UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF CIVIL RIGHTS

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,

Notice of Proposed Rulemaking
Docket RIN 1870-AA16

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COMMENTS OF WOMEN'S LIBERATION FRONT

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I. INTRODUCTION[1]

A. WoLF's Interests

WoLF is a non-profit radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving female-only spaces, and abolishing sex discrimination as well as discrimination based on gender (when "gender," to the extent not used synonymously with "sex," is understood to refer to stereotypical roles or expectations imposed on members of each sex). Since 2020, over 16,230 supporters have joined WoLF's mission through email subscription, participating in a targeted action, or signing a petition. This includes over 900 WoLF members, most of whom live, work, attend school, or participate in other education programs and activities in the United States.

As a core part of its mission WoLF works to empower women and girls by defending and promoting recognition and respect for females as a distinct sex class under sex-based civil rights laws, regulations, and policies. WoLF and its members recognize the grave threat to this mission posed by trends in law toward embracing a vague concept of "gender identity" in a manner that overrides constitutional and statutory protections that are explicitly based on sex. If, as a matter of law, sex is not acknowledged to be an immutable biological characteristic, and instead the characteristic of sex is replaced with or overridden by a subjective, self-declared, mutable personal belief in one's "gender identity," then the law will have abandoned a century-long effort to affirm the rights of women and girls to dignity, autonomy, and opportunities equal to those of men and boys.

For much of history, regressive stereotypes about women and men have resulted in social and legal burdens on women and girls by reason of their membership in the female sex class. Equality for women and girls, in many circumstances, necessitates treating all persons the same, as individuals, making no distinction between people based on sex.

However, due not to sexist stereotypes but to biological, genetically-determined, immutable differences between the male and female members of the human species, some critical circumstances advise or even require differentiating between women and men, because in such circumstances treating males and females "the same" necessarily disadvantages women and girls, depriving them of the dignity, autonomy, and opportunities enjoyed by men and boys. For example,

[1] The Department's proposal includes many specifics that are beyond the scope of this comment letter. WoLF takes no position, either in favor or opposition, with respect to any proposal not specifically discussed in this letter.

While WoLF recognizes that discrimination "on the basis of sex" can sometimes be targeted at men, we often choose to highlight examples involving women or girls. Such examples and their associated points should be taken as generally applicable to instances of sex discrimination aimed at boys or men.

due to the biologically-driven physical differences between males and females, often the only way to ensure equal opportunity for women and girls in competitive or contact sports is to provide single-sex sports teams and competitions. Similarly, physical, biological differences between males and females counsel that the safety and dignity of women and girls is not adequately protected without providing single-sex, comparable intimate facilities for members of each sex. Conversely, unless a particular job requires *bona fide* occupational qualifications based on sex, the selection and termination of employees should be made without regard to a person's sex in order to ensure that women have employment opportunities equal to those of men.

WoLF's ability to pursue its organizational mission depends upon the legal recognition of women and girls as a discrete, definable category of persons entitled to and deserving of civil rights protections. If the Department attempts to combat unfair treatment of people who assert a "gender identity" or "transgender" status, without concurrently affirming and clarifying that women and girls remain in an objective sex-based category, then women and girls will be left without recourse under the very civil rights laws and regulations originally designed, intended, and for nearly fifty years applied, to protect them from sex-based discrimination, ensure their equal access to education, and promote equal opportunities for them to succeed.

WoLF and its members value their freedom of association, and their liberty to make statements of fact and expressions of opinion or belief – without interference or restriction by the government – as guaranteed under the U.S. Constitution. However, wherever laws and policies grant legal recognition based on "gender identity," acts of free expression and free association are often improperly deemed to be discrimination or harassment based on "gender identity." Women who reject the "gender identity" belief system often suffer serious negative consequences including public shaming, loss of employment, and administrative and legal complaints. Unless a concept of unlawful discrimination based on "gender identity" is carefully and precisely defined alongside clear reinforcement of sex-based rights, WoLF and its members risk accusations of engaging in discriminatory conduct for doing nothing more than stating facts or exercising constitutionally protected rights.

B. Terminology

Sex

The word "sex" in these comments refers to the fundamental distinction, found in most species of animals and plants, based on the type of gametes each individual's body is organized to produce. *See* section III.A.1 of these comments, below. In humans these fundamental sex differences divide people into two sexual reproductive categories: Females are those whose bodies are organized to support

the production of ova and the creation of offspring through sexual reproduction; Males are those whose bodies are organized to support the production of sperm.

Sex in humans is determined at conception and remains fixed throughout all life stages, regardless of individual life experiences such as aging, illness, or infertility, and regardless of whether the individual has a "difference (or disorder) of sexual development" (DSD), sometimes incorrectly labeled "intersex."

Women, girls, boys, and men

The word "woman" in these comments refers to adult human females, and the word "girl" refers to minor human females. The word "men" in these comments refers to adult human males and the word "boy" refers to minor human males.

Sexual orientation

The term "sexual orientation" in these comments refers to whether a person is sexually or romantically attracted to people of the opposite sex (heterosexual), people of the same sex (homosexual, gay, or lesbian), or people of both sexes (bisexual). Sexual orientation is determined by sex, *i.e.*, whether one is male or female, and whether one is sexually or romantically attracted to males, females, or both.

"Gender identity"

The term "gender identity" in these comments refers to the subjective belief that one has an internal sense of self-identification that is incongruent with one's sex. This belief has no bearing on whether one is male or female.

As used in the NPRM and in current popular parlance, the possession of a "gender identity" is treated as synonymous with "transgender" status. *See*, *e.g.*, NPRM at 41529, citing the Department's "Q & A on Sexual Violence" issued by OCR in April 2014. Though many people who assert such an identity may also have a clinical psychiatric diagnosis of "gender dysphoria," such diagnosis (including self-diagnosis) is not a prerequisite under the NPRM. In fact, the word "dysphoria" is never mentioned in the NPRM. The near-impossibility of this omission being a coincidence in a 190-page preamble that is heavily focused on "gender identity" suggests that the omission is intentional. This is consistent with the Department's apparent desire to avoid suggesting that anything so objectively-verifiable as a medical diagnosis would be needed to establish one's "gender identity" or "transgender" status.

C. Overview Of WoLF's Comments

"Sexual orientation," "sex characteristics," "sex stereotypes" and "pregnancy and related conditions"

Under Title IX, a person's sex is generally irrelevant to whether he or she is entitled to participate and benefit from certain educational opportunities. 20 U.S. Code § 1681; 34 C.F.R. §§ 106.21, 106.31, 106.51. However, certain longstanding exceptions exist *precisely* because of the material physical differences between men and boys in comparison to women and girls—including the provision of single-sex facilities for sleeping, showering, and using the toilet; the provision of single-sex athletics; and the limited provision of single-sex classes or resources. Under these circumstances, discrimination between males and females is permissible and in some cases necessary, in order to preserve fairness and safety for women and girl athletes, to protect women and girls from sexual predation and invasion of privacy in spaces where they must be fully or partially nude, and to remedy past discrimination that was primarily aimed against women and girls.

Sex is an aspect of sexual orientation (insofar as it is determined by the sex of the relevant individuals), sex stereotypes (insofar as they are applied depending on the sex of the targeted individual), sex characteristics (insofar as these are inseparable from sex), and pregnancy (insofar as only members of the female sex are capable of pregnancy). Motivation to discriminate on the basis of any of these factors stems from subjective and malleable beliefs about how individuals of each sex (male or female) "should" exist and conduct themselves. Discrimination by educational institutions and individuals against women on the basis of any of these factors is an attempt to narrow the category of women who are deemed worthy to enjoy the benefits of an educational program or activity. Allowing discrimination under Title IX on the basis of these characteristics – where it is otherwise impermissible to discriminate "on the basis of sex" – would operate as a backdoor pass for exactly the type of discrimination that Title IX seeks to prohibit.

Sexual orientation in particular falls naturally under Title IX's prohibition against discrimination "on the basis of sex," because sexual orientation is fundamentally defined by the sex one is and the sex of individuals to which one is attracted. Indeed, the concept of sexual orientation relies on material sex differences. People who are homosexual or bisexual are morally entitled to the same respect, autonomy, freedom of association, and liberty from pernicious discrimination, as people who are heterosexual. Since being gay, lesbian, or bisexual are objective categories based on sex , protecting people from discrimination on the basis of sexual orientation requires legal recognition that sex itself is also objective.

WoLF does not object to the inclusion of these proposed terms in the regulatory definition of the scope of Title IX (proposed 34 C.F.R. 106.10), as long as the terms are consistently applied on the basis of sex. However, WoLF does object to any final agency action that codifies a definition of these terms that relies on subjective beliefs about sex or "gender identity." A woman is no less entitled to safety and privacy in single-sex spaces or to the benefit of fair athletic competition, simply because she or others perceive her personality or fashion preferences to be unacceptably masculine for a woman. Therefore, in order to prevent confusion and absurd or abusive applications of these terms – in order to protect women's and girls' right to educational equality – the Department's must define "sex," "sexual orientation," "sex characteristics," and "sex stereotypes," in an objective and factual manner.

With respect to "sexual orientation" in particular, unless the Department includes an explicit definition specifying that one's sexual orientation is defined by the sex class (male or female) of individuals to which one is sexually attracted, and is limited to homosexuality, bisexuality or heterosexuality, the proposed rules will be used to threaten and punish lesbian, gay, or bisexual individuals who are attracted to others on the basis of sex, not on the basis of "gender identity."

"Gender identity" and the obligations of Title IX recipients

WoLF is adamantly opposed to the Department's proposal to add "gender identity" to the scope of the Title IX prohibition against discrimination "on the basis of sex." We object in particular to the Department's failure to provide a clear or coherent definition of that term, and a clear explanation of how the concept of gender identity may or may not affect all of the circumstances where current regulations allow for differential treatment "on the basis of sex." This concern about gender identity stands out as both unique and ubiquitous for several related reasons:

- Unlike sexual orientation, sex stereotypes, or sex characteristics, all of which exist because of material, biological sex differences, the concept of **gender identity purports to supersede and obfuscate** the ordinary public meaning of "sex." This in turn distorts the meaning of other sex-related terms in the proposed rules, including "sex characteristics," "sexual orientation," and "sex stereotypes."

- The concept of **gender identity purports to confer special rights and exemptions** upon those who claim to have a special gender identity, such as the special right for men or boys to access intimate spaces where women or girls are fully or partially nude (and vice versa), or the special right for men and boys to take athletic opportunities that were established for safety and fairness to women and girls, purely through the power of self-declared feelings and beliefs about sex and gender identity.

- **Gender identity policies have disproportionate harmful effects upon women and girls,** by depriving female students of protections that are needed due to their unique vulnerability to sexual assault, rape, and involuntary impregnation by males in mixed-sex intimate facilities, the unfairness of forcing females to compete against males for opportunities in athletics, and other disproportionate sex-based harms. Because of material sex differences, these disadvantages do not fall on men and boys to anywhere near the same extent.

- Since **belief in gender identity is grounded in sex stereotypes about what it "means" or "feels like" to be male or female**, allowing recipients to define people by idiosyncratic stereotype-laden gender identities renders the proposed rules internally-contradictory and deeply irrational.

By proposing ostensibly beneficial changes to the grievance process together with a significant harmful and disfiguring redefinition of the scope of Title IX with the concept of "gender identity," the Department puts members of WoLF and members of the public in an impossible situation. The proposed gender identity provisions are not severable from other aspects of the regulations, and all of them will distort many aspects of how Title IX functions on the ground. Nor are the proposed gender identity provisions supported by the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). WoLF simply cannot support expanded remedies or strengthened anti-discrimination standards knowing that they will just be used by the government and educational institutions to enforce the gender identity belief system in a manner that deprives, punishes, and silences women and girls, and chills the speech of any individual who rejects that belief system.

Bias against women and girls, and in favor of "gender identity" beliefs

The NPRM conveys the strong impression that the Department is highly biased toward hearing the concerns of people who identify as transgender, but distinctly unconcerned about the fairness and safety of women and girls under its proposed gender identity policies. In this way the Department is telling women and girls that validating the subjective gender identities of other people is a vital goal of the highest order, while their concerns about their loss of female-only spaces and athletics is at best an unjustified overreaction, and at worst a moral failure that requires atonement.

If a boy feels that his feminine "gender identity" is invalidated by his use of facilities created for boys, the proposed rules give him access to the girls' bathrooms, locker rooms, and showers, while conscripting the girls into service as if they are his emotional support animals. But if a girl feels uncomfortable and unsafe undressing in closed spaces with boys, if she objects to the presence of a stranger's exposed

penis in her immediate vicinity, her consent is treated as irrelevant, her concerns are written off as "unsubstantiated," and she is cast as a villain who is unjustifiably "preventing" the boy from "participating in school." NPRM at 41535, 41537.

This type of bald-faced ideological bias is inappropriate, unconstitutional, and unbecoming of any governmental agency, and it renders this rulemaking arbitrary and capricious at best.

II. THE PROPOSED RULEMAKING DOES NOT MEET MINIMUM STANDARDS UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Legal defects in specific proposed provisions are further discussed below in sections III and IV of these comments. This section discusses overarching problems with the rulemaking.

A. Failure To Resolve WoLF's Petition For Rulemaking

Since 2016, WoLF has urged the Department to establish a clear and rational policy for addressing claims regarding gender identity while upholding and not undermining the plain text and legislative intent of Title IX. *See*, *e.g.*, Complaint, *WoLF v. U.S. Dep't of Justice, et al.*, Case 1:16-cv-00915 (Aug. 2016, D. N.M.) (challenging the Department's May 2016 Title IX "guidance document"). To that end, on February 8, 2021, WoLF submitted its *Petition For Rulemaking To Protect The Title IX Rights Of Women And Girls* to the Department. Ex. A. The petition contains a number of specific requests:

1. Adopt regulations that preserve the legal permissibility of factually, objectively identifying people as males or females. WoLF Petition for Rulemaking at 1-2.

2. Adopt regulations that continue to distinguish between individuals on the basis of sex, when such distinctions are important for ensuring equal opportunities for women and girls to flourish in educational programs and activities. *Id*. at 2.

3. Codify the meaning of "sex" as biological, immutable, and binary. *Id*.

4. Adopt regulations that explain the ways in which existing Title IX statutory and regulatory provisions permit or require various education programs and activities to include single-sex spaces and provisions. *Id*.

5. Specifically address application of the meaning of the term "sex" under Title IX with regard to: employment (under 34 C.F.R. §§ 106.55, 106.59, 106.61); sexual harassment (under 34 C.F.R. §§ 106.8, 106.44, 106.45, 106.71); sports (under 34 C.F.R. § 106.41); intimate facilities (under 34 C.F.R. § 106.33);

housing (under 20 U.S.C. § 1686); and physical education and human sexuality classes (under 34 C.F.R. §§ 106.34(a)(1), 106.34(a)(3)). *Id.* at 14.

6. In line with the foregoing requests, adopt the following specific provisions:

Provision (1): Acknowledge that humans are an anisogamous mammalian species. A person's sex refers to whether the person is male or female. Classification of a person as male or female is immutably, biologically determined based on whether the person's sexual reproductive system is developed to support large gametes (female) or small gametes (male). A person's sex is not determined or changed by the person's thoughts or beliefs, or by steps taken to emulate the physiology of the opposite sex. Clarify that the term "sex" as used in the Title IX statute and regulations refers to whether a person is male or female, that the terms "women" and "girls" refer to human females who are adults or minors, respectively, and that the terms "men" and "boys" refer to human males who are adults or minors, respectively.

Provision (2): Codify a coherent statement of what "gender identity" means (such as, a person's belief that one has an internal sense of self-identification as male, female, both, or neither, that is incongruent with one's sex) and explain that discrimination based on gender identity may be prohibited[2] in circumstances where sex is not a permissible basis for discrimination under Title IX, because a person's gender identity is a belief about one's sex (where "sex" is understood, per Provision (1) above, to mean biological sex).

Provision (3): State that as to Title IX statutory and regulatory provisions that permit or require distinctions based on sex, such distinctions must be made based on sex rather than on characteristics or beliefs that are intertwined with sex (such as gender identity), such that single-sex spaces authorized by the Title IX statute and regulations remain valid. Again, "sex" is understood, per Provision (1) above, to mean biological sex.)

Provision (4): Affirm that none of the following conduct constitutes actionable or unlawful discrimination or harassment on the basis of sex: (i) identifying or acknowledging a person's sex (including by use of a sex-based pronoun that corresponds with the person's sex without regard for the person's preferred pronoun); (ii) stating the fact that humans are a sexually dimorphic species, that sex is an immutable biological characteristic, or similar factual statements; (iii)

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[2] Although the intended and correct word here is "prohibited," the original petition inadvertently used the word "protected." WoLF Petition for Rulemaking at 3. Elsewhere the petition states clearly that WoLF's requested provisions would provide "[p]rotection *against* discrimination based on 'transgender' status" while simultaneously "acknowledg[ing] that 'sex' refers to the biological, immutable status of a person as a male or female," and "discrimination based on gender identity may fall under Title IX's prohibition *against* sex discrimination because gender identity is a belief about a person's biological sex." Petition at 8, 13 (emphasis added).

expressing opinions, beliefs, or viewpoints critical or skeptical of the concept of "gender identity," including the viewpoint that gender identity is a spiritual or metaphysical concept.

If the Department's response to WoLF's petition is a denial, the Administrative Procedure Act (APA) requires the agency to provide a reason for the denial. "[P]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e). If the Department fails to resolve the petition by granting or denying it, the APA authorizes federal courts to "compel any action unreasonably delayed or unlawfully withheld." 7 U.S.C. § 706(1). The Department may also take final action that effectively denies some or all of the petition's requests, such that the final action is subject to judicial review as if it were an express written denial. *See. Center for Food Safety v. Johanns*, 451 F.Supp.2d 1165, 1193 (D. Haw. 2006).

To the extent the Department's final action in this rulemaking preempts or is otherwise irreconcilable with WoLF's petition requests, such action effectively denies WoLF's requests. *Id.* In that event the Department should provide a full explanation, not only to support its final action but also to explain why it declined to grant WoLF's petition requests instead.

None of WoLF's petition requests are fulfilled by the Department's NPRM. The Department does not propose to codify *any* definition of "gender identity" as it is used in proposed § 106.10, much less an accurate or coherent one that comports with the ordinary public meaning of "sex" under Title IX. *See* WoLF Petition for Rulemaking at 3-4, 7-13. It does not specifically address application of the meaning of the term "sex" under existing provisions that require or permit sex differentiation, as enumerated in WoLF's Petition. *Id.* at 14. Nor does the NPRM preserve the ability to identify people according to sex rather than "gender identity," or preserve the availability of single-sex spaces, athletics, or other resources or services, as requested in WoLF's Petition. *Id.* at 1-2, 4, 13-21. It does not specify that the regulatory prohibition against "sex-based harassment" cannot be used to suppress speech that factually, correctly identifies people by their sex, or is critical or skeptical of the gender identity belief system, as requested in WoLF's Petition. *Id.* at 6-7, 22-26.

Instead, the Department now proposes to codify the term "gender identity" in the regulatory definition of Title IX's scope (proposed 34 C.F.R. § 106.10), so that the meaning and construction of "sex" is altered by an individual's subjective, self-declared, mutable "gender identity." *See also* pre-employment inquiries, proposed § 106.60, NPRM at 41,528, and pre-admission inquiries, proposed § 106.21(c)(2)(iii), NPRM at 41,517 (both allowing for self-identification of sex or "gender identity"). At

the same time the Department refuses to adopt any explicit definition of "sex," and refuses to explain how the meaning of "sex" in Title IX and its regulations will be altered by the inclusion of "gender identity" in proposed § 106.10, particularly those expressly allowing for discrimination between males and females (such as single-sex intimate facilities).

In short, a final action on this proposal will effectively deny all of WoLF's petition requests, yet at no point does the Department acknowledge or explain its choice to reject WoLF's proposed alternatives to this rulemaking. This course of action is arbitrary and capricious.

The Department has previously acknowledged that construction of the term "sex" in Title IX to mean biological sex "is the only construction consistent with the ordinary public meaning of 'sex' at the time of Title IX's enactment. WoLF Petition for Rulemaking at 7, discussing U.S. Dep't of Educ., Office of the General Counsel, *Memorandum For Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights* (Jan. 8, 2021) ("OGC Memo"). Indeed, since their initial enactment, Title IX regulations have explicitly permitted discrimination between male and female individuals in numerous settings, including for purposes of employment, sexual harassment, intimate facilities, housing, and physical education and human sexuality classes. WoLF Petition for Rulemaking at 14. In a drastic departure from this history, the proposed rules would render all sex-based distinctions impermissible.

The Department's failure to acknowledge and explain this drastic change of interpretation renders the proposal fatally defective. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.").

Further, the NPRM makes no attempt to demonstrate that there is a rational connection between the facts presented in WoLF's petition (including material biological sex differences between males and females), and the Department's choice to ignore those differences in favor of identifying individuals by their subjective "gender identity" under proposed §§ 106.10 and 106.31(a)(2). This falls short of the Department's obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *See Motor Vehicle Manuf. Assoc. of United States, Inc v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted). It is further arbitrary and capricious because the Department has "entirely failed to consider an important aspect of the problem"—namely, how the proposed "gender identity" provisions will have a significant and disproportionate adverse effect on the educational experience of women and girls, as discussed throughout WoLF's

Petition for Rulemaking. *See Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143 (9th Cir. 2011).

WoLF's petition provides a viable alternative to the Department's proposed "gender identity" provisions, offering meaningful protection from discrimination and harassment for people who identify as transgender in circumstances where differential treatment based on sex is impermissible, while preserving existing necessary single-sex provisions, and staying true to the ordinary public meaning of "sex" in Title IX. This alternative would "impose the least burden on society, including individuals," informed by "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation," consistent with the Regulatory Philosophy and Principles of Regulation set out in Executive Order 12866.

However, the NPRM gives no indication that the Department considered the alternatives set out in WoLF's Petition, or that it has any rational explanation for rejecting them. This too is fatal to the rule, since "failure of an agency to consider obvious alternatives has led uniformly to reversal." *City of Brookings Mun. Telephone Co. v. F.C.C.*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (internal citation omitted).

B. Misapplication of Title VII Ruling *Bostock v. Clayton County, Georgia*

The Department contends that "its prior position (i.e., that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity) is at odds with Title IX's text and purpose and the reasoning of the *Bostock* Court and other courts to have considered the issue in recent years." NPRM at 41531. We disagree.

1. The logic of *Bostock* does not extend to Title IX settings where discrimination between the male and female sexes is expressly permitted.

As an initial matter, neither *Bostock* nor the other mentioned court cases are binding on the Department. *Bostock* was decided under Title VII. The other referenced lower court cases are, of course, not binding on federal government agencies.

The court in *Bostock* only set out to adjudicate a narrow question arising in a specific dispute under Title VII: whether a person's employment can be terminated because of their "transgender status" in situations where it is clearly and separately understood under Title VII that the person's employment could not be terminated because of sex. 140 S. Ct. at 1753 (stating the court's holding in the *Harris Funeral Homes* case). The Department cannot take the same narrow, simplistic approach because it is engaging in a wide-ranging legislative rulemaking. And it is doing so against a background of myriad existing programs and practices where not only is

sex-differentiation and sex-segregation permissible, in some settings it is positively indispensable to the continued fairness and access to educational opportunities for women and girls. *Bostock* therefore offers little useful insight into the meaning of "sex" as applied in more complex situations arising under Title IX and the Department's implementing regulations.

The Department's reliance on *Bostock* to justify its proposed "gender identity" rules is also ineffectual because the court in *Bostock* assumed that "the term 'sex' in 1964 [when Title VII was enacted] referred to 'status as either male or female [as] determined by reproductive biology,'" *not* to "norms. . . concerning gender identity," and "the employees concede[d] the point for argument's sake." 140 S. Ct. at 1739. Consequently, the court did not address whether (or when, or *why*) subjective feelings or beliefs about "gender identity" must be granted legal status *in lieu* of sex under Title IX. Much less did it address more complicated situations arising under specific Title IX regulations that expressly allow sex-differentiation, or any other laws or regulations concerning discrimination on the basis of "sex."

Indeed, the majority opinion in *Bostock* explicitly denied "that [the] decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Id.* at 1753. It even expressly declined to address closely-related issues "under Title VII itself [such as] sex-segregated bathrooms, locker rooms, and dress codes." *Id.* It certainly did not touch the existing Title IX regulatory provisions allowing for sex-based *bona fide* occupational qualifications under 34 C.F.R. § 106.61. *Id.*

The cautionary limiting language in *Bostock* was necessary and appropriate because, as recognized by another federal court:

> Title VII differs from Title IX in important respects: For example, under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in "maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.

Meriwether v. Hartop, 992 F.3d 492, 518 n.4 (6th Cir. 2021).

The court in *Bostock* assumed "that the ordinary public meaning of the term 'sex' in Title VII means biological distinctions between male and female," and that assumption "drove the reasoning" of the court's holding. WoLF Petition for Rulemaking. at 8, citing the Department's January 2021 OGC Memo at 2, n.1 and *Bostock*, 140 S. Ct. at 1738-39. Using a "but-for" analysis, the court held that discrimination against an employee based on the employee's "transgender status" is discrimination "because of . . . sex" under Title VII, if "the employer intentionally

penalizes a person *identified as male at birth* for traits or actions that it tolerates in an employee *identified as female at birth*." *Id.* at 8, citing *Bostock,* 140 S. Ct. at 1741 (emphasis added).

In other words, the Court rested its ruling on the fact that people remain either male or female, as they were "identified... at birth," regardless whether they may later develop a "gender identity" that they believe is incongruent with their sex.

Since the court in *Bostock* did not prejudge any legal questions outside of its narrow holding, the Department's proposed amendments amount to a major legislative rulemaking that must stand on its own two feet, including a reasoned explanation of how the proposed gender identity provisions comport with the legislative history and Congressional intent underlying Title IX's language, "on the basis of sex." *See* Mem. Opinion and Order, *Tennessee v. U.S. Dep't of Educ.*, Case No. 3:21-cv-308 at 41 (E.D. Tenn., July 15, 2022) (enjoining Department guidance that "purports to expand the footprint of Title IX's 'on the basis of sex' language. . ." in a manner that is not supported by "*Bostock*, Title IX, or its implementing regulations").

2. *Bostock* is poorly reasoned and its defects should be strictly limited to the specific facts and Title VII claims at issue in that case.

The holding about "transgender status" in *Bostock* was poorly reasoned, and its defects should be limited to that case. The court conflated subjective and ill-defined feelings and beliefs about "gender identity" (*i.e.* "transgender status") with objective and well-defined material states of being (homosexuality, bisexuality, and heterosexuality, *i.e.*, sexual orientation). Under *Bostock*, something that is not otherwise considered a legal injury *becomes* a legal injury purely through an act of self-declaration: "I identify as transgender, so requiring me to comply with permissible and universally-applicable 'sex'-based rules harms me, because it conflicts with my subjective perception of myself." This is not a viable legal framework for implementing rules about employment under Title VII, much less all the rules that expressly allow for sex-differentiation under Title IX.

The ruling is also defective because, while neither of the employers in *Bostock* or *Zarda* claimed that extending Title VII employment protections to gay men would undermine the rights of other employees in violation of Title VII, the employer in *Harris Funeral Homes* did argue that complying with the extraordinary demands of its male funeral director would cause harm to others, including by undermining other employees' sex-based rights. The court simply swept these crucial distinctions and concerns aside for the sake of simplicity.

Specifically, Harris Funeral Homes made the decision to terminate their employee because they correctly understood that the his stated intention to "live

and work full-time as a woman" meant that he planned to flout the employer's sex-specific dress code by wearing skirts (as required of female employees) instead of a suit and tie, as he had done for the previous five years (as required of male employees); that he would misrepresent himself as a female to grieving funeral home clients; and that he would use the women's restrooms alongside female staff and guests. In the employer's view, those actions would significantly undermine the funeral home's ability to provide a safe and dignified environment in which to serve grieving families. *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 593 (6th Cir. 2018) (noting that the funeral home owner "insisted that [the male employee] presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman[. . . .] The record thus compels the finding that [the owner's] concerns extended beyond [the male employee's] attire and reached [his] appearance and behavior more generally.").

To be clear: under Title VII, employers are still allowed to maintain sex-specific grooming standards and dress codes, even when such codes are grounded in regressive sex-stereotypes and impose material burdens on women but not men. *Cf. Harris Funeral Homes,* 884 F.3d at 574 (noting that recent case law calls into question the legality of even non-burdensome sex-specific dress codes that are based on sex-stereotypes.) However, the male employee in *Harris Funeral Homes* did not raise such a challenge, because he expressly wished to dress according to feminine sex-stereotypes. Title VII also permits employers to maintain sex-segregated restrooms. *See* 29 C.F.R. § 1604.2(b)(5) (stating that employers cannot avoid hiring women on the ground that they lack separate women's restroom facilities). Therefore, when women are at work they are generally entitled to safe, sex-segregated bathrooms or showers. The male employee in *Harris Funeral Homes* did not challenge these policies by arguing that *all* male employees have a federally-protected right to wear skirts and use women's bathrooms in the workplace. Rather, the employee argued that he was entitled to special exemptions from ordinary sex-based rules, on the basis of his subjective "gender identity" feelings.

At no point did the Supreme Court bother to examine the ideological underpinnings of "transgender status" or "gender identity," or determine whether granting these concepts official legal recognition *in lieu* of "sex" is consistent with the text or purpose of Title VII. *See* 140 S. Ct. at 1739 (admitting that "nothing in [the majority's] approach to these cases turns on the question of whether "sex" in Title VII "refer[s] only to biological distinctions between male and female"). Nor did it consider how granting broad exemptions from sex-based rules based on self-declared "transgender status" would affect others, falsely insisting that these important questions could be decided separately. In reality, Harris Funeral Homes faced two stark choices: either allow their male employee of 5 years to return to work wearing skirts and using the women's restroom, or terminate the employment relationship.

In a word, the court's reasoning was shoddy. If this reasoning were valid it would apply to other civil rights laws that prohibit discrimination on the basis of immutable characteristics like age or ethnicity. A business could be held liable for age discrimination if it fired an employee who came to work one day dressed in children's clothing and sincerely insisted that he was 9 years old, since age "plays a necessary and undisguisable role in the decision." A school would be subject to claims of racial discrimination if they fired a white man who intentionally misrepresented to his students and colleagues that he is black, since his race "plays a necessary and undisguisable role in the decision." Yet these outcomes – which are consistent with the reasoning in *Bostock* – are patently absurd.

Bostock is based upon a denial that material sex differences between male and female are real and significant. By blinding itself to those differences, the court inexplicably lent the highest level of judicial imprimatur to an ill-defined class of individuals whose only shared characteristics are that they make objectively-false claims about their sex and demand others in society treat those claims as legally binding truths. Extending this flawed reasoning to the Title IX regulations will only foster more absurd and harmful results.

III. SPECIFIC PROPOSED SUBSTANTIVE REGULATIONS

A. "Gender Identity" And The Scope Of Title IX

The Department's proposal to include "gender identity" in a new regulatory definition of the scope of Title IX under proposed § 106.10 is contrary to the text and legislative intent of Title IX, and is arbitrary and capricious.

1. "Sex" is a vital characteristic grounded in biology, not a subjective identity grounded in feelings.

> [S]exual reproduction is a very old evolutionary strategy, which far predates the existence of the North Star (70 million years old), the rings of Saturn (10 to 100 million years old), and even trees (approximately 370 million years old). Primitive forms of sexual reproduction date back about two billion years, but complex organisms like sharks have been using this strategy for at least 450 million years. If there's anything new under the sun, it's certainly not sex.

Bogardus, *How Our Shoes Can Help Explain the Biology of Sex; There are no good reasons to doubt that sex is, in fact, binary*, REALITY'S LAST STAND (Aug. 9, 2022), https://www.realityslaststand.com/p/how-our-shoes-can-help-explain-the

Humans are an anisogamous mammalian species, meaning we use "a mode of sexual reproduction in which fusing gametes, formed by participating parents, are dissimilar in size." Kumar, *et al*., *Anisogamy*, in: Vonk, J., Shackelford, T. (eds) ENCYCLOPEDIA OF ANIMAL COGNITION AND BEHAVIOR. Springer, Cham., (Feb. 2019) https://doi.org/10.1007/978-3-319-47829-6_340-1. In mammals, sex is determined based on whether an individual's sexual reproductive system is organized around the production of large gametes called eggs (making her female) or small gametes called sperm (making him male). *See* Lehtonen, *et al*., *Gamete competition, gamete limitation, and the evolution of the two sexes*, MOLECULAR HUMAN REPRODUCTION, Vol.20, No.12 pp. 1161–1168, (2014), https://pubmed.ncbi.nlm.nih.gov/25323972/.

Accordingly, a person's "sex" refers to nothing more or less than whether he or she is a member of the male reproductive sex class or a member of the female reproductive sex class. *See* "Sex," MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003); *id.*, "Male," *id.,* "Female," https://medical-dictionary.thefreedictionary.com/sex. The same principle applies to individuals who have so-called "intersex" characteristics, more accurately called differences of sex development (DSDs). *See* section III.F. of these comments, explaining why the term "intersex" in inaccurate and inappropriate.

A human's sex is determined *in utero*, when one or the other reproductive developmental pathway is selected for, and the other is suppressed. *See* Sekido, *Sex Determination And SRY: Down To A Wink And A Nudge?* TRENDS GENET. (Jan. 2009); https://pubmed.ncbi.nlm.nih.gov/19027189. Regardless of an individual's personal thoughts or beliefs about his or her sex, and regardless of whether a person takes steps (such as hormonal or surgical interventions) to emulate the physiology of the opposite sex, no belief or intervention can unwind the fact that either a male or female reproductive developmental pathway was selected while the person was *in utero*, making the person immutably male or female. *See id.* Further, a person's classification as male or female does not depend on whether his or her sexual reproductive system actually or actively produces the large gametes (ova) or small gametes (sperm) that determine the person's sex class; in other words, an infertile woman is immutably female, and an infertile male is immutably male, because the person's reproductive system developed *in utero* to be organized around the production of either large or small gametes. *Id.*

In humans, around 6,500 genes are expressed differently based on sex, and this has genetic consequences that lead to a plethora of differences between males and females affecting a myriad of aspects of human life, such as how males versus females respond to medication or are susceptible to diseases. *See* Weizmann Institute of Science, *Researchers identify 6,500 genes that are expressed differently in men and women: Genes that are mostly active in one sex or the other may play a crucial role in our evolution, health*, SCIENCEDAILY (May 4, 2017), https://www.sciencedaily.com/releases/2017/05/170504104342.htm.

By scientific definition, only the female of the human species can produce large gametes as part of a sexual reproductive system developed to support the bearing of offspring. In other words, while not all females become pregnant, only females are capable of becoming pregnant. Protections against pregnancy discrimination are therefore legitimate corollaries of anti-sex discrimination laws only because "sex" refers to whether a person is biologically male or female. *See* section III.E. of these comments, below.

Civil rights laws and constitutional equal protection based on sex were and are needed precisely because women and girls face legal and social disadvantages on the basis of sex, regardless of any individual girl or woman's personal belief about her status as female. Thus, the legally appropriate interpretation of the term "sex" under Title IX must be biological sex, male or female, and the terms "women," "girls," "men," and "boys" must be understood to refer to human females and human males, respectively.

2. Interpreting "sex" as the biological distinction between male and female is the only interpretation that is consistent with the ordinary public meaning of 'sex' at the time of Title IX's enactment.

The Department in 2020 correctly observed that the text and contemporaneous history of Title IX demonstrates that "the ordinary public meaning of the term 'sex' at the time of Title IX's enactment could only have been, as Justice Gorsuch put it, 'biological distinctions between male and female.'" Title IX presupposes the existence of two sexes – male and female.

> For example, 20 U.S.C. 1681(a)(2), which concerns educational institutions commencing planned changes in admissions, refers to "an institution which admits only students of one sex to being an institution which admits students of both sexes." Similarly, 20 U.S.C. 1681(a)(6)(B) refers to "men's" and "women's" associations as well as organizations for "boys" and "girls" in the context of organizations "the membership of which has traditionally been limited to persons of one sex." Likewise, 20 U.S.C. 1681(a)(7)(A) refers to "boys'" and "girls'" conferences. Title IX does not prohibit an educational institution "from maintaining separate living facilities for the different sexes" pursuant to 20 U.S.C. 1686.
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> . . . .
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> In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department's justification for not allowing

> schools to use "a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex" was that "if progress is measured by determining whether an individual can perform twenty-five pushups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex."

Contemporaneous court decisions similarly assume that sex means the material distinctions between the sexes, male and female:

> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth"); 34 CFR §§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43. 106.52, 106.59, 106.61; see also *Bostock*, 140 S. Ct. at 1739, 1784–91 (Appendix A) (Alito, J. dissenting); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."); *General Elec. Co v. Gilbert*, 429 U.S. 125, 146, 149 (1976) (Brennan, J. and Marshall, J. dissenting) ("*Geduldig* itself obliges the Court to determine whether the exclusion of a sex-linked disability from the universe of compensable disabilities was actually the product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women's role in the labor force. . . . [T]he Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed.") (citations and footnote omitted).

No relevant facts about the nature of sex have changed since Congress enacted Title IX. In particular, no evidence has emerged to support the notion of a third (or fourth, or any greater number) of sexes. What has emerged is the "gender identity" belief system.

3. "Gender identity" beliefs lack a basis in material reality.

Because gender identity is founded on subjective beliefs, it has no material effect on one's sex. There exists no scientific evidence of feelings, thoughts, or social preferences that are categorically unique to one sex or incongruent with one sex.

Even in scientific studies aimed at finding sex differences in human behavior or preference, the differences can only be described as general tendencies in behavior that is largely varied *within* male and female sexes, and largely overlapping *between* the male and female sexes. *See* Cordelia Fine, TESTOSTERONE REX (W.W. Norton & Co., 2017); Cordelia Fine, DELUSIONS OF GENDER: THE REAL SCIENCE BEHIND SEX DIFFERENCES (Icon Books 2010).

As with "transgender," the term "cisgender" is an artifice employed in the "gender identity" belief system. "Cisgender" is commonly defined as, "of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." Merriam-Webster, "Cisgender," MERRIAM-WEBSTER online, https://www.merriam-webster.com/dictionary/cisgender. *See also*, *e.g.*, American Psychological Assoc., *A glossary: Defining transgender terms*, APA online (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary. Since it depends on the poorly-defined and unverifiable concept of "gender identity," it is equally inaccurate, and serves only to promote the idea that humans fall into the imagined "cisgender/transgender" categories. Referring to individuals as "cisgender" perpetuates the idea that all people have a gender identity, and anyone who does not consider him or herself "transgender" identifies with all the sex-stereotypes and gender roles that are associated with his or her sex. There is no evidence to support these ideas.

Unlike sex, there are no objective diagnostic tools to detect, measure, or classify an individual's "gender identity." Therefore, as the concept is used in the NPRM, "gender identity" can mean virtually anything that any given person perceives it to mean. Indeed, "gender identity" is not limited to "identifying as" male or female, but rather is believed to encompass a theoretically unlimited number of idiosyncratic identities. One influential group defines "gender identity" as "[a] person's intrinsic sense of being male (a boy or a man), female (a girl or woman), or an *alternative gender (e.g.*, boygirl, girlboy, transgender, genderqueer, ***eunuch***)." World Professional Association for Transgender Health, (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (2012), available at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341 (emphasis added; citations omitted).[3] Thus, even a man's sexualized desire to have his testicles surgically removed or rendered non-functional would be considered a "gender identity," which would entitle him to demand special

[3] In anticipation of protestations claiming that this viewpoint is a fringe one, we note that WPATH is taken seriously enough that it is cited as a credible and authoritative source of information and policy advice by federal agencies. For example, in a 2016 report by the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, https://nces.ed.gov/FCSM/pdf/Evaluations_of_SOGI_Questions_20160923.pdf, and by Admiral Levine, the HHS Assistant Secretary for Health, in remarks to the April 2022 "Out for Health" conference, https://www.hhs.gov/about/news/2022/04/30/remarks-by-hhs-assistant-secretary-for-health-adm-rachel-levine-for-the-2022-out-for-health-conference.html.

privileges not available to other men, including access to female-only spaces and athletics.

It is worth pausing to note that this description of "gender identity" beliefs is fully consistent with descriptions of that concept by entities who claim to have authoritative knowledge of "gender issues," with the exception of a single point of disagreement: proponents of "gender identity" claim (without evidence) that it is an "***intrinsic*** sense of being male. . . or female," or something else. WPATH 2012, *supra* at 96. Setting aside the dubious notion that any subjective, mutable "sense" can ever accurately be described as "intrinsic," this confirms that "gender identity" is defined even by its most ardent and respected proponents as an internal, mental, psychological, emotional "*sense* of being," not an objectively verifiable state of being.

If a person can self-identify his "sex" in a way that conflicts with material reality, then a person would be justified in demanding the right to self-identify *any* legally-relevant vital characteristic in such a manner. An atheist who renounced all faith-based beliefs and traditions could "identify as" Catholic based on self-declaration alone, and lodge successful religious discrimination claims on that basis. People with no discernable disabilities could "identify as" disabled based on self-declaration and file discrimination claims on that basis. People reliably documented as having been born outside of the U.S. could "identify as" U.S. citizens based on self-declaration and claim national origin discrimination on that basis. Under the same rationale employed by the Department to justify its "gender identity" proposals, an agency or court would be barred from rejecting whatever "identity" the claimant asserts.

The closest conceptual relative to "gender identity" in U.S. legal jurisprudence is the First Amendment prohibition against laws restricting the free exercise of religious belief. Religious belief is personal, mutable, and subjective, and the possession of religious belief from a legal standpoint is largely a matter of self-declaration. However, unlike "gender identity," claims of religious discrimination are subject to testing for verifiability and sincerity, because specific religious beliefs are relatively well-defined. For example, Mormonism prescribes specific foundational concepts and practices that differ substantially from those prescribed under Islam.

In contrast, believing oneself to be transgender has no specific or objective definition. Whatever feelings or preferences a person subjectively believes to be in conflict with their sex is what purportedly makes that person "transgender"—even thought billions of other people of both sexes can and do have the same feelings and preferences. Thus a male can claim that he identifies as transgender based on his possession of a submissive or nurturing personality, which he subjectively characterizes as feminine, even though countless females defy those stereotypical expectations, and countless males embrace them.

A claim to hold a particular status can only be dismissed as spurious if the status itself has a definition that enables a neutral arbiter to distinguish objectively between spurious and non-spurious claims. But a claim of discrimination on the basis of "gender identity" is always based on actions that violate ordinary standards of behavior and make unusual demands of others. Other people may be required to remember and use inaccurate pronouns, to falsify records, or to make false statements. Institutions that wish to provide singe-sex spaces or services specifically for females may be required to grant access to males, and the women and girls who seek such services may have no legal recourse to challenge their loss of safety, privacy, and dignity.

At a minimum, the Department must explain and justify why counterfactual self-declaration of age, race, religion, disability, or nationality is facially absurd, but inaccurately "identifying as" the opposite sex is a valid construction of "sex" under Title IX.

4. The proposed "gender identity" provisions alter the meaning of "sex" under Title IX, despite the Department's omission of formal definitions.

The Department in 2020 took a distinct, measured position in the dispute over sex and "gender identity." To begin, the Department made clear that all people regardless of sex or "gender identity" may be subject to any of the three categories of sexual harassment defined in the 2020 regulations, so all people regardless of sex or "gender identity" are entitled to remedies for such discrimination under Title IX. Dept. of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30177-78 (May 19, 2020) (the 2020 Sexual Harassment Regulation).

This is obvious and straightforward, and we are unaware of any efforts – during the 2020 rulemaking or today – to exclude people who assert a "gender identity" from the ordinary protections and remedies that are available to all people "on the basis of sex" under Title IX, including the current sexual harassment regulations. This approach is also consistent with the Supreme Court's ruling in *Bostock*. *See* WoLF Petition for Rulemaking at 12-13.

At the same time, the Department in 2020 affirmed that "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition." Further, the Department has always "expressly acknowledged physiological differences between the male and female sexes" in its Title IX regulations. *Id.* (citing examples). The Department affirmed this stance in its revised letter of impending enforcement action in OCR Case No. 01-19-4025, *In re. Connecticut Interscholastic Athletic Conference*, *et al.* (Aug. 31, 2020) (hereafter,

revised CIAC letter), stating that, "when a recipient provides 'separate teams for members of each sex' under 34 C.F.R. 106.41(b), 'the recipient must separate those teams on the basis of biological sex' and not on the basis of gender identity." NPRM at 41530, describing the revised CIAC letter.

Granted, the Department sidestepped calls to include a definition of the word "sex" in the 2020 final regulations based on its reasoning that:

> [D]efining sex is not necessary to effectuate these final regulations ***and has consequences that extend outside the scope of this rulemaking***. These final regulations primarily address a form of sex discrimination—sexual harassment—that does not depend on whether the definition of 'sex' involves solely the person's biological characteristics... or whether a person's 'sex' is defined to include a person's gender identity.

Id. (emphasis added).

However, in this NPRM, the Department has moved boldly toward the latter understanding of sex, in several ways:

(1) by redefining the scope of Title IX as including "gender identity," giving "gender identity" coequal status with sex, under proposed 34 C.F.R. § 106.10;

(2) by making it a violation of Title IX for funding recipients to maintain single-sex spaces, athletics, or other activities or programs where "sex" is understood to mean the distinction between male and female, under proposed § 106.31(a)(2); and

(3) by dictating that recipients must allow self-identification of sex *and* self-identification of "gender identity" for pre-employment and pre-application inquiries under proposed § 106.21(c)(2)(iii) and proposed § 106.60(d).

Thus, the Department cannot justify its current refusal to adopt clear definitions of "sex" and "gender identity" by citing the same rationale it offered in its 2020 Sexual Harassment Rulemaking, because that rationale no longer applies. *Contra* NPRM at 41534 (contending that the Department's "understanding of sex-based different treatment does not depend on any particular definition of the term 'sex.'"). While in 2020 the "regulations focus[ed] on prohibited conduct, irrespective of a person's sexual orientation or gender identity," today's proposed rules would explicitly incorporate "gender identity" in several ways that significantly alter the meaning of sex, thereby creating several entirely new categories of prohibited conduct. These are precisely the sort of "consequences that extend outside the scope of [the 2020] rulemaking," that, by the Department's own prior admission, prompt the need for an explicit definition of "sex" under Title IX.

In light of all these proposed changes and the consequences that will flow from them, the Department needs to acknowledge that the proposed "gender identity" provisions will permit self-identification of both sex and gender identity, and it must further acknowledge that these changes will outlaw most (if not all) existing single-sex spaces, athletic opportunities, and other education activities and resources. Then it must provide a rational justification for these drastic changes in policy.

As the NPRM currently stands, there is a blatant conflict between the insisting, on one hand, that "sex-based different treatment does not depend on any particular definition of the term 'sex,'" while simultaneously codifying the opposite legal finding, *i.e.*, that "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." NPRM at 41534 (emphasis added). If it were true that sex-based differential treatment does not depend on any particular definition of "sex" then, by force of logic, no harm would arise when recipients choose to employ a material biological definition based solely on the distinction between female and male, without regard to whether an individual asserts some sort of "gender identity." If the meaning of "sex" were genuinely unimportant, the Department could not justify dictating that recipients *must* determine eligibility for single-"sex" spaces and opportunities on the basis of "gender identity."

Moreover, the pertinent question raised by the current NPRM is not merely whether sex is a "binary classification" nor even whether there are unspecified "physiological differences" between male and female, as these questions were posed (then dismissed as irrelevant) in the 2020 Sexual Harassment Regulation, 85 Fed. Reg. at 30178. The Department's answers to those questions may have been acceptable in 2020 insofar as the Department at that time had expressly declined to redefine "sex" in those rules to mean or include "gender identity." But, now, the current NPRM creates an unavoidable conflict over whether sex is determined (1) solely by the objectively-verifiable distinctions between male and female, or (2) by an individual's subjective beliefs and feelings about gender roles and "gender identity," or (3) by some mix of the two depending on whether the individuals involved in a particular circumstance subscribe to one definition or the other.

To the extent the Department imagines that "sex" can have at least two completely different meanings depending on whether the parties in a Title IX grievance possess a "gender identity" or not, that approach is illogical and irrational on its face. Fundamentally, "sex" *cannot* be determined by innate biological reality in some individuals but subjective feelings in others; the resulting "sex" categories would be rendered arbitrary and meaningless at best. This rulemaking will either preserve the plain and ordinary public meaning of "sex" as the biological distinction between male and female under Title IX, or it will drastically alter that meaning to accommodate "gender identity" beliefs, but it cannot achieve both goals at once. The

Department cannot hide from this obvious conundrum by pretending not to know what "sex" actually is, or pretending that the proposed "gender identity" provisions will have no effect on the Department's interpretation and application of that statutory phrase "on the basis of sex."

In short, the proposed rules in the current NPRM *do in fact* purport to alter the meaning of "sex" under Title IX. The Department cannot avoid providing a full explanation and justification for this change simply by refusing to adopt formal regulatory definitions.

5. There is no legitimate governmental purpose for imposing the gender identity belief system on Title IX funding recipients or beneficiaries.

The proposed regulations on "gender identity" threaten freedom of speech and freedom of conscience for employees and beneficiaries of the recipients' programs. "[P]rominent members of the founding generation [of the United States] condemned laws requiring public employees to affirm or support beliefs with which they disagreed," in recognition of the principle that free speech – including freedom from compelled speech – is "essential to our democratic form of government." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021), citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2471 & n.8 (2018). "Government officials violate the First Amendment whenever they try to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,' and when they 'force citizens to confess by word or act their faith therein.'" *Id.*, *citing W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

These core democratic principles are at odds with the Department's proposal to impose the "gender identity" belief system on recipients and their beneficiaries under the guise of rules to implement Title IX's prohibition against discrimination "on the basis of sex."

As discussed above, human sex differences are dictated by material reality and mammalian biology that has primordial roots, and those differences carry important practical implications for the lives of women and girls. The material repercussions of human sex differences persist regardless of any individual's subjective beliefs and opinions about them. In contrast, the proposals on "gender identity" are grounded in a subjective belief system wherein it is considered hostile and discriminatory simply to acknowledge the objective reality of an individual's sex, or to apply ordinary permissible sex-based rules, if the individual claims to have some form of "gender identity." By interposing "gender identity" in Title IX, the Department is attempting to prescribe an official orthodoxy in matters of opinion about sex and "gender identity."

This is fundamentally unlawful and exceeds the Department's remit. Be it under Title IX or any other context, **there is no legitimate governmental purpose in imposing one person's subjective beliefs upon others**. A man who is unambiguously male may believe that his feelings and self-image are categorically feminine, and he may adopt a belief system that tells him those feelings mean he is a "transgender woman." The First Amendment of the Constitution guarantees that he is free to hold and express these beliefs, regardless of their wisdom or factual validity. But federal agencies cannot conscript everyone else to validate or facilitate a man's beliefs about himself, by mandating that we undertake supportive words or actions in the realm of material reality. The government lacks a legitimate purpose in attempting to impose such a belief system upon others, and the First Amendment explicitly bars the Department from doing so.

This point is illuminated by the 6th Circuit's ruling in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). Nicholas Meriwether was a professor at Shawnee State University when he was threatened with severe punishment under the mantle of Title IX, after he declined to treat a male student according to his feminine "gender identity" rather than his male sex. At a minimum, the University asserted that Title IX required Meriwether to use female-specific pronouns or honorifics when addressing this male student in class. Meriwether informed the school that he "felt he was being compelled to affirm a position at odds with his faith," so he requested a compromise under which he would avoid using any pronouns, and would instead address the male student only by his surname. *Id.* at 501.

Invoking Title IX and its regulatory grievance procedures, Shawnee State asserted that because "Doe 'perceives them self as a female,' [sic] and because Meriwether has 'refuse[d] to recognize' that identity by using female pronouns, Meriwether had engaged in discrimination and 'created a hostile environment.'" *Id.* at 502. The staff adopted this conclusion despite a complete absence of evidence that Meriwether's speech had interfered in any way with the student's ability to benefit from his participation in class. According to the University's administrators, (people responsible for implementing Title IX for thousands of students), merely declining to use female pronouns for a male student was all it took to establish a "hostile environment" under Title IX. *Id.* at 501-02.

At one point the University changed its tune and declared that Meriwether's behavior had *not* created a hostile environment, but had instead fallen afoul of Title IX on the theory of differential treatment. *Id.* at 502. "The officials justified the university's refusal to accommodate Meriwether's religious beliefs by equating his views to those of a hypothetical racist or sexist. . . . Since the university would not accommodate religiously motivated racism or sexism, it ought not accommodate Meriwether's religious beliefs." *Id.* Later during litigation the University revived its "hostile environment" theory. *Id.* at 514-15.

The Sixth Circuit concluded that the University's interpretation and implementation of Title IX was inconsistent with the professor's freedom of speech under the First Amendment. "Through his continued refusal to address Doe as a woman, [Meriwether] advanced a viewpoint on gender identity. . . . that 'sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires.'" *Id.* at 509. Because the school had attempted to prohibit Meriwether's free expression of a dissenting viewpoint about the nature of sex and gender, it had violated his right to free speech under the First Amendment. *Id.*

To be clear, while the Sixth Circuit also ruled that Shawnee State's actions violated the Establishment Clause, the court's ruling on free speech is distinct from its ruling on free exercise of religion. As an arm of the government, a publicly funded university lacks a legitimate purpose in attempting to establish orthodoxies—not only religious ones, but any orthodoxies relating to politics or other matters of opinion. Otherwise, "[a] university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as 'comrades.' That cannot be. 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe' such orthodoxy." *Meriwether*, 992 F.3d at 506, citing *Barnette*, 319 U.S. at 642, 63 S. Ct. 1178. Indeed, this principle also protects the free speech interests of those who embrace gender identity beliefs. *Id.* at 506-07.

The Department's proposed "gender identity" rules are irreconcilable with Constitutionally-guaranteed freedom of speech and freedom of conscience. Already, proclamations by the Department in 2016 and 2021 have encouraged abusive misapplication of the Title IX grievance process against elementary and secondary public school students and teachers. For example, before eventually dropping their complaint under threat of litigation, the Kiel Area School District in Wisconsin issued a "Formal Complaint of Sexual Harassment" against three eighth-grade boys founded on allegations of "mispronouning," after the boys expressed disagreement with a female student who demanded that members of the class refer to her as "they" or "them," in accordance with the student's idiosyncratic gender identity. *See* Ex. B, Kiel Area School District Complaint (Mar. 29, 2022) and Notice of Formal Complaint (April 2022); Ex. C, Wisconsin Inst. for Law and Liberty response letter (June 2, 2022). Similar abuse of the Title IX process has been highlighted in a case currently pending in the Virginia State Court, *Vlaming v. West Point Sch. Bd.*, Case No. 211061. *See* Ex. D, *Vlaming* Complaint (Sept. 30, 2019); Ex. E, Brief of Amicus Curiae Women's Liberation Front in support of appellant (May 23, 2022).

It is not sufficiently reassuring that the school eventually dropped its complaint in the Kiel Area School District example, or that the 6th Circuit eventually upheld the professor's Constitutional liberties in *Meriwether*. In these and numerous other cases, parties have been subjected to unjustified and

inappropriate hostility by school officials, and have been forced to expend substantial personal funds and energy in order to restore their rights.

Likewise, the Department's discussion about how its proposed rules are consistent with the First Amendment is not sufficiently reassuring. NPRM at 41414-15. It does not address this particular problem of Title IX claims being filed on the basis of "gender identity" and "misgendering." It focuses on the proposed standards for severity and pervasiveness in the context of the proposed "sex-based harassment" provisions, but does not address the more pertinent substantive question of whether correct usage of sex-based pronouns, or other verbal expressions of fact or opinion related to "gender identity," can *ever* form the basis of a valid Title IX complaint. The Department cannot finalize the proposed "gender identity" rules without directly addressing how those rules will ensure freedom of speech and freedom of conscience.

B. Self-Identification Of Sex And "Gender Identity" For Pre-Admission And Pre-Employment Inquiries

1. Overarching problems with self-identification of sex and "gender identity"

We object to the proposed regulations governing pre-admission inquiries under proposed § 106.21(c)(2)(iii), and pre-employment inquiries under proposed § 106.60(d). These changes would effectuate both a new prohibition and a new mandate: they would prohibit recipients from making inquiries about sex based specifically on sex recorded at birth; and they would mandate that recipients allow applicants to "self-identify their sex" based on their "gender identity." NPRM at 41517. The Department lacks authority or a valid rationale for either of these changes.

The current regulations state that a "recipient may make pre-admission inquiry as to the *sex* of an applicant for admision, [*sic*] but only if such inquiry is made equally of such applicants of *both sexes* and if the results of such inquiry are not used in connection with discrimination prohibited by this part." 34 C.F.R. §106.21(c)(4) (emphasis added). Accordingly, the current language supports inquiries about an individual's sex (*i.e.*, the individual's sex as observed at birth), and it presupposes a binary definition of sex grounded in biology; it neither supports nor mandates inquiries about self-declared "gender identity."

Under the proposed rules:

> [T]he Department proposes revising the last sentence in § 106.21(c)(2)(iii) to use the term *"all applicants" instead of the term "both sexes" in recognition of the fact that some applicants may have a nonbinary gender identity*. For the same reason, if a recipient asks applicants to *self-identify*

> *their sex* and provides options from which applicants may choose, nothing in the current or proposed regulations would prohibit a recipient from offering *nonbinary options in addition to male and female options*.

NPRM at 41517 (emphasis added).

Similarly, the current regulations authorize "pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part." 34 C.F.R. § 106.60(b). But, under the proposed rules, "[a] recipient may ask an applicant for employment to *self-identify their sex*, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by this part." NPRM at 41528 (emphasis added).

As with "gender identity" elsewhere in the proposed regulations, the Department fails to clearly acknowledge or explain the effect of these proposed changes on the pre-admission and pre-employment process. Nonetheless, it is apparent that the *de facto* effect of both of these provisions would be to redefine the term "sex" for purposes of Title IX, so as to encompass *either* information about whether one is male or female (*i.e.,* information about an individual's material, biological, objectively-verifiable vital characteristics), *or* information about an individual's self-declared "gender identity" (*i.e.,* a characteristic that is wholly subjective and thus unverifiable, capable of multiple changes or "fluidity" over any given period of time, and grounded solely in an individual's idiosyncratic self-image, feelings or beliefs about sex, and affinity for gender roles). Absolutely nothing in the plain text or legislative history of Title IX justifies this extreme redefinition of "sex" under Title IX.

Further, because the proposed rules only allow recipients to ask an applicant for admission or employment to "self-identify their sex," they will be interpreted as prohibiting recipients either from specifying that "sex" in pre-application or pre-employment inquiries refers specifically to the distinction between male and female as observed upon the individual's birth, and/or from requiring that every applicant provide proof of their sex in the form of a valid birth certificate or other official form that was completed by a qualified professional based on the individual's sex at birth. Both of these practices are permissible (and widespread) under the current Title IX regulations, but would be prohibited under the proposed §§ 106.21(c)(2)(iii) and 106.60(d).

The Department offers no explanation for its proposal, aside from a wish to "enhance readability," and a vague allusion to individuals with a "nonbinary gender identity" who may desire response "options in addition to male and female." *Id.* at

41516. These are not sufficient to justify such a drastic change. There is no way in which the proposed language would enhance the "readability" of the existing language in either of these two existing provisions, because that language is already clear and comprehensible. As a practical matter, the term "both sexes" has precisely the same effect as the term "all applicants," since all humans are either male or female and therefore "all applicants" already fall within the umbrella category of "both sexes." *See* section III.A.1. of these comments, above. This change makes no difference in terms of clarity.

However, it does have the effect of obfuscating the fact that sex is binary and immutable, and we assume that is the Department's true purpose. The NPRM cites no evidence that any recipients experience confusion over the meaning of the existing language, as no public commenters appear to have even mentioned pre-application or pre-employment inquiries during the Department's listening sessions. *See* Transcript of Title IX Public Hearing (June 2021). We are left to infer that the Department's real, unstated goal is simply to facilitate a redefinition of sex to mean or include self-declared "gender identity."

The proposal is doomed in any event because the concept of "gender identity" falls outside of the Department's statutory authority to prohibit discrimination "on the basis of sex." 20 U.S.C. § 1681(a). On the contrary, allowing self-identification of sex to be determined by subjective "gender identity" will lead to actions that violate the rights and endanger the safety of women and girls—by allowing males to use spaces that are presently designated for single-sex use by females, by allowing males to access sex-specific athletics to the detriment of females, and by redirecting other opportunities, services, and material resources away from females toward males.

2. Inappropriate promotion of psychosocial interventions without parental approval or medical oversight, causing disproportionate harm to girls

The proposed rules would force public school teachers and administrators and other staff at Title IX-covered institutions to facilitate "gender transition" without parental consent or even contrary to parents' express wishes. There is growing evidence that teachings and practices associated with gender identity policies are actively harmful, particularly for minor children. The Department has been apprised of these concerns but has utterly failed to address them in the NPRM.

The concept of "gender identity" goes hand in hand with the concept of "gender transition." *See* 2016 Dear Colleague Letter on Title IX and Transgender Students at 2 (cited in the NPRM at 41529). "Gender transition" may entail social interventions, such as the adoption of a name, clothing fashion, and hairstyle stereotypically associated with the opposite sex or with androgyny. It may also entail medical interventions, such as the use of puberty-blocking drugs, cross-sex

hormones, or cosmetic surgery aimed at imitating superficial physical phenotypes associated with the opposite sex or with androgyny. *See* Ex. F, Brief Amici Curiae of Quentin Van Meter, M.D., et al. (May 23, 2022) at 13-14.

Ostensibly, "gender transition" is aimed at alleviating feelings of gender dysphoria, a psychological disorder defined by the American Psychiatric Association (APA) as "psychological distress that results from an incongruence between one's sex assigned [sic] at birth and one's gender identity." APA, *What is Gender Dysphoria?* APA online, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria, (discussing diagnostic criteria in the APA's Diagnostic and Statistical Manual of Mental Health Disorders: DSM-5TM, 5th ed. (2013)). However, there is a growing body of evidence that interventions aimed at "social transition" inappropriately funnel children toward medically-unnecessary, experimental, and/or off-label pharmaceutical or surgical interventions, while distracting their parents and medical caregivers from addressing serious underlying psychological problems that contributed to the child's development of dysphoria, hardening rather than alleviating a child's subjective sense that there is something wrong with her healthy body. As a result, even social "gender transition" is a serious psycho-social intervention.

According to a formal independent review commissioned by the English National Health Service (NHS England), "[s]ocial transition. . . may not be thought of as an intervention or treatment, because it is not something that happens within health services. However, it is important to view it as an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning." Ex. G, Cass, et al., *The Cass Review: Independent review of gender identity services for children and young people: Interim report* at 62 (Feb. 2022), https://cass.independent-review.uk/wp-content/uploads/2022/03/Cass-Review-Interim-Report-Final-Web-Accessible.pdf.[4] The report warns that, when extensive social transition occurs before the underlying causes of a child's gender dysphoria have been explored, it drives children and parents to expect and demand ongoing and additional serious interventions, rather than exploring other approaches that are less physically and psychologically invasive. *Id.* at 17.

These concerns are especially grave for adolescent girls, given evidence of a sharp and disproportionate increase in the presentation of adolescent girls identifying as "transgender" (including variations like "nonbinary," etc.), and

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[4] *Citing* Sievert, et al., *Not Social Transition Status, But Peer Relations And Family Functioning Predict Psychological Functioning In A German Clinical Sample Of Children With Gender Dysphoria*, CLIN CHILD PSYCHOL PSYCHIATRY 26(1): 79–95 (2020), DOI: 10.1177/1359104520964530, and Ehrensaft, et al., *Prepubertal social gender transitions: What we know; what we can learn—A view from a gender affirmative lens*, INT J TRANSGEND 19(2): 251–68 (2018), DOI: 10.1080/15532739.2017.1414649.

seeking treatment for gender-related mental health distress. According to one international review:

> The findings in many studies that [natal females] have poorer mental wellbeing, along with the very rapid increase in [natal females] presenting for treatment (see paper 1, ref), is notable and requires careful monitoring. The aetiology [*i.e.,* the cause, set of causes, or manner of causation] of [gender dysphoria] is not fully understood, and the implications of this demographic change are important. Most papers attribute the increase in young people presenting for treatment to cultural shifts in acceptance of gender fluidity and greater availability of services. Whilst these factors are no doubt important, this alone probably does not explain the dramatic increase in [natal female] presentations: there remains the possibility, not apparently explored in this literature, that modern sociocultural pressures associated with womanhood / femininity are influencing this generation's propensity to seek treatment.

Thompson, *et al.*, *A PRISMA systematic review of adolescent gender dysphoria literature: 1) Epidemiology*, PLOS GLOBAL PUBLIC HEALTH (March 2022), https://doi.org/10.1371/journal.pgph.0000245; "Aetiology," variation of "etiology," MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), https://medical-dictionary.thefreedictionary.com/etiology.

In other words, where Title IX recipients encourage students to "socially transition" by means of self-identifying their sex or "gender identity" under proposed § 106.21, or by obtaining special treatment on the basis of "gender identity" under proposed §§ 106.10 and 106.31, those recipients would be engaging in psychosocial interventions that likely have a disproportionate adverse effect on the mental health of adolescent girls.

So serious is the growing concern over the lack of evidence to support both "social transition" (not to mention the more invasive and permanently damaging "medical transition"), that NHS England has just announced it is shutting down the Gender Identity Development Service (GIDS) at the Tavistock and Portman Trust in London in order to help address the concerns raised in the Cass Review. *See* Andersson, et al., *NHS to Close Tavistock Child Gender Identity Clinic*, BBC NEWS online (July 28, 2022), https://www.bbc.com/news/uk-62335665; Kirkup, *Why the Tavistock Clinic Had To Be Shut Down*, THE SPECTATOR.COM (July 28, 2022), https://www.spectator.co.uk/article/why-the-tavistock-clinic-had-to-be-shut-down.

Alarmed by the same evidence of harm, Sweden and Finland have dramatically altered their approach to "gender transition" as well. Davis, *The Beginning of the End of "Gender-Affirming Care?,"* COMMONSENSENEWS.COM, (July 30, 2022), https://www.commonsense.news/p/the-beginning-of-the-end-of-gender. s

Numerous citizen groups have raised concerns to the Department of Education about the lack of scientific integrity behind the push for "gender transition" and its danger to children and adolescents, including in an in-person meeting in June 2017 between the Department's Office of Civil Rights, WoLF, Alliance Defending Freedom, and several high school students and their parents. At that meeting, WoLF elaborated on the reasons for its lawsuit challenging the Department's 2016 joint "Dear Colleague" letter, including our concern that vulnerable children are being encouraged toward unhealthy mind-body alienation under the mantle of gender identity. These concerns were again repeated in WoLF's February, 2021 Petition for Rulemaking (Ex. A), and in pre-proposal meetings with citizen groups under Executive Order 12866 with staff from the Department and the White House. *See, e.g.* Ex. H, at 2, Wisc. Inst. for Law & Liberty E.O. 12866 comments (Mar. 31, 2022)[5] and Ex. I at 1, Family Research Council E.O. 12866 comments (Mar. 24, 2022).[6]

The Department has ignored these concerns entirely while forging ahead with its proposal to allow self-identification of sex in all Title IX institutions, effectively instructing public schools and other Title IX institutions to facilitate social "gender transition," a serious psychosocial intervention. *Cass*, *supra*. The proposed rule substitutes the unqualified judgment of public school administrators for the judgment of parents and legal guardians. This will have serious consequences for the students who demand these interventions, as well as externalized consequences for other students, faculty, and staff.

We note that the Department never acknowledges the concept of "gender transition" in the NPRM, despite the fact that this concept was raised numerous times in meetings with the Department and OIRA, and in the Department's June 2021 "Virtual Public Hearing." As with the absence of the term "gender dysphoria" in the NPRM, we assume that the omission is intentional, and motivated by the Department's desire to avoid accusations that it promoting risky "gender transition" for minors. However, the true nature of a regulation depends on what effects it will have when implemented in the field, not on whether the agency used a precise set of words in its proposal. Here, there can be no serious question that the effect of the Department's action is to promote and facilitate social "gender transition."

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[5] https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1870-AA16&meetingId=127623&acronym=1870-ED/OCR

[6] https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1870-AA16&meetingId=127173&acronym=1870-ED/OCR

Facilitating highly contested and potentially dangerous psychosocial mental health interventions for minors without parental consent goes well beyond the Department's remit. Furthermore, because it has ignored and failed to address serious, known concerns about this aspect of the proposed rules, the Department's proposal is arbitrary and capricious and falls short of minimum requirements for rulemaking under the Administrative Procedure Act.

C. "Gender Identity" And Permissible Differential Treatment On The Basis Of Sex

As the NPRM acknowledges, "[t]he Department's regulations have recognized limited contexts in which recipients are permitted to employ sex-specific rules or to separate students on the basis of sex because the Department has determined that in those contexts such treatment does not generally impose harm on students. *See, e.g.*, 34 CFR 106.33 (toilet, locker room, and shower facilities); *id*. at 106.34(a)(3) (human sexuality classes)." NPRM at 41534.

That is a titanic understatement. It is not merely true that sex differentiation is *harmless*; rather, sex differentiation is positively *essential* to ensure that women and girls have an equal chance to access educational programs and activities—particularly in settings where women and girls have innate athletic disadvantages or face unequal physical risks compared to men and boys, due to their innate and immutable female sex characteristics.

In settings where a person's sex is not legally relevant to how they must be treated under Title IX, a person's "gender identity" (*i.e.*, a subjective belief about sex or gender) is also irrelevant, and people who assert a gender identity retain all of the ordinary protections against discrimination on the basis of sex. However, when sex *is* relevant to ensuring equality for women and girls (as in competitive sports), the *only* relevant characteristic is sex because, in such a circumstances, consideration of "gender identity" will necessarily replace and override consideration of sex. Where sex is the characteristic that matters, legal protections based on "gender identity" inevitably come at the expense of sex-based rights and protections.

Proposed § 106.31(a)(2) would grant legal protections for "gender identity" at the expense of longstanding protections sex-based rights and protections, contrary to the text and legislative purpose of Title IX. Under this proposal, the Department would codify the legal conclusion that "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." NPRM at 41534. Yet we see no evidence that the Department has properly considered *all* legitimate and competing interests at stake before formulating this conclusion.

The Department is familiar with the process of weighing and balancing different interests: for example, in balancing a recipient's duty to protect free speech with their duty to prevent sex-based harassment, or balancing the due process rights of a respondent with the security interests of a complainant. *See*, *e.g.*, NPRM at 41468 (balancing competing interests in timeframes for grievance procedures); *id.* at 41477 (balancing recipients' Title IX obligations with a complainant's request to halt a grievance procedure); *id.* at 41499 (balancing a recipient's duty to gather evidence impartially with the parties' interests in presenting all potentially relevant evidence). The Department has no less a duty to consider and weigh the multiple competing interests at stake under its "gender identity" proposals.

Instead, the Department cites various materials that all commit the same fundamental errors that spoil the NPRM. First, the subjective desires of people who assert a "gender identity" are improperly characterized as needs. Next, the Department's desire to prevent supposed "discrimination" on the basis of "gender identity" (including by giving boys access to girls' bathrooms, locker rooms, and sports) is elevated at the expense of the Department's *statutory duty* to prevent and remedy unlawful discrimination "on the basis of sex." Finally, harms to the material interests of women and girls are waived away as irrational at best or bigoted at worst. While several federal courts and agencies have committed the same serious errors, this agency is under no obligation to repeat their mistakes.

The Department falsely implies that the safety and dignity concerns expressed by women and girls regarding mixed-sex bathrooms and locker rooms are based on nothing more than "myth." NPRM at 41535 (citing Grimm, 972 F.3d at 626 (Wynn, J., concurring), and other judicial opinions where the needs and concerns of women and girls are improperly dismissed). It further relies on an amicus brief that treats harm to women and girls as "unfounded fears," and "hypothetical concerns [that] have not materialized." *Id.* citing Rehearing Amicus Brief of School Administrators[], *Grimm*, 972 F.3d 586 (No. 19–1952), 2019 WL 6341095. The Department contends that this amicus brief proves that schools "can and do" give men and boys access to women's and girls' intimate spaces and athletics on the basis of their "gender identity," while somehow also fulfilling the schools' "legitimate interest in protecting the safety and privacy of all students," *Id.* However, even a cursory examination of the brief reveals that the school administrators who submitted it offered no evidence to support claims about harm *or* lack of harm. Instead they relied entirely on their own ideologically-motivated opinions to justify their policies. In lieu of material evidence or rational analysis, the brief offers the testimony of one school administrator who proclaims: "**At first, we had our concerns. . . . Ultimately, *we decided that we as the adults needed to manage our fears*** and give students the respect and dignity that they deserved. And I'm pleased to say that none of our fears has materialized."

We would certainly agree that the subjective and unsubstantiated "fears" of school administrators should play no role in determining whether and how schools must comply with their duties under Title IX. However, the amicus brief provides no evidence that these school administrators have ever undertaken any analysis (quantitative or qualitative) to compare the likely effects of their policies upon male students versus female students, or its effects upon those who self-identify as "transgender" versus those who do not, taking into account material sex differences, and considering the legitimate interests of all students in having access to safe, private, and dignified bathrooms, locker rooms, showers, and lactation spaces,[7] and safe and fair athletic opportunities. The necessary material analysis of these competing interests is simply absent from the cited authorities, just as it is absent from the NPRM itself.

Many people have objected to their loss of safety, privacy, and educational opportunities under existing "gender identity" policies, and including objections and complaints voiced directly to the Department. *See, e.g.,* Dept. of Educ., Transcript of Title IX Public Hearing at 22-26, 57-59, 63-66, 104-07, 120-23, 191-94, 375-78, 438-40, 685-88, 918-22 (June 2021); *see also* Revised letter of impending enforcement action in OCR Case No. 01-19-4025, *In re. CIAC*, *et al.* (Aug. 31, 2020); and *see* Ex. J, Griffin, *Lia Thomas Competitor Says She Felt 'Extreme Discomfort' Sharing Locker Room*, NY Post (July 27, 2022), https://nypost.com/2022/07/27/lia-thomas-competitor-riley-gaines-felt-extreme-discomfort-in-locker-room/. Given this, the available evidence supports at least one of the following two conclusions, and probably both: Many complaints are not being lodged with school administrators and other recipients, because the Department's own policy statements have created an ever-present threat of penalties and retaliation against people stating skepticism or disagreement with "gender identity" beliefs, as evidenced by the Vlaming, Meriwether, and Kiel Area School District Title IX complaints discussed above. Additionally, many complaints actually received are improperly summarily dismissed as being motivated by bigotry or "unfounded fears," as evidenced by the NPRM and materials cited therein. The fact that school administrators have "decided that [they] as the adults needed to manage [their] fears," demonstrates the

[7] Although males are incapable of producing breastmilk, a significant number of physicians are interested in helping men who self-identify as transgender to induce a milk-like discharge "with the aid of domperidone, estradiol, progesterone, spironolactone and regular nipple stimulation." Trautner, *et al.*, *Knowledge and practice of induction of lactation in trans women among professionals working in trans health*, INT. BREASTFEED J. 15, 63 (2020), https://doi.org/10.1186/s13006-020-00308-6. One article quoted several men who have induced pseudo-"lactation," including a doctor who did so in his late 50s, saying, "it strongly reinforced my sense of womanhood." Burns, *Yes, Trans Women Can Breastfeed — Here's How*, THEM online (May 9, 2019), https://www.them.us/story/trans-women-breastfeed. Therefore, while lactation spaces have been provided to allow women a safe and dignified space to express breastmilk after pregnancy, it is entirely foreseeable that men who identify as "transgender" will demand use these spaces for their own purposes.

ideological, counterfactual nature of their false claim that no harm has "materialized." *Id.*

1. Single-sex spaces and other educational opportunities

Proposed § 106.31(a)(2) would instantaneously prohibit female-only spaces , while simultaneously allowing covered institutions to misrepresent this situation to the public and to their intended beneficiaries.

Currently, aside from athletics, Title IX regulations allow differential treatment on the basis of sex in a number of circumstances:

- Sex-separated housing under 34 C.F.R. § 106.32, which allows women and girls to access safe and secure quarters for living and sleeping where they can maintain relatively safety from voyeurism, sexual harassment, and sexual assault;

- Single-sex toilets, locker rooms, and showers under 34 C.F.R. § 106.33, which ensure that women can conduct intimate bodily functions in places where they are relatively safe from voyeurism, sexual harassment, and sexual assault. Importantly, there is ***no evidence*** in the NPRM or elsewhere to suggest that people are similarly shielded from sexual and privacy violations in mixed-sex intimate spaces; available evidence shows that more sexual and privacy violations occur in mixed-sex spaces. Gilligan, *Unisex Changing Rooms Put Women In Danger*, THE SUNDAY TIMES online (Sept. 2, 2018), https://www.thetimes.co.uk/article/unisex-changing-rooms-put-women-in-danger-8lwbp8kgk, full text at https://archive.ph/evO4g;

- Sex-separated physical education classes, human sexuality classes, choruses, certain types of nonvocational classes and activities, and single-sex schools under § 106.34, which allows educational facilities, at their discretion, to provide educational opportunities that are tailored to account for material sex differences. The existing regulations already ensure that such classes and activities are consistent with the general prohibition against sex discrimination in Title IX, by mandating that they be "based upon genuine justifications [not] on overly broad generalizations about the different talents, capacities, or preferences of either sex," and are "substantially related to the achievement of the important objective for the classes or extracurricular activities." *Id.* § 106.34(b)(4)(i).

- Certain types of single-sex scholarships and other financial assistance are permissible under § 106.37. Such scholarships have been instrumental in increasing the presence of women and girls in educational and professional settings where they were previously barred from entry by *de jure* or *de facto* discrimination. *Cf.* George, Title IX and the Scholarship Dilemma, 9 Marq.

Sports L. J. 273 (1999), available at: http://scholarship.law.marquette.edu/sportslaw/vol9/iss2/5 (discussing challenges associated with ensuring equitable allocation of scholarship funding in conjunction with NCAA rules).

"Gender identity" proponents rarely demand an end to these existing forms of permissible sex-separation; rather, they demand *individualized special access* to existing female-only and male-only spaces, on the basis of their identities rather than sex. In other words, people who make demands on the basis of "gender identity" are not asking for equal treatment compared to their peers; they are demanding special privileges not available to peers of the same sex. When schools grant those privileges they do not typically create third spaces or separate additional opportunities for people who identify as transgender. Rather, they turn previously single-sex female-only spaces into *mixed-sex spaces*. To be sure, public schools are not barred from retrofitting their physical infrastructure or restructuring their classes and programs to provide separate mixed-sex spaces while also retaining single-sex spaces. But nothing requires them to do so, and for most recipients that would be prohibitively expensive. For that reason, it is very likely that federal funding recipients will continue to hold forth classes, activities, and opportunities designated as for "girls" or "women" when, in reality, those spaces and activities will be offering only a mixed-sex environment.

As a result, any bathroom, locker room, or shower marked for "women," "girls," or "females" will be open at all times to any male who seeks access, based on nothing more than his subjective and mutable self-image. Any single-sex classes designed to remedy an existing shortage of female (but not male) enrollment in courses where women and girls have been historically underrepresented will become available to any men or boys who claim a feminine "gender identity." If the proposed rules are finalized, some institutions will cite them as an excuse to stop providing *any* single-sex facilities, programs, or services altogether, while others will shift to making everything explicitly mixed-sex, rather than trying to maintain a false pretense.

Regardless how individual institutions choose to characterize the change, the *de facto* effect will be a loss of safety, privacy, dignity, and fairness for women and girls, and in some cases a loss of privacy and dignity for boys.

The Department's justification for this proposed change rests on a highly biased one-sided approach. Purported harms experienced by students who identify as "transgender" are counted in the NPRM as "a range of serious dignitary, academic, social, psychological, and physical harms" which present "barriers to participating in school." NPRM at 41537. But harms suffered by women and girls due to the loss of single-sex spaces and opportunities are callously dismissed as "unsubstantiated concerns about privacy & safety." *Id*. at 41535. Thus, if a boy feels that his feminine "gender identity" is invalidated by his use of facilities created for

boys, the proposed rules give him access to the girls' bathrooms, locker rooms, and showers, while conscripting the girls into service for his emotional support. But if a girl feels uncomfortable and unsafe undressing in closed spaces with boys – if she objects to the presence of a stranger's exposed penis in her immediate vicinity – her consent is treated as irrelevant, her concerns are written off as "unsubstantiated," and she is cast as a villain who is unjustifiably "preventing" the boy from "participating in school." NPRM at 41535, 41537. This blatant bias is unacceptable, arbitrary, and capricious.

The existing regulatory exceptions for differential treatment of the two sexes do not exist in a vacuum; rather they were adopted based on an understanding that they would provide substantial and meaningful benefits to students and other beneficiaries of Title IX. The proposed rule will discontinue or drastically diminish those benefits. The Department cannot propose such a drastic move without (a) fully acknowledging that there will be adverse effects, (b) confronting the distributional differences in how these changes will harm or benefit males versus how they will harm or benefit females, (discussed further in section V of these comments) and (c) addressing the fact that the loss of single-sex spaces detracts from the purposes of Title IX for females in particular, and all people who do not subscribe to "gender identity" beliefs.

Instead of making this full disclosure (as required by the basic administrative law principles), the NPRM discursively erases women and girls from their own programs and benefits, refusing even to acknowledge the fact that such policies are provided intentionally and specifically to ensure safety and fairness for women and girls and thus ensure that they have equal opportunities to access educational opportunities. Instead these crucial policies are misleadingly characterized as policies aimed at "preventing transgender students from accessing sex-separate spaces and programs consistent with their gender identity." This is how the Department attempts to justify its choice to ignore costs to women and girls, and costs to all students and staff whose privacy and safety will be degraded under the rules.

Women and girls are the biggest losers under the proposed rules, but they are by no means the only ones. Boys are also harmed by policies that subject them to invasion of privacy and indignity by allowing girls to share their intimate spaces. Teachers who use shared bathrooms lose privacy and dignity. Coaches required to supervise students in locker rooms will be forced to witness fully or partially unclothed people of the opposite sex against their wishes. Yet the Department never acknowledges these distinct harms. Instead, boys and girls are lumped together and pigeonholed as "cisgender students" who have no legitimate concerns, while costs to teachers and staff are entirely disregarded.

This extreme unbalance means that the proposed changes are arbitrary and capricious. The Department like all federal agencies has a "duty. . . to find and

formulate policies that can be justified by neutral principles and a reasoned explanation. . . . If an agency takes action not based on *neutral and rational principles*, the APA grants federal courts power to set aside the agency's action as 'arbitrary' or 'capricious.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added), citing 5 U.S.C. § 706(2)(A) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

2. Sex-specific athletics

Athletics are not categorically excluded from the scope of Title IX; rather Title IX regulations permit different treatment or separation on the basis of sex in athletics under 34 CFR § 106.41. That rule states that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors. . . [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," and so on. *Id.* § 106.41(c)(1)-(10).

The Department does not propose any changes to § 106.41, and instead says it plans to undertake a separate rulemaking to "address. . . 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." NPRM at 41537 (emphasis added).

At the same time, the proposed "gender identity" mandates in the NPRM will apply equally to athletics as to any other educational programs, due to the broad wording of § 106.11 (both the current and proposed versions). Proposed § 106.11 makes clear that "this part [*i.e.*, all of Part 106] applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity. . . ." NPRM at 41410, 41571. Consequently, § 106.10 would define the scope of Title IX as including "gender identity" for all purposes under the regulations (including athletics), and § 106.31(a)(2) would mandate that eligibility be granted on the basis of "gender identity" for *all* sex-specific spaces and activities (including athletics). The only narrow exceptions are for those institutions that are largely exempt from Title IX, such as military and religious institutions, under subpart B (§§ 106.11-18).

This approach is irrational on its face, because it forces educational institutions to open women's and girls' athletic teams to participation by males, without any guidance as to how they can somehow do this while ensuring fairness and safety for female athletes. We suspect that the Department has declined to attempt this because mounting evidence shows it to be an impossible task. Limiting the focus of this rulemaking to the abstract concept of "gender identity" functions as a camel's nose under the tent, granting new special privileges to a subset of people

without the inconvenience of hard facts demonstrating the fundamental unfairness of this approach.

The Department's failure to address athletic eligibility criteria in this rulemaking is arbitrary and capricious. No serious person can deny that males enjoy material, innate, and enduring physiological advantages over females in virtually all athletic settings. *See* Ex. K, Hilton, *et al.*, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage,* SPORTS MED. 51, 199–214 (2021), https://doi.org/10.1007/s40279-020-01389-3:

> The physical divergence between males and females begins during early embryogenesis, when bipotential gonads are triggered to differentiate into testes or ovaries, the tissues that will produce sperm in males and ova in females, respectively [15]. Gonad differentiation into testes or ovaries determines, via the specific hormone milieu each generates, downstream in utero reproductive anatomy development [16], producing male or female body plans. * * *
>
> * * * Athletic performance differences between males and females prior to puberty are often considered inconsequential or relatively small [18]. Nonetheless, pre-puberty performance differences are not unequivocally negligible, and could be mediated, to some extent, by genetic factors and/or activation of the hypothalamic–pituitary–gonadal axis during the neonatal period, sometimes referred to as "minipuberty". For example, some 6500 genes are differentially expressed between males and females [19] with an estimated 3000 sex-specific differences in skeletal muscle likely to influence composition and function beyond the effects of androgenisation [3], while increased testosterone during minipuberty in males aged 1–6 months may be correlated with higher growth velocity and an "imprinting effect" on BMI and bodyweight [20, 21]. An extensive review of fitness data from over 85,000 Australian children aged 9–17 years old showed that, compared with 9-year-old females, 9-year-old males were faster over short sprints (9.8%) and 1 mile (16.6%), could jump 9.5% further from a standing start (a test of explosive power), could complete 33% more push-ups in 30 s and had 13.8% stronger grip [22]. Male advantage of a similar magnitude was detected in a study of Greek children, where, compared with 6-

year-old females, 6-year-old males completed 16.6% more shuttle runs in a given time and could jump 9.7% further from a standing position [23]. In terms of aerobic capacity, 6- to 7-year-old males have been shown to have a higher absolute and relative (to body mass) VO2max than 6- to 7-year-old females [24]. Nonetheless, while some biological sex differences, probably genetic in origin, are measurable and affect performance pre-puberty, we consider the effect of androgenizing puberty more influential on performance, and have focused our analysis on musculoskeletal differences hereafter.

Secondary sex characteristics that develop during puberty have evolved under sexual selection pressures to improve reproductive fitness and thus generate anatomical divergence beyond the reproductive system, leading to adult body types that are measurably different between sexes. This phenomenon is known as sex dimorphism. During puberty, testes-derived testosterone levels increase 20-fold in males, but remain low in females, resulting in circulating testosterone concentrations at least 15 times higher in males than in females of any age [4, 25]. Testosterone in males induces changes in muscle mass, strength, anthropometric variables and hemoglobin levels [4], as part of the range of sexually dimorphic characteristics observed in humans.

Broadly, males are bigger and stronger than females. It follows that, within competitive sport, males enjoy significant performance advantages over females, predicated on the superior physical capacity developed during puberty in response to testosterone. Thus, the biological effects of elevated pubertal testosterone are primarily responsible for driving the divergence of athletic performances between males and females [4]. It is acknowledged that this divergence has been compounded historically by a lag in the cultural acceptance of, and financial provision for, females in sport that may have had implications for the rate of improvement in athletic performance in females. Yet, since the 1990s, the difference in performance records between males and females has been relatively stable, suggesting that biological differences created by androgenization explain most of the male advantage, and are insurmountable [5, 26, 27].

> * * * Males have: larger and denser muscle mass, and stiffer connective tissue, with associated capacity to exert greater muscular force more rapidly and efficiently; reduced fat mass, and different distribution of body fat and lean muscle mass, which increases power to weight ratios and upper to lower limb strength in sports where this may be a crucial determinant of success; longer and larger skeletal structure, which creates advantages in sports where levers influence force application, where longer limb/digit length is favorable, and where height, mass and proportions are directly responsible for performance capacity; superior cardiovascular and respiratory function, with larger blood and heart volumes, higher hemoglobin concentration, greater cross-sectional area of the trachea and lower oxygen cost of respiration [3, 4, 39, 40]. Of course, different sports select for different physiological characteristics—an advantage in one discipline may be neutral or even a disadvantage in another—but examination of a variety of record and performance metrics in any discipline reveals there are few sporting disciplines where males do not possess performance advantage over females as a result of the physiological characteristics affected by testosterone.

(Internal citations omitted).

Men and post-pubertal boys have a greater percentage of lean muscle and larger muscle fibers; their hearts are larger and send more blood to their muscles; their blood contains more oxygen-carrying hemoglobin, and they have higher aerobic capacity (VO2 max); they have less fat, making them stronger pound-for-pound; and they have a smaller "Q angle" due to their narrower pelvis, which translates to less knee stress and fewer injuries in males compared to females. Ex. L, Washington Post, *Fit but Unequal* (2014), http://apps.washingtonpost.com/g/page/national/gender-performance-in-sports/830/.

Predictably, these innate differences manifest dramatically in the real world. The woman sprinter with the most World Championship medals in history had her lifetime best 400 meter time beat by 275 high school boys on 783 occasions in 2018 alone. *See* Ex. M, Coleman, *et al.*, *Pass The Equality Act, But Don't Abandon Title IX*, WASHINGTON POST (Aug. 29, 2019), https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html.[8] Even

[8] WoLF presents this source with regard to the facts cited within, but does not endorse the policy positions asserted by the authors.

female Olympians are at a disadvantages to males: "Team USA's Vashti Cunningham [in 2019 had] the American record for high school girls in the high jump at 6 feet, 4½ inches. [During 2018] just in California, 50 high school boys jumped higher." *Id.* Best high school times in the 60m, 400m, and 800m events consistently exhibit a performance gap (*i.e.* a complete gap, not an overlap) between boys and girls. *See High School All-Time Top 10s,* TRACK & FIELD NEWS online, https://trackandfieldnews.com/tfn-lists/high-school-all-time-top-10s-boys/.

Given these innate and persistent athletic advantages, it is plainly obvious that vast numbers of men and boys are physically capable of securing the limited number of athletic opportunities currently available to women and girls, while exceedingly few natal females are physically capable of outcompeting males, particularly at elite levels or in sports requiring strength and physical contact (*i.e.* virtually all competitive sports).

Inexorably, these proposed regulations will substantially increase the number of opportunities for males to compete *and win* in athletics, by giving them access to opportunities previously reserved for females. But if assessments of "equality of opportunity" are conducted according to "gender identity" under § 106.41(c), it will hide the fact that there are disproportionately large losses of opportunities for women, and disproportionately large gains in opportunities for men.

Because sex-based athletic advantages run in only one direction, this effect will occur regardless whether schools continue to provide a constant number of opportunities in total, or instead provide an expanded number of slots in total; males will retain the overall advantage, displacing females at both lower-end *and* elite level competition. And because all female athletes are at an overall competitive disadvantage in relation to all male athletes, it is unlikely that males as a class will suffer *any* significant loss of opportunities. While some highly-exceptional females might *qualify to participate* on men's teams, it is extremely unlikely that we will ever see females overtaking elite male records.

Although it should not be necessary to provide real-world examples to prove an effect that is virtually guaranteed, such examples are readily at hand. For example, Lia Thomas produced relatively mediocre results while competing on the men's swimming team at Penn for several years. Beginning this year, he was allowed to compete in women's competitions, enabling him to smash numerous elite women's records. *See* Ex. N, Lohn, *A Look At the Numbers and Times: No Denying the Advantages of Lia Thomas*, SWIMMING WORLD online (April 5, 2022), https://www.swimmingworldmagazine.com/news/a-look-at-the-numbers-and-times-no-denying-the-advantages-of-lia-thomas/.

Prior to this, in a case with which the Department is quite familiar, two male high school athletes started out producing relatively unremarkable results when

competing on boys' teams, yet were able suddenly to overtake elite records, taking 15 statewide titles and depriving numerous individual girls of opportunities and formal recognition. As the Department correctly recognized in August 2020, the policy allowing these boys to compete against girls "denied girls opportunities to compete, including in state and regional meets, and to receive public recognition critical to college recruiting and scholarship opportunities." Revised Letter Of Impending Enforcement Action, OCR Case No. 01–19–4025, CIAC, et al. (Aug. 31, 2020)

Of course, people who participate in competitive athletics in school tend to spend a lot of time in team locker rooms and showers. All of the problems associated with mixed-sex spaces apply to female athletes, including increased exposure to privacy and sexual violations. *See* Ex. J, Griffin, *Lia Thomas Competitor Says She Felt 'Extreme Discomfort' Sharing Locker Room*, NEW YORK POST online (July 27, 2022) ("So not only were we forced to race against a male, we were forced to change in the locker room with one," and "That's not something we were forewarned about [by NCAA officials], which I don't think is right in any means, changing in a locker room with someone who has different parts.").

The proposed rules would also cause serious anomalies in data collection and analysis needed to effectively implement the legislative purpose and goals of Title IX. The existing rules require recipients to provide "equal athletic opportunity for members of ***both sexes***." 34 CFR § 106.41 (emphasis added). Yet grantees cannot complete a rational self-assessment of their compliance and progress under this rule if they allocate opportunities based on "gender identity." There are two likely ways in which the proposed rules will be carried out: (1) some programs will continue to assess "equality of opportunity" by sex, likely provoking backlash by individuals who insist that males with a feminine "gender identity" must be counted as if they are female rather than male; (2) other programs, foreseeing that backlash, will simply pretend that all the individual on the "girls'" team are actually female, when in fact any given number of them are in fact males who claim a special "gender identity."

Quantitative measures produced by the approach #2 will obfuscate important facts relevant to assessing "equality of opportunity" within an individual institution. In addition, if assessments produced under approach #2 are combined with those produced under approach #1 (*e.g.,* for purposes of comparing and monitoring equality of opportunity across school districts, states, and nationwide), the entire comparison will be invalid and the data unusable.

The Department's proposal is arbitrary and capricious because it creates an extreme inequity between males and females in athletic settings under Title IX, and because it will distort data about Title IX compliance. This defect is compounded by the Department's decision to propose this drastic change while refusing to address important practical details regarding eligibility criteria under 34 C.F.R. § 106.41.

3. Juvenile detention centers and PREA

The Department's proposed "gender identity" rules would effectively mandate that juvenile justice facilities create a mixed-sex environment in facilities and programs presently designed and operated as single-sex facilities, including institutions that serve youth of both sexes through sex-segregated housing and other sex-segregated programming. Many juvenile justice facilities offer educational programs and receive federal funding, meaning that they are covered by the requirements and protections of Title IX. *See* Ex. O, U.S. Dep't of Justice and U.S. Dep't of Education, *Dear Colleague Letter on Civil Rights Enforcement in Juvenile Justice Residential Facilities* (Dec. 8, 2014). They are also correctional facilities and thus are subject to requirements under the Prison Rape Elimination Act (PREA). *Id.* Presently, the federal PREA National Standards for Juvenile Facilities already include special considerations for incarcerated juveniles who identify as lesbian, gay, bisexual, transgender, or intersex, in light of evidence that such individuals are exceptionally vulnerable to sexual abuse. *See* 28 C.F.R. § 115.342. But they *do not* mandate that recipients must make placement eligibility determinations on the basis of "gender identity" rather than sex. *Id.*

Many incarcerated juveniles and young adults would be affected by the proposed "gender identity" rules. Data collected and maintained by the Department's through its Civil Rights Data Collection program (CRDC) includes 602 juvenile justice education programs across the country that submitted data to the Department in its most recent collection. Dept. of Educ., *Office of Civil Rights 2017–18 Civil Rights Data Collection–School Form*, https://www2.ed.gov/about/offices/list/ocr/docs/2017-18-crdc-school-form.pdf. Those 602 facilities served 97,074 "elementary, middle, and high school age students who participated in the regular educational program for [any] length of time" in a juvenile justice facility during the regular 2017-18 school year.

Numerous of these are single-sex facilities, most of which serve males only, or they are facilities operated by a single institution under a single name, but with separate single-sex units for boys and girls, respectively. For example, the McLaughlin Youth Center in Alaska has a Boys Detention Unit separate from the Girls Detention Unit. Alaska Dep't of Family and Community Services, Div. of Juvenile Justice, *McLaughlin Youth Center*, https://dfcs.alaska.gov/djj/Pages/Facilities/myc.aspx. Facilities reporting to the Department also include those which maintain programs specifically designed for youth sex-offenders, such as Dallas' Youth Village for boys. Dallas County, *Youth Village*, https://www.dallascounty.org/departments/juvenile/youth-village.php.

The concerns raised throughout these comments about the Department's proposed "gender identity" regulations apply equally to children and young adults served in juvenile justice facilities or programs that have heretofore been separated

by sex, including concerns about privacy and safety in bathrooms, locker rooms, and other spaces where detained juveniles perform intimate personal bodily functions.

There are also *additional* particular issues in juvenile justice facilities that the Department must consider under PREA. It is readily foreseeable that where both sexes are present in residential juvenile justice facilities, more sexual activity is bound to occur. The PREA Standards for Juvenile Facilities, 28 C.F.R. Subpart D, require that all facilities have "a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment," and they set forth specific requirements for preventing, detecting, and responding to such conduct. 28 C.F.R. § 115.311, *et seq*. The PREA national standards already reflect a sensible recognition that there are unacceptable risks associated with mixed-sex situations, such that juvenile justice facilities are prohibited from allowing "cross-gender" (i.e., cross-sex) viewing and searches. *Id*. § 115.315.

Despite a nominal policy of zero-tolerance, there is a substantial amount of reported sexual activity among youth in juvenile justice facilities, much of which is categorized as forcible or coercive (*i.e.*, rape and other sexual assault). "In 2018, an estimated 7.1 percent of youth in juvenile correctional facilities reported being sexually victimized during the prior 12 months, according to the Bureau of Justice Statistics." Ex. P, Office of Juvenile Justice and Delinquency Prevention (OJJDP), *Eliminating Prison Rape Among Juveniles*, INFOCUS (July 2020) (discussing assaults that occurred within the juvenile justice facilities). The Department has a duty not to increase the likelihood of sexual activity among incarcerated youth.

Looking more broadly at victim and offender statistics outside of juvenile justice facilities (including reported offenses that occurred prior to or led directly to juvenile incarceration), it is readily apparent that juvenile justice facilities serve a population that is disproportionately vulnerable. During 2018, over 24,600 girls age 12-14, over 54,500 girls age 15-17, and over 122,700 girls age 18-20 reported being the victim of rape or sexual assault. Bureau of Justice Statistics, NCVS Dashboard, https://ncvs.bjs.ojp.gov/single-year-comparison/crimeType (single-year comparison by crime type, victim sex, and victim age), retrieved Aug. 24, 2022. Also during 2019, over 10,700 male youth ages 15-17, and over 4,900 male youth ages 18-20 reported being the victim of rape or sexual assault. (Zero reported for male victims age 12-14 for 2018). *Id.* Notably, young people above age 17 report higher rates of sexual abuse victimization, and people in that age bracket are also responsible for higher rates of perpetration. *Id.* This is significant because some states have raised (or have discussed raising) the upper age limit for youth to be processed through the juvenile justice system to include young people through ages 18 or 19, or even into their 20s. Nat'l Governors Assoc., *Age Boundaries in Juvenile Justice Systems* (Aug. 12, 2021), NGA online, https://www.nga.org/center/publications/age-boundaries-in-juvenile-justice-systems/.

While rates of reported rape and sexual assault vary from year to year, consistently there are many thousands of juveniles and young adults who are made more vulnerable by sexual abuse, and many of these end up in the juvenile justice system, where their histories of abuse increase the risk that they will be victimized again, or become perpetrators, or both. A history of sexual abuse has been identified as one of the most prominent risk factors that place girls, in particular, on a path into the juvenile justice system. *See* Ex. Q, Saar, et al., *The Sexual Abuse To Prison Pipeline: The Girls' Story*, RIGHTS4GIRLS online. Of youth in the juvenile justice system, girls' rate of sexual abuse is 4 times higher than boys' rate of sexual abuse (31% of girls compared to 7% of boys); of these, the girls' rate of complex trauma (defined as five or more adverse childhood experiences) is nearly twice as high as the boys', with 45% of girls who are victims reporting 5 or more incidents, compared to 24% of boys who are victims reporting 5 or more incidents). *Id.*

Although data is not consistently collected or reported, ample anecdotal evidence supports the conclusion that incarcerated youth engage in additional un-reported sexual activity with other youth which (regardless of legal status) the youth themselves may experience or characterize as consensual. Notwithstanding that perception of consent, *all* sexual activity carries psychological and medical risks that youth are emotionally and financially unprepared to navigate. Youth of both sexes who have sexual intercourse with males are at higher risk of contracting sexually-transmitted infections than youth who have sex with females. *See* Shannon, *et al.*, *The growing epidemic of sexually transmitted infections in adolescents: a neglected population,* CURR. OPIN. PEDIATR. (Feb. 2018), https://pubmed.ncbi.nlm.nih.gov/29315111/. For girls, the risk of unplanned or forcible pregnancy is an obvious one, and it is a risk that is borne solely by girls because of their female reproductive anatomy; males cannot become pregnant, regardless of their subjective feelings and beliefs about gender.

Moreover, data from adult incarceration facilities indicate that males who assert some form of "gender identity" exhibit significantly higher than average rates of sexual offending, and this data may be relevant to the youth population. "Of the incarcerated men seeking to transfer to women's prison 33.8% — fully one third — are registered sex offenders." Keep Prisons Single Sex, *Data From California Shows That 1/3 Of The Men Seeking To Transfer To Women's Prison Are Registered Sex Offenders*, https://usa.kpssinfo.org/data-from-california-shows-that-1-3-of-the-men-seeking-to-transfer-to-womens-prison-are-registered-sex-offenders/, citing Ex. R, California Dep't of Corrections and Rehabilitation, *Number of Offenders Who Identify as Transgender, Intersex, or Non-Binary Housed in Male Facilities Seeking Transfer to Female Facilities And Percentage Who are Registered Sex Offenders or Convicted of a Sex Offense* (Feb. 9, 2022). The federal Bureau of Prisons further reports that convicted sex offenders commit 50% of rapes in prison, Ex. S, Federal Bureau Of Prisons, *Annual PREA Report, Calendar Year 2020*.

All of the foregoing information leads to the conclusion that the proposed rules will foreseeably increase the risk of sexual activity including rape and sexual assault in juvenile justice facilities, thereby making it more difficult for such facilities to comply with applicable PREA standards. Yet nowhere in the NPRM does the Department acknowledge or confront the special issues and problems its proposed "gender identity" rules will cause in juvenile justice facilities. Nor does the NPRM acknowledge the interconnections between this proposed rulemaking and state and federal government obligations for protecting youth from sexual assault and rape under PREA.

The Department's failure to address these issues in the NPRM makes it impossible for WoLF and others in the public to effectively comment on those issues. The Department is obligated to thoroughly examine the problem along with alternatives that would minimize or avoid increased risk of sexual assaults in juvenile justice facilities, *and* it must give members of the public an opportunity to examine and submit comments on the Department's analysis, including available regulatory alternatives. The current NPRM does not enable this, and this defect will not be resolved merely by acknowledging the problem in the final rule.

For these reasons, the Department should abandon its proposed "gender identity" rules and allow juvenile justice facilities to continue determining placements and treatment according to sex rather than "gender identity."

D. "Sexual Orientation"

People who are lesbian, gay, or bisexual are morally entitled to the same respect, autonomy, and freedom from pernicious discrimination as people who are heterosexual. But protecting people from discrimination on the basis of sexual orientation requires a recognition that sex and sexual orientation are real and material. Accordingly, WoLF cannot support the codification of "sexual orientation" as part of the regulatory definition of the scope of Title IX absent (1) an accurate definition that makes clear what sexual orientation is, and what it is not, and (2) clarification that Title IX does not and cannot interfere with the private associational rights of lesbian, gay, and bisexual individuals.

1. Discrimination on the basis of sexual orientation is discrimination "on the basis of sex."

"Sexual orientation" is sex-based by its very nature because sexual orientation is inextricably bound up with sexual and romantic attraction, sexual intercourse, and the material distinctions between the male and female sexes. The term "sexual orientation" acknowledges that individuals are either sexually attracted to people of the opposite sex, people of the same sex, or people of both sexes. As such there are precisely three types of sexual orientation: heterosexual, bisexual, and homosexual (also known as gay, a term that describes both

homosexual men and homosexual women, or lesbian, a term that includes only homosexual women).

Intersex characteristics are not sexual orientations. (*See* further discussion of this point in section I.F. of these comments.) "Sexual orientation" does not include any other idiosyncratic sex-related feelings or identities, all of which are distinct from and in most cases irrelevant to "sexual orientation"—including one's degree or lack of sex drive ("asexual"), a person's degree of certainty about his or her own sexual orientation ("questioning"), and idiosyncratic gender-related identities ("transgender," "nonbinary," "queer").

There is a long and well-documented history of invidious discrimination against lesbian, gay, and bisexual individuals throughout society, including adverse employment decisions and sex-based harassment rising to the level of a hostile environment. This history of discrimination is rooted in subjective patriarchal and religious ideas about which social roles men and women should fulfill, and the resulting sex-stereotypes about sexual relationships. According to those beliefs and stereotypes, men should only have sexual relationships with women, and same-sex sexual relationships are deemed to be improper because they violate traditional religious beliefs.

As to these sorts of beliefs the government must remain neutral. Therefore, government agencies like the Department cannot deprive homosexual or bisexual individuals of the same scope of Title IX protections and remedies that it makes available for heterosexual individuals. Indeed, the Department in its 2020 final rule affirmed this uncontroversial point: for instances of sexual harassment aimed at homosexual students, "the school would need to respond promptly and effectively. . . , just as it would if the victim were heterosexual." 85 Fed. Reg. at 30179. This is obvious, as there is no statutory basis and no valid governmental objective for differential treatment of homosexual or bisexual individuals under Title IX. On the contrary, such policies would deny the members of those groups the equal protection of the law.

However, the Department has also previously contended that, "if students heckle another student with comments based on the student's sexual orientation (e.g., 'gay students are not welcome at this table in the cafeteria'), *but their actions do not involve conduct of a sexual nature*, their actions would not be sexual harassment covered by Title IX." 2020 Sexual Harassment Regulation, 85 Fed. Reg. at 30179 (quoting a 2001 guidance document) (emphasis added). And yet, that same 2001 guidance on which the Department relied in 2020 made clear that "gender-based" harassment that is non-sexual but nonetheless offensive may amount to prohibited sex discrimination under Title IX if the harassment meets the ordinary standard of severity and pervasiveness:

> [G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student *on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity*. . . . [I]f it is sufficiently serious, gender-based harassment is a school's responsibility, and the same standards generally will apply.

Dept. of Education, *Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties* at *v.* (Jan. 2021).

Under this principle, a heterosexual woman who dresses in a distinctly "non-feminine" manner could obtain Title IX remedies if she was excluded from educational opportunities due to severe, persistent, disparaging taunts about her sexual orientation, because such harassment is founded on the basis of "stereotyped notions of masculinity and femininity." Yet, under the 2020 final rule (as in the 2001 final guidance), a woman would be deprived of Title IX protections and remedies for *the exact same offensive harassing conduct* for no reason other than she is, in fact, a lesbian.

The Department's 2020 interpretation was thus arbitrary and capricious because it deprived lesbian, gay, and bisexual people of the full scope of Title IX protections and remedies that would be available to similarly-situated heterosexual individuals. While the example of an single isolated incident of taunting based on sexual orientation might not satisfy the severity or pervasiveness factors for sex-based harassment, a more sustained campaign or severe incident of harassment could easily create a hostile environment.

Indeed, as the Department admitted in its 2001 guidance, "a gay student could maintain claims alleging discrimination based on both gender [sic] and sexual orientation under the Equal Protection Clause of the United States Constitution in a case in which a school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation." 2001 Sexual Harassment guidance at 27, n.14, describing the holding in *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996). In holding that a plaintiff could maintain his equal protection claim *based on sex*, the Seventh Circuit noted that, "Nabozny does allege. . . that when he was subjected to a mock rape [the school principal] responded by saying 'boys will be boys,' apparently dismissing the incident because both the perpetrators and the victim were males. We find it impossible to believe that a female lodging a similar complaint would have received the same response." 92 F.3d 446, 454. But the court did not stop there. In holding that the plaintiff could also maintain his equal protection claims *based on sexual orientation*, it said: "What is more, Nabozny

introduced sufficient evidence to show that the discriminatory treatment was motivated by the [school officials'] disapproval of Nabozny's sexual orientation, including statements by the defendants that Nabozny should expect to be harassed because he is gay." *Id.* at 457.

Nothing in Title IX authorizes the Department to adopt arbitrary carve-outs from regulatory protections against non-sexualized "sex-based harassment" that exclude only homosexual or bisexual individuals from Title IX remedies, while granting protections from the same harassing behavior to heterosexual individuals. On the contrary, such an arbitrary exception would violate bedrock equal protection principles.

It is our understanding that the Department **already** expressly interprets discrimination "on the basis of sex" under Title IX to include discrimination on the basis of sexual orientation, and will continue doing so regardless whether these regulations are finalized as proposed, as is appropriate. The Department has been applying this interpretation since at least August 2020 when, following the *Bostock* ruling, "[o]n August 31, 2020, OCR opened an investigation of a complaint of sexual orientation discrimination" regarding allegations of "homophobic bigotry." NPRM at 41530; OCR Case No. 04–20–1409, *In re. Shelby Cnty. Sch. Dist*. (Aug. 31, 2020) (letter of notification), https://www2.ed.gov/about/offices/list/ocr/letters/20200831-letter-of-notification.pdf.

However, given that an individual investigation letter lacks the legal weight and stability of a regulation, and given that the Department took an explicitly contrary position in the preamble to its sexual harassment regulations a few months earlier in the same year, an explicit regulatory clarification is in order.

2. The Department must clarify that "sexual orientation" is based on biological sex, not "gender identity."

While WoLF would support a regulation that explicitly prohibits discrimination on the basis of one's sexual orientation within the regulatory definition of the scope of Title IX, the regulations must expressly define "sexual orientation" to avoid inappropriate or punitive actions against individuals who reject "gender identity" beliefs. In particular, Title IX and its regulations must not be used as a basis to silence or punish students who are strictly same-sex attracted and who wish to form associations solely on that basis and not on the basis of gender identity.

Again, protecting people from discrimination on the basis of sexual orientation requires a recognition that sex and sexual orientation are real and material. For that reason we reject the popular practice of lumping sexual orientation together with a hodge-podge of gender identities and other vaguely sex-related factors. For example, "[t]he Department generally uses the term 'LGBTQI+'

to refer to students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way." NPRM at 41395. That is inappropriate, as this collection of unrelated things is not "similar." Aside from heterosexuality, homosexuality, and bisexuality (*i.e.* gay, lesbian, bisexual), all the listed items are distinct (and in some cases, conflicting) concepts. Conflating and transmogrifying these disparate concepts into a single label that is devoid of any stable discrete meaning is unhelpful at best, and will foster ongoing confusion and absurd interpretations of Title IX at worst.

With the rise of the gender identity belief system, increasingly lesbian, gay, and bisexual individuals are harassed when they voice the opinion that lesbians are strictly female, gay men are strictly male, and that all such individuals must be protected from unwanted sexual advances or sex-based harassment by individuals who insist that sexual attraction must be based on "gender identity" rather than sex.

This is not a speculative or marginal concern. Women who attempt to form associations based on their sexual orientation are subjected to harassment and threats by violent men who think that their feminine "gender identity" entitles them to sexual attention from lesbians. Angela C. Wild, *Lesbians At Ground Zero - How Transgenderism Is Conquering The Lesbian Body* (March 2019), available at http://www.gettheloutuk.com/attachments/lesbiansatgroundzero.pdf. Worse, support for this type of harassment has been mainstreamed. For example, the head of Stonewall, an influential international organization that purports to "stand for lesbian, gay, bi, trans, queer, questioning and ace (LGBTQ+) people everywhere," recently compared people who reject "gender identity" beliefs to anti-Semites, and said that lesbians who refuse to date men who identify as transgender are committing a form of "sexual racism." Bartosch, *Trans lobby group Stonewall brands lesbians 'sexual racists' for raising concerns about being pressured into having sex with transgender women who still have male genitals*, MAIL ON SUNDAY online (Nov. 21, 2021), https://www.dailymail.co.uk/news/article-10225111/Stonewall-brands-lesbians-sexual-racists-raising-concerns-sex-transgender-women.html; Parker, et al., *Stonewall boss defends new strategy amid criticism*, BBC News online (May 29, 2021), https://www.bbc.com/news/uk-57281448; STONEWALL, *What We Stand For*, https://www.stonewall.org.uk/what-we-stand-for (retrieved Aug. 8, 2022). Though less well documented, gay men are also sexually harassed by women who identify as transgender.

There can be no serious question that this type of anti-lesbian behavior amounts to sexual harassment of the sort that should be covered under the NPRM's definition of "sex-based harassment," yet it is commonly tolerated and encouraged from men who assert special "gender identities." Without a robust acknowledgement that lesbians are female homosexuals (with clear and accurate definitions of each of those terms), Title IX cannot adequately protect lesbians from

harassment. Moreover, the Department's failure to provide a clear definition of "sexual orientation" along with the necessary clarifications described above is likely to contribute to a hostile environment for lesbian, gay, and bisexual people who reject "gender identity," much in the same way Title IX processes have already been misappropriated to harangue public school students and teachers over "misgendering," and "mispronouning." *See* section III.A.5. of these comments.

E. "Pregnancy Or Related Conditions"

As WoLF noted in 2021:

> [E]vidence that the term 'sex' and human biology are inextricably linked under Title IX may be found in the Department's regulations expressly prohibiting discrimination related to a student or employee's pregnancy. 34 C.F.R. § 106.40(b)(1). These regulations are valid only because they effectuate Title IX's prohibition against sex discrimination. *See* 20 U.S.C. § 1682. Courts have recognized, quite correctly in our view, that discrimination on the basis of pregnancy constitutes discrimination on the basis of female physiology and is therefore prohibited under Title IX. *Conley v. Nw. Fla. State College*, 145 F. Supp. 3d 1073, 1077 (N.D. Fl. 2015). Biological males, regardless of transgender status or surgical intervention, are incapable of bearing children.

WoLF Petition for Rulemaking at 10. Further, "[t]he Department's observation regarding why pregnancy discrimination constitutes sex discrimination implicitly rests upon an accurate scientific understanding of the nature of human sexual reproductive function. Humans are an anisogamous mammalian species." *Id.*, 10-11. Accordingly, as noted in the NPRM, pregnancy and related conditions are ***already*** covered by the current regulatory language, "pregnancy or related conditions." *Id.*

The Department identifies two main goals behind its proposal to add new regulatory language regarding pregnancy: to codify specific examples of pregnancy-"related conditions," (including past pregnancy, medical conditions related to pregnancy, and lactation); and to encourage proactive efforts by recipients aimed at ensuring students understand their rights relating to pregnancy under Title IX. NPRM at 41,513.

The Department cites no evidence that any requests for accommodations have been denied or any discrimination claims dismissed on the grounds that those specific pregnancy-related conditions are not explicitly identified in the current regulation. *See* NPRM at 41513-15. The only vague justification offered is that "students generally may not be aware of their rights," "employees need better

training" in supporting students in this area, and "proactive measures" are needed because a denial of pregnancy-related accommodations *"could"* face exclusion from educational benefits. *Id.* Public comments offered during the Department's listening sessions are similarly vague, offering no evidence that the current regulatory language fails to protect women dealing with "pregnancy or related conditions," but instead identifying a potential need for more robust communication to Title IX beneficiaries so that they are more aware of their *existing* rights under the law. *See* Dept. of Educ., Transcript of Title IX Public Hearing at 76-79, 638-41 (June 2021).

It is unlikely that the current regulatory term, "pregnancy or related conditions" will be clarified in a meaningful way by codifying a few specific examples, given that there is no evidence cited in the NPRM showing that the absence of these examples has resulted in a student being denied educational benefits. As the Department notes, there is *already* a longstanding "general understanding by Congress that pregnancy-based discrimination is a form of sex discrimination," NPRM at 41,515. This "general understanding" is informed not only by Title IX, but also by an understanding that other statutes (including Title VII and the Pregnancy Discrimination Act) provide further evidence that a broad application of Title IX regulations relating to pregnancy conforms with Congressional intent.

In short, all of the Department's justifications under "Pregnancy and Parental Status" (87 Fed. Reg. at 41512-28) are matters for training and guidance, but they do not demonstrate a need for regulatory amendments.

For these reasons, with regard to all proposed provisions regarding pregnancy or related conditions (namely, §§ 106.2, 106.21 – 106.21(c), 106.40-106.40(b)(6), 106.51(b)(6), 106.57-106.57(e)), WoLF does not object to the proposed changes. However, WoLF notes that these same protections are already available and will continue to be so under the existing regulations, even if the proposed amendments are never finalized. While some of the proposed provisions provide helpful guidance on how institutions should tailor accommodations for pregnancy and related conditions, (in particular, proposed §§ 106.40 – 106.40(b)(6)), the same guidance easily can and should be issued in sub-regulatory guidance documents under the current regulatory language.

F. "Sex Characteristics"

The Department proposes to include "sex characteristics" in the regulatory definition of scope under § 106.10, and the NPRM describes that term as "include[ing] a person's physiological sex characteristics and other inherently sex-based traits." However, absent a clear, objective, and scientifically-accurate definition of "sex," specifying that "sex" is understood to refer to a person's reproductive sex category as observed at birth (*i.e.*, male or female) and *not* to subjective "gender identity," this phrase will lead to overbroad, absurd applications.

At a minimum, the vague language in the NPRM should be revised with medically-accurate descriptions, to avoid a wave of discrimination complaints grounded in superficial physiological differences or subjective perceptions rather than an accurate medical diagnosis.

We specifically object to the term "intersex" in the regulatory preamble, because it is an colloquial term that incorrectly suggests that people with such conditions are "between" sexes. *See* "Inter," MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), https://medical-dictionary.thefreedictionary.com/inter. This badly mischaracterizes well-established medical facts about sex and the human process of sexual development. *See* Wright, *Sex Chromosome Variants Are Not Their Own Unique Sexes*, REALITY'S LAST STAND online (Dec. 1. 2020), https://www.realityslaststand.com/p/sex-chromosome-variants-are-not-their; Wright, *Sex is Not a Spectrum*, *Id.* (Feb. 1, 2021), https://www.realityslaststand.com/p/sex-is-not-a-spectrum. *Cf. Gender-bending fish*, UNDERSTANDING EVOLUTION online (undated), https://evolution.berkeley.edu/fisheye-view-tree-of-life/gender-bending-fish/

Some individuals experience random variations in various sex characteristics or chromosomal or hormonal combinations, and some of these conditions are properly described as differences (or disorders) of sex development (DSDs). Indeed, the first source cited in the "intersex" discussion of the NPRM uses just that terminology: "Consortium on the Management of ***Disorders of Sex Development***, CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD at 2–7 (2006)." NPRM at 41532 (emphasis added). In the definition of "DSD," that publication itself notes "that the term 'intersex' is avoided here because of its imprecision." Just as people who identify as "transgender" do not actually move "through, across, or beyond" sex, people with DSDs are not "between" sexes; nor are they hermaphroditic or sexless. Rather, such persons are either male or female with a congenital, medical condition producing differences in how that person's maleness or femaleness develops and presents compared to other people. Wright, *Sex Chromosome Variants Are Not Their Own Unique Sexes*, and Wright, *Sex is Not a Spectrum, supra.*

The only exception is primarily theoretical, and is only applicable to cases so extremely rare as to be functionally nonexistent. *See* Bogardus, *supra* (locating a single potential example of an individual with both female and male tissues, from 1970, which was "likely the result of mosaicism" since "the patient's body consisted of cells with different genomes," and "*probably* the right way to characterize this case is as that of a male who carried within himself a small amount of foreign, female tissue." (emphasis in original).

DSDs are (for those individuals who have them) an aspect of sex, and therefore they are unquestionably a type of "sex characteristic." However, the

Department contends that "[d]iscrimination based on intersex traits is rooted in *perceived* differences between an individual's specific sex characteristics and those that are *considered typical* for their *sex assigned at birth*." NPRM at 41532 (emphasis added). This description is laden with vague and misleading language that is popular in the gender identity movement, and appears designed to prop up that belief system. The fact that the Department cites two court decisions in which (1) the respective claims were based on subjective "gender identity," and (2) the courts mischaracterized "gender identity" as a type of sex characteristic, confirms this intention.

The medical understanding of DSDs is not based on subjective "perceived differences," nor on what is "considered typical." DSDs are fairly well characterized, and their diagnosis is based on objective medical analysis and an objective factually-grounded observation that an individual's sexual reproductive pathway has diverged substantially from the norm—often in ways that cause painful, debilitating problems including but not limited to an inability to sexually reproduce. *See* Ex. T, Sax, "*How Common Is Intersex? A Response to Anne Fausto-Sterling,*" *The Journal of Sex Research, v.* 39, no. 3 (2002), available at http://www.jstor.org/stable/3813612. Individuals with DSDs should not be used as props in the campaign to promote concepts like "gender identity" and "transgender."

In sum, although we do not object to the idea of including "sex characteristics" including DSDs in the regulatory scope of Title IX, ultimately we must object to their inclusion without a specific, medically-accurate definition of "sex" and "sex characteristics" making clear that each term is grounded in material facts and not subjective perception or identity. We further object to the unscientific ideologically-tinged use of the term "intersex," along with the Department's vague and incorrect description of "intersex," in the preamble discussion of "sex characteristics."

G. "Sex Stereotypes"

WoLF generally agrees that discrimination on the basis of sex stereotypes is discrimination "on the basis of sex." Sex is an aspect of sex stereotypes, insofar as specific sex stereotypes are applied depending on the sex of the targeted individual. In plain terms, stereotypes associated with femininity are applied to females, so that females deemed to be either masculine or insufficiently feminine are sometimes targeted for unfavorable social or legal treatment. Stereotypes associated with masculinity are applied to males, so that males deemed to be either feminine or insufficiently masculine are sometimes targeted for unfavorable treatment. For the same reasons recognized in the context of Title VII in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), discrimination on the basis of sex stereotypes is discrimination "on the basis of sex."

Unfortunately, as with other terms in proposed § 106.10, the inclusion of the term "sex stereotypes" is undermined by the Department's failure to include an accurate and valid definition of "sex" itself, grounded in objective material fact rather than subjective beliefs about "gender identity. Without a clear, objective, and scientifically-accurate definition of sex, the term "sex stereotypes" in proposed § 106.10 is open to overbroad, inconsistent, and absurd applications.

Because of the way the NPRM is written, we are forced to point out the fact that sex itself is not a stereotype, regardless of any individual's subjective beliefs *about* sex. This needs to be made clear in any final version of the rule. Likewise, the application of sex-specific rules and practices is not a form of sex stereotyping—nor does it become a form of sex stereotyping when a person to which those rules are applied asserts a "gender identity" that they believe is incongruent with their sex. Rather, sex-specific rules about who may use which toilets, showers, locker rooms, and other intimate spaces are grounded in material factors: (1) objectively-verifiable biological sex differences that are relevant to risk and vulnerability, such as the fact that only males are capable of raping and involuntarily impregnating females, and the fact that males are larger and stronger that females and therefore are almost always capable of physically overwhelming a female victim; (2) consistent data demonstrating differential offense patterns based on sex, specifically, showing that males are more likely than females (by a long shot) to commit rape, sexual assault, or other sexual offenses. *See* discussion of sexual offense rates in section III.C.3 of these comments.)

Moreover, (as further discussed in sections I.C. and III.C. of these comments), there is a glaring internal inconsistency between the inclusion of "sex stereotypes" and the simultaneous inclusion of "gender identity" in the scope of Title IX because "gender identity" is, by definition, deeply grounded in sex stereotypes. The gender identity belief system variously conflates and replaces sex with sex stereotypes, thereby reinforcing and normalizing sex stereotypes. "Gender identity" encourages people to internalize sex stereotypes, to interact with and assess others based on superficial factors like fashion and personality.

Although we do not object to the idea of including "sex stereotypes" in the regulatory definition of the scope of Title IX, ultimately we object to its inclusion without a specific, medically-accurate definition of "sex" and "sex stereotypes" making clear that sex is a material objectively-verifiable state of being either male or female, while "sex stereotypes" are subjective perceptions and ideas about sex that are applied in specific ways depending on sex.

H. "Sex-Based Harassment"

The Department proposes a new definition of "'sex-based harassment' [which] would clarify that it covers sexual harassment, harassment on the bases described in proposed § 106.10, and other conduct on the basis of sex," under three categories

that largely track the three categories in the current sexual harassment regulations, but with significant modifications. NPRM at 41410, discussing proposed § 106.2. The proposed definition of Category Two ("hostile environment harassment") is "[u]nwelcome sex-based conduct that is sufficiently *severe or pervasive*, that, *based on the totality of the circumstances* and evaluated *subjectively and objectively*, *denies or limits a person's ability to participate in or benefit from* the recipient's education program or activity (i.e., creates a hostile environment)." NPRM at 41569 (emphasis added). The definition also includes a list of factors for consideration in a fact-based determination of whether complained-of behavior meets the definition, including the "degree to which the conduct affected the complainant's ability to access the recipient's education program or activity," the type, frequency, and duration of the conduct, the parties' ages and roles, location, and "[o]ther sex-based harassment in the recipient's education program or activity."

By way of comparison, the proposed Category Two would replace the current language in 34 C.F.R. § 106.30 defining the second category of prohibited "sexual harassment" as "[u]nwelcome conduct determined by a reasonable person to be so *severe, pervasive, and objectively offensive* that it effectively *denies a person equal access* to the recipient's education program or activity." (Emphasis added).

We do not object to the general idea of providing a definition of "sex-based harassment" that expressly encompasses harassment "on the basis of sex" that is not sexualized in nature, including harassment on the basis of sexual orientation, to the extent "sex" and "sexual orientation" are understood to have meanings grounded in material sex differences between males and females (consistent with sections III.A. and B. of our comments, above). However, we object to the proposal to substantially broaden "hostile environment harassment," because of the way the new standard will be used, in conjunction with the proposed "gender identity" provisions, to punish and harass women and girls who do not subscribe to the gender identity belief system.

The Department's discussion of the need for these changes is exceedingly vague. It asserts that "stakeholders expressed confusion regarding the scope of sexual harassment, including noting that they were receiving questions from their students regarding whether *certain forms of harassing conduct* are covered under the current definition of 'sexual harassment.'" NPRM at 41411 (emphasis added). There is no transparency as to any specific "forms of harassing conduct" that fall outside of the existing regulation but would be captured by the proposed regulation, except for a generalized mention of "harassment based on sexual orientation and gender identity."

At the same time, the Department acknowledges that the existing regulation is already quite broad: it reaches well beyond harassment that is sexualized in nature, capturing also "gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-

stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond." *Id*., quoting a 2001 guidance and the 2020 preamble, 85 Fed. Reg. at 30179. Therefore, aside from harassment on the basis of sexual orientation (which the Department explicitly excluded from the current definition in its 2020 Sexual Harassment regulation, and which we address separately above), it appears that the only other category of conduct excluded from the current regulation would be speech or conduct treating people according to their sex rather than according to their "gender identity"— that is, conduct requiring males to follow the ordinary rules for males; speech acknowledging the fact that a man is a male and not a female; and speech expressing disagreement with gender identity beliefs.

Consequently, the proposed changes substantially broaden the meaning of "sex-based harassment" compared to the current regulations in two ways: (1) by expanding it to sexual orientation and "gender identity," and (2) by loosening the fact-based standards for determination so they reach a much wider set of behaviors that are severe OR pervasive (rather than severe and pervasive); evaluated objectively AND subjectively, based on the totality of the circumstances (rather than objectively, based on the standard of a reasonable person in the complainant's position), and denies OR limits a person's ability to participate in OR benefit from an education program or activity (rather than denying a person equal access to such).

The proposed factors for making a factual determination also include a multiplier for "other sex-based harassment in the recipient's education program or activity." NPRM at 41414-16. We are very concerned that complainants will use this multiplier in an attempt to justify filing Title IX complaints over isolated, fleeting, mild (perhaps even objectively-inoffensive) speech or conduct such as "misgendering," by claiming that an entire campus is awash in so-called "transphobia."

It is one thing to require schools to take action against pervasive or persistent offensive statements such as "girls don't belong in school," or "girls should spend less time advancing in athletics and more time learning home economics." It is quite another thing for schools to take action against a student who makes factual statements grounded in a biological facts about sex, such as that "lesbians are female, not male," or "males have an unfair athletic advantage in competitions against girls," or "my friends and I are less safe from voyeurism, sexual harassment, and sexual assault, now that a person with a penis is allowed to undress and mingle with us in the girls' and women's showers." The former examples are based on sex stereotypes, the latter on objectively-verifiable facts. However, by including "gender identity" under the definition of the scope of Title IX in proposed § 106.10, by eliminating the permissibility of single-sex spaces and activities under proposed § 106.31(a)(2), and by greatly expanding the standard for making a determination of "sex-based harassment" under the definition in proposed

§ 106.2, the Department would open the floodgate to claims of harassment aimed entirely at punishing recipients, staff, or students for policies, speech, or other conduct that conflicts with gender identity beliefs.

As discussed in section III.A.5. of these comments, these changes have serious First Amendment implications that the Department has failed to address in the NPRM. For those reasons, and the reasons discussed in this section, we object to the Department's proposed expanded definition and standards for determination of "sex-based harassment."

I. Definition Of "Relevant"

For formal grievance procedures under § 106.45 (for complaints of sex discrimination) and § 106.46 (for complaints of sex-based harassment at postsecondary institutions), the Department proposes to codify which types of questions and evidence are "relevant," by codifying a definition of "relevant" in § 106.2, and by identifying specific types of questions and evidence that are impermissible in § 106.45(b)(7). The first category of impermissible evidence deals with privileged material (*e.g.,* attorney-client, doctor-patient, spousal privilege); the second category deals with documents prepared by a doctor or psychologist. Under the third category:

> § 106.45(b)(7)(iii) would provide that *evidence related to the complainant's sexual interests* would not be permitted in a recipient's grievance procedures. Proposed § 106.45(b)(7)(iii) would also provide that *evidence related to the complainant's prior sexual conduct* would not be permitted in a recipient's grievance procedures *unless it is offered to prove that someone other than the respondent committed the alleged conduct or to prove consent* with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. Similar prohibitions appear at current § 106.45(b)(6)(i) and (ii).

NPRM at 41420 (emphasis added). Further, "although the language in proposed § 106.46(f)(1) and (3) would not explicitly refer to the complainant's sexual predisposition or prior sexual behavior, the same limitations regarding those concepts would be incorporated into those proposed provisions. *Id.* at 41510.

Once again, we are concerned about the way these limitations would play out in situations where women and girls have complained (or wish to complain) about the presence of males in their intimate spaces, including bathrooms, locker rooms, changing rooms, showers, and lactation spaces. *See* fn.7, above. Under the proposed rules, the Department grants *any male* the right at *any time* to use any such space as he sees fit, on the basis of his "gender identity." Simultaneously the Department

proposes to make it a violation of Title IX to exclude males from spaces that are currently female-only, opening the door to a flood of complaints of "sex-based harassment" lodged against women who object to the presence of such males, using accurate statements of fact (*e.g.,* "a man is changing his clothes in front of the mirror in the women's bathroom") or statements of opinion (*e.g.* "I feel unsafe and uncomfortable using the gym showers now because only a flimsy curtain separates me from a stranger's penis.")

The proposed definition of "relevant" and the proposed categories of excluded evidence would mean that, not only will women be vulnerable to complaints of "sex-based harassment" if they object to having men in women's intimate spaces, they will also be prohibited from introducing evidence that the man in question has questionable intentions—including evidence that the man's claim to identify as "transgender" is motivated by his desire to access women in a vulnerable state. Women and girls would even be barred from presenting evidence that the complainant has a personal history of sexually predatory behavior. Evidence of the male complainant's "sexual interests" would be barred entirely. NPRM at 41420, 41575. And evidence of his "prior sexual conduct" would be excluded because it does not fit under the proposed exceptions in § 106.45(b)(7)(iii) for proving that the conduct was committed by someone else or for proving consent. *Id.*

We are further concerned that the proposed rules regarding relevance in §§ 106.2 and 106.45(b)(7) are so narrow, they can even be used to prevent *any* respondent (even in cases that have nothing to do with "gender identity") from presenting evidence that a man had filed a Title IX complaint against a woman for the purpose of harassing her after she rejected his advances. Such evidence would not qualify for the exception to establish the identity of the perpetrator, nor would it qualify for the exception to prove consent.

We do not think these problems can be solved by creating additional exceptions under § 106.45(b)(7)(iii). No one should be slapped with a Title IX complaint after complaining that her own safety and privacy is being impaired by men using intimate spaces like bathrooms, locker rooms, showers, or lactation spaces. But that problem can only be avoided by adopting regulations that expressly protect recipients' ability to maintain single-sex spaces where eligibility is determined strictly by sex rather than "gender identity." Having proposed instead to give men and boys an unfettered right to access women's and girls' spaces, the Department must consider the ways in which its narrow evidentiary rules will be used to punish and harass women even further through the Title IX grievance process. Then, the Department must explain how exposing women in this way can somehow be consistent with the legislative text and goals of Title IX. For all the reasons discussed in these comments, that will be an impossible task, for the Department's proposed "gender identity" provisions sharply contradict Title IX in a

way that disproportionately harms women and girls, and that effect is only amplified by the overly-narrow exceptions in proposed § 106.45(b)(7)(iii).

IV. SPECIFIC PROPOSED ADMINISTRATIVE PROVISIONS

A. Expanded Availability Of "Emergency Removal"

The Department proposes "broadening the language in current § 106.44(c), to permit emergency removal of a respondent after a recipient conducts an individualized assessment and determines that an immediate threat to the health or safety of any student, employee, or other person arising from the alleged sex discrimination exists." NPRM at 41451. The Department further "proposes removing the limiting term 'physical' and adding language that focuses instead on the seriousness of the threat to a person's health or safety (physical or nonphysical)." *Id.* Emergency removal would be used to address alleged "threats arising from all forms of alleged sex discrimination," *i.e.* it would not be limited to claims of sex-based harassment." *Id.* at 41452.

In plain terms, the proposed rules allow recipients to impose an interim "emergency" expulsion for an extraordinarily broad set of complaints, prior to the completion of the grievance process that allows the aggrieved person to respond to and refute the allegations against him or her.

We object to this change because, when combined with the proposed "gender identity" provisions, it encourages recipients to impose harsh and extraordinarily disproportionate punishments against women and girls and others who use objectively-correct factual language about sex and gender, who engage in speech that rejects or critiques the idea of "gender identity," or who raise concerns about their own safety due to the presence of men or boys in intimate spaces and single-sex athletics that are designated for women.

The proposed language is highly subjective. The inclusion of the word "serious" does not meaningfully limit its application, considering that proponents of the gender identity belief system frequently claim that "misgendering" or denial of special privileges causes people who identify as transgender to have suicidal thoughts, and speech acknowledging an individual's sex is an invitation to violence.

For example, having largely abandoned its commitment to free speech in its advocacy for "gender identity," the ACLU has filed briefs implying that so-called "misgendering" causes or contributes to suicidal thoughts or suicide attempts, and has further argued that this threat of suicide means it is appropriate to terminate the employment of a public high school teacher who chooses not to use male pronouns to refer to a female student who "identifies as" male. *See*, *e.g.*, Brief of ACLU and ACLU Virginia As Amici Curiae In Support Of Defendants-Appellees at 4, *Vlaming v. West Point Sch. Bd.*, Case No. 211061 (July 27, 2022),

https://www.aclu.org/legal-document/amicus-brief-vlaming-v-west-point-school-board. Courts resolving claims about "gender identity" have also invoked the same suicide threat to help justify their rulings granting special exemptions from ordinary sex-based rules for the use of public school bathrooms on the basis of "gender identity." *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1041 (7th Cir. 2017) (abrogated on unrelated grounds, per *Illinois Repub. Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020).

Similarly, a Berkely law professor serving as an invited witness in a Senate Judiciary Committee meeting recently proclaimed that merely raising questions about the validity of the "gender identity" construct "opens up trans people to violence by not recognizing them," and, further, "[d]enying that trans people exist and pretending not to know that they exist is dangerous." Gabbatt, *Republican Josh Hawley accused of transphobia at Senate hearing*, THE GUARDIAN online (July 13, 2022) https://www.theguardian.com/us-news/2022/jul/13/republican-josh-hawley-transphobia-berkeley-professor.

In light of those arguments, there is no reason to doubt that public school Title IX administrators will use the proposed expanded provisions for emergency removal to justify expelling students, including primary and secondary school students, who engage in speech that is critical of "gender identity" beliefs, or who object to the loss of single-sex spaces, athletics, or other resources. We therefore oppose this change.

B. Notification Requirements For Recipients Other Than Elementary And Secondary Schools

The proposed rules create mandatory reporting obligations for a very broad range of recipients' employees, including "any employee who is not a confidential employee and who has authority to institute corrective measures on behalf of the recipient," and "any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in a recipient's education program or activity," to "notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX." NPRM at 41438-39, discussing proposed §§ 106.44(c)(2)(iii) and (iv),

Our objection to these broad reporting requirements stems from our objection to the proposed "gender identity" rules, and the likelihood that these rules will be used to punish speech about sex and "gender identity," as detailed in sections III.A.5. and III.H., above. Standing alone, those rules create a chilling effect on women's and girls' speech, but the proposed mandatory reporting rules will further amplify that chilling effect, by vastly increasing the number of individuals who are empowered to initiate Title IX complaints or investigations in efforts to suppress and punish such speech. We therefore object to this proposed change.

C. Preemption Of State And Local Laws

It is one thing to clarify that Title IX regulations establish a minimum level of protection against discrimination "on the basis of sex," but it is quite another thing for the Department to use the subjective concept of "gender identity" to expressly preempt state and local laws dealing with "sex."

Under the current regulations, state and local laws and regulations are expressly preempted only if they "would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, *to practice any occupation or profession*," (34 C.F.R. 106.6(b) (emphasis added)), or if there is an *actual* "*conflict* between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45." (34 C.F.R. § 106.6(h) (emphasis added) (addressing three subsections dealing with sexual harassment and the Title IX grievance process). *See* also 85 Fed. Reg. at 30454.

The Department now proposes to eliminate the limiting language in § 106.6(h) entirely, while expanding § 106.6(b) to specify that *all* Title IX regulations preempt *any* State or local law with which there is a purported conflict. The only justification offered for this extremely broad preemption regulation is to make "a simple comprehensive statement that the Title IX regulations preempt any State or local law with which there is a conflict." 87 Fed. Reg. at 41405. This merely restates the effect of the proposal without providing an explanation of the Department's authority or a reasoned explanation for why the change is needed.

Title IX does not authorize the Department to adopt "gender identity" regulations that alter or supersede the effect of Title IX's protections against discrimination "on the basis of sex." The proposed provisions in §§ 106.10 and 106.31 will themselves foster discrimination against women and girls "on the basis of sex," by depriving them of safe and private bathroom, locker room, and shower facilities, fair athletic opportunities, and other sex-specific services or resources, all under the banner of "gender identity." Yet proposed § 106.6(b) would state that these "gender identity" provisions bar individual states from adopting or maintaining stronger protections for women and girls "on the basis of sex." This exceeds the Department's statutory authority.

V. REGULATORY IMPACT ANALYSIS

The Regulatory Philosophy and Principles set forth in Executive Order 12866 state that, "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach." E.O. 12866 § 1(a); *see also id.* § 1(b)(5).

The Department correctly recognizes that "[t]his proposed action is 'significant' and therefore subject to review by OMB under section 3(f)(4) of... Executive Order [12866] because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order." We agree. However, the Department's Regulatory Impact Analysis falls short for the following reasons.

A. Distributive Impacts and Equity

The proposed "gender identity" rules reflect an unstated assumption that giving people what they demand is a desirable course of action because it makes them happier. But the Department has failed to consider how granting those demands also carries costs, including costs to other people in the form of lost opportunities and additional burdens, and costs to recipient institutions in the form of added burdens and diminished ability to maintain fairness and equal treatment.

As quoted above, E.O. 12866 requires the Department to consider "distributive effects" as well as "equity." The Office of Management and Budget provided further guidance on how to assess distributive effects in its 2003 document entitled Circular A-4:

> Those who bear the costs of a regulation and those who enjoy its benefits often are not the same people. The term "distributional effect" refers to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, **sex**, industrial sector, geography). . . .
>
> Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency. Executive Order 12866 authorizes this approach. Where distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups. You should be alert for situations in which regulatory alternatives result in significant changes in treatment or outcomes for different groups.

Circular A-4 (Sept. 17, 2003) (emphasis added). These principles apply equally to "benefits and costs that are difficult to quantify." *Id.* The Biden White House recently reaffirmed these principles in its Memorandum on Modernizing Regulatory

Review, Sec. 2(b)(ii) (Jan. 20, 2021) (directing agencies to develop "procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.").

As our comments above make clear, because of the material sex differences between males and females, the benefits and costs of the proposed "gender identity" provisions will carry substantially disproportionate costs and benefits for males versus females. They will have disproportionate harmful effects upon women and girls (females), by depriving women and girls of protections that are needed due to their unique vulnerability to sexual assault, rape, and involuntary impregnation by males in mixed-sex intimate facilities. They will also disproportionately harm women and girls who will either lose athletic opportunities due to being displaced by men and boys, or will be forced unfairly to compete against males for the chance to participate and achieve wins, and earn titles that are crucial to advancing their athletic and academic careers.

The proposed rules will also have very different costs and benefits for students who are differentiated under the rule as "transgender" and "cisgender," respectively To be clear, WoLF rejects these categories because they are vague, inaccurate, and subject to change on a whim; quite literally *any person* may fall into *either* of these two categories depending on whether he or she subscribes to subjective beliefs about sex and gender identity on any given day. However, having adopted these categorizations based on "gender identity," and having recognized that humans are also categorized by sex, the Department cannot finalize the proposed regulations without a robust distributional analysis that examines the many ways in which the benefits and burdens of its "gender identity" regulations would fall upon (1) males versus females, and (2) "transgender" versus "cisgender" individuals.

The Department must also consider how the proposed regulations will disproportionately burden low-income schools and communities that cannot afford physical retrofitting, staffing, and other additional security measures needed to ensure that the mixed-sex spaces and activities required under the proposed rules will not result in increased incidence of sexual assault or other physical or psychological harm, such as increased injuries in mixed-sex athletics.

B. Need for regulatory action / Benefits of the Proposed Regulations

In some places the NPRM claims that the 2020 rules created confusion, but it cites no specific evidence of such confusion, other than vaguely-referenced comments by unnamed entities during the listening sessions, making it impossible for WoLF and other members of the public to verify whether the comments support the need for regulatory action. For example, the Department asserts that

"stakeholders expressed confusion regarding the scope of sexual harassment, including noting that they were receiving questions from their students regarding whether *certain forms of harassing conduct* are covered under the current definition of 'sexual harassment.'" NPRM at 41411 (emphasis added). Yet there is no specific information on what "certain forms of harassing conduct" escape the 2020 regulations. This falls short of the Department's requirement to establish the need for the specific regulatory action it has decided to propose.

Further, the Department's statements of need for regulatory action need to be evaluated in light of the available alternative actions for protecting the civil rights of people who claim transgender status or otherwise assert rights on the basis of "gender identity." WoLF's Petition for Rulemaking offered specific alternatives for protecting such individuals from discrimination while also preserving the meaning and application of Title IX's prohibitions and protections "on the basis of sex," including preserving the availability of single-sex spaces and other educational programs and activities, and protecting the right to make statements of fact an opinion about sex and "gender identity." (*See* section II.A. of these comments.) Because the Department has failed to explain why such alternatives are unworkable, it has failed to establish the need for its proposed regulatory actions regarding "gender identity," and has further failed to demonstrate that the supposed benefits of those provisions justify their costs, particularly in light of the disproportionate costs to women and girls.

C. Costs That Are Disregarded In The Regulatory Impact Analysis.

Currently people enjoy a substantial measure of safety, privacy, and dignity in single-sex bathrooms, locker rooms, and other intimate facilities. The proposed rules would force covered entities to grant broad, unquantified, and theoretically-unlimited special exemptions to individuals who claim to have a "gender identity," exempting them from longstanding rules and practices designed to ensure fairness, safety, privacy, and dignity. The Department must consider and attempt to quantify the following costs:

- The loss of single-sex bathrooms, showers, and other intimate facilities that will be converted to mixed-sex facilities as a result of the rule. This is not limited to those single-sex facilities that may be expressly re-designated as mixed-sex or "gender-neutral," because single-sex facilities that are designated as such (*i.e.,* bathrooms and showers marked "Women's" and "Men's") will also become *de facto* mixed-sex facilities. The cost of this loss falls on both sexes, but it falls disproportionately upon females because females are highly unlikely to commit rape or sexual assault in bathrooms and locker rooms (against males or females), but are themselves disproportionately vulnerable to rape and sexual assault in public facilities (the vast majority of which is committed by males, as recorded by the FBI; see section III.C.3. of these comments).

- Costs to schools forced to renovate and add physical privacy measures due to this rule's mandate for mixed-sex bathrooms and locker rooms.

- Substantial loss of privacy and dignity for breastfeeding women, as males will gain access to lactation rooms.

- The loss of single-sex athletic opportunities. Because of innate material competitive advantages held by males but not females (even in cases where males have undergone testosterone suppression), this loss will fall primarily on women and girls.

- Cost to schools as increasing numbers of Title IX actions are initiated against individuals for complaints about "misgendering" or "mispronouning," a likelihood this NPRM does nothing to prevent or dispel.

- Costs to covered institutions as those disadvantaged and victimized under the proposed rules file litigation in search of a remedy for the harms caused by this rulemaking.

The proposed rules will decimate the safety, privacy, and dignity of women and girls, and the privacy and dignity of men and boys in mixed-sex intimate facilities. Mixed-sex spaces expose women and girls to sexual predation for obvious reasons, by forcing them to share close quarters with men or boys while they are in a state of partial or complete nudity.

> Unisex changing rooms are more dangerous for women and girls than single-sex facilities, research by The Sunday Times shows. Almost 90% of reported sexual assaults, harassment and voyeurism in swimming pool and sports-centre changing rooms happen in unisex facilities, which make up less than half the total.

Gilligan, *Unisex Changing Rooms Put Women In Danger*, THE SUNDAY TIMES online (Sept. 2, 2018), https://www.thetimes.co.uk/article/unisex-changing-rooms-put-women-in-danger-8lwbp8kgk; full text at https://archive.ph/evO4g.

Single-sex spaces provide benefits that would be lost under the proposed rules, and these losses must be counted. Instead the loss of those benefits is ignored. The Department further fails to consider the costs of measures that would be needed to mitigate these losses. According to the Department:

> [T]he proposed requirement to permit students to participate in a recipient's education program or activity consistent with their gender identity may require updating of policies or training materials, but **would not**

> **require significant expenditures, such as construction of new facilities**. The Department proposes that the benefits associated with this change—increased protection of students from sex discrimination and better alignment of the regulations with Title IX's nondiscrimination mandate—far outweigh any costs.

The "significant expenditures" not required (and therefore, specific costs not considered) would encompass not only the construction of new facilities, but also other safeguarding measures that are less drastic but that would help to mitigate (though not eliminate) the increased risk of sexual assault and voyeurism that is created by the proposed rules, such as retrofitting existing bathrooms or showers with full ceiling-to-floor lockable doors, or installing emergency alarms in mixed-sex bathrooms and locker rooms.

Failure to consider the costs of these mitigation measures is not justified by the fact that the Department has declined to mandate them in the rule itself. People's need for safety and dignity does not disappear under the pretense that sex differences are meaningless. Women and girls will continue to complain about their loss of safety and dignity because that loss is real and material. Schools and other recipients that want to act responsibly will have to undertake such measures to prevent an increase in voyeurism and other forms of sexual predation and assault, if they are also forced to create mixed-sex intimate facilities in order to comply with the proposed "gender identity" rules in this NPRM.

The Department has managed to avoid confronting the substantial costs of its proposed "gender identity" regulations by simply denying and disregarding significant and material differences between males and females. The Department's failures in this area appear to be driven by its embrace of the gender identity belief system. While it may be permissible for the Department to acknowledge the concept of "gender identity" to the extent it is has been invoked to justify claims and demands under Title IX, that does not mean it is justified in adopting the belief system outright. Whatever the reason, it is clear that the Department has simply ignored obvious and foreseeable costs of its proposed regulations regarding gender identity and sex-differentiated spaces, rendering the proposed rules arbitrary and capricious.

CONCLUSION

WoLF opposes the proposed rules for the reasons discussed above. If there are any questions or if the Department wishes to discuss these comments, please don't hesitate to contact us: contact@womensliberationfront.org.

/s/ Jennifer C. Chavez
Advisory Council Member

/s/ Dr. Mahri Irvine
Executive Director

Women's Liberation Front
1802 Vernon St. NW, #2036
Washington, DC 20009