists taking the findings of their discipline seriously. Denying that sex in humans is binary attacks the very foundations of biological sciences."[12]

The American College of Pediatricians has likewise emphasized the biological reality that humanity is scientifically divided into two sexes. As doctors Michael Artigues and Michelle Cretella noted, "[s]ex is a dimorphic, innate trait defined in relation to an organism's biological role in reproduction. In humans, primary sex determination occurs at fertilization and is directed by a complement of sex determining genes on the X and Y chromosomes … Consideration of these innate differences is critical to the practice of good medicine and to the development of sound public policy for children and adults alike."[13]

Additionally, "[t]he National Institutes of Health urges scientists and physicians to include sex as a biological variable in all aspects of healthcare. [T]he reality of sexual dimorphism and its importance to health has been documented for decades." *Id*. The popular lingo of an assigned sex is a fraud:

> Pediatricians do not "assign" an infant's sex; they announce it based upon the physical reality of the infant's body before them. This growing movement to deny the physical reality of sexual dimorphism requires a dangerous dismissal of both science and medical ethics, one that will cause severe harm to individuals and society at large if embraced. [*Id.*]

Moreover, one's sex is unalterable. "Interventions that alter a person's sexual appearance do not alter the person's genetic code. Therefore, sex does not change. Administering sex hormones and other drugs can alter appearance and physiology to varying degrees, but these chemicals do not change biological sex." *Id*.

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[11] C. Wright and E. Hilton, "The Dangerous Denial of Sex," *Wall Street Journal* (Feb. 13, 2020). Available at https://www.wsj.com/articles/the-dangerous-denial-of-sex-11581638089. (Colin Wright is an evolutionary biologist at Penn State University; Emma Hilton is a developmental biologist at the University of Manchester.)

[12] G. Marinov, "In humans, sex is binary and immutable," *Academic Questions*, Vol. 33, Issue 2, available at https://www.nas.org/academic-questions/33/2/in-humans-sex-is-binary-and-immutable. (Georgi K. Marinov is Postdoctoral Research Scholar at the Department of Genetics, Stanford University School of Medicine, Stanford, CA.)

[13] M. Artigues and M. Cretella, "Sex is a Biological Trait of Medical Significance," *American College of Pediatricians* (Mar. 2021).

However much the popular political view may wish it otherwise, denying reality will inevitably harm those it claims to try to help. "Acknowledging the fact of inborn genetic sex differences is also crucial for creating public policies that will ensure the health and safety of children and adults alike." *Id*. Thus, the proposed rulemaking is profoundly dangerous to the health and safety of our nation.

IV. Basing educational policy on politics rather than science ensures the continuation of sex discrimination.

Senator Bayh was crystal clear as to the intent of his Title IX Educational Amendments in 1972. The amendments were intended to reduce the disparities that existed in favor of men and against women in educational opportunities. He decried "the desire of many schools not to waste a 'man's place' on a woman."[14] He addressed the out-of-balance opportunities in favor of men as "persistent, pernicious discrimination which is 'serving to perpetuate second-class citizenship for American women.'" *Id*. The purpose of the amendments, he stated, was to provide women "an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice…."[15]

Yet the Department's Proposed Rule would effectively enshrine sex discrimination in federal education funding into federal law. In the name of "nondiscrimination," the Proposed Rule would construct an unbreakable barrier to women's achievement in scholastic sports. This has been amply demonstrated, both scientifically and historically.

> The predominant influence affecting male versus female athletic performance is hormonal, particularly during puberty. The sex hormone testosterone plays an important role in regulating bone mass, fat distribution, muscle mass and strength, and the production of red blood cells leading to higher circulating hemoglobin. After puberty, male circulating testosterone concentrations are 15 times greater than those of females at any age. The result is a clear male advantage in regard to muscle mass, strength and circulating hemoglobin levels even after adjusting for sex differences in height and weight.
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> On average, females have 50-60% of male's upper arm muscle cross-sectional area and 65-70% of male's thigh muscle cross-sectional area with a comparable reduction in strength. Young males have on average a skeletal muscle mass over 12kg greater than age-matched females at any given body weight. While numerous genes and environmental factors such as physical activity and diet contribute to muscle mass, the major cause of the sex difference in muscle mass and strength is the difference in circulating testosterone. Taken together, these discrepancies render females, on average, unable to compete

[14] 118 *Cong. Rec.* 5804.
[15] 118 *Cong. Rec*. 5808.

effectively against males in power-based or endurance-based sports.[16]

The sports media spotlight has recently shone on the swimmer currently known as "Lia Thomas," a biological male allowed to compete in women's swimming teams. And a cursory review of Thomas' swimming record is illustrative. "During the last season Thomas competed as a member of the Penn men's team, which was 2018-19, [Thomas] ranked 554th in the 200 freestyle, 65th in the 500 freestyle and 32nd in the 1650 freestyle. As [Thomas'] career at Penn wrapped, [Thomas] moved to fifth, first and eighth in those respective events on the women's deck."[17]

Dr. Carole Hooven, the co-director of undergraduate studies in human evolutionary biology at Harvard, stated the obvious: "There is a large performance gap between healthy normal populations of males and females, and that is driven by testosterone."[18] "Lia Thomas is the manifestation of the scientific evidence," Dr. Ross Tucker, a sports physiologist and consultant on world athletics, told the New York Times. "The reduction in testosterone did not remove [Thomas'] biological advantage."[19]

In 2020, Chelsea Mitchell and three other Connecticut high school girls who competed in track and field filed suit against the Connecticut Interscholastic Athletic Conference (CIAC), seeking the right not to be forced to compete against biological males competing as "transgender girls."[20] Once considered "the fastest girl in Connecticut," Mitchell has now lost, "time after time," to "transgender" runners.

> I've lost four women's state championship titles, two all-New England awards, and numerous other spots on the podium to transgender runners. I was bumped to third place in the 55-meter dash in 2019, behind two transgender runners. With every loss, it gets harder and harder to try again. That's a devastating experience. It tells me that I'm not good enough; that my body isn't good enough; and that no matter how hard I work, I am unlikely to succeed, because I'm a woman. [*Id*.]

"[B]esides the psychological toll of experiencing unfair losses over and over," Mitchell wrote:

> the CIAC's policy has more tangible harms for women. It robs girls of the chance to race in front of college scouts who show up for elite metes, and to compete for the scholarships and opportunities that come with college recruitment. I'll never know how my own college recruitment was impacted by losing those four state

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[16] M. Artigues and M. Cretella, "Sex is a Biological Trait of Medical Significance," *American College of Pediatricians* (Mar. 2021).
[17] J. Lohn, "A Look At the Numbers and Times: No Denying the Advantages of Lia Thomas," *Swimming World* (Apr. 5, 2022).
[18] S. Warren, "Doctors Verify the 'Scientific Evidence' Proves Trans Swimmer Lia Thomas' Unfair Advantage Over Females,'" *CBN News* (May 31, 2022).
[19] M. Powell, "What Lia Thomas Could Mean for Women's Elite Sports," *New York Times* (May 29, 2022).
[20] C. Mitchell, "I was the fastest girl in Connecticut. But transgender athletes made it an unfair fight," *USA Today* (May 25, 2021).

> championship titles. When colleges looked at my record, they didn't see the fastest girl in Connecticut. They saw a second- or third-place runner. [*Id*].

The science is overwhelming. "Olympic sprinter Allyson Felix … is a six-time Olympic gold medalist and holds numerous World Championship titles. Yet in 2018, 275 high school boys ran faster times than Felix's lifetime best."[21] Felix is "the most decorated woman in Olympic track history."[22] But she would be only 276th best among U.S. male high school athletes.

Numerous female athletes have pointed out the tilting of the playing field that policies such as the Proposed Rule have already inflicted on female athletes. After the University of Pennsylvania nominated "Lia Thomas" for "Woman of the Year," rival swimmer Riley Gaines, the University of Kentucky's nominee, tweeted, "Being the real girl in that photo [of her and Thomas after a swimming competition] and also University of Kentucky's nominee for NCAA WOTY, this is yet another slap in the face to women. First a female national title and now nominated for the pinnacle award in collegiate athletics. The NCAA has made this award worthless."[23]

Martina Navratilova, a lesbian U.S. tennis star who herself once hired a transgender trainer, tweeted in response to Thomas' nomination, "Not enough fabulous biological women athletes, NCAA?!? What is wrong with you?!!!!!!!?"[24]

Harvard's Dr. Hooven notes, "In 2019, about 2,500 men, almost one-third of the total number of men competing worldwide in the [International Amateur Athletic Federation] 100-meter event, beat the fastest women's time. Without segregation, it's not just that men would win — women would never even qualify for the competitions in the first place."[25]

Former Representative Tulsi Gabbard (D-HI) has noted the indisputable fact that allowing biological males to compete in girls' sports is "creating uncertainty, undue hardship, and lost opportunities for female athletes."[26]

Brazil's Olympian volleyball athlete Ana Paula Henkel had the courage to speak the truth in an open letter to the International Olympic Committee:

> [T]his rushed and heedless decision to include biological men, born and built with testosterone, with their height, their strength and aerobic capacity of men, is

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[21] C. Holcomb, "Biden preaches science while ignoring it on high school sports," N.Y. Daily News (Feb. 5, 2021).
[22] A. Barnes, "American sprinter becomes most decorated woman in Olympic track history," *The Hill* (Aug. 6, 2021).
[23] https://twitter.com/RileyGaines/status/1548153964289396740 ; see also G. Fonrouge, "UPenn slammed for nominating Lia Thomas for NCAA's 'Woman of the Year' award," *N.Y. Post* (July 17, 2022).
[24] G. Fonrouge, "UPenn slammed for nominating Lia Thomas for NCAA's 'Woman of the Year' award," *N.Y. Post* (July 17, 2022).
[25] E. Spitznagel, "Trans women athletes have unfair advantage over those born female: testosterone," N.Y. Post (July 10, 2021).
[26] J. Simonson, "Female high school athletes fear for their future with inclusion of transgender women in sports," Washington Examiner (Feb. 9, 2021).

> beyond the sphere of tolerance. It represses, embarrasses, humiliates and excludes women.
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> Sport has always been a great and respected vehicle for women's gains, a weapon that has always evidenced women's worth to those who have tried to impose limits on the dreams of all women who have struggled and fought to show our value, talent, capacity to overcome and merit.[27]

If the Proposed Rule is adopted, sport will cease to be a "great and respected vehicle for women's gains." In its determination to pursue a political agenda over science, this Proposed Rule hurts the very women Title IX was created to help. As Henkel put it in her letter to the IOC, "We currently look on as sporting entities blind themselves to human biology, in an attempt to hoodwink science in the name of politico-ideological agendas. We currently look on a moral perversion against women and the complicity of sport authorities around the world in a supreme form of misogyny…." *Id*.

V. The Proposed Rule, if implemented, will be found to be arbitrary and capricious.

Agency rules may not be arbitrary and capricious:

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. [*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).]

Title IX's language is clear and precise. "No person in the United State shall, on the basis of sex, be … subjected to discrimination under any education program or activity…."[28] As demonstrated in Section III, *supra*, the plain and ordinary meaning of "sex" in every major dictionary in 1972 described biological reproductive differences between the binary options of male and female. In its Executive Summary supporting the Proposed Rule, the Department distorts the words of Senator Bayh, the sponsor of Title IX, to say something he never said and to create an intent that cannot be divined from the words. The Department states that Bayh noted that because of stereotypes, many American schools did not wish to "waste a 'man's place' on a woman…. Thus, Senator Bayh said sex discrimination in 'admissions, scholarship programs, faculty, hiring and promotion, professional staffing, and pay scales,' was 'one of the great failings of the American educational system.'"[29]

The Department illogically and arbitrarily conflates the Senator's words into a mandate to allow biological males to compete on women's scholastic sports teams. The Department completely overlooks and fails to note that the Proposed Rule would allow biological males to scarf up scholarships and sports opportunities, intended by the clear language of Title IX to be removed from a traditionally male-dominated realm and preserved for biological females.

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[27] A. Henkel, "Open letter to the International Olympic Committee by Ana Paula Henkel," (Dec. 13, 2018).
[28] 20 U.S.C. § 1681.
[29] 87 *Fed. Reg*. 41393 (internal quotations omitted).

The Department likewise ignores Senator Bayh's clear statement that "differential treatment by sex" would be permitted under his bill such as "**in sports facilities or other instances** where personal privacy **must be preserved**."[30] This further illustrates the intent of Title IX to expressly separate the biological sexes in such cases. The Proposed Rule baldly inverts the intent of Title IX.

VI. *Bostock* was Wrongly Decided, But Does Not Control Here.

The Department's reference to *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), is unavailing. *Bostock* was a poorly reasoned decision, and there are indications that it may be overruled. That decision ignored the fact that the word "sex" in the employment context of the 1964 Civil Rights Act had the same binary meaning of male and female – based on reproductive differences – that Title IX had in 1972. Even if not overruled, it should not be applied here, as there is a crucial difference between the 1964 Civil Rights Act and Title IX.

The 1964 Civil Rights Act was certainly intended to remedy discrimination on the basis of "sex," and to grant biological females a more equal playing field in employment with biological males. But even making the immense logical leap the *Bostock* Court did to redefine "sex," to prohibit expanded protection against "discrimination" in the employment context against so-called "transgender" persons, that ruling did not directly harm biological females. However here, to redefine "sex" to include transgender persons would harm biological females in order to remedy so-called discrimination against so-called "transgender" persons. In the context of scholastic athletics, science and history have abundantly proven that so-called "transgender" biological males playing on girls' and women's teams overwhelmingly consume and monopolize opportunities formerly reserved for biological females.

Even more than the legislative history of the 1964 Civil Rights Act, the legislative history of Title IX unequivocally demonstrated the Congressional plan and intent to expressly protect separation by biological sex "in sports facilities or other instances where personal privacy must be preserved."[31] This further crucial difference renders *Bostock* inapposite. Notably, the *Bostock* Court itself declined to apply its holding beyond the employment context:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. **Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind**. [*Bostock* at 1753 (emphasis added).]

[30] 118 *Cong. Rec.* 5807 (emphasis added).
[31] 118 *Cong. Rec.* 5807.

VII. The Proposed Rule is arbitrary and capricious because, without reasoned explanation, it reverses the Department's position of August 2020 that Title IX prevents biological males from monopolizing opportunities preserved to females, and is not entitled to Chevron deference.

As recently as August of 2020, the Department's Office of Civil Rights ("OCR") itself took the polar opposite position on whether Title IX or *Bostock* requires allowing males to compete on female sports teams. On August 31, 2020, Kimberly M. Richey, the Acting Assistant Secretary for Civil Rights, sent a letter to the attorneys for four Connecticut public school systems and the Connecticut Interscholastic Athletic Conference ("the Richey letter"). In the letter, the Department offered a comprehensive reasoning for its position that allowing biological males to compete on women's and girls' teams unlawfully discriminates against biological females on the basis of sex:

> Specifically, although the Department's regulations have long generally prohibited schools from "provid[ing] any athletics separately" on the basis of sex, they permit schools 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." 34 C.F.R. § 106.41(a), (b). In those circumstances, **men and women are not similarly situated because of their physiological differences, and separating them based on sex is accordingly not prohibited by Title IX**. See Bostock, 140 S. Ct. at 1740 ("To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated."). Thus, schools may offer separate-sex teams. Indeed, such separate-sex teams have long ensured that female student athletes are afforded an equal opportunity to participate. 34 C.F.R. § 106.41(c)(1). Those regulations authorize single-sex teams because physiological differences are relevant.
>
> Even assuming that the Court's reasoning in Bostock applies to Title IX—a question the Court expressly did not decide—the Court's opinion in Bostock would not affect the Department's position that its regulations authorize single-sex teams under the terms of 34 C.F.R. § 106.41(b). **The Bostock decision states, "An individual's homosexuality or transgender status is not relevant to employment decisions**" because an employee's sex is not relevant to employment decisions, and "[se]x plays a necessary and undisguisable role in the decision" to fire an employee because of the employee's homosexual or transgender status. *Bostock*, 140 S. Ct. at 1741, 1737.
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> **Conversely, however, there are circumstances in which a person's sex is relevant, and distinctions based on the two sexes in such circumstances are permissible because the sexes are not similarly situated**. **Congress recognized as much in Title IX itself when it provided that nothing in the statute should be construed to prohibit "separate living facilities for the different sexes**." See, e.g., 20 U.S.C. §1686; see also 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing on the basis of sex" as long as housing is "[p]roportionate" and "comparable"); 34 C.F.R. § 106.33 (**permitting "separate toilet, locker room, and shower facilities on the basis of sex**," so long as the

facilities "provided for students of one sex shall be comparable to such facilities provided for students of the other sex").[32]

As a result, your Department concluded:

> OCR determined that the participation of Danbury [public schools] in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 3, and other female student-athletes, competing against Students A and B, denied athletic benefits and opportunities to Student 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Further, Danbury is not providing separate teams for each sex as permitted under 34 C.F.R. § 106.41(b). Danbury placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. [*Id*. at 39.]

The Richey letter was consistent with the Department's continual practice since the drafting of Title IX in 1972. It was consistent with the text and history of Title IX, given that Senator Bayh's comments, in accord with 20 U.S.C. § 1686, 34 C.F.R. § 106.32(b), and 34 C.F.R. § 106.33, clearly indicate intent to protect the rights of biological females not to have to compete against and shower next to biological males.

The Department's radical shift in position from 2020 to 2022, with no intervening change in federal law, regulation, or Supreme Court precedent, renders the Proposed Rule arbitrary and capricious, and legally indefensible.

> [W]hen it is necessary for a court to interpret a statute committed to an agency's implementation, *Chevron* deference may be withheld if the agency failed to adequately explain why it shifted to its current interpretation. But the *Chevron* framework is inapposite where a plaintiff directly challenges an agency rulemaking as violating the APA—as opposed to the statute that is being interpreted—because the agency arbitrarily departed from a prior statutory interpretation. When a plaintiff merely argues that an agency violated the APA by not providing sufficient reasons for its change of position, it is unnecessary for a court to actually decide whether the new statutory interpretation is correct to resolve the question; indeed, an agency can violate the APA by switching to a statutory interpretation that is wholly reasonable under *Chevron* if it does so without providing an adequate explanation for the change. [*Brackeen v. Haaland*, 994 F.3d 249, 355 (5th Cir. 2021) (internal citation omitted).]

In its Executive Summary, the Department offers no reasoned explanation for its 180-degree change of position. It cites *Bostock* but offers no rationale for why the Richey letter's distinguishing of the employment context from the competitive sports context, with citations to

[32] K. Richey, "Letter to Attorneys Mizerak, Monastersky, Murphy, Yoder, and Zelman," at 35, U.S. Department of Education, Office of Civil Rights (Aug. 31, 2020).

supportive federal law and regulations, is no longer correct – when Title IX, *Bostock*, the statute, and the regulations are unchanged since August 31, 2020.

In reversing the clear intent of Title IX's language, the Proposed Rule utterly fails to offer a "permissible construction of the statute." If the NPRM leads to issuance of a final rule, the Department will be utterly unable to provide a reason for the change that is not irrational and politicized. It is "arbitrary, capricious, [and] manifestly contrary to the statute." *New York v. United States EPA*, 413 F.3d 3, 18 (D.C. Cir. 2005).

CONCLUSION

The Proposed Rule would create insurmountable barriers to the ability of women to compete in women's sports. It is a direct assault on the text and history of Title IX, and the expressed desire of its chief patron to expand, not contract, women's opportunities. Congress has never redrafted Title IX to impose these barriers on women. The Department is without authority to turn Title IX on its head by rewriting it without congressional approval. The Proposed Rule is arbitrary and capricious, as the Department has radically reversed its position from August 2020, with no explanation as to why its well-reasoned position of 2020 was legally incorrect, and no such explanation is possible. This Proposed Rule should not be adopted.

Sincerely yours,

William J. Olson

William J. Olson

WJO:gw