

September 12, 2022

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

ED-2021-OCR-0166-0001

Dear Secretary Cardona:

Pro-Family Women submits these comments regarding the proposed Title IX regulations, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 87 Fed. Reg. 41390 (July 12, 2022).

Although the regulations, and the accompanying commentary, are short on specifics regarding its implementation, the Biden administration’s prior actions and statements present a clear picture of future implementation. By expanding Title IX’s prohibition on “sex” discrimination to include a prohibition on “gender identity” and “sexual orientation,” these regulations will take a federal law that was designed to protect young women from discrimination, and twist it into a vehicle by which the privacy and modesty of young women will be violated, their fair footing in competitive sports infringed, and their voice silenced out of fear of speaking up.

Avoiding a “hostile environment” for a transgender student will just create another hostile environment for girls. Thus, discrimination against women will be restored, only with a new face.

Biden Administration’s Prior Actions

Beginning with the President’s first day in office, the President and his Administration have made clear their intent to interpret Title IX’s prohibition on “sex” discrimination to include a prohibition on “gender identity” and “sexual orientation,” based on an erroneous interpretation of the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). The implications for our nation’s women and children are clear. In that initial order of January 20, 2021, it was declared that it would be federal policy that “[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports” -- meaning, biological males must be allowed entrance into girls’ restrooms, locker rooms, and school sporting

events. The U.S. Department of Education’s June 22, 2021 “Notice of Interpretation,” [“Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*,” 86 Fed. Reg. 32637 (June 22, 2021)], and its June 23, 2021 “Dear Educator” letter and accompanying “Fact Sheet” only reinforced this harmful policy.

The “Fact Sheet” was issued jointly by the U.S. Department of Justice’s Civil Rights Division, and the U.S. Department of Education’s Office for Civil Rights. It lists several examples of incidents that can be investigated, including the following: “On her way to the girls’ restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys’ restroom or nurse’s office because her school records identify her as ‘male.’ Later, the student joins her friends to try out for the girls’ cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her ‘those are the district’s policies.’”¹

The commentary accompanying these proposed Title IX regulations specifically states: “When a person is denied access to education programs or activities consistent with their gender identity, it causes them more than de minimis harm on the basis of sex. Therefore, such treatment generally violates Title IX’s prohibition on discrimination” 87 Fed. Reg. 41390, 41537 (July 12, 2020).

Young Women’s Privacy and Modesty Violated in Bathrooms, Locker rooms, Showers

DOE’s interpretation and enforcement of Title IX so as to allow biological males to use girls’ bathrooms, locker rooms, and showers will violate a young woman’s modesty, privacy, and potentially, her safety. A girl will be embarrassed to undress in a locker room where biological boys are allowed.

Young women have important reasons for wanting to have their own spaces without biological males present, especially during the sensitive time of sexual development and learning positive ways of relating to males. Their religious beliefs regarding modesty and human dignity are also involved. And will girls identifying as boys want to undress or shower with heterosexual males?

The questions and problems created by this new policy of the current administration seem to intensify a sense of discrimination rather than lessen it. The potential discrimination against women’s needs and rights seem to be ignored.

¹ Note, on July 15, 2022, a Federal district judge issued a preliminary injunction enjoining implementation of the Interpretation, Dear Educator Letter, and Fact Sheet, against the 20 states bringing suit, pending litigation of the matter. *Tennessee v. U.S. Dept. of Education*, E.D. Tenn, No. 3:21-cv-00308.

Vulnerable Young Women's Overnight Trip Accommodations and College Dorm Rooms Affected

It can be expected that these new Title IX regulations will require federally-funded schools to allow biological males, who identify as the opposite sex, to share sleeping accommodations with young girls during school-sponsored trips with overnight accommodations.

On the college level, it's expected that female college dorms will be required to allow biological men, who identify as a female, to request and be given a female roommate. And vice versa. And there could be such problems during foreign study programs overseas.

Young women are at their most vulnerable point when they are sound asleep. That is the worst possible time to place them in a position where a biological male, who could be of superior strength and body weight, is placed in the same room with them.

Unfair Advantage in Women's Competitive Sports

The commentary on the proposed regulations states that "the Department plans to address by separate notice of proposed rulemaking 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." Nevertheless, elsewhere in the commentary it states: "A recipient's education program or activity would also include all of its academic and other classes, extracurricular activities, *athletics programs*, and other aspects of the recipient's education program or activity." (emphasis added). In light of this language, we address the serious concerns regarding biological males participating in women's sports.

Requiring that a biological male who identifies as a woman be included on a women's team places the women on that team in an inferior position, unable to compete with a male who has denser muscles, larger lung size, greater bone density and a stronger frame. The women could lose opportunities to win championships and athletic scholarships. This has already happened this year when a biological male identifying as a female, won the women's NCAA swimming championship in freestyle. How did that make the talented women on that team feel? If the changes to Title IX are implemented, women's educational and athletic opportunities could be substantially reduced.

Women athletes train long and hard to have these opportunities. It is clearly unfair to force them to compete with biological males. Ignoring the basic science of sexual differences which are immutable is unjust. It is not only championships and scholarships that are at stake, but also the opportunity to get a place on a team or be allowed to play on the field. These athletic experiences are formative and can have a life-long positive influence. Must we once again make women losers and victims?

Young Women's Voices Silenced Due to Intimidation and Fear

In all of these easily foreseeable scenarios that threaten a young woman's modesty, privacy, and/or safety, it can be expected that the young woman involved will be afraid to speak up for fear of how it will impact her standing at the school or college, or worse, have a complaint of "discrimination" filed against her.

Parental Rights Violated

Lastly, schools will be required to address students who identify as the opposite sex by the student's chosen name and pronoun. And, it can be expected that these proposed regulations will be implemented so as to violate parental rights and deny parents the right to be notified of their child's gender transition at school. (See "Cardona refuses to say if schools should tell parents about gender transitions, *Washington Examiner*, May 26, 2022).

Conclusion

Pro-Family Women strongly opposes these proposed regulations and urges that they be rescinded.

Sincerely,

Susan T. Muskett, J.D.
President
Pro-Family Women